



Macharia & 3 others v Mbaa & another; Gachuhi (Administrator) (Miscellaneous Application 1 of 2023) [2024] KEHC 13498 (KLR) (30 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13498 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
MISCELLANEOUS APPLICATION 1 OF 2023
CW GITHUA, J
OCTOBER 30, 2024**

BETWEEN

**ELIZAPHAN MACHARIA 1ST APPLICANT
NELIUS NYAMBURA 2ND APPLICANT
BENJAMINI MBAA MACHARIA 3RD APPLICANT
BETH MUGURU 4TH APPLICANT**

AND

**EPHANTUS MAINA MBAA 1ST RESPONDENT
SAMULE MUTHOGA MBAA 2ND RESPONDENT**

AND

JANE WANJIKU GACHUHI ADMINISTRATOR

JUDGMENT

1. What falls for this court's determination is the summons for revocation of grant dated 24th March 2023. Prayers 1 to 4 of the summons sought interim orders and are already spent. The prayers pending determination by this court seek the following orders:
 - i. That the court be pleased to revoke the grant of letters of administration intestate dated 6th March 2007 and annul the certificate of confirmation of grant dated 31st August 2009 issued in Succession Cause No 175 of 2006 in the Principal Magistrates Court at Murang'a, together with the schedule of distribution listing the respondents as the beneficiaries of the estate of Jeremiah Macharia Mbaa (deceased);



- ii. That this honourable court be pleased to direct that a new grant of letters of administration intestate be issued to Elizaphan Macharia, the 1st applicant herein and Jane Wanjiku Gichuhi, the administrator;
 - iii. That this honourable court be pleased to cancel the validity of the new title deed dated 10th February 2023 and reinstate the validity of the original title deed dated 3rd March 1975 registered in the name of the deceased;
 - iv. That this court be pleased to issue any other orders as the court may deem fit and just to grant in the circumstances of this case to prevent intermeddling and division of the estate of Jeremiah Macharia Mbaa (deceased) by the respondents;
 - v. That costs of this application be provided for.
2. The brief background to the summons is that the deceased Jeremiah Macharia Mbaa died intestate on 27th May 1990. He was survived by his widow, Jane Wanjiku Gachuhi (the administrator) and four children who are the applicants herein. The two respondents Ephantus Maina Mbaa and Samuel Muthoga Mbaa are his brothers.
 3. According to the record, the deceased's estate comprised of one parcel of land known as LOC. 13/ Gitugi/1451 (hereinafter the suit land). The grounds anchoring the summons and the depositions made in the supporting affidavit sworn by the 1st applicant on his own behalf and on behalf of the 2nd - 4th applicants reveals that upon the demise of their father, with the applicants' consent, their mother petitioned for grant of letters of administration for the deceased's Estate in Murang'a Principal Magistrate's Court Succession Cause No. 175 of 2006. The grant was issued on 6th March 2007.
 4. It is the applicants' case that after the administrator applied for confirmation of the said grant naming them as heirs to their late father's Estate, their late paternal grandmother filed an affidavit of protest proposing a different mode of distribution; that the proposed distribution excluded them from sharing in their father's estate and included only the respondents; that the resultant certificate of confirmation of grant dated 31st August 2009 was obtained by means of an untrue allegation that the suit land was owned by their paternal grandfather and had been registered in the deceased's name as trustee for his late mother and his brothers (the respondents).
 5. Further, the applicants contended that the respondents used the confirmed grant to register themselves as proprietors of the suit land as shown in the new title deed dated 10th February 2023; that they have proceeded to subdivide the suit land into four portions and that together with their mother (the Administrator), they face the risk of eviction from the suit land yet they are the rightful beneficiaries of the Estate being the deceased's children; that the respondents have threatened to demolish their permanent house constructed on the suit land which if actualized will render them homeless.
 6. The administrator who in my view ought to have been enjoined in the proceedings as the principal respondent given that she is the one who was charged with the responsibility of administering the deceased's Estate, swore a replying affidavit dated 4th May 2023 in which she supported the positions taken by the applicants. She in a nutshell deposed that the proceedings leading to confirmation of the grant were defective as after the filing of a protest by her mother in law, she was from that point not involved in the proceedings; that the respondents and their mother proceeded to have the grant confirmed in her name without her involvement and had themselves listed as beneficiaries to the estate excluding the applicants who ranked higher in priority than the respondents as the deceased's beneficiaries.



7. The administrator further deposed that the confirmation of grant was based on false information that the suit land belonged to the deceased's late father whereas the deceased had individually bought it from one Nyawira Warui in 1975; that the land belonged to the deceased's Estate and ought to have been inherited by the applicants; that as the deceased's widow, she was entitled to a life interest in the whole residue of the deceased's net intestate estate.

