



**In re Estate of Mbaka Munogia (Deceased) (Succession Cause  
417 of 2008) [2023] KEHC 214 (KLR) (25 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 214 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
SUCCESSION CAUSE 417 OF 2008  
LM NJUGUNA, J  
JANUARY 25, 2023  
IN THE ESTATE OF MBAKA MUNOGIA (DECEASED)**

**BETWEEN**

**NYAGA MATOGI ..... APPLICANT**

**AND**

**NATHAN NYAGA MURIUKI ..... RESPONDENT**

**AND**

**SAMSON KITHINJI NJUGUNA ..... INTERESTED PARTY**

**ESTHER WAYUA NDUNGO ..... INTERESTED PARTY**

**RULING**

1. Before this court is the summons dated May 12, 2021 and which seeks revocation and/or annulment of the grant of letters of administration made to Nathan Nyaga Muriuki in relation to the estate of the deceased herein.
2. The said summons is based on the grounds on its face and its supported by the affidavit annexed to the application.
3. In a nutshell, it is the applicant's case that the said grant was obtained by means of untrue allegations of facts, fraudulently by making of a false statement or by concealment from court of something material to the case and the proceedings to obtain the grant were defective in substance. It appears that the applicant's claim is that the grant was defective in nature as he was disinherited by the respondent. It was his case that his father Matogi and Munogia, the deceased's father were brothers and therefore the deceased herein and the applicant are first cousins and as such, he had more rights over the estate than the respondent.



4. The application is opposed by the respondent and the interested parties. The respondent and the 2<sup>nd</sup> interested party filed a joint replying affidavit sworn on December 15, 2021 and wherein it was deposed that the deceased herein was an adopted brother of the administrator. The administrator denied obtaining grant of letters of administration secretly and fraudulently as alleged by the applicant herein. That the applicant is neither a beneficiary of the estate herein nor is he a cousin as he alleges; and that for 13 years, the applicant did not bring or challenge the same in court. It was deposed by the administrator that the deceased was like his step father as his mother was the one who brought him up. That during his lifetime, the deceased sold him land parcel number Evurore/ Evurore/xx and that is why he inherited it. It was his case that he had started utilizing the said parcel but the deceased passed on before a transfer could be finalized. The 2<sup>nd</sup> interested party deposed that she is a grandchild to the deceased and that is why the land parcel number Evurore/Evurore/12xx was transferred to her; and that no fact was misrepresented at all. The 1<sup>st</sup> interested party in joining hands with the respondent and the 2<sup>nd</sup> interested party equally denied the allegations and urged this court to dismiss the application herein. It was his case that he is the registered proprietor of land parcel numbers Evurore/Evurore/38xx and 35xx which were transferred to him by his father Fredrick Njuguna Njagi who had bought the same from the administrator (the respondent) herein).
5. Directions were taken that the summons be canvassed by way of *viva voce* evidence and thereafter parties were to file written submissions and all parties complied with the said directions.
6. The applicant submitted that the respondent filed the succession cause without disclosing the same to him. It was his case that the respondent could not clearly explain how he was the deceased's stepson and that his evidence to justify the said relationship was unclear. That the respondent was at pains to explain why he did not name the 2<sup>nd</sup> interested party but included her in the distribution schedule in the certificate of confirmation. The applicant did not deny selling and transferring Land Parcel No Evurore/Evurore/35xx a resultant parcel from the subdivision of Land Parcel No Evurore/evurore/xx to the 1<sup>st</sup> interested party. The applicant wondered how the 2<sup>nd</sup> interested party could be a grandchild of the deceased who had never married or left any child. It was contended that the [\*Law of Succession Act\*](#) is clear that when dealing with revocation of grant, it's only the process of obtaining the grant that should be looked into and not the distribution of the estate of the deceased.
7. It was submitted that the respondent is not at all related to the deceased and that the applicant as the deceased's cousin ranks higher in consanguinity to the deceased. A reference to section 66 of the [\*LSA\*](#) was made to buttress the averment by the applicant that he falls under the order of preference under (b) as other beneficiaries entitled on intestacy as provided under part v of the [\*LSA\*](#). A further reference was made to section 39 and rule 26 (2) of the [\*Probate and Administration Rules\*](#) that an applicant for grant of representation intestate, he must get consent from persons equal or lower in priority than him. It was submitted that the proceedings herein were defective and reliance was placed on the case of [\*Anthony Karukenya Njeru v Thomas M Njeru\*](#) (2014) eKLR. This court was therefore urged to allow the application herein.
8. The respondent on the other hand submitted that the only issue for determination is whether the applicant has demonstrated and /or proved any of the grounds under section 76 of the [\*LSA\*](#). It was his submission that the application has not met the threshold for the revocation of the grant. That the applicant in filing the application herein had averred that he was a cousin to the deceased and yet no evidence was adduced to prove the same. That the applicant is an imposter who thought that the estate herein did not have an owner and that explains why he filed the application over 13 years since the grant was issued to the respondent herein. It was also submitted that the applicant in his evidence confirmed that indeed the respondent lives on the deceased's parcel of land but he did not tell the court



