



**Nthiga (Substitute for Patrick Nthiga Njeru - Deceased) v Nyaga & 5 others (All being Substitutes for Cyrus Nyaga Njeru - Deceased) (Succession Cause 163 of 2005) [2024] KEHC 4213 (KLR) (24 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4213 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT EMBU**

**SUCCESSION CAUSE 163 OF 2005**

**LM NJUGUNA, J**

**APRIL 24, 2024**

**IN THE MATTER OF THE ESTATE OF NJERU M'NJARIA (DECEASED)**

**BETWEEN**

**PHERIS MUTITU NTHIGA ..... APPLICANT  
SUBSTITUTE FOR PATRICK NTHIGA NJERU - DECEASED**

**AND**

**STEPHEN KITHINJI NYAGA ..... 1<sup>ST</sup> RESPONDENT  
DAVID MUKUNDI NYAGA ..... 2<sup>ND</sup> RESPONDENT  
JOSHUA MUGAMBI NYAGA ..... 3<sup>RD</sup> RESPONDENT  
ALEXANDER KINYUA NYAGA ..... 4<sup>TH</sup> RESPONDENT  
BONFACE KIMATHI NYAGA ..... 5<sup>TH</sup> RESPONDENT  
GEOFREY MUGENDI NYAGA ..... 6<sup>TH</sup> RESPONDENT  
ALL BEING SUBSTITUTES FOR CYRUS NYAGA NJERU - DECEASED**

**JUDGMENT**

1. The applicant filed the summons dated 19<sup>th</sup> July 2021 seeking revocation of a grant issued to Cyrus Nyaga Njeru on 13<sup>th</sup> February 2006 in the estate of the deceased. She sought for revocation of the said grant on grounds that the proceedings to obtain the grant were defective in substance and that the same was obtained fraudulently by making of a false statement or by concealment from the court of something material to the case.
2. The background of the matter is that Cyrus Nyaga Njeru (deceased) petitioned for a grant of letters of administration in the estate of the deceased in his alleged capacity as the son of the deceased.



According to P&A5 Form, he is the only named survivor of the deceased and that the deceased died in 1961 (the certificate of death was not provided) in Embu leaving behind land parcel number Gatari/Nembure/1382. The accompanying P&A Form 38 shows that he named himself as the only beneficiary of the estate of the deceased. The accompanying affidavits of justification of proposed sureties were deposed by the petitioner and the 4<sup>th</sup> respondent herein. Using this information, the grant was issued to the petitioner. The petitioner proceeded to file summons for confirmation of the grant and the same was issued on 13<sup>th</sup> October 2006 naming Cyrus Nyaga Njeru (deceased) as the sole beneficiary of parcel number Gatari/Nembure/1382.

3. The applicant herein is the wife of the Patrick Nthiga Njeru while the respondents are the sons of her brother-in-law who is the deceased administrator of the estate of the deceased. It is her case that the deceased administrator petitioned for the grant of letters of administration without informing her late husband, his brother. That the petitioner concealed from the court the fact that her late husband was still alive at the time of petitioning for the grant and that he misled the court into believing that he was the only survivor of the deceased. She stated that the land at the center of the prevailing contention is parcel number Gatari/Nembure/1382, on which she lived with her husband and they have extensively developed.
4. She stated that the respondents are attempting to evict the applicant from the land where she now lives with her children yet the share of land devolved to her children after the death of her husband. She stated that the respondents should benefit from land parcel number Gatari/Nembure/2736 which he received from the estate of the deceased. That the said Cyrus Nyaga Njeru (deceased) subdivided parcel number Gatari/Nembure/1382 into 3 portions namely parcel number Gatari/Nembure/10964, 10965 and 10966.
5. That the said Cyrus Nyaga Njeru (deceased) lied that the deceased herein was his father but he is the person who sold the land to the applicant's father-in-law and the court apportioned him parcel number Gatari/Nembure/1382 excluding the applicant's husband. That at the point of petitioning for letters of administration, Cyrus Nyaga Njeru (deceased) had the consent forms signed by the respondents, his sons, which is fraudulent.
6. In response, the 5<sup>th</sup> respondent filed a replying affidavit on behalf of the other respondents stating that the application is premature and bad in law. That the applicant ought to initiate citation proceedings for the purpose of citing the family of the deceased to take out letters of administration in the estate, but she has not done so. That the respondents are merely beneficiaries of property they received from their deceased father Cyrus Nyaga Njeru and that whatever consequences for his misdeeds if any, should not be visited on the respondents. That none of the respondents herein is willing to be appointed as an administrator of the estate. That the applicant's failure to cite the family of the deceased is not the respondents' fault and it should not affect their enjoyment of the land.
7. The applicant filed a further affidavit wherein she deposed that parcel number Gatari/Nembure/1382 belonged to her father-in-law, one Njeru Rwanjau and not to the respondents' father. That the fraud arises from the fact that the respondents' father lied to the court that the deceased was his father and that the applicant's husband was deceased at the time of petitioning for the grant, which was obtained without her husband's knowledge. She stated that parcel number Gatari/Nembure/1382 had been exempted from her father-in-law's succession because the property had not been fully transferred to his name from the original owner, who is the deceased herein, and not because it belonged to the respondents' father.
8. She stated that when the succession proceedings in the estate of her father-in-law were instituted, the deceased had not been traced for purposes of completing the purchase and to date, he still cannot be



