



**In re Estate of Ibrahim Afundi Limozi (Deceased) (Succession Cause 39 of 1997) [2024] KEHC 13760 (KLR) (29 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13760 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
SUCCESSION CAUSE 39 OF 1997  
SC CHIRCHIR, J  
OCTOBER 29, 2024**

**IN THE MATTER OF THE ESTATE OF IBRAHIM AFUNDI LIMOZI-(DECEASED)**

**BETWEEN**

**NANCY UNDISA AFUNDI ..... OBJECTOR**

**AND**

**FESTUS AFUNDI ..... PETITIONER**

**JUDGMENT**

1. These proceedings relate to the Estate of Ibrahim Afundi Limonzi who died on 21<sup>st</sup> August 1986. His property comprised of Kakamega/Lumakanda/147.
2. The petitioner/ respondent applied for letters of administration intestate which was issued on 22<sup>nd</sup> September 1998 and confirmed on 12<sup>th</sup> February 1999. The entire property went to him.
3. On 28<sup>th</sup> September 2022, the Applicant/ objector filed for summons of revocation of the grant. She has further prayed that upon the grant being revoked, the registration of the sub- division of land parcel No. Kakamega/ Lumakanda/147, being sub- divison Nos. 5789-5799 be cancelled and the land revert back to the name of the deceased. She finally prays that the estate of the deceased be distributed afresh and each beneficiary shares be determined by the court.
4. The Application is premised on grounds that the petitioner applied for the letters of administration without obtaining the consent of the other beneficiaries; that despite being a daughter of the deceased, she was excluded from the succession proceedings and the sharing of the deceased's property. She further states that in the chief's letter in support for petition for the grant, her name was deliberately left out ; that she resides in the suit property and she has nowhere to go if she is evicted from the suit property;



5. The Applicant further states that the grant was obtained through concealment of material facts and therefore it should be revoked.
6. The petitioner/ respondent filed a replying affidavit dated 18<sup>th</sup> January 2023. He stated that he could not confirm if the Applicant is the child of the deceased; that all he knows is that the Applicant is the daughter of one Timinah Ndavola Afundi who had earlier approached the court seeking for revocation of grant but which Application was dismissed; and that her Appeal to the court of Appeal was equally dismissed .
7. According to the petitioner the mother of the Applicant never mentioned the applicant anywhere during the hearing of her own Application.
8. The petitioner has also questioned the sincerity of the Applicant's move considering that it has been 11 years since her mother's case was dismissed by the court of Appeal.
9. The respondent believes that this is an attempt by the Applicant's mother to come back to court on a second attempt while riding on his daughter.
10. The summons proceeded by way of a viva voce evidence.

### **The Applicant's case**

11. Pw1 was the Applicant. She told the court that the deceased was her father , her mother was Timnah Ndavola Afundi and the respondent was her half- brother. .She further stated that she had agreed with the respondent that the respondent was going to give her a portion of the land; that she resides in the land and she wants her share of the estate.
12. On cross- examination, She admitted that she knew about the earlier Application that her mother had filed, and she did not know the outcome of the said Application; that it is true that she was never listed by her mother as a beneficiary but her brother Bernard did appear in the list . She further testified that she resides in the portion of the suit property that had been allocated to her brother Bernard. She told the court that her mother is alive , but she is not her witness. On being questioned as to why her mother did not list her as a beneficiary she stated that her mother simply went as per the list that had ben prepared by the Respondent herein. She further told the court that when the succession proceedings were going on, she was still young and was in school, but was 44 years when her mother was seeking for revocation of the grant. She was aware about the outcome of her mother's Application both in the high court and the court of Appeal. She admitted that it took her 7 years from the time the court of Appeal decided on her mother's case for her to move the court in respect of the present Application.
13. On re-examination, she told the court that she took so long to approach the court because the respondent had promised her a share of the Land.
14. PW2 adopted his written statement as his evidence in chief. In the statement he states that he was the eldest son of the deceased. He states that the Applicant is a child of the deceased , but was left out of the distribution. On cross- examination , he told the court that he knew the Applicant , his bother Bernard and their mother Timinah.
15. PW3 also adopted his written statement as his evidence -in- chief. In the statement , he states that the deceased was his father and he was the only child of his mother, one Risper Kagea. He knew both the Applicant and respondent as children of the deceased. This witness was not cross- examined.
16. PW5 was one sarah Ayuma. She too adopted her written statement as her evidence- in -chief . She recorded that the Applicant was her sister-in-law; that she married to the family in the year 1984. She



knows the Applicant as the daughter of the deceased. In cross- examination, she reiterated the facts as recorded in her written statement.

### **The respondent's case**

17. DW1 was the Respondent/Petitioner. He adopted his Affidavit sworn on 18<sup>th</sup> January 2023. as his evidence- in- chief and which I have referred to earlier on in this judgment.
18. On cross- examination, he told the court that the deceased was his father and that he had six wives; that he came to know the Applicant after the deceased had died. .He further stated that he knew Bernard who is also the child of Timina. That The Applicant's mother separated with the deceased , in 1965, but by then they had gotten Bernard. He further stated that the Applicant's mother later sent Bernard to stay with the deceased.
19. He denied listing himself as the only beneficiary when he filed succession proceedings in 1999
20. Though the parties had told the court that they had filed submissions, none was available in the file as at the time of this Ruling.

