



In re Estate of Martin Ndunyu Wahome (Deceased) (Succession Cause 459 of 2010) [2024] KEHC 11272 (KLR) (26 September 2024) (Ruling)

Neutral citation: [2024] KEHC 11272 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION CAUSE 459 OF 2010
DKN MAGARE, J
SEPTEMBER 26, 2024**

IN THE MATTER OF THE ESTATE OF MARTIN NDUNYU WAHOME (DECEASED)

BETWEEN

ALICE WANJIRU NDUNYU ADMINISTRATOR

AND

MARTIN MITHAMO NDUNYU 1ST OBJECTOR

LYDIA KABUCHI NDUNYU 2ND OBJECTOR

ANDREW THUKU NDUNYU 3RD OBJECTOR

RULING

1. This ruling is in respect of the Summons for Revocation of Grant dated 22/1/2024 and filed by the Objectors.
2. The Objectors also filed an application dated 11/6/2024 seeking interim restraint on the Administrator from carrying on further transactions with regard to the deceased's estate in Plot No. 1974 Ziwa la Ng'ombe Settlement Scheme (Bombolulu Settlement Scheme). On 25/6/2024, the court stayed the operation of the rectified certificate of confirmation of grant. The issues in the application dated 11/6/24 were consequently settled.
3. The Summons for Revocation of Grant dated 22/1/2024 seeks for the following reliefs:
 - a. Spent
 - b. Spent
 - c. A grant issued to Alice Wanjiru Ndunyu (The Legal Representative of Gabriel Mithamo Ndunyu) made on 27/7/2022 be revoked.



- d. The costs be provided for.
4. The Summons is supported by the affidavit of the Applicant sworn on 22/1/2024 as follows:
 - a. That the Applicants are legal administrators in the estate of Gabriel Mithamo Ndunyu in Nairobi High Court Succession Cause No. 718 of 2017.
 - b. The application leading to substitution of the Administrator herein was made by concealment of a material fact that Alice Wanjiru Ndunyu was an Administrator of the estate of Gabriel Mithamo Ndunyu which was untrue.
 - c. The Administrator has altered the mode of distribution as per the Amended Certificate of Confirmation of Grant dated 2/12/2012.
 - d. The Administrator has already filed application dated 13/12/2023 seeking to authorize the Deputy Registrar of court to sign all relevant documents on behalf of the deceased beneficiaries Patrick Maina Ndunyu and Gabriel Mithamo Ndunyu.
5. The Objectors also filed a further affidavit sworn on 28/6/2024 in response to the Replying Affidavit.
6. The Administrator filed a Relying Affidavit dated 24/6/2024 responding to the application as follows:
 - a. The deceased Gabriel Mithamo Ndunyu was the initial administrator and died in 2017.
 - b. As to Plot No. 1074 Ziwa la Ngombe, it had been distributed jointly to Richard Nguru Ndunyu and Patrick Maina Ndunyu but later, Patrick sold his share to Richard Nguru Ndunyu and therefore the entire plot was redistributed to Richard Nguru Ndunyu.
 - c. The Objectors irregularly obtained a grant to their father's estate in Nairobi High Court Succession No. 718 of 2017 and the same is pending revocation.
 - d. Plot 1974 is the same erroneously quoted as Plot 1074 and the same is Plot 182 after surveying.
 - e. The offer letter of Plot 182 to the late Gabriel was cancelled through letter dated 21/11/2002 issued by the Ministry of Lands.
7. The parties took directions for the Summons to proceed by way of submissions.

Submissions

8. The Objectors filed submissions on 5/7/2024. It was submitted that the Administrator herein had no right in law to appoint herself as the legal representative of the late Gabriel Mithamo. They relied on Section 66 of the *Law of Succession Act*.
9. It was submitted that Plot No. 1974 does not form part of the deceased's estate as it is registered in the name of the late Gabriel Mithamo Ndunyu.
10. Reliance was also placed on *Veronica Njoki Wakagoto (Deceased)* (2013) eKLR where he stated thus: "The effect of [section 45]...is that the property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorized to do so by the Law.
11. I was urged to allow the application.
12. On the part of the Respondent, they filed undated submissions on 24/7/2024. It was their submission that there was no fraud or concealment of material fact on the part of the administrator who acted in good faith.



13. They submitted further that the Objectors had irregularly obtained the grant in Nairobi High Court Succession No. 718 of 2017}} and the same was pending revocation. They however did not cite any authorities.

Analysis

14. The issue before me for determination is whether there is any lawful ground on which to revoke the grant of letters of administration herein.
15. The grounds for revocation or annulment of grant of Letters of Administration are set out in Section 76 of the *Law of Succession* 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) 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.