found. That her husband and the respondents' father went before the District Land Tribunal over the said land but it lacked jurisdiction to determine the dispute, leading the respondents' father to fraudulently obtain the grant. She deposed that out of the subdivided portions being parcel number Gaturi/Nembure/10964, 10965 and 10966, the first one measures one acre while the others measure 3 acres each yet the 2 brothers were entitled to equal shares of the property. That the applicant is occupying her half of the property while the respondents are occupying the other half of the property. She disputes the fact that the respondents are offering her the one-acre portion of the land. She urged the court to revoke the grant.

9. The court took viva voce evidence. PW1 was the applicant who stated that the deceased herein sold land parcel number Gaturi/Nembure/1382 to her father-in-law known as Njeru Rwanjau (deceased) who was the father of her late husband and the respondents' father. That when the succession herein was filed, the petitioner did not disclose that the applicant's husband was still alive and that she only learned of the proceedings when the said land was being subdivided. That the introductory letter from the chief stated that the applicant's husband was dead but at the time he was alive. That throughout the pleadings leading up to the grant, the respondents' father failed to disclose to the court that he had a brother and he obtained the land through transmission yet the deceased was not his father.
10. That the respondents have only given her 1 out of 7½ acres but the land should be divided equally. That the applicant's father-in-law had another parcel of land known as Gaturi/Nembure/2736 which was shared equally between his 2 sons through another succession cause. She stated that the land dispute was placed before the District Land Tribunal and it was later taken to the ELC in Case Number 60 of 2016 where the same was referred back to the High Court. On cross-examination, she stated that her father-in-law and mother-in-law were buried in Weru on land whose number she does not know. It was put to her that when the succession cause was gazetted, she did not object. That after the respondent's father received the land through transmission, he stayed for 1 year before he died. That the land belonged to Njeru Rwanjau but it was put to her that the land belonged to Njeru Muruanjaria. She stated that her husband bought the land from Njeru Muruanjaria and had title deeds but the same were lost through a fire.
11. PW2 was Newton Francis Njeru who is the son of the applicant. He stated that the deceased sold the land parcel number Gaturi/Nembure/1382 in 1961 to his grandfather Njeru Rwanjau but he disappeared before transferring the land to his grandfather. That the respondent's father fraudulently obtained the grant which he used to take away all the land. That the respondent's father and his father are step brothers since his grandfather had 2 wives. He stated that he lives on the said land and that in any event, his father should have been part of the succession proceedings, but instead, he told the chief that his step-brother is dead. On cross-examination, he stated that the subdivided titles may had been having titles but he was not aware of that.
12. DW1, the 1<sup>st</sup> respondent, stated that his father sent his grandfather money to buy the land parcel number Gaturi/Nembure/1382, something which the applicant's husband knew at the time. That the applicant's husband was the administrator of the estate of his father which comprised of land parcel number Gaturi/Nembure/2736 and which was divided equally amongst his sons. That the respondents were orphaned early and were left under the care of the applicant who did nothing to help them but instead wants to take away their land. That when the conflict arose, the applicant's father was involved and the matter went to the District and Provincial land Disputes tribunals and then to the chief magistrate's court where the decision of the tribunal was upheld and the applicant's husband was willing to comply.
13. That in the pending ELC suit, the respondents are only interested in parcel numbers Gaturi/Nembure/10965 and 10966 and even then, there are status quo orders in place and so none of the



