



**In re Estate of Wallace Mbogo alias Ngunyi (Deceased) (Probate & Administration
2194 of 2004) [2024] KEHC 10151 (KLR) (14 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10151 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
PROBATE & ADMINISTRATION 2194 OF 2004**

MA ODERO, J

AUGUST 14, 2024

IN THE MATTER OF THE ESTATE OF WALLACE MBOGO ALIAS NGUNYI (DECEASED)

JUDGMENT

1. The Objector herein Dishon Kanai Mbogo filed in Court the Summons for Revocation of Grant dated 16th July 2004 seeking to have the Grant of Letters of Administration issued to Phyllis Nyambura Mbogo (the Administrator) revoked.
2. The Summons was brought under Section 76 of the Law of Succession Act Cap 160 Laws of Kenya and Rule 44 of the Probate and Administration Rules and was supported by the Affidavit of even date and the Further Affidavit dated 6th November 2019 both sworn by the Objector.
3. The Respondent/Administrator opposed the Summons through his Replying Affidavit dated 16th October 2019. The Summons was canvassed by way of Vive Voce evidence. The Objector called three (3) witnesses in support of his case whilst the Administrator called two (2) witnesses.

Background

4. This succession cause relates to the estate of the late Wallace Mbogo Ngunyi Alias Mbogo Ngunyi (hereinafter, 'the Deceased') who died intestate on 11th March 1996 at Nazareth Hospital. A copy of the death certificate serial number 288690 is annexed to the Petition for letters of Administration dated 3rd December, 1996.
5. The Deceased is said to have been survived by the following persons:-
 - (1) Phyllis Nyambura Mbogo - Widow (now also deceased)
 - (2) David Ngugu Mbogo - Son
 - (3) Wilfred Njuguna Mbogo - Son
 - (4) Leonard Njoroge Mbogo - Son
 - (5) Hottensia Ngonyo Mbogo - Daughter



- 6) Lucy Wanjiru Mbogo - Daughter
6. The estate left behind by the Deceased comprised the following assets
 - i. Muguga/Kanyariri/359
 - ii. Muguga/Kanyariri/T109
 - iii. Shares with Kenya Commercial Bank
 - iv. Shares with ICDC Investment Company Ltd
 - v. Account with Kiambu Dairy and Pyrethrum Co-operative
7. Following the demise of the Deceased the widow Phyllis Nyambura Mbogo applied for and obtained Grant of Letters of Administration Intestate vide Succession Cause No. 569 of 1996 filed at the Kiambu Law Courts. A Grant was duly issued to her on 15th May 1997 which Grant was thereafter confirmed on 23rd September 1998.
8. The widow later passed away on 13th March 2009 and was substituted by one Leonard Njoroge Mbogo a son of the Deceased. A rectified Grant was issued on 17th September 2019.
9. According to the Certificate of confirmed Grant all the assets left behind by the Deceased were to be transferred entirely to the widow Phyllis Nyambura Mbogo.
10. The Objector on 16th July 2006 filed this Summons seeking to revoke the Grant which had been issued to his late Mother. The Objector seeks to have the Grant revoked on the following grounds:-
 - (a) That the same was obtained fraudulently.
 - (b) That the same was obtained by misrepresentation and concealment of material facts.
 - (c) That the proceedings to obtain the said Grant were defective.

The Evidence

11. The Objector Dishon Kanai Mbogo told the court that he was the third born son of the Deceased. He told the court that he has filed this summons for revocation of Grant on behalf of himself and his three (3) siblings;- Anne Wangui David Ngugu Mbogo Charles Kinuthia Mbogo
12. The objector states that although the family had all agreed that the widow (his mother) would apply for and obtain Grant of Letters of Administration Intestate, he is aggrieved by the manner in which the Administrator proceeded to distribute the estate.
13. The Objector claims that neither he nor his siblings participated in the succession cause filed at the Kiambu Law Courts. That his consent was never obtained and their signatures on the documents produced in court were been forged by their brother Leonard Njoroge. That this Grant was confirmed secretly and without his involvement.
14. The Objector states that he came to learn that one of the estate assets being LR Muguga/Kanyariri/359 was sub-divided. That he was not involved in the said subdivision and did not sign the mutation forms. The Objector alleges that he has built his home and raised his family on Plot 359, which is now being proposed to be allocated to his sister Hottensia Ngunyo. That he has been given a notice of eviction from the said Plot 359 which property according to the Objector he had been given by his late father.



