



**In re Estate of Luvandale Mwikhali (Deceased) (Succession Appeal
E003 of 2023) [2024] KEHC 14915 (KLR) (25 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14915 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
SUCCESSION APPEAL E003 OF 2023
JN KAMAU, J
NOVEMBER 25, 2024**

IN THE MATTER OF THE ESTATE OF LUVANDELE MWIKHALI (DECEASED)

BETWEEN

WYCLIFF LUVANDELE 1ST APPELLANT

FRANCIS SEVENI 2ND APPELLANT

AND

PHILIP SHIKALE LUVANDELE RESPONDENT

*(Being an appeal from the Ruling and/or Orders of Hon M. Ochieng (SRM) delivered at Hamisi
in the Senior Principal Magistrate's Court Succession Cause No 98 of 2018 on 17th June 2022)*

JUDGMENT

Introduction

1. In her decision of 18th June 2022, the Learned Trial Magistrate, Hon M. Ochieng, Senior Resident Magistrate dismissed the 1st and 2nd Appellants' Summons for Revocation of Grant dated 10th March 2020 with costs.
2. Being aggrieved by the said decision, on 5th September 2023, the Appellants herein filed a Memorandum of Appeal dated 2nd September 2023. They relied on seven (7) grounds of appeal. The said Appeal was lodged pursuant to the Ruling of this court that was delivered on 27th July 2023 in which they were granted leave to file an appeal out of time.
3. Their Written Submissions were dated 16th May 2024 and filed on 8th July 2024. There was also another set of Written Submissions of the same date that was filed on 26th July 2024. The Respondent's Written Submissions were dated 3rd September 2024. They did not bear a court stamp. However, in view of the fact that documents were being filed through the e-filing platform, this court admitted the same



as there was a likelihood of the Registry may have omitted to stamp the same. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.

Legal Analysis

4. Right at the outset, this court deemed it prudent to first address its mind as to whether the Appeal herein was competent prior to considering the merits or otherwise of the Appeal herein. It therefore dealt with the issues under the following distinct and separate headings.

I. Competence Or Otherwise Of The Appeal

5. In a Notice of Motion application dated and filed on 30th August 2022, the Appellants herein sought leave to file an appeal out of time. On 27th July 2023, this court allowed the said application in the following terms:-
 1. THAT the Applicants be and are hereby directed to file and serve a Memorandum of Appeal in the appropriate file within fourteen (14) days from the date of this Ruling (emphasis court).
 2. THAT the Applicants be and are hereby directed to file and serve their Record of Appeal in the appropriate file within one hundred and twenty (120) days from the date of this Ruling.
 3. THAT the Summons for Confirmation of Grant filed or yet to be filed pursuant to the Ruling that was delivered in Hamisi SRMC Succession No 98 of 2018 shall be kept in abeyance pending the hearing and determination of the Applicants' intended appeal in the appropriate file.
 4. For the avoidance of doubt, in the event, the Applicants shall default on Paragraph 50(1) and (2) hereinabove, the Respondent will be at liberty to move the court appropriately for the discharge and/or setting aside and/or vacating the order in Paragraph 50 (3) hereinabove to pave way for the administration of the estate of Luvandale Mwikhali (deceased).
 5. This matter will be mentioned on 5th December 2023 to confirm compliance of the order in Paragraph 50 (1) and (2) hereinabove and/or for further orders and/or directions. As this is a family matter, each party will bear its own costs.
 6. Either party is at liberty to apply.
7. The Appellants were therefore required to have filed their Memorandum of Appeal by 10th August 2023. However, a perusal of the Memorandum of Appeal on the court record showed that it was dated 2nd September 2023 and filed on 5th September 2023. This was outside the time line that had been given by the court. In the premises foregoing, the Appeal herein was defective and incompetent for having been filed after the period of the leave had lapsed and therefore rendered itself to be struck out in limine.
8. Notably, this court could have downed its tools at this point as this could have given the Appellants another chance to persuade the court to grant them leave to file the appeal afresh. However, it found it fit to pronounce itself on the merits or otherwise of this Appeal as parties had already filed their Written Submissions as there was need to expeditiously bring the proceedings to a finality as relates to the Ruling that had been appealed against.

II. Merits Or Otherwise Of The Appeal

9. Having looked at the Grounds of Appeal and the parties' Written Submissions, it appeared to this court that all the Grounds of Appeal were related and the issue that had been placed before this court for determination was whether or not the Learned Trial Magistrate erred in dismissing the Appellants'



Summons for Revocation dated 10th March 2020 warranting the interference of this court. All the grounds of Appeal were all dealt together as they were all related.

