



In re Estate of Daudi Kirunga Muchiri (Deceased) (Succession Cause 154 of 1989) [2023] KEHC 23960 (KLR) (23 October 2023) (Ruling)

Neutral citation: [2023] KEHC 23960 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 154 OF 1989
SM MOHOCHI, J
OCTOBER 23, 2023**

IN THE MATTER OF THE ESTATE OF DAUDI KIRUNGA MUCHIRI (DECEASED)

BETWEEN

GRACE WANJIRU GUCHARI 1ST APPLICANT

PETER MUCHIRI GAKURU 2ND APPLICANT

AND

STEPHEN MAINA MUCHIRI RESPONDENT

RULING

Introduction

1. The late Daudi Kirunga Muchiri (Deceased), died intestate on the 6th August 1977, approximately forty-six (46) years ago, his now deceased wife Cecilia Wanjiku Kirunga obtained a grant of letters of Administration intestate on 27th September 1989 and confirmed on 17th October 1989, twelve (12) years after his demise; The Administrator.
2. There are two applications before me for determination. The first is an Application dated 25th May, 2022 (first Application) filed by the Applicants and the second is a Miscellaneous Application dated 9th June, 2022 (second Application) filed by the Applicants.
3. In the first Application, dated 25th May, 2022 is filed pursuant to Article 159(2) (d) of the *Constitution* of Kenya, 2010; Sections 47 & 76 of the *Laws of Succession Act*, Cap 160 and Rule 44 of the *Probate & Administration Rules*; and Order 4, 40 Rule 1,2,3,4, 10 of the *Civil Procedure Rules*, 2010, and Section 3A of the *Civil Procedure Act*, supported by the Sworn Affidavit of Grace Wanjiru Gichari dated 23rd may 2023, whereby the Applicants petitions for;
 - i. Spent.



- ii. Spent.
 - iii. Spent.
 - iv. That the confirmation of Grant of the Letters of Administration made to Respondents' late mother Cecilia Wanjiku Kirunga done by the Hon Court on 17th October 1989, be and is hereby revoked and/or annulled;
 - v. That the Estate of the Deceased David Kirunga Muchiri be distributed afresh amongst the rightful beneficiaries as it relates to the property LR No: Loc.8/Gatara/412.
 - vi. That the title deed LR No 8/Gatara/412 issued in favour of the Respondent on 2nd February 2022 be cancelled and re-issued in the names of the Applicants in their capacities as Administrators of the estates of Joseck Macharia Kimani and Joseph Gichari Thuku, respectively.
 - vii. That Costs of this Application be borne by the Respondent
4. The 2nd Application dated 9th June, 2022 filed pursuant to Article 159(2)(d) of the *Constitution* of Kenya, 2010, Sections 47 & 76 of the Laws of Succession Act, Cap 160 and Rules 44 and 73 of the Probate & Administration Rules; and Sections 1A, 1B, 3A of the *Civil Procedure Act*, Order 11 Rule 3(h) of the Civil Procedure Rules supported by the Sworn Affidavit of Grace Wanjiru Gichari dated 9th June, 2022, craving for the following reliefs;
- i. Spent
 - ii. Spent
 - iii. That this application be consolidated with the Petitioners' Summons Application dated 24th May 2022 in Succession Cause No 154 of 1989 for disposal, as both matters relate to the same suit property Loc. 8/Gatara/412, which is a common factor in both Estates presently before the High Court and the Lower Court at Nakuru.
 - iv. That the Confirmation of Grant done on 13th October 2021 in Chief Magistrate Court Succession Cause No E527 of 2021 Estate of Cecilia v. Wanjiku Kirunga be revoked and/or annulled with regards to the suit property Loc. 8/Gatara/412.
 - v. That the title deed LR No No: Loc. 8/Gatara/412 issued in favour of the Respondent on 2nd February 2022 be cancelled and re-issued in the names of the Applicants in their capacities as Administrators of the estates of Joseck Macharia Kimani and Joseph Gichari Thuku, respectively.
 - vi. That Costs of this Application be provided for.
5. The grounds upon which the Applications are premised are inter alia that,
- i. The Deceased originally hailed from Githambo area of the now Muranga County but moved to Nakuru County in or around 1950 and established his family in Ngachura area.
 - ii. Land Adjudication & Consolidation under the *Land Consolidation Act* of 1960 took place in many areas of Muranga including the Githambo area in the period 1960-62 in the absence of the deceased. His brother Joseck Macharia Kimani however ensured that the portions due to him were secured in his name. The deceased thus got two parcels LR No: Loc. 8 Gatara/313 and LR No: Loc. 8 Gatara/412. The said Macharia Kimani used to farm the two parcels pending directions from his brother in Nakuru