8. The Respondents contested the summons through grounds of opposition dated 26th April 2023 and replying affidavits sworn by the 1st and 2nd Respondents on 17th April 2023 and 9th May 2023 respectively.

In the grounds of opposition, the Respondents mainly asserted that the summons was a sham; that it was filed in bad faith in order to punish them and amounted to an abuse of the court process; that the summons failed to meet the conditions set in Section 76 of the *Law of Succession Act* and that in any event, it had been filed in the wrong forum as it ought to have been filed in the Magistrate's Court as required by the Magistrate's Court Act of 2015; that the summons was thus incompetent and ought to be struck out.

9. In his replying affidavit, the 1st Respondent averred that the applicants were fully represented by their mother in the succession proceedings and that the suit land was subdivided into four equal portions by consent of the parties.

Further, he contended that fourteen years after confirmation of the grant, the administrator was using her children to revoke the grant; that if aggrieved, the petitioner should have appealed against the lower court's decision.

10. On his part, the 2nd Respondent deposed that the applicants were actively involved in the succession proceedings leading to the confirmation of grant and if they were dissatisfied, they should have appealed; that the administrator cannot seek to revoke her own grant; that filing an application for revocation of grant in the High court instead of doing so in the lower court which issued the grant amounted to an abuse of the court process and the application ought to be dismissed.

11. The court record shows that in response to the replying affidavits, the 2nd and 4th applicants swore further affidavits dated 4th May 2023 in which they denied the Respondents claim that they were aware of the Succession cause and that they were actively involved in it. They averred that the proceedings leading to confirmation of grant were defective as they did not consent to the issuance of grant of representation to their mother nor did they or their mother consent to the schedule of distribution before the grant was confirmed.

12. The summons was prosecuted by way of written submissions. Those of the applicants were filed on 29th July 2023 by the firm of Muma & Kanjama Advocates while the firm of Kimwere Josephat & Company Advocates filed submissions on behalf of the Respondents on 20th February 2024. The written submissions were highlighted before me on 16th April 2024 by learned counsel Mr. Kanjama SC and Mr. Khasogo for the applicants and the Administrator while Mr. Kimwere represented the Respondents.

13. I have carefully considered the summons, the affidavits on record and the rival written and oral submissions made on behalf of the parties as well as all the authorities cited by the applicants.

I have also read the proceedings in the lower court that culminated in the issuance of the impugned certificate of confirmation of grant.

Having done so, I find that two main issues emerge for my determination which are;



- i. Whether this court has jurisdiction to hear and determine the instant summons filed by the applicants.
 - ii. Whether the applicants have demonstrated that they are deserving of the orders sought.
14. Regarding the first issue, the Respondents in their grounds of opposition dated 26th April 2023 and in their replying affidavits challenged this court's jurisdiction to determine the applicant's summons contending that the summons ought to have been filed in the lower court where the grant of representation to the deceased's Estate was issued and later confirmed. This contention was denied by the applicants who in their submissions maintained that the summons was properly filed before this court given that under Article 165 (6) of *the Constitution*, this court has supervisory jurisdiction over subordinate courts and in the exercise of that jurisdiction, the court had power to call for the record of any proceedings before the subordinate court and make any order or direction it considered appropriate to ensure fair administration of justice.
15. The applicants also relied on Section 47 of the *Law of Succession Act* which donates to this court inherent powers to hear any application and to determine any dispute under the *Law of Succession Act* as well Rule 44 of the Probate and Administration Rules which gives the High court exclusive jurisdiction to determine applications for revocation or annulment of grant.
16. Having considered the positions taken by the parties on the issue of this court's jurisdiction to determine the current summons, I take the following view of the matter;
17. It is not disputed that the grant of representation to the deceased's Estate and the impugned certificate of confirmation of grant were issued by the lower court. I am also aware that Section 48 of the *Law of Succession Act* which hitherto prohibited subordinate courts from entertaining summons for revocation of grants was amended by Section 23 of the Magistrate's Court Act of 2015. The amendment conferred jurisdiction on the Magistrate's Court to hear and determine any dispute under the *Law of Succession Act* which included applications for revocation of grant. The jurisdiction was however subject to the value of the Estate in question which should not exceed the court's pecuniary jurisdiction.
18. That said, it is my considered view that the above amendment did not oust the jurisdiction of the High Court to hear and determine any dispute under the *Law of Succession Act* (the Act).

The jurisdiction of this court conferred under Section 47 of the Act is very wide in scope and cannot be narrowly interpreted to exclude disputes arising from Succession proceedings in the lower court.

In addition, the amendment did not oust this court's supervisory jurisdiction over subordinate courts donated by Article 165 (6) of *the Constitution* of Kenya 2010.
19. Given the foregoing, it is my finding that this court has jurisdiction to hear and determine the instant summons. The summons is therefore properly filed before this court.
20. Having resolved the issue of jurisdiction, I now turn to consider whether the application meets the threshold for revocation of grant and annulment of the certificate for confirmation of grant dated 31st August, 2009.
21. The law governing revocation of grants is set out in Section 76 of the 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) 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.”

