



**In re Estate of Mbogo Muthage (Deceased) (Succession Cause
1190 of 2002) [2024] KEHC 4180 (KLR) (24 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4180 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
SUCCESSION CAUSE 1190 OF 2002
LM NJUGUNA, J
APRIL 24, 2024**

IN THE MATTER OF THE ESTATE OF MBOGO MUTHAGE (DECEASED)

BETWEEN

RICHARD MBOGO MUTHAGE APPLICANT

AND

GRACE MABUTI MURIUKI RESPONDENT

JUDGMENT

1. The applicant filed the summons dated 27th April 2016 seeking revocation of a grant issued to the respondent on 23rd January 2006 in the estate of the deceased. He also sought for orders that the resultant registration of L.R. No. Ngariama/Thirikwa/642 arising from the said grant be revoked. The application is premised on the ground, *inter alia*, that:
 - a. The said grant was obtained fraudulently by concealment from the court of something material to the case;
 - b. The proceedings to obtain the grant were defective in substance; and
 - c. The grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.
2. The applicant deposed that the petition for letters of administration was filed by Elemina Wangui Mbogo (deceased) the respondent's mother and daughter of the deceased through Embu Chief Magistrate's Court Succession Cause No. 47 of 1992 before it was transferred to the High Court. That the respondent was substituted as the petitioner when her mother died and the grant was issued to her. That the grant issued on 23rd January 2006 was confirmed and a certificate of confirmation of grant was issued on 13th October 2006. The applicant stated that he filed the summons for revocation as soon as he became aware that a grant was issued to the respondent in the estate. That at the time of



petitioning for letters of administration, the petitioner/respondent failed to disclose to the court that parcel number Ngariama/Thirikwa/415 belonged to the deceased who prior to his death, subdivided it into 2 parcels namely Ngariama/Thirikwa/642 and Ngariama/Thirikwa/643.

3. That prior to his death, the deceased gave parcel number Ngariama/Thirikwa/642 to the applicant Mbogo Muthage, before he was baptized and re-named Richard Mbogo Muthage and the property was registered in the name of the applicant on 08th January 1976. That the applicant was named after his grandfather in accordance with Kikuyu Customary Law of naming of first-born sons, hence the similarity in names between the deceased and the applicant. He stated that the respondent concealed from the court the fact that the deceased and the applicant shared names and that the deceased was not the registered owner of parcel number Ngariama/Thirikwa/642.
4. That she also concealed the fact that the applicant is a grandson of the deceased and that the said parcel does not form part of the estate of the deceased. That the respondent misled the court into believing that the original title deed for the property was lost whereas the same was in the custody of the applicant, leading the Land Registrar to advertise the same as a lost title. That the respondent also fraudulently misled the court into believing that she was the only beneficiary of the estate of the deceased who was survived by many dependants.
5. That the said parcel number Ngariama/Thirikwa/642 was transmitted to the respondent through the fraudulently obtained grant and she intends to dispose the same to 3rd parties. The applicant produced a copy of his baptism certificate dated 31st March 2009 showing his names as Richard Muthage Mbogo and a verifying affidavit dated 02nd March 2011 deposed by John Muchiri Muthage stating that the applicant is also known as Mbogo Muthage and his name appears as such on the title document for parcel number Ngariama/Thirikwa/642 which he received as a gift from the deceased prior to his death.
6. The respondent filed grounds of opposition dated 18th August 2016 disputing the averments made in the summons for revocation. She stated that when her late mother, the petitioner, filed the petition, the applicant's father was alive but did not oppose the process at any given time. That the applicant lied when he stated that he was given land parcel number Ngariama/Thirikwa/642 by the deceased.
7. A brief history of the litigation herein is that when the summons for revocation was filed, the court noted that the initial court file was missing from the court registry and it could not be traced. The applicant, through an application dated 09th August 2016, sought for orders for reconstruction of the file since the same had been called for by the Judge in Kerugoya Environment and Land Court ELC Case No. 492 of 2013 for perusal. Counsels for the parties herein consented to reconstruct the court file and the consent was adopted as the order of the court on 01st September 2016.
8. The parties agreed to have the summons heard by way of viva voce evidence. PW1, the applicant, stated that he is the proprietor and he has been residing on the land parcel number Ngariama/Thirikwa/642 all his life. That the land was a resultant parcel from sub-division of parcel number Ngariama/Thirikwa/415 and he produced a copy of the greencard for this parcel as exhibit marked 'RMM 4' indicating that the property was subdivided and the title closed on 08th January 1976. That the subdivision created 2 titles namely parcel number Ngariama/Thirikwa/642 measuring 4.5 acres and parcel number Ngariama/Thirikwa/643 measuring 6.5 acres. That the respondent's mother and the applicant's father are siblings, both being children of the deceased.
9. He also relied on his statement where he stated that the deceased was survived by 8 children including the applicant's late father, who was the only son, and the respondent's late mother. That the applicant's father, Peter Muthage Mbogo had 2 wives; the first with whom he begot the applicant and his 2