- iii. The deceased went back to Muranga in 1972 and sold the parcel LR No: Loc. 8/Gatara/313 to his brother Gichari Thuku and the title for this parcel was transferred to Gichari Thuku.
- iv. In 1977, the deceased visited Muranga again and sold his second parcel Loc. 8/Gatara/412 jointly to his two brothers Joseck Macharia Kimani (3.9 Acres) and Gichari Thuku (3.0 Acres) vide a sale agreement dated 27th July 1977.
- v. That Unfortunately, the deceased passed away on 6th August 1977 due to sickness when he was still visiting his relatives in Muranga. He was buried by his brother Gichari Thuku on the parcel he had sold to him (Loc. 8/Gatara/313).
- vi. The two brothers Joseck Macharia Kimani and Gichari Thuku took possession of the suit property Loc. 8/Gatara/412 in 1977 and continued to farm and use the land until their deaths in 1988 and 1996 respectively. The land was left to their respective families who continue to use the land to date - 45 years down the line since it was acquired.
- vii. That Cecilia Wanjiku Kirunga the wife of the deceased, obtained a grant of Letters of Administration in this matter, and had them confirmed on 17th October 1989, with the suit property conferred to her, without disclosing to the Court that the suit property had long been sold by the deceased and belong to other parties she subsequently passed away on 24th May 2008.
- viii. That clearly, as contemplated by Section 76(c) of the *Law of Succession Act* Cap 160 Laws of Kenya, the grant to Cecilia Wanjiku Kirunga 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:
- ix. The Respondent, also a resident of Nakuru obtained letters of administration in the estate of his mother Cecilia Wanjiku Kirunga and had the same confirmed on 13th October 2021, whereby the suit property Loc. 8/Gatara/412 was conferred to him in Nakuru Chief Magistrate Court Succession Cause No E527 of 2021.
- x. That on 2nd February 2022, the Respondent obtained title deed for the suit property Loc.8/Gatara/412 in his name and immediately began harassing the family members of the two estates of Joseck Macharia Kimani and Gichari Thuku who reside on and use the land. Several of the members have been summoned to DCI Office Kahuro police station and have been given threats of eviction and arrest.
- xi. Unless this Hon. Court grants the conservatory, orders sought in this Application, the Petitioners, some of whom are in their 70s, 80s and 90s stand the risk of eviction by the Respondent, police harassment and violation of their proprietary rights during the pendency of the Summons herein.
- xii. The Respondent on his part stands to suffer no prejudice if the conservatory orders are issued, as he has never been to the land leave alone using it for the last 45 years.
- xiii. That the impugned Confirmation of Grant was fraudulently obtained by the Respondent without the consent, knowledge and/or participation of the Petitioners/Applicants:
- xiv. That the impugned Confirmation of Grant was irregularly obtained in that the confirmation was done merely two (2) months from the date of issuance of the Grant of representation as opposed to the mandatory six (6) months, and no special reason is recorded or disclosed for the hurried, irregular confirmation other than for underhand reasons:



