In re Estate of the Late Wahiu Gitatha (Deceased) (Succession Cause 93A of 1999) [2024] KEHC 16260 (KLR) (20 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16260 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

SUCCESSION CAUSE 93A OF 1999

DKN MAGARE, J

DECEMBER 20, 2024

IN THE MATTER OF THE ESTATE OF THE LATE WAHIU GITATHA (DECEASED)

BETWEEN

PAUL WARUTUMO KANGETHE .... APPLICANT

AND

KANGETHE S/O WAHIU AKA WAHIU GITATA AKA KANG'ETHE WAHIU GITATHA .... PETITIONER

AND

JOHN KARIUKI GITONGA .... RESPONDENT

JUDGMENT

1. Paul Warutumo Kangethe (Warutumo) sought the following orders against the Respondent John Kariuki Gitonga (Kariuki) vide an application dated 24/1/2024. The current applicant, Warutumo is a son of the late Kang'ethe Wahiu Gitatha (2nd deceased). Kariuki deponed that he is a son of the late Hiram Gitonga Wahiu (Hiram). Warutumo sought the following orders:

    a. Pending hearing and determination of this application, this honourable court be pleaded to place an inhibition on parcel number Thegenge/Karia/229.

    b. That the certificate of confirmation of grant herein dated 23/1/2023 be revoked.

    c. That upon prayer (2) above being granted this honourable court be pleased to issue an order directing the Land Registrar to rectify the register by cancelling any subdivision and dealings on the parcel of land known as Thegenge/Karia/229 after the demise of the deceased intestate and the title to revert to the deceased intestate.

2. The said application was opposed vide a replying affidavit sworn on 16/2/2024 by Kariuki. He stated that he served properly and as such the confirmation of grant is proper. It is his evidence that in any case, he subdivided the land equally. He seemed not to understand that the grant was not issued to him but to the 2nd deceased.

3. The application came before this court which issued directions on different occasions. The matter was finally heard vide viva voce evidence, where each party testified and the case was closed. Warutumo filed submissions. I am still waiting for Kariuki's submissions until Godot comes.

4. The court ordered that the matter be heard by way of viva voce evidence. Each of the parties testified. This was indicated to be on behalf of each of their families. The application was then fixed for mention on 27/7/2024. On that day, the matter was fixed for hearing.

5. The parties appeared but an indication was given that the matter could not be heard as one of the advocates was not in court. He was attending a funeral. I did not believe the excuse given. Given that the matter is an old one, I directed that the matter be heard on the following day after the said funeral. The matter was heard on 17/10/2024.

Evidence

6. The Applicant maintained that the petitioner was deceased at the time of the purported confirmation. He sought that I allow the application. The Respondent on the other hand, filed supporting affidavit that he adopted. On cross examination, he stated that Hiram was a stranger to the estate. He was stated to have impersonated the deceased father. According to them, the land is in the names of 2 persons.

7. Kariuki testified that he was a son of Hiram and a grandchild of the 1st deceased. He relied on the affidavit of 16/2/2024. On cross examination, he stated that he was not aware that the 1st deceased was dead. The confirmation was on 27/7/2023 while the petitioner died on 8/8/2022. He stated that he served a son called Kiama. He stated that he did not know that the deceased, who is supposed to be his uncle was dead. He prayed that the land be divided between the two estates.

Submissions

8. The Applicant filed submissions dated 30/10/2024. He submitted that the court had jurisdiction to revoke the Grant herein which ought to be revoked. Reliance was placed on Section 76 of the *Law of Succession Act*. Reliance was also placed on Jamleck Maina Njoroge v Mary Wanjiru Mwangi (2015) eKLR to canvass the submission that a false statement or concealment of material fact would lead to the revocation of the grant.

9. Warutumo further relied on the decision of in Re Estate of Julius Ndubi Javan (Deceased) [2018] eKLR where F. Gikonyo J posited as follows:

    (14) The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified. Thus, where issues on the ownership of the property of the estate are raised in a succession cause, he must be resolved before such property is distributed. And that is the very reason why rule 41(3) of the Probate and Administration Rules was enacted so that claims which prima facie valid should be determined before confirmation.

10. Warutumo further relied on the case of Albert Imbuga Kisigwa v Recho Kavai Kisigwa [2016] eKLR, in which, E C Mwita J stated as doth;

> Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not a 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.

11. Warutumo contended that the application for substitution was never served upon the 2nd deceased, who was then alive and there was no disclosure of material facts on service. His case was that the burden of proof on service was not discharged as required under Section 107 of the *Evidence Act*.