15. The Objector also takes issue with the LR Muguga/Kanyariri/ T-109 whose fate he states has not been revealed to the beneficiaries. The Objector blames his brother Leonard Njoroge for misleading their aged mother and coercing her into making irrational decisions with respect to the property left behind by the Deceased. He states that no explanation has been given as to how or why their sister Hottensiah Ngonyo has ended up with the largest share of the estate even though she resides in the USA.
16. PW2 Charles Kinuthia Mbogo told the court that he is also a son to the Deceased whilst PW3 Anne Wangari Njuguna is the wife of the late Wilfred Njuguna Mbogo who was also a son of the Deceased. Therefore PW3 is a daughter-in-law of the Deceased.
Both PW2 and PW3 support the evidence given by the Objector.
17. The two witnesses state that they are still in occupation of the portions of Plot 359 which were allocated to them by the Deceased. They complain that only the Administrator is aware of the fate of Plot T -109 as well as the funds and the shares left behind by the Deceased. They blame the Administrator for not sharing these assets with them. They accuse the Administrator of converting Plot T-109 to his own use.
18. The Administrator Leonard Njoroge Mbogo testified on his own behalf. He denies that the Grant was obtained unprocedurally. He asserts the Objector was fully involved and was included in the Succession Cause filed at the Kiambu Law Court and that all beneficiaries signed the relevant consents.
19. The Administrator states that all the children of the Deceased have been catered for in the distribution of the estate and that all the beneficiaries save for the Objector have taken up possession of the portions of land allocated to them.
20. The Administrator urges the court to dismiss this summons for vocation of Grant.
21. DW2 Lucy Wanjiru Mbogo is a daughter of the Deceased. She supports the testimony of the Administrator and reiterates that all the beneficiaries were aware of and were included in the succession cause filed in respect of the estate of the Deceased.
22. Upon conclusion of oral evidence the parties were invited to file and exchange their final written submissions. The Objector did not file any written submissions dated Whilst the Respondent/ Administrator relied upon his written submissions dated 10th August, 2023.

Analysis And Determination

23. I have considered this summons for revocation of Grant, the reply filed thereto, the evidence adduced in court as well as the written submissions filed by the parties. The only issue for determination is whether there exists sufficient grounds to have the Grant revoked.
24. The law governing revocation of Grants is to be found in Section 76 of the Law of Succession Act, Cap 160, Laws of Kenya, which provides as follows:-
“76. Revocation or annulment of grant
25. 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 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 of has produced any such inventory or account which is false in any material particular; or
 - iv. that the grant has become useless and inoperative through subsequent circumstances”
26. In this case it is not in dispute that the Deceased Wallace Mbogo alias Ngunyi died away intestate on 11th March 1996. It is further not in dispute that with the consent of all the beneficiaries Grant of letters of Administration Intestate was on 15th May 1997 made to the widow of the Deceased, Phyllis Nyambura Mbogo. The said Grant was duly confirmed on 23rd September 1998. However following the death of the widow (who was the sole administrator of the estate), the Grant was rectified on 17th September, 2019 substituting Leonard Njoroge Mbogo as the current administrator of the estate.
27. The objector claims that the initial Grant made to the widow was obtained fraudulently by his misrepresentation and by concealment of material facts.
28. The objector claims that he was not included in the Succession proceedings held in the magistrates court at Kiambu.
29. I do not find any evidence to support this allegation. The Objector and his witnesses were all named as beneficiaries in the Petition filed for Grant of letters of Administration. In his evidence the objector concedes that he and his siblings all agreed that their mother (the widow) file the Petition for letters of Administration. The record indicates that the Objector had participated in the matter from its inception and has filed numerous applications. The claim that he was unaware of the Succession Cause is clearly not truthful.
30. The Objector has also claimed that the initial Grant was obtained through misrepresentation and concealments of material facts. What was the nature of misrepresentation and what were the material facts which were concealed?
31. I have carefully perused the Affidavit in support of Petition for letters of Administration Intestate which Supporting Affidavit was sworn by the widow on 3rd December 1996.
32. The Petitioner described herself as the legal wife (widow) of the Deceased. Neither the Objector nor any of his witnesses has disputed this. They all confirm that the Petitioner Phyllis Nyambura Mbogo is their mother and the only widow of their late father.
33. The Affidavit lists the names of all the beneficiaries. Indeed there is no claim by the Objector that any beneficiary was omitted and/or left out.
34. Likewise the assets comprising the estate of the Deceased have all been listed in the Affidavit. There has been no allegation by the Objector that any of the assets belonging to the Deceased was concealed.



35. In the circumstances there has been no demonstration of a specific incident of misrepresentation and/or concealment. This ground has not been proved at all.

