



**Zakayo v Zakayo (Succession Cause 350 of 2013)
[2024] KEHC 16050 (KLR) (20 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16050 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION CAUSE 350 OF 2013
DKN MAGARE, J
DECEMBER 20, 2024
IN THE MATTER OF THE ESTATE OF ZAKAYO NJERU KARAGA (DECEASED)**

BETWEEN

SIMON NJIRU ZAKAYO APPLICANT

AND

ALICE RUGURU ZAKAYO RESPONDENT

RULING

1. Adult dependants of deceased persons must learn that bequeathing is not an entitlement by virtue of work they did. It is purely a biological process that results from the love or lust between their parents. It is thus preposterous to keep family members in a state of suspended animation in a haranguing manner and in a never-ending cycle of unnecessary and vexatious applications. This ruling is in respect of one of those applications that should never have been. The Applicant filed the application and later submissions and followed the same with completely unnecessary letters to the court.
2. The application dated 28/11/2022 and filed by the Applicant sought the following prayers: -
 - a. That Eddie Migwi Njiru Advocate is illegal and has been illegal in record of this case.
 - b. That the amended Grant dated 20/01/2005 be declared illegal, null and void.
 - c. The costs be provided for.
3. I shall dismiss the 2nd prayer pronto as the grant was issued by this court. If there was any issue, an appeal could have sufficed.
4. The grant has been confirmed and titles have been issued to Isabella Mbere Zakayo. I have also seen that the Applicant has placed a restriction on the said parcel of land, purportedly pending a family



dispute. There is no dispute pending before this court. It will be proper that the same be lifted as the applications being filed appear geared towards keeping a semblance of a dispute.

5. The Summons is supported by the affidavit of the Applicant sworn on 28/11/2022 as stating that Eddie Migwi Njiru advocate had no practicing certificate for the year 2002 and could not have signed the Summons dated 4/9/2002 and that the proceedings allowing the summons dated 4/9/2002 were forged.
6. The Respondent filed Grounds of Opposition dated 8/3/2023 responding to the application as follows:
 - a. The application was res judicata seeking same orders as the application dated 3/1/2020 that was dismissed.
 - b. The grant dated 20/1/2005 was well executed and fully implemented.
 - c. The application was untenable under Section 74 and Section 76 of the [Law of Succession Act](#).

Submissions

7. The Applicant filed submissions on 8/11/2024. It was submitted that the Respondent did not controvert any grounds in the application. It was submitted that Plot No. 8 Kithimu Market and Plot No. 19C Kithimu Market were not property of the deceased. The Applicant did not cite any authorities.
8. On the part of the Respondent, they filed submissions dated 7/11/2024 urging that the Applicant as administrator of the estate was not opposed to the mode of distribution and had not demonstrated how his rights had been adversely affected by the grant. The Respondent did not also cite any authorities.