brothers and the 2nd wife with whom he begot 10 children, the firstborn being John Muciri Muthage. That in 1954, his parents were estranged and the deceased allowed him to build a 3 bedroomed house on his land parcel number Ngariama/Thirikwa/415 where himself, his mother and brother settled while his father lived with his second wife.

10. That the relationship between his father and the deceased grew tense and his father began demanding for land from the deceased, who had entrusted him (the applicant) with custody of the title deed for parcel number Ngariama/Thirikwa/415. That when the issue got out of hand and the applicant's father began assaulting the deceased, the deceased subdivided the parcel of land into 2 portions namely parcel number Ngariama/Thirikwa/642 and Ngariama/Thirikwa/643 and gave the former to the applicant and the latter to his stepbrother John Muciri Muthage. That both parcels were registered in their names on the same day, that is 08th January 1976 at their shared cost for the transaction.
11. He stated that at the time of issuance of the title, he had not yet been baptized and therefore parcel number Ngariama/Thirikwa/642 was registered in the name "Mbogo Muthage" which was his name according to Kikuyu Customary law as he was the eldest grandson of the deceased. That in 1977 when he was baptized, he took up the Christian name "Richard" which was added to his traditional names. That he later realized that a grant had been issued to the respondent in the estate of the deceased naming the parcel number Ngariama/Thirikwa/642 as part of the estate of the deceased and naming herself as the only beneficiary. That following confirmation of the grant, the respondent got the property transmitted to her name and the title was registered on 13th July 2008, being a Sunday. He stated that when he learned of this, he moved the ELC in Kerugoya Case no. 492 of 2013 where he sued the respondent and sought orders to stop sale of the subject land. That he has used his name "Mbogo Muthage" to acquire other assets as well and he produced some of the certificates bearing his name thus.
12. That the respondent was well aware that the applicant and the deceased shared a name and capitalized on that knowledge to shortchange him. On cross-examination, he stated that the greencard of the title indicated that the land was given as a gift to him by the deceased. That the deceased asked him to collect the title at Kerugoya Lands Office and that he did the transfers himself. That he did not know that his father objected to distribution in the succession cause.
13. PW2, Francis Gatii stated that he knew the deceased who shared names with the applicant. That the applicant's father's name is Peter Muthage Mbogo who died after the deceased. That the applicant and the deceased shared a name until 1977 when the applicant was baptized and took up the Christian name Richard in addition to his other names. That it was not uncommon for someone to be baptized and offered catechism classes as an adult with understanding.
14. He testified that Peter Muthage Mbogo, the applicant's father related poorly with the deceased and he also had a falling out with the applicant's mother and they separated, leaving the applicant to live with a friend before the deceased took him in. That the said Peter Muthage Mbogo did not give the applicant any land but the deceased subdivided his land Ngariama/Thirikwa/415 and gave the 2 portions to the sons of the said Peter Muthage Mbogo, namely the applicant and John Muciri Muthage.
15. It was his evidence that when the land was being subdivided, the respondent was present as she was living at the home of the deceased with her mother who was estranged from her marriage. That following the death of the deceased, the respondent and her deceased mother misled the court into believing that the parcel number Ngariama/Thirikwa/642 belonging to the applicant formed part of the estate of the deceased and failed to tell the court that parcel number Ngariama/Thirikwa/415 was the one registered in the name of the deceased. On cross-examination, he stated that the respondent was raised in the home of the deceased and that he is well versed with the details of the land dispute.