16. The power to seek revocation of the grants and for this court to revoke a grant is stipulated in the first part of section 76 of the *Law of Succession Act* as doth:

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.

17. The main ground cited by the Applicant for seeking revocation of the grant herein is that confirmation of the grant was obtained through concealment of material facts, namely that Alice Wanjiru Ndunyu was an administrator of the estate of Gabriel Mithamo Ndunyu which was untrue.
18. On the other hand, the Respondent contends that there was no concealment of facts and the application leading to substitution of the administrator was allowed following consent by the beneficiaries.



19. 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:

“ 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.”

20. The Objectors’ case on concealment of material facts against the Administrator is premised on the reason that Plot No. Iriaini/Kairia/919 was to be divided into 4 equal portions each to Gabriel, Patrick, Alice and Veronica but the administrator has irregularly assigned the said plot to Patrick and Richard only.

21. Similarly, it is contended that Plot No. Iriaini/Kairi/1607 was to be subdivided into five equal shares to Gabriel, Richard, Patrick, Alice and Veronica but to the contrary, the administrator has proposed it to be given to Gabriel, Alice, and Alice as trustee of her siblings.

22. It is also contended that the administrator wrongly described Plot No. 1974 as 1074 to further the mischief and that this property was Gabriel Mithamo Ndunyu’s property.

23. The administrator on the other hand maintained that the family members agreed and minutes were recorded during the lifetime of Gabriel Mithamo Ndunyu to the effect that the said two parcels of land would be allocated such that each person gets a half of an acre instead of a quarter thereof. This is described to have been motivated by the need for economic sense.

24. As to the Objectors’ contention that the Administrator concealed information, the Administrator herein brought the application dated 1/4/2022 seeking to substitute the late Gabriel Mithamo Ndunyu for reason of his demise which was allowed by this court. I note that the Objectors or none of them has sought to be a co-administrator, or challenged the temporary grant ad litem even though they seek to revoke the grant issued on 27/7/2022. The Administrator herein was clearly not seeking to be substituted as a legal representative of Gabriel Mithamo Ndunyu. Her role as administrator was to be limited to the estate of her deceased father only substituting the Objectors’ deceased father who was the Administrator. I find no prejudice that will be occasioned to the Objectors merely by the reason that the administrator herein remains Alice Wanjiru Ndunyu.

25. In the case of *Albert Imbuga Kisigwa v Recho Kawai Kisigwa*, Succession Cause No.158 of 2000, the Court stated as follows:

“(13) 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.”



26. Similarly, in animating the discretionary powers of the court in the case of *Ramakant Rai vs. Madan Rai*, Cr LJ 2004 SC 36, the Supreme Court of India rendered itself thus on the issue of judicial discretion:

“Judicial discretion is canalized authority not arbitrary eccentricity. Cardozo, with elegant accuracy, has observed:

“The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to ‘the primordial necessity of order in the social life.’ Wide enough in all conscience is the field of discretion that remains.”

27. The Objectors maintain that they did not give their consent to the proceedings leading to the variations to the grant made on 27/7/2022 and were not aware of these proceedings as they were not notified of the same. Rule 26 of the *Probate and Administration Rules*, states that;

- (1) Letters of Administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the Applicant.
- (2) An Application for a grant where the Applicant is entitled in a degree equal to or lower than that of any other person shall in default of renunciation or written consent in form 38 or 39 by all persons so entitled in equality or priority be supported by an affidavit of the applicant and such other evidence as the court may require.

28. Section 66 of the *Law of Succession Act*, Cap 160, Laws of Kenya provides that: -

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—

- (a) surviving spouse or spouses, with or without association of other beneficiaries;
- (b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

29. In the case of *Charles Mutua M'anyoro vs. Maria Gatiria* [2009] eKLR it was held that:

“...in mandatory language, the proviso to section 71 of the *Law of Succession Act* enjoins the court, in case of intestacy, to confirm the grant only if it is satisfied as to the respective identities and shares of all persons beneficially entitled to the estate. Another safeguard in ensuring that only the deceased person’s dependants benefit from the estate is in Rule 40(3) of the *Probate and Administration Rules* which requires that before a grant can be confirmed the particulars of the dependants must be disclosed...It is imperative under the rules that all the dependants be in attendance during the hearing of the application for confirmation save where the dependants have signed a consent in writing. See Rule 40(8).”



30. The same position was restated *In re Estate of Abdulkarim Chatur Popat (Deceased)* [2019] eKLR where the court pronounced itself as follows:

“Having found that the applicants therein were beneficiaries of the estate of the deceased, their consent was necessary as was their participation in the confirmation proceedings.”

