



REPUBLIC OF KENYA



**Shanyisa v Maraka (Succession Appeal 4 of 2019)  
[2023] KEHC 2896 (KLR) (31 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2896 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
SUCCESSION APPEAL 4 OF 2019  
PJO OTIENO, J  
MARCH 31, 2023**

**BETWEEN**

**GLADYS SHANYISA ..... APPELLANT**

**AND**

**GLADYS MARAGA ALIAS MARAKA ..... RESPONDENT**

*(Being an appeal from the Ruling and Order of Hon. T. M. Muraguri (SPM)  
in Kakamega CMC Succession Cause No. 195 of 2017 delivered on 21.2.2019)*

**JUDGMENT**

1. This appeal was provoked by the ruling of the lower court dated 18/3/2019 by which the court adjudged that the grant issued to the appellant on the 28/6/2017 and confirmed on the April 11, 2018 was obtained fraudulently and by reason of concealment of material facts. In the decision the court rendered itself as follows:-

“It is clear that the respondent in this case is a daughter in law of deceased being a wife of a deceased’s son. The above three are the biological children of the deceased. In filing this Succession Cause, the respondent violated the law as follows:-

- a) She did not cite the children of deceased who ranked in prior or equal priority a herself.
- b) In the absence of (a) above, she did not filed a consent with the other beneficiaries allowing her to file the petition.
- c) She concealed other beneficiaries of deceased’s estate. Section 76(b) of the *Succession Act* 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 the one mention that the grant was obtained fraudulently by the unlikely of false statement or by concealment from the court of something material in this case.”



2. That decision has aggrieved the appellant who faults it on the grounds that:-
  - i) The learned trial Magistrate erred in law and in fact in allowing the application for revocation of grant dated August 1, 2018 contrary to the evidence on record.
  - ii) The learned Magistrate erred in law and in fact in allowing the application dated 1-8-2018 without further directions on the administration of the estate herein.
  - iii) The learned trial Magistrate erred in law and in fact by considering extraneous matters hence misconstruing the law on beneficiaries and administration of deceased person's estates.
  - iv) The learned trial Magistrate erred in law and in fact in allowing the application dated August 1, 2018 without evaluating the evidence before him and without giving reasons for his decision.
  - v) The learned trial Magistrate erred in law and in fact in making a ruling that is contrary to the letter and spirit of the *law of Succession Act* thereby leaving the estate without any administrator and hence failed to distribute the estate as by the law required.
  - vi) The learned trial Magistrate failed to exercise his discretion judiciously on cost by awarding the respondent cost of the application dated August 1, 2018.
3. In the application for annulment of grant the respondent introduced herself as a daughter of the deceased and one of the only three surviving children of the deceased, who had been appointed by the family and filed a petition for grant of letters of administration intestate in which petition she named all beneficiaries including the appellant and a grant had been issued and was due for confirmation when it was learnt that the estate land had been transferred to the appellant and one, Michael Musuku Sakha. The respondent accused the appellant for having filed the petition without her consent nor concurrence yet she was not a child to the deceased and did not stand in any equal or superior position for purposes of applying for the grant. The respondent was thus accused of obtaining the grant by failure to fully disclose all the beneficiaries of the estate and urged the court to annul the grant and direct that the estate be administered pursuant to the proceedings pending before the Magistrates Court at Hamisi.
4. When served, the appellant filed a replying affidavit sworn on the September 3, 2018 whose gist was that the respondent had not sought to be joined to the cause after the grant had been confirmed and denied any wrongdoing in the manner she had presented and prosecuted the petition in that she had been given a consent by Michael Musuku Sakha as the biological son of the deceased and that she had sworn an affidavit to the effect that the area Chief had refused to give her a letter of introduction for purposes of prosecuting the Petition. She additionally denied having failed to disclose the pendency of the Hamisi Cause while accusing the respondent to have been the guilty party for failure to disclose the pendency of Kakamega CMC Succession Cause No 195 of 2017 then pointed out that while the Kakamega Cause was gazetted on the May 26, 2017 that at Hamisi was gazetted on 18/8/2017. It was then underscored that the respondent is an elderly person married and leaving happily elsewhere, cannot undertake the daily demands of a distribution and was only out to meddle with the estate.
5. The respondent stressed having acted properly and that the grant had been confirmed then accused the appellant of introducing strangers to the estate and lying on the date of death of the deceased.