16. PW3 was Nyaga Muthage brother of the applicant. He stated that he resides on parcel number Ngariama/Thirikwa/642 alongside his brothers and step-brothers from his father's 2 wives. That their father had a bad relationship with the deceased and with their mother. That in 1954, his father took a second wife and he chased their mother away and she moved back to her father's house, leaving the applicant with a family friend. That his father began demanding for the title document for parcel number Ngariama/Thirikwa/415 from the deceased, thus prompting the deceased to subdivide the land and give the portions to his 2 eldest grandsons being the applicant and his step brother John Muciri Muthage. That the respondent and her mother misrepresented the facts to the court and also hid some facts from the court at the time of petitioning for the grant.
17. PW4, John Muciri Muthau stated that he is a grandson of the deceased and stepbrother of the applicant. He stated that he is the registered owner of parcel number Ngariama/Thirikwa/643 which was given to him by the deceased at the same time when parcel number Ngariama/Thirikwa/642 was given to the applicant. That their father consented to them being given the property directly by the deceased. That the deceased was the owner of parcel number Ngariama/Thirikwa/415 which he subdivided into the 2 portions before he died in 1975. That he was not aware of the succession proceedings in this case and that he only heard much later that the respondent had sought to inherit his brother's land as part of the estate of the deceased. On cross-examination, he stated that the deceased went to process the titles with his (PW4's) father and that he does not have any documents to show for the transaction but he got his title deed. That he does not know why the deceased gave him and the applicant the land in exclusion of everybody else. That his father was the only son of the deceased.
18. DW1, the respondent, stated that her late mother, the petitioner was a daughter of the deceased and that the family agreed that she should be the one to take out letters of administration in the estate of the deceased. That the deceased was survived by 7 children among them one son who is the father of the applicant. That before his death, the deceased subdivided his land parcel number Ngariama/Thirikwa/415 into 2 parcels namely parcel numbers Ngariama/Thirikwa/642 and Ngariama/Thirikwa/643, the former which he gave to the respondent's late mother.
19. It was her testimony that her late mother petitioned for a grant in the Chief Magistrate's Court but the matter was transferred to the High Court and she substituted her late mother in the proceedings where the grant was issued to her and the same was confirmed. That she did not know where the title deed of the property is and so she reported loss of the title to facilitate its replacement. That her actions are not illegal as she followed the legal process. That she does not live on the land and it is the applicant who is using it. That her late mother was buried on parcel number Ngariama/Thirikwa/643. On cross-examination, she stated that she does not know what transpired between the deceased, the applicant and PW4 and no one told her about it.
20. She stated that she does not know why the deceased gave land to the applicant and his brother only, leaving her mother out of the picture. That the deceased told her mother that parcel number Ngariama/Thirikwa/643 belonged to her and that it was easier to transfer the land during his lifetime rather than through succession. That neither the applicant nor his siblings were involved in the succession proceedings and that the applicant's father had already died. That the living children of the deceased were called to court during confirmation of the grant. That she only stayed on the land when she was small but now it is occupied by the applicant but the land was transmitted to her name through succession.
21. DW2 was Esther Muringo, the respondent's aunty who is also a daughter of the deceased. She stated that the respondent's mother was married but got divorced through the court of Elders and the dowry paid was returned. That she lived in the home of the deceased and the deceased gave her his land. That



