



**In re Estate of M'Nkabu M'Najau (Deceased) (Succession Cause
401 of 2008) [2023] KEHC 2169 (KLR) (16 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2169 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
SUCCESSION CAUSE 401 OF 2008
EM MURIITHI, J
MARCH 16, 2023**

BETWEEN

**DAVID MBAABU NKABU 1ST APPLICANT
MARION GACHERI 2ND APPLICANT
CATHERINE NCHOORO NKAABU 3RD APPLICANT
GRACE NKİROTE 4TH APPLICANT
MARY RUGURU 5TH APPLICANT**

AND

JULIUS MURITHI NJAU RESPONDENT

AND

**EPHANTUS MUTHAMA KITHINJI INTERESTED PARTY
ALICE WANJA NKABU INTERESTED PARTY**

RULING

1. By Summons under certificate of urgency dated January 14, 2022 brought under section 76 of the *Law of Succession Act*, Section 68 (1) of the *Land Registration Act*, Rules 44 (1) and 73 of the *Probate and Administration Rules*, the applicants seek that:
 1. Spent
 2. Spent
 3. The honorable court do issue an order of inhibition stopping further dealings, registration and transactions over LR No ABOGETA/U-CHURE/3606, 3607, 3608 and 3609 pending hearing and determination of this application.



4. The grant of letters of administration issued to the petitioner/respondent on November 4, 2009 and confirmed on December 9, 2010 be revoked and annulled.
5. Upon granting prayer 4 above, this honorable court do issue an order cancelling the registration pursuant to the certificate of confirmation of grant dated December 9, 2010, the resultant certificate of title for LR No ABOGETA/U-CHURE/3606, 3607, 3608 & 3609 and consequently the registration of the deceased be restored.
6. The costs of this application be provided for.

2. The application is premised on the grounds on the face of it and supporting affidavit of Marion Gacheri, the 2nd applicant herein, sworn on even date. She avers that she is a daughter to the deceased; that the 2nd interested party is their mother; and that the 1st interested party and the petitioner are her brothers. She accuses the petitioner of collusion with the interested parties and the chief in order to stealthily file this cause without the knowledge and/or consent of other beneficiaries. She further accuses the petitioner of concealing from the court the existence of other beneficiaries, and proceeding to have the grant confirmed in their absence. It is urged that as a result of the matters aforesaid, the 1st and 3rd applicants, who had been residing on LR No ABOGETA/U-CHURE/533 (hereinafter called the subject property), were disinherited.

3. The applicant alleged that the petitioner caused the suit property to be subdivided into ABOGETA/U-CHURE/3606, 3607, 3608 and 3609 and registered in the names of the petitioner, the 1st interested party, 1st applicant and the 2nd interested party respectively. She avers that the 1st and 3rd applicants are on the verge of being rendered homeless, since the respondents are actively planning to fence of the resultant parcels. She urges the court, in the interest of justice and fairness, to allow the application.

4. The application was opposed by the replying affidavit of Ephantus Muthamia Kithinji, the 1st interested party herein, sworn on March 8, 2022. He wants the application to be dismissed with costs for being taken out in bad faith, informed by malice and otherwise an abuse of the court process. He avers that the deceased had distributed the suit property to his sons before his death, and set aside a portion for his mother to hold in trust for his sisters who would return home if their marriages failed. Following the said distribution, his brothers and himself took possession of their respective portions and have been in occupation since 1980s to date. The 2nd-5th applicants got married and left home, but the 2nd applicant later returned and was given a portion to farm by their mother. When the 1st applicant could not raise school fees for his children, it was agreed in a meeting attended by the 1st applicant, the interested parties and the 1st interested party's wife that he would take up that mantle in exchange for ½ acre of the 1st applicant's portion. He terms the allegations of eviction of the 1st and 3rd applicants as being incredulous, because they have lived together as a family in harmony for over 25 years.

5. The applicants swore a supplementary affidavit on April 13, 2022 in support of the application.

Submissions

6. The applicants submit that the proceedings leading to the confirmation of the grant were defective in substance as the petitioner refused to reveal to the court their existence as dependants. They urge that the deceased died intestate as no evidence was led to show that he had distributed his assets according to Kimeru customary law, and cite *re Estate of Kimayo s/o Shibeyi (Deceased) (2020) eKLR*. They urge the



court to allow the application as the petitioner obtained the grant fraudulently without the knowledge of all the beneficiaries.

7. The respondent and the interested parties insist that the deceased had distributed the suit property before his death, and rely on *re Estate of Henry M'bagine M'ithika alias Bagine Ntaka (Deceased) (2019) eKLR*, *re Estate of MMuthuri Gituambae (2019) eKLR* and *re Late Morogo A Mugun (Deceased) (2019) eKLR*. They urge the court to find that no fraud has been proved or that the petitioner concealed material facts in obtaining the grant, and cite *re Estate of Jason Wagikuri Giticha (Deceased) (2019) eKLR*. They fault the applicants for failing to present evidence to support their allegation that they have been threatened with eviction from the suit property, and cite *Nyando Power Techniques Limited v Nairobi City County & Another (2016) eKLR*. They urge the court to dismiss the application with costs as it is informed by malice and misrepresentation of facts with intent to hoodwink the court to grant the orders sought.