6. The application appear to have attracted other persons interested in the estate including Michael Musuku Sakha and Dina Khadenge both of whom filed applications to be joined as interested parties.
7. Dinah Khadenge describe herself as widow to the deceased and mother to the Objector/respondent and mother-in-law to the appellant. In both applications tacitly oppose the application for annulment and support the administration by the appellant. However, both proffer different reasons and capacities in taking that position.
8. For Dinah Khadenge, she admits that the respondent is indeed her daughter adding that there is yet another son to the deceased called Hudson Rubani Shisakha but recuses both as intermeddlers for reasons that both have abandoned home of the deceased, live away and only interested in intermeddling with the estate and to disinherit the respondent. She contended that the appellant was happily married elsewhere while Hudson Ambani has also abandoned home for Mombasa and has joined hands with the respondent to introduce imaginary debtors to the estate and adds that the appellant being a daughter in law to whom her and Michael Musuku had given consent had the right to administer the estate.
9. For Michael Musuku Sakha, the position taken is that being a biological son of the deceased he consented to the administration by the appellant and the estate has since been transmitted to her and the appellant as two persons representing the two houses of the deceased. He contended that the respondent had introduced strangers as beneficiaries to the estate and maliciously misnamed him and stressed that the Kakamega Cause was gazetted earlier than the Hamisi one.
10. In addition, Hudson Ambani Shisakha swore and filed a supplementary affidavit on the September 7, 2018 asserting being versed and conversant with the issues in controversy including the events leading to the application for annulment of the grant. He asserts that the appellant is not related to deceased but only a widow to a son to the said deceased and that his consent was never sought before the petition was filed. He then gave the mental history of the deceased and his children and alleged that the appellant persuaded the only surviving widow to move out of the suit land only for strangers to visit the land alleging that the appellant and Michael were offering same for sale as a consequence of which he lodged a restriction to forestall any sale.
11. In this appeal both parties have filed submissions which together with the proceedings at trial, as set above, and the Judgment the court has had a chance to review and re-appraise. The central question is whether the annulment of the grant was erroneous and whether upon annulment, the court ought to have given directions on the administration of the estate.
12. What is not in dispute is that as at the date the application for annulment was filed, the deceased was survived by a widow, two sons and one daughter. Those four people, stand in priority over the respondent by dint of section 66 of the Law of Succession Act and rule 7 of the Probate and Administration Rules which provide the order of preference for purposes of petitioning for grant of letters of administration intestate. That position obligated the appellant to do the following:-
  - i) Disclose in full, the names, addresses, marital status and description of all surviving spouses and children of the deceased.
  - ii) Demonstrate that all person having prior preference to a grant had:-
    - a) Renounced the right to apply for grant.
    - b) Consented in writing to the making of grant.



- c) Been issued with citation calling upon him to either renounce the right or apply for grant.

13. The court has perused the petition lodged by the appellant and it is clear that while the relationship between the Petitioner and the deceased was accurately captured, the widow and the two children of the deceased challenging the administration were never disclosed.
14. That concealment affront rule 7 (1) e(i) and (7). That non-disclosure alone suffices for purposes of section 76 to have the grant annulled or revoked.
15. To this court any of the five grounds stipulated under section 76 of the Act suffices to have the grant revoked. Granted that one of the sons gave consent, that did not excuse the exclusion of the son and a daughter.
16. In addition, the assertion by the widow that she gave oral/verbal consent to the appellant does not suffice because the law demands and obligates that the consent be in writing. Having exercised the mandate and expectation from the court to re-appraise and re-examine the evidence afresh with a view to coming to own conclusion, the court comes to the said conclusion, as the trial Court did, that there was material non-disclosure, or concealment of the widow and children of the deceased, which was a material matter to the distribution of the estate.
17. In coming to that conclusion, the court did consider in detail of all the evidence presented and applied the law as it ought to be applied. The trial court therefore reached a sound and proper conclusion this court is unable to fault. I discern no consideration of any irrelevant matter nor failure to consider a relevant matter to invite interference with the decision reached. It is therefore the conclusion of the court on grounds 1, 3 & 4, that there is no basis to fault the conclusions by the trial Court.
18. On whether it was erroneous to annul the grant and stop at that without directing on how the estate be administered, the Court appreciates that ordinarily and for the purpose of having continuity in administration towards winding up the estate, any applicant seeking to have a grant revoked or annulled, ought to offer to take out the administration. That however, was not the situation in this matter because in the matter it was disclosed to the court that there was pending a petition before the Magistrates Court at Hamisi where the respondent had been issued with a grant and an application for confirmation and distribution was the one pending determination.
19. With a grant issued in favour of the respondent, the annulment of the grant did not leave the estate unadministered. The respondents remains an administrator so long as her grant has not been revoked. The court therefore finds that in the circumstances prevailing here it was not erroneous not to give directions on how the administration would proceed after annulment. For that finding even grounds 2 and 5 also lack merit and are dismissed.
20. On the award of costs, it is appreciated by the court that the parties are related and would ultimately have to sit down for the efficient administration and distribution of the estate. The difference between parties on who administers the estate needs to be managed and repaired and not aggravated by an award of costs. It is to this Court an accepted exception to the general rule that costs follow events, that in family disputes unless a party demonstrates a wholly detestible conduct, no costs should be awarded to a family member against the other. For that reason, the appeal succeeds to the extent that the order on costs by the trial Court is set aside and substituted with an order that each party bears own costs.
21. Having determined the appeal as above, and noting that while the grant in Kakamega CMC Succession Cause No 195/2017 stands revoked while that in Hamisi stand undisturbed, the Court directs that parties go before the Court at Hamisi and have the administration of the estate progressed there. For



avoidance of doubt, the appellant here being a recognized beneficiary in terms of section 41 of the Act, shall participate as representing and pursuing the interest of her deceased husband. That applies to Dinah Khadenge and Michael Musuku who must be involved as beneficiaries to the estate.

22. For reasons that the deceased died domiciled within the local limits of Hamisi Court with both pecuniary and territorial jurisdiction to handle the matter, let the Kakamega Cause be closed to have parties focus on the Hamisi file.
23. For this appeal, each party shall bear own costs.

**DATED, DELIVERED AND SIGNED AT KAKAMEGA THIS 31<sup>ST</sup> DAY OF MARCH 2023.**

**PATRICK J. O. OTIENO**

**JUDGE**

**In the presence of:**

No appearance for the appellant

Mr. Balusi for the respondent

**Court Assistant: Polycap**