### **Determination**

21. It is necessary to first put into perspective the relationship of the parties herein. There is common ground that the deceased was polygamous man of 6 or 8 wives. One of those wives was Timinah Ndavola Afundi. Timnah is the mother of the Applicant herein and one Bernard Afundi. The respondent is the son of the deceased and step- son of Timinah. It is accepted by the respondent that Bernard too is the son of the deceased.
22. The respondent took out the letters of Administration intestate upon the demise of the deceased .During the confirmation of Grant, Bernard was given a portion of 0.85 hectares from parcel No. Kakamega / Lumakanda/147, being the only property of the Estate.
23. On 28 July 2010, the Applicant's mother, Timinah filed for revocation of grant. Her grounds was that the succession proceedings were commenced without her consent, as the lawful wife of the deceased , and the distribution has left out some of the beneficiaries. She did not name the particular beneficiaries in her pleadings. In the end , the court dismissed her Application and ordered for distribution as per the respondent's proposal. Those who benefited included her son Bernard. Her Appeal to the court of Appeal was equally dismissed. The court of Appeal decision was rendered on 25<sup>th</sup> September 2015.
24. The Applicant herein has now brought her own claim. She states that she is a child of the deceased. Her consent was never sought when the petition was filed and that she was left out of distribution. She has further told the court that she came to know that she had been left out sometimes in the year 2013, but the Respondent assured her that he will give her a share of the property.
25. On the other hand the Respondent states that he does not know if the Applicant is a child of the deceased; that he only came to know her after the demise of the deceased; that when the deceased separated with the Applicant's mother , she only had one child, and that was Bernard.
26. The Law on revocation is set out under Section 76 of the *Law of Succession Act*. The section 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) .....
27. The above grounds were reiterated in the case of *Jamleck Maina Njoroge v Mary Wanjiru Mwangi* (2015) eKLR where the court discussed circumstances under which a grant may be revoked. The court observed:

“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.”

28. It is now settled that failure to obtain consent from those who rank higher or equal to an Applicant seeking to administer the deceased’s estate or to name them as beneficiaries amount to concealment of material facts in terms of section 76 and therefore is a ground for revoking the grant. In re estate of Wahome Mwenje Ngonoro (2016) eKLR it was held: -

“It is trite law that if a 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 fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently, such a grant can be revoked or annulled. The law permits the court to revoke a grant on its own motion or on application by an interested person.

The evidently deliberate failure by the Respondent to involve the applicants at the time of filing these proceedings, failing to list them among the beneficiaries or seek their consent or renunciation was in view in bad faith and amounts to concealment of material facts” ( Emphasis added).

29. In the present case the fact that the Applicant’s consent was not sought is not contested. The fact that she was not given a share of the suit property is admitted. It is her paternity that is under contest.
30. Thus before delving into whether she was entitled to a share or not it is imperative to establish whether indeed she was the child of the deceased. As always, he who alleges must prove.
31. It was incumbent upon the Applicant to fully address the question of her paternity. She must have noted in the Respondent’s Affidavit that her relationship to the deceased had been questioned and the onus was on her to prove that she was a heir of the deceased . The Applicant called three witnesses to back up her testimony , but there was no single document to support the claims of paternity. There was no birth certificate, no baptismal card , or any document to show her relationship to the deceased.
32. Further she told the court that her mother was alive. It is this mother whose claim to the estate had earlier been dismissed by both the high court and the court of Appeal. One of the observations made by the court of Appeal is that the Applicant’s mother, having been divorced by the deceased, placed no obligation on the part of the respondent to seek her consent when petitioning for the Grant. The



Applicant's mother would have been a more persuasive witness on the Applicant's paternity. Her brother Bernard's testimony too would have been more persuasive. Both of these blood, and closet relatives did not testify.

33. Further the respondent told the court that when the Applicant's mother separated with the deceased, she had only one child, namely Bernard, and he first saw the Applicant herein after the demise of the deceased. Faced with these allegation, the Applicant's mother would have been the one to rebut these allegations.
34. It is also curious that when her mother challenged the distribution of the estate, she did not refer to the Applicant as one of the beneficiaries .
35. The Applicant admitted that she was aware of her mother's claim, including the decision of the court of Appeal. That decision was made in the year 2015, yet it took the Applicant 5 years to bring her own claim. Whereas I entirely agree with her submission that she has a right to bring her claim, separate from that of her mother, she needed to discharge her burden of proving her paternity. This prove was particularly important in what was implied by the respondent's testimony; - that is to the effect that the Applicant's mother only had her brother Bernard when she separated with the deceased.
36. Am not satisfied that the Applicant has proved that the deceased was her father. Consequently her claim to consent and being included as a beneficiary becomes immaterial
37. This court therefore has no ground to revoke the grant nor grant the other prayers sought in the Application.
38. The summons dated 28<sup>th</sup> September 2022 is hereby dismissed.
39. Each party to meet their own costs.

**DATED SIGNED AND DELIVERED AT KAKAMEGA THIS 29<sup>TH</sup> DAY OF OCTOBER 2024.**

**S.CHIRCHIR**

**JUDGE**

**In the presence of:**

GodwinLuyundi- Court Assistant

Mr. Magina for the respondent.

