



In re Estate of Mweri Ngwaru Mwanyule (Deceased) (Succession Cause 433 of 2012) [2023] KEHC 1149 (KLR) (27 January 2023) (Ruling)

Neutral citation: [2023] KEHC 1149 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 433 OF 2012**

**JN ONYIEGO, J
JANUARY 27, 2023**

IN THE MATTER OF THE ESTATE OF MWERI NGWARU MWANYULE (DECEASED)

BETWEEN

**NIXON MWERI NGWARU 1ST APPLICANT
ALBERT MWERI NGWARU 2ND APPLICANT
KACHE MWERI NGWARU 3RD APPLICANT**

AND

**JUSTIN KITSAO MWERI 1ST RESPONDENT
ALPHONCE KARISA MWERI 2ND RESPONDENT**

RULING

1. The late Mweri Ngwaru Mwanyule (hereinafter “the Deceased”) Died Intestate On April 28, 2010. Upon His Demise, The 3rd Applicant, 1st respondent and one Kalume Mweri Ngwaru petitioned this honourable court on October 17, 2012 seeking a grant of letters of administration intestate as wife and sons of the deceased respectively. In their affidavit in support of the petition, they listed the following persons as the survivors of the estate of the deceased;
 - a. Kache Mweri Ngwaru-Widow
 - b. Justin Kitsao Mweri-Son
 - c. Robert Chengo Ngwaru-Son
 - d. Stanley M.Baya-Son
 - e. Alphonce Karisa Mweri-Son
 - f. Albert Mweri Ngwaru-Son



- g. Kalume Mweri Ngwaru – Son
- h. Nixon Mweri Ngwaru-Son
2. Listed as comprising the estate was plot no. Kilifi /mtwapa/2019(hereinafter suit property) as the only asset left by the deceased herein. Consequently, a grant of letters of administration was made on February 13, 2013 and issued on February 19, 2013. The same was confirmed and a Certificate of Confirmation issued on November 9, 2013.
3. Four years later, the applicants herein who are beneficiaries of the deceased’s estate moved this court vide summons for revocation of grant dated March 2, 2017 and filed on the same day, seeking the following orders:
- a. That the grant and confirmed grant issued to Alphonce Karisa Mweri on the November 9, 2013 vide Mombasa High Court Cause No 433 of 2012, be revoked and/or annulled.
- b. That as a consequence to granting prayer 1 above, that the court be pleased to issue fresh grant to the applicants Kache Mweri alongside Alphonce Karisa Mweri.
- c. That pending the hearing and determination of this application, transfer, disposition and all other dealings with the deceased’s assets, the subject matter of the confirmed grant issued on the November 9, 2013 be stayed and the same preserved.
- d. That all the steps and actions taken by the said order granting the confirmed grant and which may have changed the assets of the estate, subject of this application be declared nullity in law.
- e. That costs be provided for.
4. The application is premised on the grounds stated therein and the supporting affidavit of the applicants jointly sworn on March 2, 2017 and filed on the same day. It is the applicants’ case that the 1st respondent did subdivision on the suit property without the involvement of the other beneficiaries and instead of eight equal shares, he divided the same into seven shares thus omitting the name of the 3rd applicant who is the widow of the deceased herein. That upon discovery of the subdivision, they made attempts to have the matter resolved through the DCIO and village elders but all in vain.
5. They averred that after confirmation of the grant, the 1st respondent changed the title of the subject property into his own name and subsequently subdivided the suit property and transferred appportion of it to his brother Justin Kitsao Mweri to the exclusion of the other beneficiaries.
6. In response, the 1st respondent filed a replying affidavit sworn on June 19, 2017 thus admitting subdividing the suit property into seven portions instead of eight. He stated that his mother Kanze Mweri Died In The Year 2007 Leaving Them With Their Step Mother Kache Mweri (the 3rd applicant).
7. He further stated that prior to the confirmation of the grant in the year 2012, as a family, they sold about a half an acre of land to one Mr Hassan Olat for Kshs 1,800,000 which amount was shared among all beneficiaries listed in the certificate of confirmation. That after the confirmation of the grant, they agreed as a family to subdivide the property into seven parcels, and then take care of their mother Kache Mweri collectively. He went further to state that their mother (the 3rd applicant) allegedly agreed to their proposal and allowed them to carry out the subdivision. That due to financial constraints, they agreed to subdivide the suit property into seven equal portions in his name which he would later transfer to each beneficiary accordingly.
8. He averred that; it was the 1st applicant who secured a surveyor for the subdivision by the name Mr James; it was also the applicant who received the payment made for transmission to the surveyor; the