- all the children of the deceased agreed that the respondent's mother should be the one to petition for letters of administration. On cross-examination, she stated that she does not remember her date of birth and that her initial name was Muringo Mbogo and she took up the name Esther when she got married and became a mother. That she does not remember when she was baptized to take up the Christian name.
22. That her late brother's name was Muthage Mbogo and that besides the deceased, she does not know anyone else by the names Mbogo Muthage but later on she identified the applicant in court and said that his name was initially Gachoki Muthage, then it changed to Richard Mbogo and then Mbogo Muthage. She stated that only 2 of her sisters are still alive but they did not attend court when the grant was being confirmed. That she does not know where the applicant lives or where he got the land from. She also stated that the applicant's father had 3 wives and he was given land by the clan; which land is now occupied by his younger wife. That when the applicant finished school, he went to live with the deceased and he built a house on the land of the deceased.
 23. Counsel for the applicant moved the court seeking orders that the 2 surviving daughters of the deceased be called as witnesses for the applicant's case. Through a ruling delivered on 05th July 2023, the court allowed the applicant's motion, granted the said order and the witnesses testified.
 24. PW5, Victoria Waruguru, daughter of the deceased stated that her only late brother was called Muthage Murage Mbogo. That she knew the applicant's mother and that when the deceased was born he was called Gachoka and then his name was changed to Mbogo Muthage. That she also knows that her late brother had a son called Muciri. She stated that she knew that the respondent's mother had sued petitioner and the matter was pending in court but she had never attended court at any other time in this matter and that it was her first time. On cross-examination, she stated that following divorce of the respondent's mother, the deceased gave her some land, which the respondent is now pursuing through these proceedings.
 25. PW6, Phylis Ndegwa, daughter of the deceased stated that she had one brother named Muthage Mbogo who had two wives and several children but she remembers the applicant as one of his sons. She stated that the applicant was named after his father, her brother and Muciri, the applicant's step-brother was named after her uncle. She stated that she had been to court another time over this matter but it was put to her that DW2 stated otherwise. She stated that she did not know where the applicant lived and whether the land was given to him by the deceased. That she knows that the land where the applicant lives belonged to the deceased. On cross-examination, she stated that at the time of confirmation of grant, the 5 surviving daughters of the deceased were in court and agreed that the respondent should inherit the land which belonged to the deceased according to his wishes.
 26. The court directed the parties to file their written submissions and they both complied.
 27. The applicant submitted that he is a grandson of the deceased and was named after him according to Kikuyu Customary Law, hence the similarity in their names. That he adopted the name Richard after he was baptized in 1977 and after the deceased had already given him parcel number Ngariama/Thirikwa/642 which was hived from Ngariama/Thirikwa/415, registered in the name of the deceased. He referred to the Land Certificate registered on 08th January 1976 in his name as Mbogo Muthage and his baptism certificate issued in 1977 which bears his name as Richard Mbogo Muthage.
 28. He submitted that the respondent made false statements that misled the court, leading to the grant being obtained fraudulently. He relied on section 76 of the *Law of Succession Act* and the cases of *Jamleck Maina Njoroge v. Mary Wanjiru Mwangi* (2015) eKLR and *Estate of Katana Vuko Wale v. Hamisi Katana Vuko* (2021) eKLR. It was his case that the respondent knowingly omitted the fact that the applicant and the deceased had similar names and therefore included the parcel number Ngariama/



- Thirikwa/642 as the estate of the deceased even though it had been transferred to the applicant prior to the death of the deceased. That the process of obtaining the grant and the certificate of confirmation was flawed because the grant was confirmed in the absence of the other members of the family and PW5 stated as much. He relied on Rule 41(1) & (2) of the *Probate and Administration Rules* and the case of *Lazarus Estates Limited v. Beestey* (1956), QB 702 and 712 in support of this argument.
29. It was also his argument that parcel number Ngariama/Thirikwa/642 does not form the free estate of the deceased within the meaning of Section 3(1) of the *Law of Succession Act*. That the applicant produced the original title document to the court to show that indeed the property was hived from another one through subdivision and then it was registered to the applicant in 1976, before the deceased died. That DW1 confirmed that the land was occupied by the applicant and that he has been in occupation for a long time and that parcel number Ngariama/Thirikwa/643 does not belong to John Muciri Muthage.
 30. The applicant placed reliance on section 43 of the *Law of Succession Act* and the case of *Dan Ouya Kodwar v. Samuel Otieno Odwar & Another* (2016) eKLR and argued that parcel number Ngariama/Thirikwa/642 was passed to the applicant by the deceased prior to his death, thus, it is a gift inter vivos and does not form part of the estate of the deceased. He relied on texts in *Halsbury Laws of England* 4th Edition Volume 20(1) and the case of *In the Estate of Ruth Nyakanini Rukwaro (Deceased)* (2016) eKLR where the court set conditions to be met before determining whether the property was a gift inter vivos. That there is overwhelming evidence to show that the deceased gave the land to the applicant before he died.
 31. He urged the court to examine the evidence adduced and see that there is sufficient corroboration of the facts as stated by the applicant. He also relied on Rule 44 of the *Probate and Administration Rules* which provides for the procedure for revocation of grant and the case of *Faustina Njeri Njoka v. Kimunye Tea Factory Limited* (2022) eKLR where it was held that failure to controvert the averments of an application does not amount to a valid denial. Further reliance was placed on Article 165(3)(a) of the *Constitution* and the cases of *Santuzza Billoti Alias Mei Santuzza (deceased) v. Giacanio Balasconi* [2014] eKLR, *In re Estate of Leah Wangui Nding'uri (deceased)* (2020) eKLR, *Salome Wambui Njau (suing as the administratrix of the Estate of Peter Kiguru Njuguna (Deceased) v. Caroline Wangui Kiguru* (2013) eKLR and *Justice P. Nyamweya Munyasya Mulili & 3 others v Sammy Muteti Mulili* (2017) eKLR.
 32. He urged the court to exercise its discretionary powers as vested upon it through Rule 73 of the *Probate and Administration Rules* and order cancellation of the transactions done on the applicant's land. He relied on the cases of *In the Estate of Moffat Mariga Ng'ethe (deceased)* HCSC No. 1665 of 2008, *Estate of Jonah Thumbi Karimi (deceased)* HCSC 104 of (2017) eKLR and *In re Estate of Andrea Ooko Tianga (Deceased)* [2019] eKLR where the court ordered cancellation of titles that had been issued through transmission.
 33. The respondent submitted that parcel number Ngariama/Thirikwa/642 belonged to the deceased and she inherited it as the sole beneficiary through succession. That the deceased had given the said land to her late mother and that is why she petitioned for letters of administration. That the deceased was given land parcel number Ngariama/Thirikwa/415 by the clan and he subdivided it into 2 portions namely Ngariama/Thirikwa/642 and 643. That from the evidence adduced, the deceased wanted the respondent's mother to take his property. That when the succession proceedings were gazetted, the applicant did not raise any objection.
 34. She conceded that indeed the applicant and the deceased shared the same name but on the greencard of parcel number Ngariama/Thirikwa/415, there is no mention of the property passing to the applicant