22. The court in *re Estate of Prisca Ong'ayo Nande (Deceased) (2020) ekLR* which is cited by the applicants in their submissions interpreted Section 76 above and expounded on the grounds for revocation of grant as follows;

“Under section 76, a court may revoke a grant so long as the grounds listed above are disclosed, either on its own motion or on the application of a party. A grant of letters of administration may be revoked on three general grounds. The first is where the process of obtaining the grant was attended by problems. The first would be where the process was defective, either because some mandatory procedural step was omitted, or the person applying for representation was not competent or suitable for appointment....it could also be that the process was marred by fraud and misrepresentation of concealment of matter, such as where some survivors are not disclosed or the applicant lies that he is a survivor when he is not among other reasons.”

23. In this case, it is not disputed that the applicants are children of the deceased and that they were of age at the time their mother, who was the deceased’s widow petitioned for grant of letters of administration of the deceased’s estate. it is also not disputed that

the applicants were not listed as beneficiaries to the Estate in the certificate of confirmation of grant.

24. Although the applicants have maintained in their submissions that the proceedings leading to issuance of the grant were defective since they did not consent to the petition for the initial grant as required by Rule 26 (a) and (2) of the Probate and Administration Rules (P & A Rules), the 1st Applicant who swore the affidavit in support of the summons on his own behalf and on behalf of the other applicants admitted in paragraph 5 thereof that the applicants consented to filing of the grant by their mother.

25. Further, even if this court were to accept the 2nd applicants claim that she did not consent to the issuance of the grant which was probably true considering that the consent dated 1st August 2006 was only executed by the 1st and 4th Applicants, it is my opinion that failure of the administrator to obtain



consent of the other two applicants did not render the proceedings defective since the applicants, being children of the deceased, were not entitled to a grant of their father's Estate in the same degree or in priority to their mother who was his widow.

26. Section 66 of the *Law of Succession Act* shows clearly that their mother who petitioned for and obtained the grant ranked higher in priority to the applicants. Rule 26 (1) of the P&A Rules provides that letters of administration shall not be granted to an applicant without notice to every other person entitled in the same degree or in priority to the applicant. Rule 26 (1) was thus not applicable to this case.
27. In any event, Rule 27 P&A Rules makes it clear that obtaining of consents envisaged in Rule 26 was not a mandatory requirement. The said rule states as follows:

“Nothing in Rule 26 shall operate to prevent a grant being made to any person to whom a grant may be made, or may be required to be made, under the Act”

In view of the foregoing, it is my finding that the grant herein was properly issued to the administrator in accordance with the law.

28. The above finding does not however resolve all the issues in controversy in this matter. In addition to impugning the initial grant, the applicant's challenged validity of the proceedings leading to confirmation of grant claiming that they were defective since together with the administrator, they were not involved in the process; that the confirmed grant was obtained by means of an untrue allegation of fact that the suit land belonged to their grandfather whereas there was evidence that it was registered in the deceased's name.
29. Having read the record of the lower court, I have noted that after the administrator filed summons for confirmation of grant, Ms Nyambura Mbaa, the deceased's mother, (her mother in law) filed an affidavit of protest contesting the mode of distribution of the deceased's Estate as proposed in the summons. In the summons, the administrator had deposed that the suit land was the only property constituting the Estate and proposed that the same be transmitted to her as the sole proprietor.
30. In her affidavit of protest, Nyambura Mbaa (now deceased) asserted that she had bought the suit land together with her late husband in 1975 and they had it registered in the deceased's name as trustee for her and his two siblings, the respondents in this case.

She made an alternative proposal that the land be subdivided into four equal shares which should be allocated to her, the administrator and the two respondents.

31. In effect, the affidavit of protest contested absolute ownership of the suit land by the deceased's Estate by asserting that the land was subject to a customary trust held by the deceased for the benefit of the protestor and the respondents.

Rule 41 (3) of the P&A Rules requires that where a question as to the identity or ownership of property of an estate arises in a succession cause, such questions must be resolved in the appropriate court before such property is distributed.

32. In this case, however, it was not necessary for the trial court to stay confirmation of grant in order to have the issue of whether or not the suit land was subject to a customary trust adjudicated upon in an appropriate court since the issue was resolved by the parties themselves. The record shows that the protestor and the administrator resolved the issue by recording a consent to the effect that the suit land should be shared by the protestor, the administrator and the two respondents in equal shares. The consent was adopted by the court on 12th May 2009. The grant issued to the administrator was



subsequently confirmed on the basis of this consent and a certificate of confirmation of grant was issued on 31st August 2009.