- surveyor did do his work resulting to mutation for the property and that, a field diagram was shown to all beneficiaries and as a result everybody consented to the subdivision process. He claimed to have paid KShs 48,000 for the process which resulted to the processing of the title deeds. That after the processing of title deeds, the applicants raised questions against the whole process that claiming that the property should be divided into two that is between the house of his deceased mother and that of Kache Mweri.
9. He stated that he transferred Plot No Kilifi/Mtwapa/5410 to the 2nd respondent as he was ready to develop his parcel. That he could not do further transfers due to the issues raised by the applicants. According to him, he was willing to distribute the property and urged the court to dismiss the application with costs.
 10. In support of the respondents' contention, Lawrence Mwarandu Kombe and Stanley Baya filed affidavits sworn on September 18, 2017 and filed on September 18, 2017 and September 20, 2017 respectively.
 11. Lawrence being a cousin to the 1st respondent in his affidavit stated that it was agreed that the suit property be subdivided and titles issued in the name of the 1st respondent for convenience. That all beneficiaries agreed to subdivide the suit property into 7 portions instead of 8 and collectively take care of their elderly mother. On his part, Stanley corroborated the position taken by the respondents. He went further to state that they were ready to transfer the seven title deeds to the beneficiaries as and when they are ready.
 12. The application was canvassed by way of written submissions with the applicants through their advocates Omollo Onyango & Company Advocates filing their submissions on May 15, 2018. They submitted on two issues namely;
 - a. Whether the applicants are correct to say that the administrator ignored the court orders and is therefore in contempt of court.
 - b. Whether the respondents were right in leaving out the widow of the deceased Mweri Ngwaru Mwanyule from the subdivisions
 13. On the first issue, counsel submitted that the administrator (1st respondent) was in contempt of court for not subdividing the suit property into eight portions of 1/8th each as per the court order in the confirmed grant.
 14. On the second issue, counsel submitted that a surviving spouse has a right to a share in the estate of the deceased under section 35(1) of the [Law of Succession Act](#). Thus, the administrator failed to do his duty of fair and equal distribution of the estate and urged the court to have the grant given to someone else to complete the administration of the estate.
 15. On their part, the respondents through their advocates Marende Necheza & Company Advocates filed their written submissions on July 31, 2018. Counsel reiterated the respondents' position in their respective affidavits thus submitting that the 1st respondent acted on the instructions of the beneficiaries of the estate.
 16. Counsel contended that the applicants had failed to establish the requisite grounds for revocation under section 76 of the [Law of Succession Act](#). In his view, the averments contained in the three affidavits sworn by the respondents and their witnesses had not been disputed. Counsel urged the court to dismiss the application with costs.



17. I have considered the application herein, the responses thereof and rival submissions by both counsel. The only issue that emerges for determination is whether the applicants have established the grounds for revocation of the grant.

18. Before I delve into the issue of revocation and nullification of the transactions herein, I wish to note that the orders sought and facts raised by the applicants differ from their submissions as the submissions introduces new issues such as contempt of court. Its trite law that a party is bound by his pleadings and thus cannot introduce new issues or evidence through his submissions. See the case of *Daniel Otieno Migore v South Nyanza Sugar Co Ltd* [2018] eKLR where the court stated that;

“It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded.

19. In view of the above observation, the submission that the court finds the respondents guilty of contempt of court orders is wrongly placed and untenable as there is no specific prayer in respect of that order. Indeed, this is a new issue which cannot be introduced through submissions.

20. Regarding the question of revocation, it is incumbent upon the applicant to establish the grounds set out under section 76 of the *Law of Succession 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”.