36. The objector and his witnesses further seek to have the Grant revoked on grounds that the signatures appearing in the consent annexed to - the petition for Grant of letters of Administration Intestate were forged.

There is in the file a consent dated 12th February 1997 duly signed by Dishon Kanai Mbogo (the Objector herein) which signature is purported to have been forged.

37. It is not enough to merely bandy about allegations of forgery. It is trite law that “he who alleges must prove.” In law the burden of proof lies upon the party who asserts the existence of a fact or set of facts.

Section 107 of the Evidence Act Cap 80, Laws of nya provides as follows:

“Burden of Proof

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(1) whoever desires any court to give judgment as to any legal 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.”

38. Forgery is a very serious allegation, one which if proved may lead to Criminal sanctions. In the case of Christopher Ndaru Kagina -vs- Esther Mbandi Kagina & Another [2016] eKLR the court stated as follows:-

“It is trite law that he who alleges fraud must prove fraud.

Allegations of fraud must be strictly proved. Great care needs to be taken in pleading allegations of fraud or dishonesty. In particular, the pleader needs to be sure that there is sufficient evidence to justify the allegations.”

39. In the case of Central Bank of Kenya Ltd -vs- Trust Bank Ltd & 4 others [1996] eKLR the Court of Appeal in considering the standard of proof required where fraud is alleged stated as follows:-

“The appellant has made vague and general allegations of fraud against the respondents. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the appellant in this case than in an ordinary civil case” [Own emphasis]

40. Further in the case of Vivos Energy Kenya Limited -vs- Maloba Petrol Station Limited & 3 others [2015] eKLR the Court Appeal delivered itself thus:-

“Where fraud is alleged, it must be specifically pleaded and particulars thereof given. That is what is required by order 2 Rule 10 of the Civil Procedure Rules 2010.....”

41. Even in cases where fraud has been alleged the Applicant has a duty to prove the allegation beyond a mere balance of probability.



42. In R. G. Patel -vs- Lalji Makanji [1957] E. A the court of Appeal for Eastern Africa stated that;-
- “Allegations of fraud must be strictly proved, although the Standard of proof may not be so heavy as to require proof beyond reasonable doubt. Something more than a mere balance of probability is required.
43. The Objector has not adduced any tangible evidence in support of his allegations of fraud. Although the Objector sought and obtained orders issued on 8th March 2011 authorizing the investigation of the claims of forgery, no report made by the handwriting (forensic) examiner has been produced in court. Thus the allegation of forgery remains unproven.
44. In the circumstances the claims of forgery are dismissed. The fact that the objector did sign the consent dated 12th February 1997 authorizing issuance and confirmation of the Grant has not been controverted. He cannot now seek to renege on that consent.
45. In the case of ALbert Imbuga Kisigwa -vs- Recho Kawai Kisigwa [2000] eKLR Hon Justice stated as follows:-
- “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.” [own emphasis]
46. Based on the above I find that none of the grounds set out in Section 76 for revocation of Grant have been proved. The estate involves several beneficiaries who are all entitled to have the estate finalized.
47. From the evidence of the Objector it is quite apparent that he does not have any real issue with the appointment of the Administrator. The Objector’s real gripe is the manner in which his mother (the Administrator) decided to divide the property known as Muguga/Kanyariri/359. It must be remembered that under the terms of the confirmed Grant the entire estate devolved to the widow, There was no indication that she was to hold these assets ‘in trust’ for the other beneficiaries.
48. The mutation from Annexure ‘LM,-6’ shows that the property known as Muguga/Kanyari/359 was registered in the name of the widow who then proceeded to sub-divide the land amongst her children.
49. Therefore it was the widow who after inheriting the suit property from her late husband decided to subdivide and distribute the same. This sub-division took place way after the estate of the Deceased had been settled by way of confirmation of the Grant.
50. In the circumstances the objector’s grievances over distribution is actually being raised in the wrong estate. The property all devolved to the widow, thus if the objector took issue with the mode of distribution then his complaint ought to be raised under the estate of his late mother. The two estates are separate and distinct. The distribution was done by his mother not under the estate of his late father.
51. The Objector’s claims of forgery have already been dismissed by this court. Indeed this is an extremely old matter in which the Deceased died way back in 1996. The Succession Cause has been alive in court since the year 2004. There is no justification for dragging this case on any longer.
52. Finally I find no merit in this Summons for revocation of Grant. The same is hereby dismissed in its entirety. This being a family matter I make no orders on costs.



DATED IN NAIROBI THIS 14TH DAY OF AUGUST 2024.

MAUREEN A. ODERO

JUDGE