Analysis

9. The issue before me for determination is whether there is any lawful ground on which to revoke the grant of letters of administration herein. 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.
10. The main ground cited by the Applicant for seeking revocation of the grant herein is that the summons application leading to the grant was signed by an advocate who was not qualified to practice law in the year 2002. There is nothing on the record showing who Eddie Migwi Njiru was. It is also instructive that the land parcel No. Gaturi/Nembure/36 was divided into 3 for each house and registered in the names of the beneficiaries. Evidence before me is that the same was transferred as follows:-
- i. Gaturi/Nembure/5666 – Isabella Mbeere Zakayo (Deceased)
 - ii. Gaturi/Nembure/5667 -Alice Ruguru Zakayo
 - iii. Gaturi/Nembure/5668 – Anna Wangui Zakayo (Deceased)
11. There is no rocket science needed to fathom the *raison d'être* for the application. The applicants' step mothers are deceased. Possibly, one does not have dependants or dependents are not dependable. The revocation is meant to return the land to the same basket so that the Applicant can find a way of disinheriting the deceased widows. On the other hand, the Respondent contends that the Applicant has not demonstrated how she was adversely affected by the grant and so is content with the mode of distribution.
12. The grant of representation is not cast in stone. It may be revoked if circumstances presented before the court point towards the parameters based on which the grant can be said to have been erroneously issued when it ought not to have been issued or when it is only justifiable to revoke the grant. I note that the Applicant has been raising issues some of which were mediated. However, it is crucial to note that the grant of representation was given to Isabella Mbere Zakayo, Alice Ruguru Zakayo and Ann Wangai Zakayo. both Isabella Mbere Zakayo and Ann Wangai Zakayo are now deceased. Only the Applicant's mother remains.
13. The grant of representation is fully administered and the titles issued to the respective beneficiaries. Two of the beneficiaries are now deceased. Their parcels cannot be dealt with in this cause. It is now irrelevant whether, the Applicant has an issue with his mother. He has to wait until the mother dies. He should however, not accelerate her death, since in doing so, he will forfeit any share of the estate pursuant to Section 96 of the *Succession Act*.
- (1) Notwithstanding any other provision of this Act, a person who, while sane, murders another person shall not be entitled directly or indirectly to any share in the estate of the murdered person, and the persons beneficially entitled to shares in the estate of the murdered person shall be ascertained as though the murderer had died immediately before the murdered person.
 - (2) For the purpose of this section the conviction of a person in criminal proceedings of the crime of murder shall be sufficient evidence of the fact that the person so convicted committed the murder.
14. There is nothing remaining in the estate for the court to determine. The shares have been given out. Even if I was minded, which I am not, to revoke the grant, it cannot affect shares of Isabella Mbere Zakayo and Ann Wangai Zakayo. The registered owners are not alive to protect their interests. 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.”

15. The estate has been concluded and titles issued. The Court of Appeal in Mary Wambui Kibunya –vs- Peter Kariuki & Another (ELD CA 308 of 2019) stated that:

As already stated, the 1st deceased’s estate was only made up of LR No. Muguga/Kahuho/428, which had been transferred to third parties by the time the application for revocation of the grant was being made. In the circumstances, even if we allow the application for substitution and appoint the respondents and Teresiah Mukuhi Muriithi as the administrators and administratrix of the estate of the 1st deceased, we shall be appointing them to manage a shell estate as there is nothing left of the estate to be administered. As correctly held by the learned Judge, the appellant’s application had been overtaken by events. Although courts have a duty to render substantive justice, sometimes parties arrive in court when it is too late for the courts to assist them. We therefore do not find fault in the learned Judge’s declination of the application for substitution. It is apparent from the record that the 2nd deceased had fully administered the estate of the 1st deceased.

16. The Applicant’s case therefore fails. Further, there is no evidence of fraud, concealment of material fact or misrepresentation of facts on the part of the Respondent.

17. The Applicant’s case is also that the advocate forged the proceedings of court used to obtain the grant by writing in his own handwriting that the summons dated 4/9/2002 are hereby allowed. These are serious allegations against the court record and the advocate and this court is unable to delve into their core without evidence of forgery. The attached proceedings only cannot prove such serious allegation. The need to prove and the burden of proof of such allegations of forgery, fraud, falsehood or dishonesty was elaborated by the court in Christopher Ndaru Kagina vs. Esther Mbandi Kagina & Another [2016] eKLR where the court stated that–

“He who alleges fraud must prove fraud. Allegations of fraud must strictly be 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. In the Case *Central Bank of Kenya Ltd -Vs- Trust Bank Ltd & 4 Others* [26] the Court of Appeal in considering the standard of proof required where fraud is alleged stated that fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof is much heavier on the person alleging than in an ordinary Civil Case. The burden of proof lies on the applicant in establishing the fraud that he alleges. In *Belmont Finance Corporation Ltd. v. Williams Furniture Ltd* [27] Buckley L.J. said:

“An allegation of dishonesty must be pleaded clearly and with particularity. That is laid down by the rules and it is a well-recognized rule of practice. This does not import that the word ‘fraud’ or the word ‘dishonesty’ must be necessarily used. The facts alleged may sufficiently demonstrate that dishonesty is allegedly involved, but where the facts are



complicated this may not be so clear, and in such a case it is incumbent upon the pleader to make it clear when dishonesty is alleged. If he uses language which is equivocal, rendering it doubtful whether he is in fact relying on the alleged dishonesty of the transaction, this will be fatal; the allegation of its dishonest nature will not have been pleaded with sufficient clarity.”