12. According to Warutumo, the Respondent's misery is further compounded by the death of the sole administrator. Warutumo submitted that the grant became inoperative and ineffective upon the said death as addressed in the case of Re Estate of Stephen M'imanyara (Deceased) [2024] KEHC 2098 (KLR). He concluded that upon death of a single administrator, the duties of the legal representative have no owner and the grant becomes ineffective. In effect the grant was a document issued on a person and could not be transferrable as held. Reliance was placed inter alia on the case in Re Estate of George Kagui Karanja (2016) eKLR.

13. Reliance was also placed on the case of In Re Estate of Stephen Mbau Giticha (2022) eKLR to submit that there was no room for substitution of a deceased administrator and the correct procedure was to revoke the grant and apply for fresh letters of administration. Warutumo submitted that Kariuki's actions amounted to intermeddling in the estate of the deceased against Section 45 of the *Law of Succession Act*.

14. On the existence of trust as argued by Kariuki, Warutumo submitted that this court had no jurisdiction to entertain the issue of trusts and the same could only be determined in the Environment and Land Court. Reliance was placed on the case of Peter Moturi Ogutu v Emelda Basweti Matonda & 3 Other (2013) eKLR.

15. The Respondent filed submissions dated 26/11/2024. It was submitted that the Respondent had in no way concealed any material facts. In this regard, it was submitted that there were no grounds presented to the court upon which to revoke the grant herein.

16. The Respondent also submitted that the Applicant had not demonstrated that any of the beneficiaries had been disinherited. The Respondent cited no authorities.

Analysis

17. A registry clerk accepted filing of this matter on 27/7/1999. It is doubtful that the said judiciary staff knew that 25 years later, this matter will still be a fresh matter. The dispute appears to be resurrected after every turn of a decade for the last two and a half decades. It is my hope that this matter will be concluded by the turn of the 4th decade, if the parties wish to do so. The case is an eyesore that need not be in the court corridors. The registry has changed the file covers 6 times. Nevertheless, some of the parties don't seem bothered that the case is this old.

18. This matter has had a chequered history of subterfuge, skullduggery, grand larceny, falsehoods, history and culture of lies and blatantly misleading statements without any sense of shame to an officious bystander. This case is a simple succession case. When I was in Sunday School, I was told that the Lord

God hates six, no, seven things he detests: haughty eyes, a lying tongue, hands that kill the innocent, a heart that plots evil, feet that race to do wrong, a false witness who pours out lies, a person who sows discord in a family.

19. This court notes that the case was a grand scheme to disinherit, and subvert the cause of justice in a manner grander than the great Richard Nixon Watergate scandal. The case turns the doctrine of Nemo dat quod non habet on its head. The doctrine is a common-sense way of positing that no one can give what he does not have. In other words, you cannot present what is mine to me as a gift. Parties cannot share more than what is part of the net estate.

20. The 1st deceased died on 21/6/1978. This was before the commencement of the *Law of Succession Act* (Succession Act), which was assented to on 13/11/1972 and had a commencement date of 1/7/1981. The succession act is an Act of Parliament to amend, define and consolidate the law relating to intestate and testamentary succession and the administration of estates of deceased persons; and for purposes connected therewith and incidental thereto.

21. The court needs to settle preliminaries for this case, having been a transition matter. Section 2(1) and (2) of the Succession Act, provides for estates of persons dying before the commencement of the said Act. The sections also provide that the Act has universal application to all cases of intestate or testamentary succession to the estates of deceased:

    (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.

22. In effect, the law applicable for this estate was the law in force as at 21/7/1978. However, administration shall be under the *law of Succession Act* since the (1st deceased) died before the commencement of the Succession Act.

23. A little history of the registration of the suit land will help to problematize, conceptualize and contextualize, the imbroglio that has survived for more than a quarter a century in our courts. The saddest bit is that for the last 65 years Kariuki and his father do not appear to have ever stepped on the suit land. The first such attempted entry was in the year of our Lord 2024 after fraudulently obtaining the title to the suit property.

24. Why does the court call the transfer fraudulent? Kariuki was either a nephew or not. If he was a nephew, he had knowledge that the 2nd deceased was dead. Further, this is augmented by the false information they gave the court that the deceased was bed ridden. Surely, who removed a man who had been buried to a hospital bed? If they are nephews, they definitely knew the 2nd deceased was dead, when these orders were being sought.

25. It is not lost on the court that the entire fraudulent scheme started in June 2022, just 2 months to the demise of the 85-year-old 2nd deceased. If truly, they did not know as stated in the replying affidavit, then it is more sinister. It cannot be that the 2nd deceased was an uncle and they did not know that he was dead but they knew, that he was sick 2 months after his death.