10. The Appellants submitted that as this was an appellate court, it was mandated to re-evaluate the evidence before the Trial Court as well as the Ruling delivered on 17th June 2022 and arrive at its own judgment as was enunciated in the case of *Selle & Another vs Associated Motor Boat Co Ltd & Others* [1968] EA 123 and as quoted at paragraph 2 in *Mursal & Another vs Manese (Suing as the Legal Administrator of Dalphine Kanini Manesa)* [2022] KEHC 282 (KLR).
11. They pointed out that the Respondent had omitted them as beneficiaries of the deceased estate and had also failed to seek their consent as required under the law. In the premises, they faulted the whole succession process at the Trial Court and urged the court to allow their Summons for Revocation of Grant dated 10th March 2020.
12. They placed reliance on the case of *Jamleck Maina Njoroge vs Mary Wanjiru Mwangi* [2015] eKLR where it was held that the circumstances that could lead to the revocation of grant were set out in Section 76 of the *Law of Succession Act*, which provision of the law they relied upon. They argued that they were entitled to the share of the deceased's estate as his grandchildren and that their names ought to have appeared in the list of beneficiaries for consideration by the court before the Grant was confirmed.
13. They were emphatic that they were rightful beneficiaries of the share of their late father who was a son to the deceased. They pointed out that they were absent during the confirmation of the Grant of 16th October 2018 when the court could have confirmed if they had an objection to the proposed division of the deceased's estate. They asserted that the distribution of the estate was not equitable. They were categorical that the said Grant had been obtained fraudulently and through concealment of material facts. They invited the court to consider the proceedings of the court on the same.
14. They cited Rules 26(1) and (2) of the *Probate and Administration Rules* which they submitted were coined in mandatory terms and hence, the Respondent had no option but to include them as beneficiaries in Form 38 which was a crucial document that supported the Petition for Grant.
15. They were categorical that the Trial Court misapplied itself when it failed to address itself to the fact that they were not included in the succession process despite being beneficiaries who ought to have been considered as such.
16. It was their contention that they had met the threshold required under Section 76 of the *Law of Succession Act* to revoke the grant of representation that was issued to the Respondent herein.
17. They relied on the case of *Kimani vs Mc Conell* [1966] EA 547 p.555 as quoted in *Re Estate of Gichuiya Kabora (Deceased)* [2021] eKLR and the case of *Beatrice Mbeere Njiru vs Alexander Nyaga Njiru* [2022] eKLR where the courts revoked the grants that had been issued therein.
18. They further placed reliance on Order 42 Rule 32 of the *Civil Procedure Rules*, 2010 and Rule 73 of the Probate and Administration Rules which empowered the court to set aside and/or vary the order. They thus urged this court to exercise its discretion and set aside the Ruling of 17th June 2022 so as to allow their Summons for Revocation of Grant dated 10th March 2020 which would prevent an apparent injustice.
19. They urged the court to hold that costs of this appeal be borne by the Respondent herein. They referred this court to Section 27 of the *Civil Procedure Act* and the case of *Republic vs Rosemary Wairimu Munene (Ex parte Applicant) vs Ibururu Dairy Farmers Co-operative Society Ltd* Judicial Review Application 6 of 2004 as quoted in *Haraf Traders Limited vs Narok County Government*



[2022] eKLR at pg 22 which were to the effect that the issue of costs was the discretion of the court and that costs followed the event.

20. The Respondent agreed with the Appellants on the duty of a first appellate court. He, however, submitted that there was a strict caveat on re-evaluating and analysing the evidence that was tendered before a trial court. He averred that the appellate court ought to exercise great caution as it never saw or interacted with the witnesses at the trial. He asserted that a party seeking revocation of grant or its annulment had to satisfy the grounds that were set out in Section 76 of the [Law of Succession Act](#).
21. He pointed out that he was the only surviving son of the deceased and therefore had a higher degree than the Appellants to administer the estate of his deceased father pursuant to Section 66 of the [Law of Succession Act](#).
22. He reproduced the beneficiaries he listed in his Petition and the distribution of the estate in the affidavit thereof and argued that he had ensured that the interests of his deceased brothers' children had been disclosed through representatives as he chose one grandson from each of the deceased's sons' families and listed them as trustees for the rest of the grandsons from each house. He asserted that the said arrangement was informed by the local administration advise vide the Chief's Letter dated 9th June 2016.
23. He averred that pursuant to the said arrangement, he made that proposal to court vide his Summons for Confirmation of Grant dated 17th October 2018. He explained that the deceased's estate being Kakamega/Shamakhokho/768 was distributed equally, each of the son's house getting 0.3Ha of the estate. He stated that the law governing distribution for a deceased's property did not emit the distribution of an estate on an equitable basis but rather, that the requirement of the law was that the distribution of the deceased person's estate had to devolve on an equal basis amongst the surviving sons.
24. He argued that the Appellants ought to have asked the court to have included them amongst other surviving beneficiaries of their deceased father rather than revoking the whole Grant as there was no plausible grounds to warrant this court to interfere with the Ruling of the Trial Court.
25. Section 76 of the [Law of Succession Act](#) Cap 160 (Laws of Kenya) provides that:-
 - “ 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.”
26. An order for revocation of the grant can thus only be given if the aforesaid grounds for revocation had been satisfied. A similar finding was arrived at *Re: Estate of L A K – (Deceased)* [2014] eKLR.
27. The documents on record indicated that the deceased had three wives namely, Colletta Khavere Luvandale, Khavagali Livandale and Agamale Luzenja. In his letter dated 9th June 2015, the Chief indicated that the deceased left behind six (6) sons namely, Seveni Luvandale (deceased), John Lusava (deceased), Simon Sesi (deceased), Makumba Luvandale (deceased), Tomas Shikali (deceased) and the Respondent herein, who was the only son who was alive.
28. The said letter indicated that Mwashu Seveni would represent his late father, Seveni Luvandale, Josphat Amira would represent his late father, John Lusava, Paul Natse would represent his late father, Simon Sesi, Francis Inzai would represent his late father, Makumba Luvandale, Elimina Ingasiani would represent her late husband, Tomas Shikali and the Respondent as the Administrator would represent his own house. Those were the same beneficiaries that were listed in the Affidavit in support of the Petition for letters of administration intestate at the Trial Court.
29. This court noted that the consent to the making of the Grant herein was only signed by three (3) of the above-mentioned beneficiaries. Paul Natse and Elimina Ingasiani did not append their signatures in the said consent. On 16th October 2018, the Respondent informed Hon Ogal, RM, who was handling the matter at the time that his sisters had died and that the two (2) sisters who were in court were elderly and had no interest in the deceased’s property. Having found that there was no objection to the mode of distribution, the said Learned Magistrate confirmed the Grant of Letters of Administration intestate herein that was issued on 28th July 2017.
30. A perusal of the Certificate of Confirmation of Grant dated 30th October 2018 indicated that the 1st Appellant’s late father, Thomas Shigali Luvandale was awarded 0.3Ha and it was his wife, Elimina Ingasiani Shikali who represented his late husband. The said portion of the Certificate read as follows:-