- parties are utilizing the land. On cross-examination, he stated that the name of his father is Cyrus Nyaga Njeru and his grandfather was Njeru Wanjau and not the deceased herein. That the applicant's husband is his uncle who predeceased his father. That he does not know whether his uncle was involved in the succession proceedings. That after his father acquired the land, he subdivided it into 3 portions namely numbers Gaturi/Nembure/10964, 10965 and 10966. That by the time his father went before the land tribunal, he had already acquired the land through succession. That he does not have proof of purchase of the said land but there is a suit pending before the ELC in Embu case number 60/2016 where they are seeking an injunction.
14. DW2, the 4<sup>th</sup> respondent in his statement, testified in the same terms as DW1. On cross examination, he stated that the name of his father is Cyrus Nyaga Njeru and his grandfather was Njeru Wanjau whose estate comprised of parcel number Gaturi/Nembure/2736 and was administered by his father. That his father bought parcel number Gaturi/Nembure/1382 and subdivided it into 3 portions but none of the respondents is occupying the said land.
  15. DW3, the 1<sup>st</sup> respondent testified in the same terms as DW1 and DW2.
  16. The court directed parties to file their written submissions and they complied.
  17. The applicant submitted that the grounds for revocation of the grant as established under section 76 of the *Law of Succession Act* have been proved. She relied on the case of *In Re Estate of Prisca Ong'ayo Nande (deceased)* (2020) eKLR where the court stated that a grant can be revoked where the process of obtaining it was marred with fraud including lies that the petitioner is a survivor of the deceased when he is not. That the respondents' father made a false statement to the court that the deceased was his father when in real sense he was not, and that his father was Njeru Rwanjau who purchased the land from the deceased herein. That none of the respondents had any documents to show that their father bought the land from the deceased and still, her husband was not involved in the succession proceedings herein.
  18. She also placed reliance on the provisions of section 38 of the *Law of succession act* and argued that the parcel number Gaturi/Nembure/1382 should be divided into 2 equal portions for the applicant's husband and the respondents' father. Further reliance was placed on the case of *Joseph Malakwen Lelei & Another v. Rift Valley Land Disputes Appeals Committee & 2 Others* (2014) eKLR where the court discussed the extent of jurisdiction of the land tribunals, and she urged the court to find that the district land tribunal had no jurisdiction. She urged the court to order cancellation of the resultant titles from the subdivision of parcel number Gaturi/Nembure/1382 and she cited the case of *In Re Estate of Leah Wanguii Nding'uri* (2020) eKLR where the court ordered cancellation of titles issued to 3<sup>rd</sup> parties.
  19. The respondents submitted that their father and the applicant's husband were brothers and when their father Njeru Rwanjau died, the applicant's husband was appointed administrator of his estate which comprised of land parcel number Gaturi/Nembure/2736. That their father bought parcel number Gaturi/Nembure/1382 from the deceased herein but the transaction was not completed and the deceased disappeared and could not be found for a long time. That the respondent's father cited the family of the deceased but no one took out letters of administration, prompting him to petition for the same. That parcel number Gaturi/Nembure/1382 was not included in their grandfather's succession because the applicant's husband knew that the land belonged to their father.
  20. They submitted that the land dispute that was adjudicated at the district Land Tribunal was between their father and the applicant's husband who later appealed against the finding to the Provincial Land Tribunal where the previous decision was upheld and the decisions have never been set aside by any court. That the applicant's husband accepted the one acre given to her husband through the subdivision as parcel number Gaturi/Nembure/10964 while parcels Gaturi/Nembure/10965



and 10966 were given to the respondents. That the award of the land tribunal was adopted in Embu CMC Award No. 37 of 2008 where the applicant's husband was given parcel number Gaturi/Nembure/10964. The applicant has not instituted any judicial review proceedings against this decision. They termed these proceedings as the applicant's attempt at forum shopping and urged the court to dismiss the application.

21. From the foregoing, the issue for determination is whether the grant was properly obtained in the estate of the deceased and whether it should be revoked in light of section 76 of the *Law of Succession Act*.
22. The issues arising from the foregoing are multifaceted; that is, they touch on the validity of the grant and entanglement of ELC issues therein, but all in all, I shall attempt to unravel them. First of all, the applicant herein deposed that the grant was obtained by the respondents' father in the estate of the deceased where he petitioned as a son of the deceased. According to the petition and the accompanying documents, he names himself as the only survivor and beneficiary of the estate of the deceased. It was the applicant's case that this aspect is fraudulent and that the petitioner failed to inform the court that the deceased is not his father and that his father's name is Njeru Rwanjau (deceased) who purchased the property from the deceased. She also decried the fact that the petitioner failed to inform the court that the applicant's husband was his brother and that he was entitled to the estate of the deceased too.
23. This is the applicant's basis for seeking revocation. A grant may be revoked under circumstances set out under section 76 of the *law of Succession Act* as follows:

“ 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.”
24. In the replying affidavit to the summons, the respondents stated that the misdeeds of their father should not be visited upon them and that they should be left to freely enjoy the property which they received from their father. They stated that if the applicant wanted to make an effective case, she should cite the