26. The court is cognizant from the record that as the colonial government started issuing title deeds to natives in what was then native reserves in its sunset days, the 1st and 2nd deceased took advantage to

be registered as owners on Wednesday 29/10/1958 and title issued on 6/3/1975 in respect of a parcel of land in Kiamuthi Village in the then Nyeri known Thegenge/Karia/229. From the certified copy of record, the title appears to be for owners in common.

27. The 1st and 2nd deceased were first registered owners entitled to 1.6 acres (0.645 ha) for each of the two out of the total acreage of 1.29 hectares. (3.1863). This works out to 1.59315 acres each rounded to 1.6 acres. The registration was carried out during the last year of the reign of Sir Evelyn Baring as the Governor of the Kenya colony. This was barely 6 years after Queen Elizabeth II acceded to the throne on February 6, 1952, after the death of her father, King George VI. Kenya thereafter gained independence and had its first Prime Minster and thereafter president Jomo Kenyatta.

28. There was no history of any other altercation over a parcel of land Thegenge/ Karia/229, till the 1st deceased died peacefully on 21/6/1978 at a ripe old age of 120 years, in Kiamuthi Village in Nyeri district during the last months of the reign of the first president of this country.

29. Twelve years after the demise of the 1st Deceased, the estate had not been administered. The 2nd Deceased filed this cause, where he indicated that he was the only son and a co-owner of the suit land. The succession on 27/07/1990 in Nyeri CMCC 126 of 1990 was over 0.645 ha (1.6 acres) owned by the 1st deceased.

30. The part owned by the 2nd deceased has not and cannot be subject of these proceedings. Now that the 2nd deceased has died, invariably, the estate of the 2nd deceased can pursue to inherit that part.

31. The record reflects that on 28/8/1990, the District Registrar ordered that the matter be placed for publication. The publication was done on 28/09/1990 with the 2nd deceased as the only applicant. The Kenya gazette notice No. 4540 of 28/09/1990, read in part:

> In the Senior Resident's Court at Nyeri
>
> In the matter of the estate of Wahiu Gitatha of Thegenge Location probate and administration cause no 176 of 1990.
>
> Let all parties concerned take notice of a petition for a grant of letters of administration intestate to the estate of the above named deceased, who died at Thegenge location in 21.6.1978, has been filed in this registry by Kangethe Wahiu Gitatha of P.O Box 1130 Nyeri in his capacity as an administrator of the deceased's estate...
>
> Signed
>
> District registrar
>
> 28.8.1990.

32. It is thus clear that at the time of filing there was only one petitioner, that is the 2nd deceased. Subsequent to this there are no proceedings in the court file until on 7/3/2000 when the matter appeared before Justice JVO Juma, who stood over the matter generally as the objector was not served. There was no evidence that the said date of 7/3/2000.

33. Meanwhile an application had been filed by Lawrence Wahiu Warigo (Warigo). When (Warigo) filed an objection, he indicated the petitioners to be the 2nd deceased and Hiram. His objection is still pending. On 17/12/2001, the court directed that the wife or sons of Hiram must appear before the application dated 7/11/2001 is determined.

34. This was a kind of stay as the said Hiram had not been appearing in court since inception. On 19/1/2005 Warigo fixed the matter for the objection but the matter was stood over generally. It is not

until 6 years later on 15/10/2021 that Kariuki listed the application dated 15/10/2021 for hearing on 15/12/2021.

35. Kariuki had not taken part in the case before then. Later on 2/3/2022 Kariuki filed an application dated 15/10/2021 for hearing. On the said date the court fixed an application dated 15/11/2022 for mention on 25/5/2022. On the said date the court ordered that Francis Kahiu file his documents if he was interested in proceeding with the matter. The 2nd deceased did not appear on the said date. Francis Kahiu Koina is not a party to this cause. He has not filed any document or been made a party to any application or petition.

36. Subsequently, the matter was slated for mention on 22/6/2022. There is no evidence that the 2nd deceased was served. On the said mention date, the court allowed the application dated 15/5/2021 and dismissed the application dated 7/11/2009. The applicant had requested that an application dated 7/11/2001 be dismissed. No order was made in respect of that application dated 7/11/2001 and the same is alive and active in the file. The application for removal is still in situ. It was not listed for hearing or served for that day. There was also no order made in respect of the application dated 15/11/22, earlier fixed for mention.

37. There was no pretense at all times that the 2nd deceased was not served. Further none of the applications were listed for hearing. The Respondent misled the court into issuing orders in respect to nonexistent applications on a mention date without service to the deceased.

38. Emboldened by the wins, Kariuki made an application for letters to issue to the 2nd deceased and he be given 7 days to apply. The Respondent did not inform the court that Warigo had filed a pending objection, stating that the deceased bequeath him half share of the land. His interest was that of an occupier and beneficial interest which ought to be dealt with first.

