



**In re Estate of Wekesa Sioni (Deceased) (Succession Cause
90 of 2016) [2024] KEHC 10404 (KLR) (23 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10404 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
SUCCESSION CAUSE 90 OF 2016
DK KEMEL, J
AUGUST 23, 2024
IN THE MATTER OF THE ESTATE OF WEKESA SIONI (DECEASED)**

BETWEEN

STEPHEN WAFULA WEKESA & 2 OTHERS & 2 OTHERS PETITIONER

AND

MARGARET KHANJIIRA WEKESA OBJECTOR

RULING

1. By way of summons for revocation or annulment of a grant application dated 26th May 2023, and filed in Court on 5th June 2023, the Objector herein pursuant to Section 76 of the *Law of Succession Act*, Rule 44 (1) of the *Probate and Administration Rules* seeks orders that the Grant issued and confirmed on 17th March 2017, be revoked as the same was obtained fraudulently vide concealment of material facts since the deceased had sons and daughters from another wife. The application was grounded on the reasons availed on the face of it and supported by an affidavit in support of the summons sworn on even date.
2. According to the Objector, the deceased herein is her father who was survived by three widows, two of whom are deceased. She avers that she is a daughter from the 3rd house. That her brother was appointed as an Administrator but failed to represent them truthfully leading to many of them missing out on their respective shares. She avers that some of the children from the 1st house have been disinherited and that they were not informed of the succession proceedings prior to their commencement. She avers that the distribution of her father's estate was unfairly done and it is in the interest of justice that the confirmed grant be revoked.
3. In response to the application, the 1st Petitioner with the authority of the two others swore a replying affidavit on 4th December 2023, wherein he averred that during administration of the estate of the deceased, his sisters were granted land but that the same is not appearing in the final grant. According



to him, his sisters were granted land from land parcel LR. No. Bokoli/Misikhu/314 and that Moses, and Eliud Ndinyo all have shares in the final grant as they were respectively apportioned 3 ½ acres. He avers that although his sisters' portions do not appear on the grant, the same exists on ground as they were respectively apportioned 1 ¼ acres to share amongst themselves. He argues that a mistake occurred thus their names did not make it to the final grant.

4. I have considered the pleadings herein and the replying affidavit by the Petitioner. It is note that it is not in dispute that the deceased herein was the registered owner of the suit lands being Land Parcel No. Bokoli/Misikhu/373; Land Parcel No. Bokoli/Misikhu/314; Land Parcel No. Bokoli/Misikhu/356; Land Parcel No. Bokoli/Misikhu/396; Land Parcel No. Bokoli/Misikhu/1924. Further, it is not disputed that the Petitioners herein petitioned for grant of letters of administration intestate in relation to the deceased's estate and that the Objector herein refused to consent to the grant of the letters of administration Intestate to the selected Petitioners.
5. By consent order, this Court issued the letters of administration Intestate to the Petitioners herein and a mode of distribution was duly created but that the name of the Objector herein and some of her sisters were not included.
6. It is this grant issued on 18th September 2019 and confirmed on 19th April 2023 which the Objector seeks that it be revoked. It is my considered view that the main issue for determination herein is whether the said grant ought to be revoked.
7. The grounds under which a grant of representation may be revoked are provided for under Section 76 (a) - (e) of the Law of Succession Act Cap 160 of the Laws of Kenya. It is clear therefore that the grounds upon which a grant may be revoked or annulled are statutory and it is incumbent upon any party making an application for revocation or annulment of a grant to demonstrate the existence of any, some or all the above grounds. However, the Court is bestowed with the powers to revoke the grant on its own motion so long as there is evidence of the existence of any of the conditions provided under Section 76. (See *Matheka and Another -vs- Matheka* [2005] 2 KLR 455). Further, from the reading of Section 76 above, it is clear that the same deals with revocation of grant and not the process of confirming the grant or the certificate of confirmation of grant (See *re Estate of Prisca Ong'ayo Nande (Deceased)* [2020] eKLR).
8. From the pleadings herein, it is clear that the application is premised on conditions (c) which provides that; the grant was obtained fraudulently by 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 untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.
9. The Objector's case is that she was not aware of the succession proceedings with regard to the estate of the deceased as such the Petitioners obtained the grant fraudulently as they did not involve her. A perusal of the Court record reveals that there is a consent to the making of the grant dated 29th November 2016 and filed in Court on 29th November 2016, wherein it indicated that the Objector herein refused to sign the same.
10. Despite the Objector alleging herein that the grant was obtained fraudulently by 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 untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently, there was no evidence which was tendered to prove the said fraud. It is trite law that where fraud is alleged fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts. {See *Central Bank of Kenya Limited v Trust Bank Limited & 4 Others* [1996] eKLR)}. The



