



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIVASHA**

**(CORAM: R. MWONGO, J)**

**MISC. SUCCESSION CAUSE NO. 56 OF 2015**

**(FORMERLY NAKURU HIGH COURT MISC SUCCESSION CAUSE NO. 4 OF 2013)**

**IN THE MATTER OF THE ESTATE OF BETH MUMBI MBUGUA**

**JOSEPHAT MBUGUA KIMANI.....PETITIONER**

**VERSUS**

**MARY NJERI NGIGI.....APPLICANT**

**RULING**

**Background**

1. This matter is filed as a miscellaneous application in relation to the Estate of Beth Mumbi Mbugua. The application seeks to revoke the certificate of confirmation of the grant issued on 14<sup>th</sup> March, 2012, in that estate in Succession Cause No 69, Naivasha. However, the foundational file upon and in which the grant was issued and confirmed is not attached to this miscellaneous file. In order to be able to get to the bottom of the issue whilst appreciating the foundation, context and circumstances upon which the grant was made in the first place, the original file is necessary.

2. Accordingly, in exercise of the power granted to the Court under **Article 165(6)** of the **Constitution**, I called up the lower court file in **Succession Cause No 69 of 2011, Naivasha** which I understood was sent to Nakuru High Court I now order that this miscellaneous file shall henceforth be permanently tied together with Succession Cause No 69 of 2011.

3. The documents filed in this matter disclose the family tree of the patriarch of the family, Kangethe Gatitika, deceased, (hereinafter referred to as Gatitika). His wife is indicated in the response to the application as Elizabeth Nyambura. The patriarch Gatitika was the father of Michael Kimani Kangethe (hereinafter referred to as Kimani) deceased, and Ngigi Kangethe (hereinafter referred to as Ngigi), also deceased. If there were other children of Gatitika, they are not mentioned in the suit papers.

4. Kimani and Ngigi, are brothers and the sons of Gatitika. Kimani was the husband of the late Beth Mumbi Mbugua (Beth), the deceased in the estate subject hereunder. Ngigi was the husband of Mary Njeri Ngigi (Mary), the applicant herein. The late Beth and Mary are therefore the daughters in law of Gatitika. Beth died on 14<sup>th</sup> December 2010, and it appears that her Succession Cause No 4 of Nakuru was transferred to Naivasha and re-numbered Succession Cause No 56 of Naivasha.

5. Josephat Mbugua Kimani (Mbugua) is the son of Kimani and Beth – both deceased – and is therefore Gatitika’s grandson. Mbugua is the petitioner in the estate of his mother Beth. He obtained the grant of letters of administration of her estate (in

Succession Cause No 69 of 2011, in Naivasha). The confirmed Grant is dated 14<sup>th</sup> March, 2012. On the confirmed grant the description of property is stated as follows:

***“Name: Josephat Mbugua Kimani - Plot No 43 Eburu Farmers Co-operative Society (to hold in trust for all other beneficiaries) – Whole share”***

6. Benson Kangethe Ngigi (Benson) is the son of Ngigi and Mary and therefore a grandson of Gatitika

7. The dispute concerns the aforesaid piece of land – **Plot No. 43 Eburu Farmers Co-operative Society** – alleged by the applicant to have belonged to the patriarch, Gatitika. This original ownership is disputed by the respondent in his replying affidavit. Presently, the piece of land is titled **Nakuru/Eburu/43** and comprises fifteen (15) acres.

8. Under orders of Meoli, J, the court directed that this matter be tried by affidavit evidence of the parties. Accordingly, in addition to the summons for revocation, and affidavit in support of revocation, Mary filed a further supporting affidavit. She also filed written submissions through counsel Gichuki. Mbugua on his part filed a replying affidavit to the application for revocation and a further replying affidavit. He also filed written submissions through counsel Mburu.