39. The matter was slated for mention on 21/9/2022. On the said date, the applicant stated that he had filed forms and served the 2nd deceased, who he stated was ailing and in hospital. As at this time the deceased was 6 feet underground. The old adage goes, dead men tell no tales. The 2nd deceased could not have opposed the application or protested service.

40. The proceedings were one month after the 2nd deceased died. The mention was made while the family of the 2nd deceased was mourning his demise. The court mentioned the matter to confirm whether the 2nd deceased will have recovered. The court did not sit. The matter was fixed for mention on 23/1/2023. There was no indication on why the matter was fixed for mention.

41. The court was misled that the grant was for confirmation and the 2nd deceased had been served several times. Indeed one of the false affidavits, was filed by Julius Kariuki Mundia, whom the court shall sanction shortly, that he went on 30/3/2023, where he met Warutumo, who informed him of the absence of the father but accepted service on behalf of the 2nd deceased. He also served on 7/2/2023

42. The application dated 14/9/2022 was allowed confirming the grant. This time the Respondents did not bother to serve the deceased. In continuing with their fraud, he filed an application dated 28/2/2023 for dispensing with the signature of the deceased. This was barely a month after the grant was confirmed. The said application was allowed as the deceased was expectedly absent.

43. Unfortunately, the confirmation involved both the 1.6 acres owned by the 1st deceased and the other 1.6 acres owned by the 2nd deceased. The Respondents replaced the deceased and effectively disinherited the 2nd deceased as he remained with his original share. A new title deed was issued on 20/9/2023. It is when Kariuki went to the ground, for the first time in 65 years for their family, that hell broke loose.

This application was filed complaining of this. Kariuki actually admitted that they intended to evict the 2nd deceased's family and his heirs from the suit land.

44. The history of how this file transformed from a lower court matter to a high court matter is not clear. What is now on record is that this case was re-registered as HCC Succession Cause No. 93 of 1999, with the 2nd deceased as the only petitioner. The matter stalled through the objection by Warigo. It is Warigo who indicated Hiram's name in his objection and cross petition. The cross petition has not been heard or dismissed. There was no petition filed by Hiram.

45. The 2nd deceased kept fixing the matter for hearing of the objection, but the same aborted for reasons beyond his control. It is only until 7/11/2001, when the 2nd deceased made an application for removal of Hiram from the proceedings. It was the 2nd deceased's view that Hiram inserted himself in the proceedings. This part is true as there was no formal application to be joined in the proceedings. What is obvious from the record is that the name of Hiram was added to some of the documents and forms filed but he was neither an objector nor a petitioner.

46. Before proceeding further, it is critical to note that the free estate of the deceased was only 1.6 acres. The registration was succinct that 1.6 acres was property of the original petitioner and other 1.6 acres to the deceased. In short, whichever way the application goes, the grant is wrong for giving the 'beneficiaries' more than the net estate. The applicant's father was given 0.645 ha while the Respondents were given 0.645 acres. This is twice the amount of land, that is, only 0.645 ha that was open for inheritance. The land 0.645 ha measuring given to Moses Macharia Gitonga, Peter Kangethe Gitonga and John Kariuki Gitonga was all the land belonging to the deceased. In other words, there was nothing given to the 2nd deceased as he was given his own land.

47. It is perplexing for the respondent to proceed as if Hiram was one of the petitioners. Hiram was nowhere in the forms that were filed by the 2nd Deceased. The gazette notice No. 4540 of 28/09/1990 related to an application by the 2nd Deceased. If the said Hiram felt and he wanted to say that he was left out, he ought to have objected. He did not object at all. Instead, he inserted his name in some of the forms but left the petition and other forms untouched. The insertion of the names was done after the names were sent to the principal registry, and to the government printers.

48. I have seen all the notices by the court issued on 28/08/1990. Hiram G was not one of the petitioners. The introduction of Hiram was introduced by Warigo, who was an objector after some names were inserted in a few non consequential forms. However, Warigo was also categorical that Hiram was not a son of the 1st Deceased. The said Lawrence did not pursue the objection. The court was informed that Hiram died in 1998. However, nothing was done to push the case forward. Hiram was deceased at the time an application to remove his name was filed.

49. There was a note in the file by the Deputy Registrar of the court, that no action was to be done until Hiram was substituted. In this regard, the Applicants blatancy misled the court that the deceased had not moved the court over the application dated 7/11/2001 which was unprosecuted. Further, the late Hiram had not been substituted and the stay grant, albeit wrongly by the deputy registrar had not been vacated.