standard of proof required where fraud is alleged is higher than in ordinary civil matters (balance of probabilities) but it ought not to be one beyond a reasonable doubt as in criminal cases. (See *Ndolo -versus- Ndolo* (2008) 1 KLR (G&F) 742). It is clear that the Objector was aware of the ongoing succession proceedings but refused to participate in the same and that she could as well wait for the confirmation of the grant when she could easily put in a protest to the proposed distribution of the estate.

11. Any party seeking the revocation of the Grant must establish to the Court that any of the ground established above was present when the grant was being obtained.
12. In the case of *Jamleck Maina Njoroge v Mary Wanjiru Mwangi* (2015) eKLR the Court discussed circumstances when a grant can be revoked. The Court observed as follows: -
 - “ 11. The circumstances that can lead to the revocation of grant have been set out in Section 76 *Law of Succession*. For a grant to be revoked either on the Application of an interested party or on the court’s own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.”
13. Section 38 of the *Law of Succession Act* states that the estate of the deceased person is distributed equally amongst the children of the deceased. The language of Section 38 is gender neutral. It does not classify children into male and female, nor sons and daughters, nor men and women. There is no discrimination nor differentiation nor classification nor categorization along gender lines. That would mean that sons and daughters of a dead person are entitled on equal basis to a share in the estate of their dead parent. Section 38 does not make marriage a factor in the distribution of the estate of a dead parent. Gender and marital status are factors under customary law, but not under the *Law of Succession Act*. Section 38 should be read together with Article 27 of the *Constitution*, which outlaws discrimination of women based on gender and marital status. It declares that men and women have a right to equal treatment in all spheres of life. These principles and standards set out in Article 27, are drawn from the United Nations Convention on Elimination of All Forms of Discrimination against Women. (CEDAW), to which Kenya is a signatory.
14. The Petitioners herein referred to the exclusion of some of his sisters, including the Objector herein from the mode of distribution and subsequent certificate of confirmation as an error but their portions are captured on ground with all of them being apportioned 1 ¼ acres.
15. Let me revisit Section 38 of the *Law of Succession Act* that provides for equal distribution of the estate amongst the children. Under section 76 (a) - (e), this Court is bestowed with the powers to revoke the Grant on its own motion so long as there is evidence of the existence of any of the conditions provided under Section 76.
16. The contravention of the dictates of Section 38 of the *Law of Succession Act* and Article 27 of the *Constitution* of Kenya prompts this Court in the interests of the other beneficiaries of the estate of the deceased herein be considered and further in the interests of justice, this succession court must now issue the appropriate orders. The Petitioners have already admitted that they failed to include the Objector and her sisters plus their share in the confirmed grant. Even though the Objector has sought for revocation of grant, i find the same to be unsuitable since her only grouse is on the distribution. I find the suitable order in the circumstances is to order for the cancellation of the confirmed grant and the Petitioners directed to file fresh summons for confirmation of the grant.



17. In view of the foregoing observations, it is my finding that the Objector's application dated 26.5.2023 has merit. The same is allowed in the following terms:
- a. The certificate of confirmation of grant issued on 4.5.2023 is hereby cancelled.
 - b. The Petitioners are ordered to file fresh summons for confirmation of grant within thirty (30) days from the date hereof.
 - c. Mention on 26.9.2024 to confirm compliance.
 - d. This being a succession cause, each party shall bear their own costs.

It is so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 23RD DAY OF AUGUST 2024.

D. KEMEI

JUDGE

In the presence of:

Charles Masai 2nd Petitioners

Masengeli for Objector

Rapando for Applicant

Kizito Court Assistant