the reason he did not get him out of the land if indeed he had any relationship with the deceased herein as alleged. That evidence was adduced that the deceased had a sister called Ciambutu who died but left PW2 Eunice Gatiri Njue; that it was not clear why the applicant says that it is him who ranks close to the deceased than even PW2 who appeared as his witness.

9. In reference to the 1<sup>st</sup> interested party, it was submitted that he is the owner of the land parcels Evurore/ Evurore/38xx and 35xx and the same is protected by the provisions of section 93 of the *LSA*. This court was therefore urged to find that the application herein lacks merit as the same was not proved and as result, the same be dismissed with costs.
10. I have perused the application herein and the responses thereto by the respondent and the interested parties and it is my view that this court has been called upon to determine whether the orders sought for revocation of the grant issued to the petitioner/ respondent can be granted.
11. As I have already noted, the application herein seeks revocation of the grant made to the petitioner/ respondent herein. The said grant is dated January 22, 2009.
12. The circumstances under which a grant of representation may be revoked are provided for under section 76 (a)- (e) of the *Law of Succession Act* and include;
  - a. Where the proceedings to obtain the grant were defective in substance;
  - b. Where 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. Where 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. Where 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. Where the grant has become useless and inoperative through subsequent circumstances.
13. What is clear from the above provision is that when a court is dealing with an application for revocation of grant, it is supposed to consider only the process of obtaining the grant. Such that issues touching on the process of confirmation of the grant and distribution of the estate amongst the beneficiaries is beyond what the court should consider as it is not covered by section 76 and thus, cannot form a basis of revoking a grant but ought to be challenged through a review or appeal. *In re Estate of Prisca*



*Ong'ayo Nande (Deceased)* [2020] eKLR, W Musyoka, J after analyzing section 76 and discussing the meaning of a grant within the provisions of the laws governing succession in Kenya held thus;

- “ 17. I have very closely perused through the provisions of the *Law of Succession Act*, and I have not come across any provision that provides a remedy to a person who is aggrieved by confirmation orders. Sections 71, 72 and 73 of the *Law of Succession Act*, which deal with confirmation of grants, do not address the question of redress for parties who are unhappy with the confirmation process, nor do they deal generally with flaws in the confirmation process. As stated above, section 76 has nothing to do with the confirmation process, and provides no relief at all to any person unhappy with the confirmation process. In the absence of any provision in the *Law of Succession Act*, for relief or redress for persons aggrieved by such orders, the aggrieved parties have only two recourses under general civil law, that is to say appeal and review, to the extent that the same is permissible under the *Law of Succession Act*. I would believe that one can also apply for the setting aside or vacating of confirmation orders, where the same are obtained through abuse of procedure.”
14. From the perusal of the application herein, the applicant’s ground for seeking the revocation is mainly that the respondent obtained the grant fraudulently and through misrepresentation of facts to the court.
15. Section 66 of the *Law of Succession Act* bestows this court with the discretion to as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made. The court in exercise of the said discretion is mandated to accept as a general guide the following order of preference;-
- i. surviving spouse or spouses, with or without association of other beneficiaries;
  - ii. other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by part v;
  - iii. the Public Trustee; and
  - iv. creditors:
16. Section 39 on the other hand stipulates that (1) where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority—
- (a) Father; or if dead
  - (b) Mother; or if dead
  - (c) Brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none:-
17. Rule 26 provides that letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as, or in priority to the applicant. Further that, in an application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.