50. There are over 10 documents by the court indicating the 2nd deceased as the only petitioner. These are:

    a. Notice dated 19.1.2005

    b. Notice by Warigo dated 17.1.2005

    c. Notice by Warigo dated 2.8.2004

d. Notice of motion dated 7.11.2001

e. Letter by the 2nd deceased dated 20.9.2001

f. Guarantee by personal sureties dated 19.1.1990.

g. Affidavit of justification for proposed sureties

h. Affidavit of justification of proposed administrator

i. Public notice for application for letters of administration

j. Notices to the Kenya gazette and to the principal registry.

k. Affidavit in support of petition for letters of administration interstate

l. Petition for letters of administration intestate.

m. The Kenya gazette notice No. 4540 of 28.09.1990

51. The only place Hiram appears are;

    a. Insertion of a name on photostat copies as a beneficiary in form P & A 5.

    b. A letter by the S Gitonga, senior Chief Mukaro Location.

    c. Application by Warigo.

52. It is therefore not true that Hiram was a petitioner in this matter. A party who wishes to challenge a petition filed cannot just add their names. They must either object, the way Warigo did or apply to revoke as Warutumo did. Any other short cut is fraudulent and untenable. Nevertheless, we are here. There has been a claim by children of Hiram that he was a son. This is an issue that must be dealt with, to enable us distribute 1.6 acres of the estate of the 1st deceased.

53. The court is also cognizant of certain applications which were dismissed but I cannot trace the same on record. I will thus not concern myself with such applications as this court has not been moved.

54. The jurisdiction of this court relates only to the net estate of a deceased person. Section 3 of the Succession Act defines the net estate to mean the estate of a deceased person after payment of reasonable funeral expenses, debts and liabilities, expenses of obtaining probate or letters of administration, other reasonable expenses of administration and estate duty, if any.

55. The 1st deceased and the 2nd deceased were registered owners of Land Parcel Number Thegenge/Karia/229. Their respective shares were known. It is thus not true that the entire Land Parcel Number Thegenge/Karia/229 is free property of the 1st deceased. The gross estate of the deceased was 1.6 acres subject to any claims that may be laid. The 1.6 acres belonging to the 2nd deceased is not a subject for determination in this court.

56. The portion of the 1st deceased, whose estate we are concerned with, was measuring 1.6 acres of land (0.645 acres). I have been invited to declare a trust. I shall decline and for good reason, the grant is already confirmed without that issue being raised. It is a fact that the court was moved to declare any trust. Kariuki cannot invite us now to do so. They confirmed a grant and shared nonexistent land. At the very least, there was no dispute on 0.645 acres originally belonging to the 2nd deceased. If Hiram had a claim, that claim is not in this matter.

57. What is astonishing, is that Kariuki had applied vide an application dated 15/11/2021 to be substituted in place of Hiram, since according to him Hiram was now deceased, having died in 1998, some 24 years earlier. Before being given locus, he proceeded to apply for dismissal of an application that was nonexistent and proceeded to confirm a grant in the name of the 2nd deceased where he was not an administrator thereof. An application for confirmation can only be made by an administrator.

58. The foregoing creates difficulties. It must be noted that the 2nd deceased had not been given letters of administration due to the objection by Warigo. The letters were issued and confirmed within 6 months, without the application by the administrator. If an administrator is not willing to administer the estate, one does not take over their work. He has to apply to revoke the grant as per Section 76 of the *Law of Succession Act* which provides 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. ...
>
> b. ...
>
> c. ....
>
> 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.

59. Once the administrator, though dead, and upon being notified within one year to apply for confirmation, failed to administer the estate, the applicant cannot arrogate that role to himself. Such an applicant, has to apply to revoke the grant with notice to him.

60. The only notice given was to a stranger, Francis Kiama. The said person was by all means not the administrator. Even if he could have a power of attorney, he could not act on his behalf as the powers of the administrator are personal and cannot be delegated.

61. An administrator is a delegate and trustee for the court. An administrator can only account to the estate and the court. There is a rule delegatus non potest delegare which essentially provides that as a delegate, an administrator cannot delegate. The rule is based on the fact that an administrator is holding powers in trust and has no authority to further delegate this obligation. There was no express authority to delegate. The presence of Francis Kiama has no effect on the 2nd deceased. In any case the grant of representation is personal to the administrator and lives and dies with him.

62. Further, the 2nd deceased was already dead when the grant was confirmed. The 2nd deceased could not be granted letters of administration or have ones he had, confirmed. Although the letters of administration were issued while he was alive, the letters become useless and inoperative upon his demise. The application for confirmation was filed by a stranger. The grant that issued to 2nd deceased, albeit erroneously or inadvertently, became inoperative and useless upon his death. There was nothing to confirm and nothing to act on as the grant died with the 2nd deceased as the grant is issued in personum and is nontransferable.