9. Submissions were orally highlighted on 20<sup>th</sup> September, 2018.

## **The Dispute**

### *Applicant's case*

10. In her application dated 21<sup>st</sup> February, 2013, Mary seeks the revocation of the grant issued to Mbugua in respect of the estate of his mother Beth. Mary alleges that the grant was obtained fraudulently by the making of a false statement and in particular by concealment from court of material information regarding Plot No. 43 Eburu Farmers Co-operative. She alleges that Mbugua, in his petition to the estate of Beth, concealed the fact that she, Mary, was entitled to her late husband's (Ngigi's) half share in the piece of land. Further, she alleges that Mbugua is or was granted the confirmation purely as a trustee of her late husband.

11. Mary further alleges that when Gatitika died, Plot No 43 was transferred to Kimani to hold as trustee for himself and Ngigi, her husband, but that Kimani died before he could transfer Ngigi's half share to him. Accordingly, that when Kimani's wife, Beth, filed Succession No 333 of 1989 in respect of Kimani's estate, she transferred Plot No 43 to herself, instead of apportioning Ngigi's half share to him or to his estate.

12. In her further affidavit, Mary exhibits, inter alia: receipts showing that Gatitika purchased shares in Eburu Farmers Co-operative Society Limited and paid survey contribution; a receipt dated 20<sup>th</sup> November, 1979 that, on its face, shows that Gatitika transferred shares to Kimani in the sum of twenty shillings; a letter dated 24<sup>th</sup> April, 2012 from the chairman of the Society stating that there is no letter that could be traced in the society's office that the original owner requested the change of name; a certificate of death obtained on 20th January 2017, showing that the patriarch Gatitika died on 21 January 1972; and a certificate of death number 42554 showing that Ngigi died on 21 February 1971, at the age of 41 years.

13. Mary asserts that after the death of her father-in-law, Gatitika, her brother-in-law Kimani fraudulently transferred the property to himself in 1979 without filing any succession cause. After the said transfer it was implied that he was holding the property in trust for himself and his brother Ngigi. She states that Kimani died before he could transfer half of the property to her as she was the administrator of the estate of her late husband.

14. Mary also attaches documents showing that Title No Loc 6/Giathaini/379 and Loc 6/Kandani/940 were devolved from her late husband, Ngigi to her and her husband's brother, Kimani, respectively. In addition she attached a letter dated 24 April 2012, stated to be signed by the chairman of Eburu Farmers' Co-operative Society Ltd, addressed to the Chief Gilgil Location, and referenced: Plot Number 43 Kangethe Gatitika Eburu Settlement Scheme, that states:

***“...I am writing to inform you that the late Kangethe Gatitika was the rightful shareholder of Plot Number 43 Eburu settlement***

*scheme within Gilgil district.*

*However in 1979 the piece of land was transferred the name of the original Kangethe Gatitika to Michael Kimani Kangethe.*

*There are no records that show the person who changed the name that is from Kangethe Gatitika to Michael Kimani Kangethe . The original owner did not request the officials through any letter which can be traced in society's office....”*

15. Finally, in her submissions, Mary asserts that all other suits between her son, Benson, and the late Beth are concluded in that nothing is pending in them.

*Respondent's case*

16. The respondent argues that the aforesaid Plot was never at any time the property of Gatitika.

17. The respondent submits that through Succession. Cause No. 333 of 1989, in the matter of the Estate of Michael Kimani Kangethe (deceased), Beth Mumbi Mbugua became the beneficiary to plot no. 43 Eburu Farmers. Further, that In the Succession Cause No. 69 of 2011 dealing with the estate of Beth, the mother to Mbugua, the respondent, he obtained a confirmed Grant of his late mother's estate including the plot in issue to hold in trust of other beneficiaries i.e his brothers and sister on the 14th May, 2012., and that the said Plot No 43 was the only property subject to Succession Cause No. 69 of 2011. He states that the grant that the applicant prays to be revoked concerns Succession Cause No. 69 of 2011 and not Succession Cause No 333 of 1989.