Analysis and Determination

8. Having considered the application, the responses thereto and the submissions on record, the issue for determination is whether the grant should be revoked for having been obtained fraudulently by concealment by the petitioners of material fact of the existences of other beneficiaries.
9. Section 76 of the *Law of Succession Act* sets out the requirements for revocation or annulment of grant 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.'
10. The point of contention is that whereas the applicants contend that the deceased died intestate, the petitioner and the interested parties are firm that the deceased had distributed the suit property before his death.



11. The applicants cite the concealment of material facts from the court to wit the existence of other beneficiaries of the deceased, as the primary reason behind their quest to have the grant revoked.
12. The Chief of Igoki Location, in his introductory letter dated September 13, 2007, listed Alice Nkabu, Julius Murithi Njau, Ephantus Kithinji and David Mbabu as the only beneficiaries of the deceased. The official search on record shows that the suit property was registered in the name of the deceased on September 9, 1963.

The Petitioner's pleadings

13. The petitioner only listed himself, the interested parties and the 1st applicant as the beneficiaries of the estate of the deceased, in the affidavit in support of the petition for letters of administration intestate and the affidavit in support of Summons for Confirmation of the Grant. It appears only the petitioner, the interested parties and the 1st applicant signed the consent to the making of the grant of Letters of Administration intestate and the consent to the mode of distribution of the estate.
14. When the petitioner appeared in court on December 9, 2010 for the hearing of the Summons for Confirmation of Grant, he informed the court that, 'The other beneficiaries are absent. However, we have agreed on distribution. We sub-divided the land in 1985. This is a formality in order to get title to our pieces of land.' The court went ahead to confirm the grant in terms of paragraph 5 of the affidavit in support of the Summons for Confirmation of Grant.
15. The deceased died on February 1, 1978 before the Law of Succession Act had come into force but the Petition for Letters of Administration Intestate was filed on September 9, 2008 and the provisions of the Act relating to administration and distribution of estate of a deceased person apply, by virtue of section 2 (1) and (2) of the Law of Succession Act which provides as follows:

' 2. Application of Act

- (1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.
- (2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.'

Evidence of gift during lifetime of Deceased

16. The deceased may, in accordance with Meru customary law as alleged, have given his property out to his sons as alleged but to perfect this gift such disposal must be evidenced by evidence of transfer. Being a matter within their special knowledge, the respondents had the burden of proof under section 112 of the Evidence Act as follows:

' 112. Proof of special knowledge in civil proceedings.



In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.'

17. No proof by cogent evidence of Deceased's gifting of the parcels of land to the respondents during his lifetime was adduced. Although the petitioner and the interested parties maintain that the deceased had distributed the suit property before his death, there is no evidence on record towards that end, and this court must find that the deceased died intestate. Even if it were true that the deceased had distributed the suit property to his sons during his lifetime, why did the petitioner find it difficult to just list all the beneficiaries of the deceased? If that were done, the applicants would have attended court to lend weight to the petitioner's assertions that the deceased had actually distributed the suit property prior to his death. But that was not done.
18. Significantly, there was no suggestion that under Meru Customary law, there was no provision for the inheritance of female children and indeed, the allegation was that a portion of the estate had been reserved for female children who being married were to return to their father's land in the event of divorce. There is also no suggestion that the Meru Customary law applicable to the inheritance of the deceased who died before the coming into force of the *Law of Succession Act* was averse to an application of the provision for defendants similar to that set out in section 26 of the Act, which governed the procedure for litigating succession causes by virtue of section 2 (2) of the Act for all Causes filed after the commencement. How could the applicants file for provision for defendants under section 26 of the Act if there were not aware of the filing of the petition?

Concealment of material facts

19. This court thus finds that, by failing to either disclose the existence of his siblings to the court, or involve them and/or seek their consent in the entire process of obtaining the grant, the petitioner is guilty of concealing something material from the court. The applicants and the petitioner are all children of the deceased and because they ranked in equal priority, it was incumbent upon the petitioner to seek and obtain their consent before he could petition for letters of administration intestate in accordance with Rule 26 of the Probate and Administration Rules 1980, which provide as follows:

- ' 26. Grants of letters of administration
 - (1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.
 - (2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.
 - (3) Unless the court otherwise directs for reasons to be recorded, administration shall be granted to a living person in his own right in preference to the personal representative of a deceased person who would, if living, have been entitled in the same degree, and



to a person not under disability in preference to an infant entitled in the same degree.'

20. Consequently, the grant herein having been obtained fraudulently by concealment from the court of something material to the case, is ripe for revocation under section 76 of the *Law of Succession Act*.

Orders

21. Accordingly, for the reasons set out above, the application dated January 14, 2022 is allowed in the following terms:

1. The Grant of Letters of Administration Intestate issued to the petitioner on November 4, 2009 and subsequently confirmed on December 9, 2010 is hereby revoked.
2. The resultant subdivisions of the suit property being LR No ABOGETA/U-CHURE/3606, 3607, 3608 & 3609 are hereby cancelled and the suit property restored to the name of the deceased.
3. Any of the beneficiaries is at liberty severally or jointly with others, subject to the limitation on the numbers of administrators under section 56 (1) (b) of the *Law of Succession Act*, to apply to be appointed as an administrator.
4. There shall be no order as to costs.

Order accordingly.

DATED AND DELIVERED ON THIS 16TH DAY OF MARCH, 2023.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Muchomba Law Advocates for the Applicants.

M/S CM Advocates for the Respondent and 1st Interested Party.