- xv. That it is in the interest of justice, fairness, equity and the law that the Grant issued to the Petitioner is revoked and/or annulled and the Deceased's estate distributed afresh:
 - xvi. That this matter relates to the 6.9 Acres suit property Loc. 8/Gatara/412 situate in Muranga County, where the 1st Petitioner, a senior citizen aged 93 years resides together with ten (10) other families.
 - xvii. That the suit property initially belonged to the one Daudi Kirunga Muchiri now deceased, whose estate is the subject of Succession Cause No 154 of 1989 - In the Matter of the Estate of Daudi Kirunga Muchiri (Deceased) in which Cecilia Wanjiku Kirunga was appointed the Administrator.
 - xviii. The said Cecilia Wanjiku Kirunga subsequently passed away and the Respondent Stephen Maina Muchiri was appointed the Administrator in her Estate this being Nakuru Chief Magistrate Court Succession Cause No E527 of 2021 - Estate of Cecilia Wanjiku Kirunga.
 - xix. Before his death, Daudi Kirunga Muchiri had sold the suit property Loc.8 Gatara/412 to his two brothers Joseck Macharia Kimani (3.9 Acres) and Gichari Thuku (3.0 Acres) vide a written sale agreement dated 27th July 1977. The families of the two brothers and their extended sub-families have been in possession and use of the property since its purchase in 1977. The Petitioners/Applicants are therefore the Administrators of the Estates of the two purchasers Joseck Macharia Kimani and Gichari Thuku respectively.
 - xx. That unknown to the Petitioners, the Respondent covertly obtained confirmation of grant in Nakuru Chief Magistrate Court Succession Cause No E527 of 2021 Estate of Cecilia Wanjiku Kirunga through which the suit property was distributed to him, and he obtained a title deed therefor on 2nd February 2022.
 - xxi. That the Petitioners/Applicants filed a Summons Application dated 24th May 2022, in Nakuru Succession Cause No 154 of 1989 - Estate of Daudi Kirunga Muchiri (Deceased and obtained a temporary injunction against the Respondent with regard to the suit property.
 - xxii. That the aforesaid matter is set for mention before Hon. Lady Justice Teresia M. Matheka on 27th June 2022 for further directions.
 - xxiii. That the suit property Loc. 8/Gatara/412 is the subject of the two matters at the Nakuru Courts one at the High Court Succession Cause No 54 of 1989 - Estate of Daudi Kirunga Muchiri) and the other at the Lower Court Chief Magistrate Court Succession Cause No E527 of 2021- Estate of Cecilia Wanjiku Kirunga, hence the two files should be consolidated and considered together for consistency of Court orders, saving of judicial time and justice for the parties involved.
 - xxiv. That the Applicants have moved Court without unreasonable delay.
6. This Court on 26th May, 2022 granted orders of temporary injunction restraining the Respondent by himself, his agents, and/or servants to trespassing onto, or in any other way interfering with the Applicants and their families' possession and use of the property LR No Loc.8/Gatara/412, pending the hearing and determination of the summons.
7. Subsequently the Court had with regards to the 1st Application, disposed off a notice of preliminary objection in a ruling dismissing the same dated 2nd February 2023 thereby allowing a viva voce hearing of the summons for revocation of a grant.



8. The hearing of the Petitioners/Applicant was on the 5th May 2023 with the 1st Applicant testifying as PW1 and 2nd Applicant testifying as PW3 and a further witness Josephat Kuria Maina testifying as PW2 whose oral evidence centred on demonstrating beneficial ownership of suit property Loc. 8/ Gatara/412 by virtue of an agreement of sale dated 28th July 1977 allegedly executed by the deceased and the 1st Applicant and his deceased brother-in-law and another agreement between the deceased's 2nd born son and themselves subsequent to the demise of the deceased.

The Applicant's Submissions

9. The Applicant generic submissions on the 1st and 2nd Applications was filed on 13th June, 2023 which submissions revolved and centred on evidence of purchase of the suit property on the agreement dated 27th July 1977 and the Agreement dated 10th February 1982, the fact that the Applicants patriarchs Gichari Thuki and Joseck Macharia Kimani had registered their beneficial interest in Thika SRM Succ No 140 of 1982- the Estate of Daudi Karuga.
10. That the Respondent did not present any evidence to controvert their assertions and as such the matter turns to their favor.
11. The Applicant thus prays that their Application be allowed as prayed.