as a gift. She relied on the case of *In Re Estate of the Late Gideon Manthi Nzioka (Deceased)* (2015) eKLR where the court held that a gift inter vivos must be complete. That the applicant himself testified that he did not know how the land was transferred to him yet the greencard does not contain the word “gift”. That the summons for revocation were filed 8 years after the title for the property was reported missing. It was her argument that the issue of ownership of the land cannot be determined by this court as it lacks jurisdiction to do so. She relied on the cases of *In Re Estate of Atibu Oronje Asioma (deceased)* (2022) KEHC (KLR) and *Joseph Koori Ngugi v. Stephen Ndichu J. Mukima* (2017) eKLR.

35. The issues for determination are as follows:

- a. In light of section 76 of the *Law of Succession Act*, whether the grant issued to the respondent should be revoked; and
- b. Whether parcel number Ngariama/Thirikwa/642 forms part of the estate of the deceased.

36. Section 76 of the *Law of Succession Act* provides for circumstances under which a grant of representation may be revoked. It states thus:

“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion-

- (a) that the proceedings to obtain the grant were defective in substance;
- (b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
- (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
- (d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either-
 - (i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or
 - (ii) to proceed diligently with the administration of the estate; or
 - (iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
- (e) that the grant has become useless and inoperative through subsequent circumstances.”

37. The applicant filed the summons for revocation on the grounds that the respondent obtained the grant fraudulently by concealment from the court of something material to the case. From a perusal of the petition and the accompanying documents, it is evident that the respondent’s mother only named herself as the beneficiary of the estate of the deceased which comprised of parcel number Ngariama/Thirikwa/642 even though all her siblings were named as survivors of the estate of the deceased. Unfortunately, the petitioner died before the grant was issued and she was substituted by the