63. It is the duty of the court under Section 73 of the Law of succession to give notice to the holder of the grant to apply for confirmation thereof within one year from the date of any grant of representation. This was not done and 1 year had not lapsed. In any case the 2nd deceased was already dead. We do not know where he went and we do not know how long the parties will wait for him since even Christ who promised to take humanity to the other world does not know the day or the hour. In short, the death is permanent and cannot be reversed, and so was the grant issued.

64. The grant of letters of administration intestate given to the 2nd deceased became inoperative upon his death and stood revoked by operation of the law. In a recent decision, in the case of Mary Wambui Kibunya V Peter Kariuki and James Ngugi [Eldoret CACA 308 of 2019, where I was involved in as an advocate many years ago, the Court of Appeal [Gatembu, Ochieng, & Korir, JJ.A.] posited as doth: -

> Were her application for substitution and appointment of new administrators to succeed, there would be no need to pursue the pending application for the revocation of the grant issued to the 2nd deceased. As correctly pointed out by the learned Judge in his ruling, the grant previously issued to the 2nd deceased stood revoked as a result of his death and the appellant could not be heard to argue that she wished to pursue the summons for revocation of the grant that she had filed against the 2nd deceased before his demise.

65. The grant that was said to have been issued on 22/6/2022 was actually not issued. The court made the following order on the said date:

> 'The Application dated 7.11.2009 is hereby dismissed for want of prosecution as the applicant has not been desirous of Prosecuting the same. The application dated 15.5.2021 for substitution is allowed."
>
> Judge
>
> Mr. Mbau to serve Mr. Kangethe who is given 7 days to apply for letters of administration. Mention 21.9.2022.'
>
> Judge

66. Subsequently on 21/9/2022 the 2nd deceased was said to be sick in hospital. We now know the truth. The truth is self-evident and can if embraced set us free and we shall all be free indeed. This culture of lies, subterfuge, and skullduggery must stop. Kariuki should at least have conceded the fraud when he realized that Warutumo had caught him with his hands in the cooky jar.

67. The grant was given in spite of the application by Warigo dated 3/9/1990. It does not matter that the same has been 25 years in not being prosecuted. Kariuki was under a legal duty to deal with the said application. The issuance of grant was therefore in error, null and void, in all accounts.

68. This grant was subsequently confirmed on the Respondent's application. As stated earlier, the grant was only issued to Kange'ethe Wahiu Gitatha. The Respondent filed an application dated 14/9/2022,

applying that the grant to Kang'ethe Wahiu be confirmed. This was less than 6 months, from the date of issuance on 22/6/2022. The same was not due for confirmation until 23/12/2022.

69. The affidavit in support indicated that the deceased was survived by the following male progeny with no single female including their mothers:

    a. Kangethe Wahiu - son

    b. Hiram Gitonga Wahiu (deceased) - son survived by:

        i. Moses Macharia Gitonga

        ii. Peter Kangethe Gitonga

        iii. KariukiKariuki Gitonga

70. The grant issued was confirmed in the following manner: -

    a. Kangethe Wahiu 0.645 ha

    b. Moses Macharia Gitonga }0.645 ha

       Peter Kangethe Gitonga

       Kariuki Kariuki Gitonga

71. It is surprising that this family does not appear to be blessed with girls. This is however for another day. The court will have to determine who the heredity of the estate of the 1st deceased are, apart from the 2nd deceased whose heredity is not disputed.

72. The grant issued on 22/06/2022 is hereby revoked by operation of the law as it is inoperative or useless. As a corollary, the subsequent confirmation of grant is set aside. This is based on the fact that the same was dealt with by strangers. The Respondents had no locus standi to make any application. He had a duty to prove consanguinity with the deceased. This had not been proved.

73. Further, it is not for strangers to apply for confirmation. If the administrator refuses to apply for confirmation, or if he is dead, the only way to move forward is to revoke the grant. There was also an objection by Warigo that has not been formally dismissed.

74. It is not an idle question that the court finds that Kariuki is a stranger because he could not even tell that his uncle, the 2nd deceased had died. He only came in to steal a match while the estate of 2nd deceased were mourning.

75. It is therefore clear that the Kariuki did not serve. He served a deceased person and filed an affidavit of service. How could he serve a deceased administrator, in 2023, when he had died on 8/8/2022?

76. Consequently, any proceedings undertaken after 7/8/2022 were a nullity. Once anything is a nullity, there can be nothing built on it. In Macfoy vs. United Africa Co. Ltd [1961] 3 All E.R. 1169, Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

> "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

77. To enable us to move forward, I will appoint a new administrator. The only undisputed person is Warutumo. The false affidavits filed also show that Warutumo is a son. The claim by Warigo is unsatisfactory. The claim by Kariuki is that he is a son of Hiram. His replying affidavit was strong on being a son of Hiram and not a grandson of the 1st deceased. He will then have to prove his dependency.