Respondent's Submissions

12. The Respondent submits in its written submissions dated 7th July 2023 that the Applicants have not satisfied the conditions for the prayers sought, that this matter is statute time-barred, that the Agreement sought to be relied on contravene section 3(3) of the Law of Contract, that the Jurisdiction of disputes relating to ownership and use of land is located in the Environment and Land Court, that the purported completion of the sale of the suit property by John Mwangi (deceased) constituted intermeddling and was illegal and he did not have legal capacity.
13. The Respondent prayed that the Applications be dismissed with costs.

Analysis & Determination

14. Revocation of grants is provided for in Section 76 of the *Law of Succession Act*. Under Section 76 (c) a grant will be revoked for where 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;
15. The power to revoke or uphold a grant is a discretionary one and not an equitable remedy as submitted by the Applicants. This principle was enunciated in the persuasive decision in *Albert Imbuga Kisigwa v Recho Kavai Kisigwa* Succession Cause No 158 of 2000 where Mwita J stated: -

“Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the Court to invoke section 76 and order to revoke or annul a grant. And when a Court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased's estate and ensure that the action taken will be for the interest of justice.”
16. Section 83(g) of the *Law of Succession Act* mandates administrators of an estate to, within six months of confirmation of grant or longer period as the Court may allow, complete the administration of the estate, and to produce to the Court a full and accurate account of the complete administration.



17. In this Instance the Administrator was expected to conclude the distribution of the assets of the deceased by May 1990.
18. With regard to the Miscellaneous Application 9th June, 2022 for revocation of a grant Confirmed of Grant on 13th October 2021 in Chief Magistrate Court Succession Cause No E527 of 2021 Estate of Cecilia Wanjiku Kirunga. This Court is guided by the case of *Musine v Osamo (Sued as co-administrator of the Estate of Stephen Osamo (Deceased))* where it was held that the High Court can only revoke grants made by itself but not those made by the Chief Magistrate's Court except by way of appeal.
19. In *Owners of Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR, the Court affirmed, and rightly so, that 'Jurisdiction is everything. without it, a Court has no power to make one more step.'
20. In the instant case, the Court must indeed examine whether the property parcel Loc. 8/Gatara/412 belonged to the deceased and if so, whether the same was distributed.
21. There is no doubt that the suit property parcel Loc. 8/Gatara/412 formed part of the estate of the deceased, late Daudi Kirunga Muchiri. This has not been disputed by any party. In fact, all parties acknowledge that the suit property belonged to the deceased.
22. Furthermore, it is apparent that the suit property has already been distributed and transmitted pursuant to the grant issued and confirmed to the deceased Administrator on the confirmed-on 17th October 1989 and transmitted to her on the 23rd October 1989.
23. The Suit property was transferred and registered in the name of the Respondent pursuant to the confirmed grant in Chief Magistrate Court Succession Cause No E527 of 2021 Estate of Cecilia v. Wanjiku Kirunga. This can be seen from the certificate of official search marked Document No 12 of the Respondent list of documents shows land parcel Loc. 8/Gatara/412 as freehold title in favour of the Respondent.
24. The search certificate further confirms that a title was issued on the 2nd of February 2022. Indeed, a copy of the title deed confirms the Respondent as the registered owner of this piece of land and further, the search certificate confirms that a title deed has been issued. A copy of the title deed annexed confirms the same.
25. In the foregoing, it is my finding that the suit property indeed belonged to the deceased and has already been distributed pursuant to the grant issued to the deceased Administrator and subsequently the same was subject to a second Probate and Administration and was accordingly transmitted to the Respondent as a result of which, the property no longer forms part of the estate of the deceased and thus cannot be the subject of preservation by the succession Court. This position finds support in *Abdalla Mutembei Gisaga v Pamela Gacheri Patrisio & 5 others* [2014] eKLR where the Court while dealing with a similar scenario as herein held that: -

“The estate having been distributed and taken over by the respective beneficiaries cannot be the subject of preservation by the Succession Court. Any dispute arising concerning property already distributed should be dealt with in the Environment and Land Court.”