21. In the case of *In re Estate of Prisca Ong'ayo Nande (Deceased)* [2020] eKLR the court expounded on the grounds for revocation of a grant under section 76 of the *Law of Succession Act* 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 persons applying for representation was not competent or suitable for appointment, or the deceased died testate having made a valid will and then a grant or letters of administration intestate was made instead of a grant of probate, or vice versa. It could also be that the process was marred by fraud and misrepresentation or 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. The second general ground is where the grant was obtained procedurally, but the administrator, thereafter, got into problems with the exercise of administration, such as where he fails to apply for confirmation of grant within the time allowed, or he fails to proceed diligently with administration, or fails to render accounts as and when required. The third general ground is where the grant has become useless and inoperative following subsequent circumstances, such as where a sole administrator dies leaving behind no administrator to carry on the exercise, or where the sole administrator loses the soundness of his mind for whatever reason or even becomes physically infirm to an extent of being unable to carry out his duties as administrator, or the sole administrator is adjudged bankrupt and, therefore, becomes unqualified to hold any office of trust.”

22. In the instant case, the applicants’ argument is that the administrator (1st respondent) failed in carrying out his duties by virtue of carrying out subdivision of the suit property without involvement of the other beneficiaries; subdividing the same into seven parcels instead of eight and having the parcels registered in his name.
23. On the other hand, the respondents argued that the subdivision of the suit property was done by the consent of all beneficiaries as well as the registration of the same in the name of the 1st respondent. That they were willing to transfer the remaining parcels of land to each beneficiary subject to each party bearing the cost of transfer into his name. They went further to state that only Kitsao Mweri was able to meet the transfer expenses resulting to the transfer of parcel number Kilifi/Mtwapa/5410 into his name.
24. On the subdivision of the suit property into seven parcels and omission of their mother the third applicant, the respondents argued that the same was done by consent of all beneficiaries with the understanding that they would take care of their mother collectively.
25. From the record and parties’ own admission, it is apparent that there are three administrators but only one has been carrying out his duties without the involvement of the other beneficiaries. The sole ground cited in support of the revocation of the grant is subdivision of the land into 7 pieces instead of 8. The applicants did not challenge the respondents’ claim that the sub-division was done with the concurrence of all beneficiaries them included. In my view, that is not a ground to revoke the grant. Thus, it’s my finding that the applicants have not established any ground for revocation or removal of the 1st respondent as an administrator.
26. On the prayer for the 3rd applicant to be appointed as an administrator alongside the 1st respondent, it’s not viable as it is evident from the grant herein that the court appointed three administrators the 3rd applicant included.
27. Regarding the sale of part of the estate allegedly by the family after the deceased had died, the same is a matter that was not disclosed to the court before or during confirmation of the grant. Obviously, the said sale amounted to intermeddling with the estate of the deceased by the beneficiaries which is a criminal offence under section 45 of the *Law of Succession Act* which provides;



Section 45

1. Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
 2. Any person who contravenes the provisions of this section shall—
 - a. be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
 - b. be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.
28. In view of the illegal sale and subsequent subdivision of the estate into 7 plots contrary to the confirmed grant, it is my finding that the actions by the parties to subdivide the estate into 7 portions in exemption of one beneficiary(widow) was an illegality and a nullity hence this court cannot enforce the same. In that regard I seek refuge in the holding in the case of Macfoy v United Africa Company Limited [1967] 3 ALL ER 1169 where Lord Denning held that;

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

1. In view of the above finding, I am inclined to hold and make the following orders;
 - a. That the three administrators namely Kache Mweri Ngwaru, Kalume Mweri Ngwaru and Alphonse Karisa Mweri to proceed with the administration of the estate of the deceased in accordance with the grant issued on February 19, 2013 and confirmed on December 9, 2013.
 - b. That all subdivisions, transfer and or transactions in respect to the suit property no Kilifi/Mtwapa/2019 are hereby cancelled and declared null and *void ab initio*.
 - c. That the land registrar Kilifi to cancel all title deeds arising from the subdivision of LR No Kilifi/Mtwapa/2019 and the same to revert back to the name of the deceased pending formal transmission as per the confirmed grant.
 - d. Each party to bear own costs

DATED, SIGNED AND DELIVERED IN MOMBASA THIS 27TH JANUARY, 2023

J.N. ONYIEGO

JUDGE