In *Armitage v Nurse* [28] Millett L.J. having cited this passage continued:

“In order to allege fraud it is not sufficient to sprinkle a pleading with words like “willfully” and “recklessly” (but not “fraudulently” or “dishonestly”). This may still leave it in doubt whether the words are being used in a technical sense or merely to give colour by way of pejorative emphasis to the complaint.”

In *Paragon Finance plc v D B Thakerar & Co* the court stated that it is well established that fraud must be distinctly alleged and also distinctly proved, and that if the facts pleaded are consistent with innocence it is not open to the court to find fraud. The burden is always on the claimant to prove fraud on the part of the Respondent. The standard of proof where fraud is alleged is high. Though it is the same civil standard of proof on a balance of probabilities, it is certainly higher than the ordinary proof on a balance of probabilities but lower than proof beyond reasonable doubt. It all depends on the nature of the issue and its gravity. Evidence of especially high strength and quality is required to meet the civil standard of proof in fraud cases. It is more burdensome: (see also the cases of *Mpungu & Sons Transporters Ltd –v- Attorney General & another*. In *Jennifer Nyambura Kamau v Humphrey Nandi*, the Court of Appeal, Nyeri, emphasized that fraud must be proved as a fact by evidence; and, more importantly, that the standard of proof is beyond a balance of probabilities.’

18. For this court to proceed and revoke a grant, there needs to be presented evidence of wrong doing for the court to invoke Section 76 of the [Law of Succession Act](#) and order to revoke or annul a grant. Revocation of the grant is a discretionary function 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. 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.”

19. The court in exercising this discretion to revoke or annul a Grant of Representation is not a free element as it does so only in accordance with the law. 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 a 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".

20. The Applicant maintains the advocate forged the proceedings and signed the application leading to conformation of the grant irregularly as he had no practicing certificate for the year. Therefore, the Applicant opines that the grant was illegal. I have perused the impugned Summons dated 4/9/2002 and note it is drawn by R.M. Mugo Advocates and supported by the affidavit of one Isabella Mbeere Zakayo.
21. The summons sought that the certificate of confirmation of the original grant dated 29/5/1989 be amended and corrected to the effect that Plot No. 8 Kithimu Markwet instead of Plot No C Kithimu Market. I dismiss the assertion by the Applicant that the said Plot is not part of the estate of the deceased. This assertion has only emerged in the submissions and not the application and supporting affidavit. In the absence of pleadings, submissions have no value.
22. Mwera J, posited as follows when postulating on what is the role of submissions. He stated that they are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim, in the case of *Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi* Nairobi HCCC No. 36 of 1993:

"Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case."

23. Submissions are not, strictly speaking, part of the case, the absence of which may do no prejudice to a party. Their presence or absence does not in any way prejudice a case as held in *Ngang'a & Another vs. Owiti & Another* [2008] 1KLR (EP) 749, where the Court stated that:

"As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable."

24. The Court of Appeal was more succinct in that submissions cannot take the place of evidence when they addressed the question in the case of *Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another* [2014] eKLR:

"Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course



only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."

25. Once the case is closed a court may well proceed to give its judgement with or without submissions. In *Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi* Nairobi HCCC No. 36 of 1993 the learned Judge expressed himself as follows:

"Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case."