- respondent in the proceedings. In the absence of the original court file, it is uncertain whether or not all the survivors of the deceased were present in court at the time of confirmation of the grant.
38. From the evidence on record, PW1-PW6 all stated that the deceased had 8 children, 7 daughters and one son who is the late father of the applicant. Even in the absence of the initial court file, from the available evidence, the grant was issued and confirmed. PW1, PW3 and PW4 stated that they did not know about the succession proceedings when they were initiated. PW5, a daughter of the deceased stated that she has never been to court over this matter before. PW6 on the other hand stated that all the surviving children of the deceased were present in court at the time of confirmation of the grant. DW2 stated that her siblings did not attend court for the confirmation proceedings.
 39. The standard of proof is on a balance of probabilities and the burden of proof lay with the applicant to prove that the grant was obtained fraudulently (see section 107 of the *Evidence Act*). From the available evidence, PW5, PW6 and DW1 and DW2 stated that the respondent's mother was allowed to petition for letters of administration in the estate of the deceased since she was divorced and was living with the deceased prior to his death. PW1, PW3 and PW4 stated that they did not know about the succession proceedings. PW1 stated that he saw some people surveying his property and that is when he learned that the land had been transmitted to the respondent through succession. On a balance of probabilities, I find that the respondent excluded the applicant and his brothers from the proceedings and that in any event, she should have informed the court that her mother's siblings or their children were also beneficiaries of the estate.
 40. The second issue for determination which is connected to the first issue is that the respondent named the property parcel number Ngariama/Thirikwa/642 as the only asset in the estate of the deceased. Since she was named as the only beneficiary, the property passed to her through transmission. In an ideal situation, the applicant is also a beneficiary of the estate of the deceased if the court had been informed as much and in accordance with the provisions of Part V of the *Law of Succession Act*. The deceased was presumed to have died intestate and being survived by 8 children (some of whom are now deceased).
 41. Parcel number Ngariama/Thirikwa/642 was named as the only estate of the deceased, but the question is, does it belong to the applicant or to the estate of the deceased? The applicant stated that the named property was given to him by the deceased prior to his death and after he subdivided his property parcel number Ngariama/Thirikwa/415. It was his case that before he was baptized, he was known as Mbogo Muthage, like his late grandfather but after baptism, he was given the Christian name Richard. This testimony was corroborated by PW2, PW3, PW4, PW5 and PW6 who confirmed that the applicant was named after his grandfather and the name Richard was added after his baptism. PW2 stated that it was common for an adult to be baptized and given a Christian name as was the case for the applicant. DW2 testified that she was given a Christian name after her marriage and when she became a mother. Above all, in her written submissions, the respondent conceded that the deceased and the applicant indeed shared a name and stated that there was no doubt about that fact.
 42. According to the title deed for parcel number Ngariama/Thirikwa/415, the proprietor was Mbogo Muthage and it was issued to him on 10th October 1957. The said land was subdivided into 2 portions namely parcel number Ngariama/Thirikwa/642 and 643 on 08th January 1976 and on the said date the title was marked as closed on subdivision. PW1 stated that the parcel number Ngariama/Thirikwa/642 was given to him by the deceased after he had a falling out with the applicant's father. This testimony was corroborated by PW3 and PW4. On the other hand, DW1 stated that the deceased subdivided the land and gave parcel number Ngariama/Thirikwa/643 to her and that after her mother died, she was interred on the said property.



43. In the context of the Law of Succession, and having determined that the deceased and the applicant shared a name, it is my view that the property parcel number Ngariama/Thirikwa/642 does not form part of the free estate of the deceased for purposes of succession. From the available evidence, there is sufficient proof that parcel number Ngariama/Thirikwa/642 was passed on to the applicant by the deceased prior to his death on 03rd September 1976, thus it was a gift inter vivos.
44. It is important that a gift inter vivos be passed completely to the recipient before the death of the deceased. This means that where the deceased give property to the applicant as his grandchild, he was at liberty to do so while he is still alive, provided that the gift passes fully to the applicant. At the point of succession, such a property is taken into account as having passed to the recipient but it does not form part of the estate of the deceased. This is provided for under Section 42 of the *Law of Succession Act*. It provides:
- “Where-
- (a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or
 - (b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.”
45. This section also means that during succession, the net estate of the deceased that is available for distribution is determined in exclusion of the portion which he gave as a gift to his grandson during his lifetime so long as the gift passed completely. In the case of *Re Estate of the Late Gideon Manthi Nzioka (Deceased)* (2015) eKLR, it was stated thus:
- “...For gifts inter vivos, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trusts or the presumption of Gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts inter vivos must be complete for the same to be valid.”
46. According to *Halsburys Laws of England* 4th Edition Volume 20(1) at paragraph 67 it is stated as follows with respect to incomplete gifts:
- “Where a gift rests merely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where the donor’s subsequent conduct gives the donee a right to enforce the promise. A promise made by deed is however, binding even though it is made without consideration. If a gift is to be valid the donor must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do.”
47. Therefore, in determination of the second issue, I find that parcel number Ngariama/Thirikwa/642 does not form part of the estate of the deceased as the same was passed to the applicant during the lifetime of the deceased.



48. In the end, I find that the summons dated 27th April 2016 seeking revocation of a grant has merit and it is hereby allowed. The following orders shall issue:

- a. The grant issued to the respondent on 23rd January 2006 is hereby revoked;
- b. The certificate of confirmation issued on 13th October 2006 is hereby set aside;
- c. There shall be no order as to costs considering the relationship between the parties.

49. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 24TH DAY OF APRIL, 2024.

L. NJUGUNA

JUDGE