78. Therefore, I appoint Warutumo as an administrator to the estate of his grandfather the late Wahiu s/o Gitatha. He should file for confirmation of grant for net estate of the late Wahiu s/o Gitatha, measuring 1.6 acres. The other half, which is registered under the name of Kang'ethe Wahiu Gitatha, shall be dealt with separately for the beneficiaries of that estate. Only 1.6 acres are available for sharing. Upon filing of application for confirmation, the Respondents be served. If he has any interest, he should file protests and evidence of consanguinity with the deceased Wahiu s/o Gitatha.

79. Meanwhile, the Respondents are barred from entering into or in any other way disturbing the current occupation of the Applicants and the children of the late Kang'ethe Wahiu Gitatha pending determination of the confirmation.

80. As I pen off, I will be remise to repeat what I recently noted regarding the conduct of people upon the demise of the patriarchs and matriarchs. I lamented in the case of in Re Estate of the Late Magayu Kiama alias Magayu s/o Kiama alias Peter Magayu Kiama alias Magayo Kiama (Deceased) [2024] KEHC 14059 (KLR) as follows:

> These are the beneficiaries that the current application relates. In distribution the court will always be guided by the law and *the constitution*. As I was reading this file, the words of the supreme court in the case of Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae) (Presidential Election Petition 1 of 2017) [2017] KESC 42 (KLR) (Election Petitions) (20 September 2017) (Judgment)(with dissent - JB Ojwang & NS Ndungu, SCJJ), kept ringing in my ears:
>
> "The greatness of a nation lies not in the might of its armies important as that is, not in the largeness of its economy, important as that is also. The greatness of a nation lies in its fidelity to *the Constitution* and strict adherence to the rule of law, and above all, the fear of God. The Rule of law ensures that society is governed on the basis of rules and not the might of force. It provides a framework for orderly and objective relationships between citizens in a country. In the Kenyan context, this is underpinned by *the Constitution*."

In looking at the case, the words in Zechariah 4:6 come through, noting that such disputes are not solved through chest thumping but as the holy scriptures said, it is not by might nor by power, but by the Spirit.

81. It is with profound sadness, that I note that the very people we entrust with keeping the process of litigation in a state of sanity are the very same ones embracing the culture of lies and conmanship. Where does one get the audacity to serve a deceased person? There must be consequences for false affidavits of service. In this connection, I have noted that the false affidavits of service were sworn by one Process Server of this court, Julius Kariuki Mundia.

82. Even the devil himself is entitled to be heard. This right is nonderogable and sacrosanct. The nature of this right finds expression in Article 25(c) of *the Constitution* which provides as follows:

> Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited–

(c) the right to a fair trial;

83. This protection extends to any matter where there is likely to be penal consequences. The said right to fair trial was addressed in the case of Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) (Petition 15 & 16 of 2015 (Consolidated)) [2017] KESC 2 (KLR) (14 December 2017) (Judgment), where the Supreme Court addressed the right to a fair trial:

    47. Indeed the right to fair trial is not just a fundamental right. It is one of the inalienable rights enshrined in article 10 of the Universal Declaration of Human Rights, and in the same vein article 25(c) of *the Constitution* elevates it to a non-derogable right which cannot be limited or taken away from a litigant. The right to fair trial is one of the cornerstones of a just and democratic society, without which the Rule of Law and public faith in the justice system would inevitably collapse'

84. In order to get their side of the story, I direct that a process server of this court, Julius Kariuki Mundia to appear before the court on a date I shall indicate and summons do issue accordingly to show cause why the court should not punish him, including removal as a process server, for filing false affidavits.

85. Given that the instructions were issued by Kariuki, the respondent shall serve the said process server to appear in court, failing which penal consequences have to follow in regard to affidavits of 1/11/2022, 27/2/2023, 15/3/2023, and undated one related to service of 30/3/2023 to appropriate parties, not limited to the process server.

86. Further, Kariuki admitted that they intended to evict or otherwise remove the children of the 2nd deceased from the suit land. It is thus necessary for the court to issue a conservatory order suo motu, directing the children of the late Hiram not in any way to interfere with the occupation as it is on the suit land. The children of the late Hiram are barred from disturbing the occupation of the Applicant and his siblings on land parcel number Land Parcel Number Thegenge/Karia/229 pending the hearing of the cause.