“Elimina Ingasiani Shikali Kakamega/Shamakhokho/768 To hold property in trust for himself and on behalf of Francis Seveni Shikali, Sore Shikali, Nancy Shavuya Shikali and Clementina Akamala Shikali.”
31. In his Witness Statement dated 23rd June 2020, the 1st Appellant stated that his father was the late Thomas Shigali Luvandale (deceased) and his mother was Akamala Luzenja (deceased). It was not clear why his name was not included in the Certificate of Confirmation of Grant that was issued on 30th October 2018 and a handwritten note that had names of beneficiaries. Having said so, his Witness Statement and Supporting Affidavit did not clearly demonstrate what facts were concealed from the court at the time of distribution of the deceased’s estate on 16th October 2018.
32. The 2nd Appellant’s Witness Statement was not in the Record of Appeal. However, this court noted that he was considered under the portion awarded to Elimina Ingasiani Shikali. This court did not therefore understand his contentions that he was left out of the distribution of the deceased’s estate.



33. In the mind of this court, although the 1st Appellant's name did not appear in the Certificate of Confirmation of Grant and/or the Petition for Grant of Letters of Administration intestate, his interests as a beneficiary had been taken care of through his late father. It was this court's considered view that the Appellants' concern could be remedied by an application for rectification of Grant to include the 1st Appellant's name, a position that the Respondent had alluded to in his Written Submissions herein.
34. Rectification of grants is provided for in Section 74 of the *Law of Succession Act* and Rule 43(1) of the Probate and Administration Rules. Section 74 of the Law of Succession provides as follows:-
- “Errors in names and descriptions, or in setting forth the time and place of the deceased's death, or the purpose in a limited grant, may be rectified by the court, and the grant of representation, whether before or after confirmation, may be altered and amended accordingly.”
35. Rule 43(1) of the Probate and Administration Rules provides that:-
- “Where the holder of a grant seeks pursuant to the provisions of section 74 of the Act rectification of an error in the grant as to the names or descriptions of any person or thing or as to the time or place of death of the deceased or, in the case of a limited grant, the purpose for which the grant was made, he shall apply by summons in Form 110 for such rectification through the registry and in the cause in which the grant was made.”
36. Under Section 74 of the *Law of Succession Act* and Rule 43(1) of the *Probate and Administration Rules*, the scope of rectification of grants of representation was limited to errors in names and descriptions or in setting forth the time and place of the deceased's death as was held in the case of *In the matter of the estate of Hasalon Mwangi Kahero [2013] eKLR*. Other such minor errors in that genre could also be rectified.
37. Accordingly, after carefully considering the affidavit evidence on record and the respective parties' Written Submissions, even if the court had not dismissed the Appellants' Appeal for having been filed without leave of the court, it would still not have been satisfied that the Appellants had demonstrated that the Grant of Letters of Administration was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case as envisaged in Section 76(b) of the *Law of Succession Act* as the Appellants had contended.
38. There would therefore have been no merit to revoke the Grant of Letters of Administration that was issued to the Respondent herein to include the beneficiaries as there was no evidence that any known beneficiary to the deceased was left out during distribution of the deceased's estate. This was a matter that was best disposed of by rectification of the Grant as explained earlier in this Judgment.

Disposition

39. For the foregoing reasons, the upshot of this court's decision was that the Appellants' Appeal lodged on 5th September 2023 be and is hereby struck out. As this was a family cause, the court deviated from the general rule that costs follow events and directs that each party bears its own costs of the Appeal herein so as not to further strain the family ties.
40. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 25TH DAY OF NOVEMBER 2024



J. KAMAU
JUDGE