18. Further, the respondent argues that the applicant did not contest Succession Cause No. 333 of 1989 in respect of Michael Kimani Kangethe who was the person the applicant alleges was holding Plot. No. 43 Eburu farmers in trust for his brother, the applicant's husband. Thus, he opines that the failure to seek redress in the right forum renders the applicant's motion fatally defective and ought to be dismissed. He notes that the applicant while pursuing the estate of her late husband never included Plot No. 43 Eburu Farmers as part of the Estate and as such she is estopped from raising the claim in the present grant.

19. The respondent also asserts that there is no evidence that Plot Number 43 Eburru co-operative society was owned by his father Gatitika, or that after his father's demise their mother Elizabeth Nyambura ever claimed the said plot during her lifetime. The said Elizabeth Nyambura died in 1995, and her estate appears not to have been administered.

20. By a letter produced by the respondent dated 31<sup>st</sup> October, 1994, written by the Chairman of Eburru Society, referenced : “*Beth Mumbi, w/o Kimani Kangethe, Deceased Member*”, Beth is stated to have been:

*“...the wife of the above deceased member of Plot Number 43 in Eburru FCS Limited.*

*Please help her if there is any question concerned with the above plot”*

In other words, the aforesaid plot was, as far as the respondent is concerned, the property of his mother, Beth.

21. The respondent accuses the applicant of being used by her daughter Hannah Wanjiku who resides in Eburru to make the claims herein, after her son Benson filed several unsuccessful suits claiming the same property. He highlighted: Civil Suit No 562 of 1990 at the High Court in Nakuru between Benson and the respondent's mother, Beth; and Civil Suit No 438 of 1997 also between Benson and Beth.

22. Finally, the respondent urges that, if anything, the receipt dated 20 November 1979, attached to Mary's further affidavit indicates that the shares of Gatitika in the Society were transferred to his father, Kimani.

#### **Issues for determination**

23. Given the background and the documentation availed through submissions the following issues arise for determination.

1. What does the evidence disclose concerning the how the suit property came about"
2. Whether the suit property was held in trust in whole or in part for the applicant, Mary, by either Kimani, her brother in law, or by his wife Beth the sister in law; and whether Mbugua, the respondent is currently holding the same in trust for the applicant and her family.
3. Whether the grant of letters of administration should be revoked.

**Evidence concerning how the suit property came into being**

24. It is clear from the documentation supplied that patriarch Gatitika first paid an amount of Kshs 540/- on 19 February 1968 as share capital and entrance fee for Eburru Co-operative Society Limited. He thus became a registered member of the Society in 1968. According to the certificate of death exhibited by Mary, Gatitika died on 21 January 1972. The documentation availed by both disputants does not disclose anything concerning the administration and winding up of the estate of Gatitika. Further, there is no indication from the documentation availed concerning what happened in relation to the shares the Society between 1968 and the time of Gatitika's death in 1972.

25. Again, from the documentation supplied by Mary, it is clear that Gatitika's son Ngigi, died on 21<sup>st</sup> February, 1971, a year before his father died. At the time of his death Ngigi, was aged 41 years. Ngigi's wife, Mary the applicant, administered the estate of her husband sixteen years later through Succession Cause No. 113 of 1987 in Kigumo Law Courts. From the documentation availed by Mary, it is noted that through Succession Cause No 113 of 1987, aforesaid, Title Numbers Loc 6/ Giathaini/ 379 and Loc 6 / Kandani/940 were devolved upon Mary and Kimani from the estate of Ngigi.

26. There is no indication given that in the administration of the estate of Ngigi any claim was made for any share in the Plot No 43, the subject of the dispute herein, or in any of the shares in the Society. In any event, at the time of his death, Ngigi's father was still alive and therefore nothing had devolved to Ngigi at the time of his death in terms of the shares held by his father in the Eburru Society.