33. It is noteworthy that despite having entered into the aforesaid consent, the administrator maintained in her replying affidavit that she was not involved in the process leading to confirmation of grant and that the respondents and their mother had themselves listed as beneficiaries to her husband's Estate without her knowledge or involvement.

This clearly shows that the administrator was dishonest and was guilty of misrepresentation of facts to this court.

34. It is pertinent to note that according to the trial courts record, prior to petitioning for grant of representation to the deceased's Estate, the administrator had taken out citations against the Respondents and their mother seeking to have them compelled to petition for grant of administration to the deceased's estate. In the affidavit supporting the citation sworn on 1st August 2006, the administrator deposed at paragraph 2 that her late husband was survived by the Respondents and their mother and that though they were entitled to administer the deceased's estate, they had refused to take out letters of administration.

35. The record does not show whether the citation was ever prosecuted but it does show that when petitioning for the grant, the administrator listed the Respondents and their mother as beneficiaries to the deceased's estate.

36. The above recognition by the administrator that the Respondents and their mother were among the beneficiaries who survived the deceased was in my view an acknowledgement that they had beneficial interest in the suit land. This must be what led the administrator to enter into the consent that led to confirmation of the grant on the terms stated in the certificate of confirmation of grant dated 31st August 2009.

37. The applicants and the administrator made no reference to the said consent and acted as if the same did not exist. The administrator did not challenge its validity and did not claim that the same was subsequently varied or set aside. As stated earlier, the applicants did not disclose existence of the consent and they did not pray that the same be set aside. But even if they did, it is trite that a consent which had been adopted as an order of the court can only be set aside or varied on grounds of fraud, collusion, illegality or misrepresentation of facts.

38. There is a long line of authorities which state the circumstances under which a consent order or Judgment can be set aside. It will suffice for purposes of this judgement to cite only one of them.

In Kenya Commercial Bank Ltd V Benjoh Amalgamated Ltd & Another (1998) eKLR, the Court of Appeal cited with approval the case of Brooke Bond Liebig(T) limited V Mallya[1975] EA 266 and stated as follows:

'prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court.... or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.'

The applicants have not established any of the above grounds that would warrant setting aside of the above consent.



39. From the material placed before me, I am satisfied that the applicants have not demonstrated that the proceedings leading to confirmation of the grant were defective in substance or that the grant was procured by means of an untrue allegation.
40. The applicants claim that they were disinherited since they were not included in the schedule of distribution cannot be true since the administrator was allocated a $\frac{1}{4}$ share of the land which she acknowledged by executing the aforesaid consent that it was the portion that the estate of the deceased was entitled to which will eventually devolve to the applicants since by virtue of Section 35 of the [Law of Succession Act](#), she only had a life interest in the deceased's net estate.
41. For all the foregoing reasons, I have come to the inevitable conclusion that the applicants have failed to establish any of the grounds stipulated in Section 76 of the [Law of Succession Act](#) that would warrant revocation of the grant issued to the administrator by the lower court on 6th March 2009 which was confirmed on 12th May 2009. I therefore find no reason to revoke the said grant or to cancel the certificate of confirmation of grant dated 31st August 2009.
42. In the premises, I find no basis upon which I can grant any of the orders sought in the summons dated 24th March 2023 including an order for cancellation of the title dated 10th February 2023 which the applicants strongly argued for in their submissions.
43. That said, I find that it is not specifically disputed that the respondents have been utilizing portions of the suit land since 1993. The 4th applicant in her further affidavit only generally denied that the Respondents owned the coffee plantation in the suit land but did not deny that the Respondents have been carrying out farming activities on portions of the suit land.
44. I have also noted that the applicants claim that they have constructed a permanent house on the suit land which serves as their family home has not been controverted by the respondents. The applicants have also alleged that the said house was at risk of being demolished if the subdivision initiated by the applicants to carve out their respective portions of the suit land was to continue.
45. Given the foregoing, in the interest of resolving the dispute between the parties in the most fair and just manner, I hereby invoke the inherent powers of this court bestowed under Section 47 of the [Law of succession Act](#) and Rule 73 of the P & A Rules and hereby direct that any subdivision of the suit land meant to carve out the share allocated to each of the parties herein shall be aligned to the portions currently occupied or utilized by the administrator and the Respondents.
46. The upshot of this ruling is that the summons dated 24th March 2024 lacks merit and it is hereby dismissed.
47. On costs, it is trite that costs follow the event but are awarded at the discretion of the court. This being a family matter, the best order that commends itself to me is that each party shall bear its own costs.
48. It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 30TH DAY OF OCTOBER 2024.

HON. C.W. GITHUA

JUDGE

In the presence of:

Ms. Susan Waiganjo, Court Assistant.



No appearance by the applicants

No Appearance by the Respondents