26. Furthermore, I am convinced that the Applicants contention would really be about ownership and use, the title of the Respondent and not inheritance, as distribution and settlement of the estate had already taken place at least in relation to the suit property. As such, it is my finding that this Court lacks jurisdiction to determine a claim against the estate of the deceased as in effect the Court would



- be deciding on the ownership of title which should appropriately be handled by the Environment and Land Court.
27. The Applicants clearly demonstrated they have been in actual possession of suit property Loc. 8/ Gatara/412 for many years, they might have beneficial ownership claims that can be ventilated in an appropriate forum.
 28. The Law of Succession does not confer on the Succession Court the power to determine the ownership of a parcel of land where the estate has already been distributed. This is in the province of the Environment and Land Court. As such, where are third parties having a claim of ownership against the deceased or the estate of the deceased then that falls under the exclusive jurisdiction of the Environment and Land Court. See *In the Matter of the Estate of Peter Igamba Njoroge*, Succession Cause No 432 of 2009 (unreported) quoted in Succession Cause 488 of 2010 *In re Estate of the Late Jonathan Kinyua Waititu - (Deceased)* [2017] eKLR and *High Court Succession Cause No 864 of 1996* [2015] eKLR.
 29. The contention by the Applicants that the Grant obtained and confirmed to Cecilia Wanjiku Kirunga was obtained by means of untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently and or without disclosing to the Court that the suit property had long been sold by the deceased and belong to other parties is not backed by any concrete evidence.
 30. The contention by the Applicants against the Respondent that the impugned Confirmation of Grant dated 13th October 2021, was fraudulently obtained by the Respondent without the consent, knowledge, and/or participation of the Petitioners/Applicants and was irregularly obtained in that the confirmation was done merely two (2) months from the date of issuance of the Grant of representation as opposed to the mandatory six (6) months, and no special reason is recorded or disclosed for the hurried, irregular confirmation other than for underhand reasons is not backed by any concrete evidence.
 31. No evidence has been laid by the Applicants to showcase the actions of the Administrator Cecilia Wanjiku Kirunga, (deceased) as having given to the Court an untrue allegation of a fact essential in point of law to justify the grant.
 32. No evidence has been laid Applicants to showcase the action(s) and role of the Respondent in the obtaining grant of letters of Administration intestate on 27th September 1989 and its confirmed-on 17th October 1989.
 33. It should be noteworthy that where section 76 (b) and (c) is invoked, the Applicant is expected to lay bare, pointed evidence and on a balance of probabilities discharges the burden of proof on all allegations pursuant to Section 76. The burden was upon the Applicants to demonstrate that the Administrator Cecilia Wanjiku Kirunga, (deceased) concealed material facts and thus the grant was obtained fraudulently.
 34. It is trite law that he who alleges must prove. Section 107 of the *Evidence Act* provides that “Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
 35. In any event, the Probate Court has no jurisdiction to make determinations relating to title to land and use and occupation of land, which is the substratum of the dispute from the application before me. That jurisdiction lies with the Environment and Land Court, by virtue of Articles 162(2) and 165(5) of the *Constitution*, the *Environment and Land Court Act* (No 19 of 2011), sections 2 and 101 of the



Land Registration Act (No 3 of 2012) and sections 2 and 150 of the Land Act (No 6 of 2012). Let the Applicants agitate their claims through the channels established under those statutes.

36. The Miscellaneous Application 9th June, 2022 for revocation of a grant Confirmed of Grant on 13th October 2021 in Chief Magistrate Court Succession Cause No E527 of 2021 Estate of Cecilia Wanjiku Kirunga fails for not having been filed in the appropriate forum and that the Court could not grant the prayers sought without the probate file where the grant was made. The Application is accordingly dismissed for want of merit.
37. I am therefore not persuaded by the Applicants' arguments that the Respondent and/or the Administrator Cecilia Wanjiku Kirunga, (deceased) concealed material facts and thus the grant was obtained fraudulently. I find that pursuant to Section 76(c) of the Law of Succession Act, the Applicants have not satisfied the Court or made a case on a balance of probability to warrant the revocation of the grant. In this regard, the application dated 25th May, 2022 must fail and is accordingly dismissed.
38. Costs of the Applications are awarded to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU ON THIS DAY of 23RD DAY of OCTOBER, 2023.

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S. MOHOCHI

JUDGE