- family of the deceased and stop interfering with their property. However, in their submissions, they stated that their father cited the family of the deceased to take out letters of administration but none of them did and so their father proceeded to petition.
25. From a perusal at the petition of letters of administration, the accompanying P&A Forms and the gazette notice number 9257 issued on 18<sup>th</sup> November 2005, the petitioner is described as a son of the deceased. DW1 and DW2 stated that their grandfather's name was Njeru Rwanjau and not the deceased. With the information presented before her, the honourable Judge at the time proceeded to issue a grant to the respondents' father since no objections were filed in the matter following gazette. The grant was issued on 13<sup>th</sup> February 2006 and the same was confirmed and a certificate of confirmation was issued on 13<sup>th</sup> October 2006 bequeathing the whole of parcel number Gaturi/Nembure/1382 to the respondent's father.
  26. Soon after, the said parcel became the subject of District Land Tribunal Case No. 15/2008 and the tribunal gave its verdict on 27<sup>th</sup> October 2008 where the tribunal found that the certificate of confirmation of grant issued by this court is sufficient proof that the respondents' father rightly acquired the land. the applicant's husband was aggrieved by this decision and he appealed to the Provincial Land Tribunal in appeal no. 11/2009 where the decision of the District land Tribunal was upheld through a verdict reached on 23<sup>rd</sup> July 2009. The decision of the District Land Tribunal was adopted through Embu CMC Award No. 37 of 2008 and an order was issued on 04<sup>th</sup> November 2009.
  27. It is clear to me that any other decision by a land tribunal or the ELC, took its course as defined by the succession proceedings in the estate of the deceased. That being the root of all the other matters arising, it should be determined with finality herein. As I have already pointed out earlier, the applicant's husband was not named as a beneficiary of the estate of the deceased and the applicant takes issue with that. However, the bigger question is whether the respondent's father had the locus to petition for letters of administration in the estate of the deceased in the first place. The respondents have submitted that their father cited the family of the deceased to petition for a grant before he took it upon himself to do so. They have not provided any proof to support any argument of this nature. In their replying affidavit, they did not produce any document and they, in fact, stated that the applicant should cite the family of the deceased and not interfere with their enjoyment of the land.
  28. Parties are bound by their pleadings and in this case, there is no evidence of the alleged citation proceedings. Even going by the evidence adduced, PW2, DW1, DW2 and DW3 named their grandfather as Njeru Rwanjau and not the deceased herein. PW1 stated that her father-in-law Njeru Rwanjau was the owner of parcel number Gaturi/Nembure/1382 which was inherited by her husband and the respondents' father in equal shares. DW1, DW2 and DW3 stated that the property parcel number Gaturi/Nembure/1382 was not part of the estate of their grandfather because the applicant's father knew that it belonged to the respondents' father. PW1 also stated that the succession proceedings in the estate of Njeru Rwanjau was already completed.
  29. Going by the available evidence, it is my view that the respondents' father masqueraded as a son of the deceased and fraudulently obtained a grant in his estate. All the witnesses testified that the deceased disappeared and has never been traced to date. There is a standard to be attained before succession proceedings are instituted and one of the measures is that the deceased must be proven to be dead (see section 51 of the *Law of Succession Act*). It is unfortunate that there is no evidence as to whether the deceased was actually dead at the time of petitioning for the grant in his estate or that his family was indeed untraceable. If that was proved, and the respondents were able to prove that the family was cited and they refused to petition for a grant, the outcome herein would be very different.



30. There is no reference to any citation proceedings under Rule 21 of the *Probate & Administration Rules* nor is there any order as such within the court's record. The preferred hierarchy of beneficiaries is provided for under section 66 of the *Law of Succession Act* as follows:

“When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference:-

- (a) surviving spouse or spouses, with or without association of other beneficiaries;
- (b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;
- (c) the Public Trustee; and
- (d) creditors.

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.”

31. That being said, it is immaterial that the applicant's husband was not included in the succession proceedings since I have already found that the proceedings were fraudulent ab initio. Further, the subject matter in ELC Case no. 60/2016 is injunction against the defendants who include the applicant herein. The court in that matter is aware of the proceedings herein.

32. In the end, the fact that the respondents' father without citing the family of the deceased (if any), concealed from the court the fact that the deceased was not his father and yet proceeded to petition for a grant in his estate, is enough ground to revoke the grant under section 76(b) and (c).

33. Therefore, it is my finding that the summons for revocation dated 19<sup>th</sup> July 2021 has merit and the same is hereby allowed. Orders are hereby issued as follows:

- a. The grant issued to Cyrus Nyaga Njeru (deceased) on 13<sup>th</sup> February 2006 in the estate of the deceased is hereby revoked; and
- b. The certificate of confirmation of grant issued to Cyrus Nyaga Njeru (deceased) on 13<sup>th</sup> October 2006 is hereby set aside.

34. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 24<sup>TH</sup> DAY OF APRIL, 2024.**

**L. NJUGUNA**

**JUDGE**