31. As was also held in *In re Estate of Mwangi Komo Rubangi (Deceased)* [2015] eKLR the court stated as follows:

An application to redistribute the estate or to vary the distribution is really an application for review of the orders on the confirmation of the grant. It should be handled in much the same way as a confirmation application. The other parties or survivors of the deceased must concur to the redistribution or the changes being proposed. It is not something that can be done ex parte.

32. It therefore follows that the consent of all the beneficiaries to the confirmation of grant is required before the Grant can be confirmed. In this case, Gabriel Mithamo Ndunyu was deceased. The survivors of the said deceased persons were clearly not party to the consent. However, the court in deciding whether or not to revoke a grant must take into account all the relevant facts including the prejudice, if any, that was occasioned by the failure to comply with Section 76 of the Act. It therefore follows that the mere fact that the conditions under Section 76 of the Act exist, it does not necessarily follow that the grant must be revoked.

33. It is my considered view that the Objectors, in their further affidavit sworn on 28/6/2024 did not make any rebuttal or comment on the minutes dated 17/12/2016 as well as the Sale Agreement dated 7/2/2022. The minutes were to the effect that the entire family members being the beneficiaries of the late Martin Ndunyu Wahome agreed to make variations among others on the shares to the Plot No Iriaini/Kairi/919 and Plot Iriaini/Kairi/1607. The meeting was held during the lifetime and in the presence of Gabriel Mithamo Ndunyu, now deceased.

34. On the other hand, the sale agreement was to the effect that Patrick Maina Ndunyu sold his share in Plot No. 1074 to Richard Nguru Ndunyu. Therefore, to this court, in the absence of any material to support the objection, I am unable to disregard the intention of the beneficiaries of the estate of the late Martin Ndunyu Wahome contained in the minutes as well as the intention of the parties to the agreement dated 7/2/2022. The Objectors' late father was in the meeting and in fact signed the minutes to confirm that he acceded to the deliberations as agreed. To hold otherwise would be tantamount to scuttling well settled matters especially where some of the parties are now deceased and their intentions are only to be derived from such documents.

35. On the issues raised on the Ziwa la Ngombe Scheme property, this court notes that it was the Objectors to avail material from which it would be inferred that Plot No. 1974 was not part of the estate of Martin Ndunyu Wahome. The letter dated 15/2/2002 was a mere offer and there was need to prove that the offer was accepted and certificate of title issued. Similarly, the letter dated 21/11/2002 and relied upon by the Administrator was an offer. The two offers were valid for 90 days. The court is thus unable to find in favour of the Objectors that Plot No. 1974 was property of the late Gabriel Mithamo and not part of the deceased Martin Ndunyu Wahome. The issues as to the description of the properties are not matters for this court's determination in these proceedings. The parties should address them through relevant fora.

36. In my view where no prejudice has been alleged and the justice of the case tilts against the interference with these proceedings, the Court ought not to revoke the grant. It is not in all cases where consent is



proved to have not been obtained from all beneficiaries that Grants must as a condition be revoked. The Objectors have not proved that they have been disinherited or that any of the property granted to their late father has been unlawfully taken away vide the Grant made on 27/7/2022 that is now sought to be revoked. The variations in the sizes of the said property were explained in the minutes of the meeting of the beneficiaries and appear to have been premised on the need to increase the sizes of the shares held by the beneficiaries. It was in good faith and has not been proved to have reduced or adversely affected the late Gabriel Mithamo Ndunyu's inheritance. As held by Mwita, J, *Albert Imbuga Kisigwa vs. Recho Kawai Kisigwa*, Succession Cause No.158 of 2000:

“Power to revoke a grant is 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 the beneficiaries entitled to the deceased's estate and ensure that the action taken will be for the interests of justice.”

37. The net effect of the foregoing is that I find no basis to revoke the grant made on 27/7/2022 as prayed in the Objectors' application. The process of obtaining the impugned Grant was not defective nor attended by misrepresentation and concealment of matters from the court.

Determination

38. In the upshot, I make the following orders in the interest of justice:

- i. The Notice of Motion application dated 22/1/2024 is dismissed in limine.
- ii. For the avoidance of doubt, the application dated 11/6/2024 is marked as spent.
- iii. Each party shall bear own costs.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 26TH DAY OF SEPTEMBER, 2024.

RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

Represented by: -

Mercy Kabethi & Co. Advocates for the Administrator/Respondent

Faith Akoth Oketch & Co. Advocates for the Objectors/Applicants

Court Assistant – Jedidah