27. Other receipts availed by Mary, show payments made in the name of Gatitika, on 9<sup>th</sup> June 1975, 17<sup>th</sup> June 1975 and 28<sup>th</sup> June 1975 or for additional sale of shares in the society. A receipt dated 21<sup>st</sup> April 1978 in the name of Gatitika shows a part payment of debtors account. Two receipts dated 7<sup>th</sup> November 1978 and 23<sup>rd</sup> November 1978 in the name of Gatitika show two survey contributions. No information is given as to the identity of the person who made these payments in the name of Gatitika.

28. According to Mbugua's (the respondent's) replying affidavit, Gatitika's wife Elizabeth Nyambura, died in 1995. No information is availed concerning the administration of the estate of Gatitika's wife. It is also unclear whether the shares held by Gatitika in Eburru Co-operative Society which would legally have devolved to his wife, were in fact transferred. Further, neither the constitution and bylaws of the Society indicating the devolvement process in the Society upon death, nor any documents evidencing transfer of Gatitika's shares in the society to his wife, have been availed to enable the court to trace the movement of those shares, and what happened thereafter.

29. What the evidence availed by both parties concretely shows is that Gatitika had contributed an entrance fee and Kshs 540/- to the share capital of Eburru Co-operative Society Ltd in 1968, four years before his death. There is nothing to ascertain that the said share capital was converted into a piece of land at all, either at that time or later, and certainly there is nothing to show that Plot No 43 emanated from that share capital.

30. After Gatitika died in 1972, his estate was apparently not administered, and it is unclear what happened to the share capital he had contributed to the Society. Between 1975 and 1979, someone made contributions amounting to Kshs 1,015/- in the name of Gatitika to the Society for additional shares, debtor's account and kshs 1,000/- for "survey contribution". These latter amounts may have been for a piece or pieces of land but the details are extremely scanty. In 1979, someone paid Kshs 20/- to the Society in the name of Gatitika, for the purpose of "share transfer to M Kimani Kangethe". By the time when these payments were being made Gatitika's son Ngigi, the applicant's husband, had also died in 1971. Gatitika's estate would have devolved to his wife upon his death in 1972, at least in respect of a life interest.

31. This court has no means of ascertaining, beyond the information and documentation availed in evidence by the parties, the origins of Plot Number 43. The difficulty stems, ultimately, from the nature of information and evidence availed. The court is only able to state as follows: that Gatitika was the owner of shares in the share capital of the Eburru Society; that it is not clear whether those shares were converted into Plot Number 43; the fact that it is unclear whether the estates of the late Gatitika or his wife were ever administered for purposes of succession and that Plot Number 43 is only seen in fact in respect of the estate of Beth..

32. The letters alleged to have been written by respective chairmen of the Society at different times in 1994 and 2012, cannot be relied upon as neither the official records of the society or searches thereof, nor evidence from its existing officials in relation to plot number 43, were availed. Indeed, the said letters were not even on letter heads of the society.

33. The only official documents that make reference to Plot Number 43 Eburru Farmers Co-operative Society Ltd. are the confirmed grants in **Succession Cause Number 333 of 1989** and **Succession Cause No 69 of 2011**, the latter of which is sought to be revoked.

#### **Whether the suit property is held in trust, and if so, for whom"**

34. The applicant exhibited documents showing several attempts by the applicant's son, Benson, to claim a share of plot number 43 from Beth, the respondent's mother. The first attempt was in **Succession Cause No 333 of 1989**, in which Benson objected to the grant of letters of administration to the estate of the respondent's mother Beth. The record of proceedings in that matter shows that on 8 November 1990, Tanui, J in the presence of Beth Mumbi Mbugua and Benson, turned down the objection stating as follows:

*"Having perused the application by Benson Kangethe Ngigi relating to frauds allegedly committed by the deceased whose estate is now administered by Bethi Mumbi Mbugua, the application is rejected and the applicant advised to bring out the matter in dispute."*

It appears that there was no further attempt in that succession cause to establish the fraud as pointed out by the judge therein.