26. The main basis of a decision in a case is to be found in the pleadings and in this case the same ought to have been pleaded in the application and evidence fully presented as well as the law applicable. This was not done. In *Ngang'a & Another vs. Owiti & Another* [2008] 1KLR (EP) 749, the Court held that:

"As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallize the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable."

27. The current Application is not the kind anticipated under Section 76 of the *Law of Succession Act*. The allegation of fraud has not been proved. An assertion that an advocate signed summons for confirmation of grant without a valid practicing certificate or forged court proceedings is not ipso facto an imputation of fraud or forgery, or concealment of material facts as to render the proceedings leading to the grant or the grant itself defective. There is no evidence placed before court that proceedings were defective in substance. It is not clear why, Eddie Migwi Njiru is material to the case. The Applicant simply collected verbiage and called it evidence. The Applicant's claim is imbued with innuendo and rhetoric and no evidence.

28. There is nothing placed before me to disturb the confirmation of the grant in this case. The matter is concluded and ought to be closed. The arc of justice bends towards maintaining legitimate proceedings. Mwita, J in *Albert Imbuga Kisigwa vs. Recho Kavai Kisigwa*, Succession Cause No.158 of 2000 said:

"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.”

29. The net effect of the foregoing is that I find no basis to revoke the grant dated 20/1/2005 as prayed in the application. It has not been demonstrated how the process of obtaining the impugned grant was fraudulent, defective or attended by misrepresentation and concealment of matters from the court.
30. The last disturbing issue is that the Applicant has been using these proceedings to maintain restrictions on land given to the beneficiaries of the estate. If the Applicant was aggrieved, he ought to have protested at that time. Secondly, he could have appealed. He is now challenging in a circumlocutory way the merit of the decision by my predecessor.
31. Given that the application is vexatious and has kept the family in a cul-de-sac, without giving light at the end of the tunnel, it is the duty of the court to lift the tunnel to shine light in the entire façade of the applicant's case. The Land Registrar is therefore directed to lift all restrictions on the parcels given to the beneficiaries herein pursuant to the confirmed grant and not to return the same on the baseless allegation that there is a dispute. The registrar should not register any other restrictions against the said properties unless an order has been issued to that effect by a court of competent jurisdiction.
32. The beneficiaries for the other houses are entitled to proceed with succession separately.
33. On costs, the Responds have gone to great length to hire an advocate to defend the Application herein. Costs, ordinarily follow the event. The event in this case is the success of the Respondent. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of [Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others](#), SC Petition No. 4 of 2012; [2014] eKLR, as follows: -
 - “(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs – that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.
34. The Respondent shall have costs of Kshs. 55,000/= payable within 30 days. I am alive that the Respondent is the Applicant's mother. However, in this case they are parties. I direct that no steps be taken in these proceedings except filing notice of appeal or bespeaking proceedings before costs are paid in full.
35. Given that the grant has been executed, I discharge the administrators and close the file as fully administered.



Determination

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

- a. The Notice of Motion application dated 28/11/2022 is dismissed with costs of Kshs. 55,000/= to the Respondent.
- b. No application or other proceedings will be taken by the Applicant in this cause before costs are paid.
- c. All restrictions placed on the parcels granted to the beneficiaries out of land parcel number Gaturi/Nembure/36, that is; Gaturi/Nembure/5666 – Isabella Mbeere Zakayo(Deceased), Gaturi/Nembure/5667 - Alice Ruguru Zakayo and Gaturi/Nembure/5668 – Anna Wangui Zakayo (Deceased), are hereby lifted. The registrar shall not place any restriction, or caution in the said parcels without an order of the court.
- d. Beneficiaries to the estates of Isabella Mbeere Zakayo (Deceased) and Anna Wangui Zakayo (Deceased) to carry out succession in separate causes.
- e. The administrators are discharged having concluded the estate fully.
- f. The file is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 20TH DAY OF DECEMBER, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

Represented by: -

Maina Kagio & Co. Advocates for the Applicant

Respondent – Present

Court Assistant – Jedidah