18. The effects of the above provisions is that where a person is applying for a grant of letters of administration intestate, he must get consent from persons of equal or lower priority than him; but in this case, could the same apply?
19. In the instant case, the applicant alleged that the deceased was his first cousin and therefore in regards to section 66 of the *LSA*, he ranked higher in consanguinity to the respondent. This court has perused the record herein and has noted that neither the applicant nor his witnesses adduced evidence before this court to prove his relationship with the deceased. Further that, none of the applicant's brother's children are claiming anything from the estate herein. That though he stated that they were first cousins, he didn't even know the name of the deceased's mother. Further, the applicant testified that the deceased herein died sometime back before his own brothers died; that he knows where the suitland herein is; that he is aware that the respondent has been in occupation of the said land ever since the deceased herein died; but he could not explain why, if at all his allegations were true, he has never placed restriction on the said land and why he did not seek to evict the respondent from the land. He could also not explain how the respondent came to occupy the land.
20. PW2 testified that the deceased was his uncle; that Munogia was her grandfather but she was not aware that she was married to Ndureve. From the evidence of the respondent and PW2, I am inclined to find that their evidence corroborates each other's. PW3 testified that he knew the parties herein and that PW2 was a daughter to Ciambutu Manogia. The evidence available is that the deceased did not have any children but Ciambutu was his sister who is also deceased but who is said to have left a daughter (PW2) but who in her testimony stated that she is not interested in the estate of the deceased but gave evidence in favour of the applicant. At the same time, it was her evidence that she challenged the issuance of the grant to the respondent at Siakago court, but the particulars of the case were not disclosed to this court or why the same was not done in this succession cause. It is also not clear why she is not interested in the estate of her uncle if indeed she is a niece.
21. It is also strange that the applicant does not know when the deceased herein died or where he was buried. The grant herein was issued in the year 2009 and the summons for revocation of the grant was only filed in the year 2020, which is a period of 13 years since the deceased died. One may be tempted to ask, where was the applicant all this time?
22. From the above, I hold the view that it was incumbent upon the applicant to lay his case and prove the same. Mativo J (as he then was) in *Hellen Wangari Wangechi v Carumera Muthini Gathua* [2005] eKLR, which was cited by the learned counsel for the respondent quoted with approval Lord Brandon in *Rheir Shpping Co SA v Edmunds* [1955] IWL 948 at 955 as follows:
 

“No Judge likes to decide case on the burden of proof if he can legitimately avoid having to do so. There are cases, however in which owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just cause to take.”
23. Justice Mativo, in the above decision, went on to state as follows:
 

“Whether one likes it or not, the legal burden of proof is consciously, or unconsciously the.....test applied when coming to a decision in any particular case. The fact was succinctly put forth by Rajah JA in *Britestone PTE Ltd v Smith & Associates Far East Ltd* [2007] 4SLR (R) 855 at 59: ‘The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him.’”
24. The principle is that whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of fact which he assert, must prove that those facts exist. The burden of



proof in a suit or proceeding, lies on that person, who would fail if no evidence at all were given on either side. [See also section 107 of the Evidence Act]. I find that the applicant has not satisfied the court that he is deserving of the orders sought.

25. In view of the foregoing I find that:

- i. The application herein is devoid of any merit and I hereby dismiss the same.
- ii. No order to costs.

26. It is hereby ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 25<sup>TH</sup> DAY OF JANUARY, 2023.**

**L. NJUGUNA**

**JUDGE**

.....for the Applicant

.....for the Respondent

.....for the 1<sup>st</sup> Interested Party

.....for the 2<sup>nd</sup> Interested Party