35. A second attempt was made by Benson seeking subdivision and surrender of the said plot in **HCCC No 562 of 1990, Nakuru**. This is evidenced by a ruling issued by Ondeyo, J in which she referred to that suit in Nakuru HC Civil Suit number A438 of 1997 and stated as follows:

*"While the first case was pending (HCCC No 562) the plaintiff filed the present case in his capacity as the administrator of the estate of the deceased (Kimani Kangethe). In the present case, he seeks a declaration that the defendant holds the suit land in trust and that the same should be subdivided and shared equally between the plaintiff and the defendant.*

*On 8 May 2000 the record of the first case shows that it was dismissed for want of prosecution".*

36. A final attempt was made by Benson in **Nakuru HCCC No 438 of 1997**, wherein he sought subdivision of the said parcel of land between his father Ngigi and Kimani, the two sons of Gatitika. However that suit was formally withdrawn on 13 September 2011, by his counsel.

37. The failures of these attempts to achieve what Beth sought in acquiring part of Plot Number 43, highlight the real problem that this court is facing in trying to appreciate the origins of that plot. As already stated, the origins of Plot Number 43 are quite unclear from the evidence availed. In my view, the only evidence so far seen from which a trust is clearly evident in respect of Plot No 43 is that seen in the confirmation of the grant in **Succession Cause No 69** where it is stated as follows concerning the property to be distributed:

*"Name: Josephat Mbugua Kimani - Plot No 43 Eburu Farmers Co-operative Society (to hold in trust for all other beneficiaries) – Whole share"* (emphasis supplied).

38. The trust indicated there is that to be held by Mbugua for and on behalf of his sisters named in the grant as Nancy Wanjiku Kimani and Esther Njoki Kimani. It is the only trust in respect of Plot No 43 which is even tenable in this case.

39. Now, it is true that even the registration of a person as a proprietor of land does not defeat a claim of trust nor relieve such proprietor of his obligation as a trustee as was held in the case of **Felista Muthoni Nyaga v Peter Kayo Mugo [2016] eKLR**. That case stated that there must be clear evidence upon which a court can conclude that in fact the registered proprietor of the land subject of the suit before it, is in fact holding the same as a trustee for the benefit of others. The only trust so far evident is that in favour of Nancy Wanjiku Kimani and Esther Njoki Kimani.

**Whether the grant of letters of administration should be revoked.**

40. The applicant seeks the revocation of the grant in **Succession No 69 of 2011**. Statutorily, the circumstances under which a grant may be revoked or annulled are set out in **section 76** of the **Law of Succession Act**. The provision is as follows:

*“76 Revocation or annulment of 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.” (emphasis supplied)*

41. It is trite that the burden of proof lies on the party who wishes the court to rely on the existence of any set of facts to make a finding in their favour to prove those facts. **Section 107 of the Evidence Act** places that burden specifically on such person. In this case, it is incumbent upon the applicant to prove on a balance of probability that the trust existed.

42. This degree of proof is well enunciated in the case of **Miller v Minister of Pensions [1947]** cited with approval in **D.T. Dobie & Company (K) Ltd. v Wanyonyi Wafula Chabukati [2014] eKLR**. The court stated:

*“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not.*

*Thus, proof on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”*

43. In the case of *Patrick Mathenge Gachui V. Karumi Wambugu & Another* [2010] eKLR Makhandia, J (as he then was) observed:

*“The burden of proving trust rests on the protesters. In my view, they have failed miserably to prove such trust. Their entire evidence was hearsay which a court of law cannot act upon. The mere fact that the protesters are in occupation of the suit premises is no proof of trust. In any event it is apparent that the 2nd protester only came to the suit premises in 1986. It is also instructive that the deceased got registered as the proprietor of the suit premises in 1978 when the 1st protester's father and 2nd protester were all adults. One wonders then, why the two could not at the time claim their portion of the suit premises if indeed they were clear in their minds that their deceased brother held the suit premises in trust for himself and themselves. The trust having not been proved, there is no basis for the protests. Accordingly they are dismissed.”*

44. I agree entirely with the above statement. In the present case, the applicant has reiterated her insistence that the trust was implied but several questions do arise. Why did she not claim or include Plot No 43 or a share thereof when she filed Succession Cause No 113 of 1987 in respect of her late husband" Why did she not claim her share while Kimani was still alive" Why was she reluctant to pursue the same matter even when he died" Why did she not call witnesses to support her case" Why is there no written proof that there was indeed a trust"

45. The grant given to Beth in Succession No 333/1989 in the estate of Michael Kimani Kangethe included the property in issue, Plot No 43 Eburru, and it was given for the entire share. Nowhere in that grant is it stated that the land was being held in trust. However, as earlier stated, in the grant to Mbugua, it is indicated that grant is given to hold the property in trust for all other beneficiaries.

46. For the revocation to be successful under section 76 of the Act, the applicant was required to show either: that the proceedings to obtain the grant were defective in substance; or 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; or 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.

47. In addition, the applicant would have to show that the person to whom the grant was made has failed, after due notice and without reasonable cause either to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order allowed; or to proceed diligently with the administration of the estate; or to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the law; or has produced any such inventory or account which is false in any material particular; or that the grant has become useless and inoperative through subsequent circumstances.

48. I am not satisfied that the applicant was able to discharge the burden of showing that there were material facts concealed by the respondent, and if so, which facts; nor was there any evidence of the existence of a trust in her favour. The classical definition of a trust is as follows:

*“an equitable obligation binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property), for the benefit of persons (who are called beneficiaries or cestui que trust), of whom he may himself be one, and anyone from may enforce the obligation”- Underhill in the Law of Trusts and Trustee, 12<sup>th</sup> Ed*

49. In this case, I did not come across the above situation in respect of Plot No 43 in relation to which, on balance, the late Beth could properly have been described as a trustee for the applicant or another person. Likewise, although the applicant asserted that the grant was obtained fraudulently and by the making of a false statement, I have seen no evidence which could measure up to the high standard of proof required to demonstrate fraud. Consequently, the application for revocation does not satisfy the probative requirement.

50. In conclusion, I agree with the court **In the matter of the Estate of Manasseh Osiako Nyawira (deceased)** [2012] eKLR to which I was referred, where it was held as follows:

*“I do not find that the deceased would have held the suit property in trust for the plaintiff. That would have been clearly indicated in the title register and therefore it would be speculative and premature at this juncture to believe the plaintiffs. In any case trust has to be established. The plaintiffs have failed to establish such trust or any intended trust at all.”*

## Disposition

51. In light of the foregoing and for all the reasons stated, I am persuaded that the respondent has given a good explanation that he is holding Plot No 43 in trust for himself, his brothers and sisters. This explanation makes sense in that Mbugua and his siblings are the beneficiaries of their mother's estate.

52. The applicant was duty bound to disprove the trust that is already evident in the documentation availed. It was for her to prove her case for a trust in her favour on a balance of probabilities. She did not discharge that responsibility. She relied on speculation, allegation and assumption with no concrete evidence, which cannot convince the court to find a trust in her favour.

53. Accordingly, the applicant's application fails and is hereby dismissed with costs.

Orders accordingly.

**Dated and Delivered at Naivasha this 20<sup>th</sup> Day of December, 2018**

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**RICHARD MWONGO**

**JUDGE**

Delivered in the presence of:

1. Mburu F. I. for the Petitioner/Respondent
2. Wairegi holding brief for Gichuki for Objector
3. Court Clerk - Quinter Ogutu



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