87. On costs, this court has discretion. The matter before the court was occasioned by fraud of one party. Even after discovery of the fraud, the Respondent was adamant on his ways. A prudent person could have admitted that errors have occurred. This therefore placed Warutumo in unnecessary expenses. He is entitled to costs. There is requiring that the court exercises its discretion otherwise.

88. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

    "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award

of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

89. The Applicant shall be entitled to costs of Kshs. 85,000/= for these proceedings. The same should be paid within 30 days, in default, execution do issue.

Determination

90. The upshot of the foregoing is that I make the following orders:-

a. All proceedings undertaken from 25/5/2022 to 27/7/2023 together with all consequential orders are hereby set aside since they were fraudulently undertaken by John Kariuki Gitonga without service of Kang'ethe Wahiu Gitatha and after 8/8/2022 when the said Kang'ethe Wahiu Gitatha was deceased.

b. The grant of letters of administration intestate to Kang'ethe Wahiu Gitatha and subsequent confirmation on 23/1/2023 are a nullity and for avoidance of doubt they are set aside.

c. Consequent upon the foregoing, the applications dated 14/9/2022, 28/2/2023 and 15/5/2021 stand struck out for being fraudulently filed and dealt.

d. In any event the grant issued to Kang'ethe Wahiu Gitatha became useless and inoperative and stood revoked at 0000 hours on the date he died, 8/8/2022 and any action based on it is null, and void.

e. All entries in the register and all the title deeds and any subdivision in respect of Land Parcel Number Thegenge/Karia/229 are hereby cancelled.

f. The Land Registrar is to delete all entries and any subdivisions out of the suit land, cancel any land certificate or title deed issued after 6/3/1975 and revert Land Parcel No. Thegenge/Karia/229 as one tile and revert the title to the status it was before 27/09/1990.

g. The Nyeri County Land Registrar is to file a certified copy of the rectified register in court by 2/2/2025, failing which the registrar to attend court on the next hearing with a copy of the rectified register.

h. The Nyeri County Surveyor to cancel all subdivisions in respect of Land Parcel Number Thegenge/Karia/229, and amend the Registry Index Map and delete any new titles and revert to the Land Parcel Number Thegenge/Karia/229. The amended Registry Index Map be filed in court.

i. The Respondent to surrender to court the cancelled title deed for Land Parcel Number Thegenge/Karia/229 together with any subdivisons that was issued on 20/9/2023 within 7 days of reading this ruling.

j. The Respondent to surrender to court the original letter of administration collected on 13/2/2023 and certificate of confirmation of grant collected on 10/2/2023 together with the original order dated 31/7/2023 collected on 22/8/2022 within 7 days of reading this ruling.

k. The Respondent and the children of the late Hiram Gitonga Wahiu are barred from disturbing the occupation of the Applicant and his siblings on Land Parcel Number Thegenge/Karia/229 pending the hearing of the cause.

l. An inhibition is hereby issued restricting all dealing on Land Parcel No. Thegenge/Karia/229 until succession is carried in the estates of the two owners.

m. The estate cannot remain unadministered. Therefore, I hereby appoint Paul Warutumo Kangethe as the administrator of the estate of Wahiu Gitatha (Deceased) in lieu of his deceased father, Kang'ethe Wahiu Gitatha.

n. The new administrator should file for confirmation within 4 months. All the objectors and persons interested shall protest upon the filing of summons for confirmation of grant, failing which the grant shall be confirmed.

o. For avoidance of doubt, the estate of Wahiu Gitatha (Deceased) comprises of 1.6 acres.

p. The heirs of the late Kang'ethe Wahiu Gitatha (deceased) are at liberty to pursue succession in his estate in respect of the 1.6 acres registered in the name of Kang'ethe s/o Wahiu in a separate cause.

q. The court cannot deal with trust as none was shown and the court in any event is dealing with succession of the estate of the late Wahiu Gitatha (Deceased) who was the absolute registered owner of 1.6 acres out of Land Parcel No. Thegenge/Karia/229.

r. Costs of Ksh 85,000/= to the Applicant payable by the Respondent within 30 days, in default execution do issue.

s. A process server of this court, Julius Kariuki Mundia to appear before me on a date I shall indicate and summons do issue accordingly to show cause why the court should not punish him, including removal as a process server, for filing false affidavits. The respondents to serve the said process server to appear in court, failing which penal consequences have to follow in regard to affidavits of 1/11/2022, 27/2/2023, 15/3/2023, and undated one related to service of 30/3/2023.

t. The matter shall be listed for compliance on 6/2/2025. Summons do issue to the Land Registrar Nyeri to produce the corrected copy of the register.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 20TH DAY OF DECEMBER, 2024.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Karanja Maina & Co. Advocates for the Applicant

Charles Mbau & Co. Advocates for the Respondent

Court Assistant – Jedidah