



REPUBLIC OF KENYA



In re Estate of Jonathan Muia Mumo (Deceased) (Succession Cause 151 of 2006) [2023] KEHC 3104 (KLR) (28 March 2023) (Ruling)

Neutral citation: [2023] KEHC 3104 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE 151 OF 2006**

MW MUIGAI, J

MARCH 28, 2023

**IN THE MATTER OF THE ESTATE OF JONATHAN MUIA
MUMO (DECEASED)**

BETWEEN

PIUS KATEETI MUIA PETITIONER

AND

DAVID MUTUKU MUIA 1ST OBJECTOR

PAULINE WAMBUA 2ND OBJECTOR

AND

PAULINE MBULA MUIA APPLICANT

PHILYLE SYOKAU MUIA APPLICANT

RULING

Court Record

1. The matter concerns the estate of the late Jonathan Muia Mumo who died intestate on 23rd November, 1993. Grant of letters of administration was issued to the Petitioner on 13th July 2006 and later confirmed on 23rd January 2020.
2. The grant was later objected to and vide ruling delivered on 23rd January 2020, the court directed that the estate would be distributed as per the Objector's mode of distribution. The Objectors further filed Applications dated 17th August 2021 seeking re-surveying of the estate with inclusion of some other properties to the distribution list and Application dated 8th September 2021 seeking a stay and/or review of the ruling dated 6th November 2021. Both Applications were dismissed vide ruling delivered on 31st May 2022 for lacking legal basis.



3. There are on record the following Rulings by the Court on various Applications;
 - a. Ruling of 6/11/2019
 - b. Ruling of 24/9/2020
 - c. Ruling of 10/6/2021
 - d. Ruling of 31/5/2022

Summons for Revocation of Grant

4. Vide the instant chamber summons Application dated 27th June 2022, the Applicants Pauline Mbula Muia & Philye Syokau Muia moved the court for the following orders;
5. That the grant of letters of administration confirmed on 23/01/2020 be and is hereby revoked.
6. That costs of this Application be provided for.
7. The Application is based on grounds on the face of it and supported by the Affidavit sworn by Pauline Mbula Muia and Philye Syokau Muia and dated 27th June 2022. They deposed that they were the daughters of the deceased and also rightful beneficiaries of his estate. They did attach the Chief's letter dated 9th May 2022 that lists 14 beneficiaries of the deceased's estate and marked PMM1 to that effect. They further deposed that the Petitioner was their brother and administrator of their father's estate, having been granted the letters of administration on 23rd January 2020. They did attach the said grant marked PMM2.
8. They deposed that the said grant was obtained by the Petitioner secretly without involving them among other beneficiaries in any way in the Petition or the distribution the estate. They averred that the total number of beneficiaries as stated in the confirmed grant was less than the actual total number of beneficiaries as outlined in the chief's letter marked PMM1.
9. The deponents further stated that they only learnt of the proceedings recently and that the same were instituted without their involvement. They deposed on their awareness that everyone is equal before the law and that despite them being women, they were equally entitled to benefit from their father's estate just like other siblings.

The Application is opposed.

Response by the Petitioner/Respondent

10. The Petitioner also filed a response/ opposition to the Application. He confirmed that the Applicants were daughters of the deceased but that they cannot allege of secrecy in the issuance of the grant since the same was publicly gazetted. He went further to aver that notwithstanding the foregoing, he did not mean to disinherit the Applicants and that he does not oppose to them being included in the list of beneficiaries. He stated that failure to include them was inadvertent and misadvised from his former advocates on record.
11. The Petitioner further stated that should the court be inclined to revoke the grant, that the beneficiaries be directed to redistribute the estate afresh in view of the long-standing disputes between the parties putting into consideration the occupation and developments that each and every beneficiary has made thereon.



Response by the 2nd Objector

12. The 2nd Objector, Pauline Wambua, filed an Affidavit in response to the Application on 14th July 2022. She deposed that she had the authority of the 1st Objector thus competent to swear the Affidavit. It was her contention that the Application was incompetent and in bad law, brought by the Petitioner in disguise as the Applicants so as to achieve his intentions of re-surveying the estate, which was earlier declined the court.
13. The Deponent further argued that when succession was being instituted, the Applicants had confirmed that they were married and that they had no interest in the estate despite them being invited to participate. She further deposed that the matter had proceeded by viva voce evidence and that the court was informed of the Applicants and all other beneficiaries, highlighting page 5 wherein the children of the deceased were listed, including the Applicants. It was their argument that the Applicants had not sought for a review or appealed against the said ruling and therefore the application is incompetent and bereft of any merit.
14. She further stated that the Application had been brought too late in the day with ulterior motives in collusion with the petitioner so as to defeat the recently delivered ruling by her Ladyship on the 31st May 2022 where the court declined the request by the Petitioner for a resurvey. She averred that she would require the Applicants to attend court for purposes of cross examination on the averments contained in the Affidavit in support in the Application. She prayed that the Application be dismissed with costs.
The Application was canvassed by way of written submissions.

Submissions by the Parties

15. There are no submissions filed by the Applicants on record. The Petitioner and the 2nd Objector did file their written submissions in support of their cases.

Submissions by the Petitioner

16. Counsel for the Petitioner filed submissions in support of their case on 14th November, 2022. He reiterated the averments in their replying affidavit and framed two issues for the court's determination;
 - a. Whether the grant dated 23/01/2020 should be revoked?
 - b. Who should pay costs of this Application
17. On the first issue, Counsel placed reliance on section 76 of the *Law of Succession Act* which contemplates revocation of a confirmed grant under circumstances, inter alia;
 - a. That the proceedings to obtain 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.
18. Counsel submitted that the gazette notice falls under the ambit of section 59 as read with section 60 of the *Evidence Act* which allows the court to take judicial notice of all matters of general notoriety. They further invited the court to note that the instant proceedings were initiated prior to the promulgation of the 2010 *Constitution* which revolutionized the position of female beneficiaries. Counsel further



submitted that the distribution ought to be done afresh in consideration of the actual position of all beneficiaries, to avoid protracted litigation.

19. On costs, they prayed that each party bears its own costs since this is a family matter.

Submissions by the 2nd Objector

20. Counsel for the 2nd Objector filed submissions in support of their client's case on 18th October 2022. Their main argument was that the names of the Applicants were disclosed to the court as evidenced by wordings of page 5 of the ruling. (They did annex a copy of the ruling to the submissions, no mention of the Applicants' names thereon though). They reiterated that the Applicants have not sought a review of the ruling hence the Application is incompetent.

It was also their submission that the Application had been brought too late in time with ulterior motives. He reiterated that the Petitioner supports the revocation without explaining why he omitted the names of the Applicants to the list of beneficiaries. It was their case, citing the ruling as delivered by Justice Kemei on 10th June 2021, that the Petitioner wanted to;

“...use the back door to agitate his case, rubbish the mode of distribution as ordered by the court and use fresh surveys to allocate himself portions which he has grabbed.”

21. They ended by stating that the court could allow the Applicants to be added as beneficiaries but that they be given an opportunity to indicate to the court if they wanted a share of the estate.

Issues

22. The issues that this court faces for determination are two-fold;
- i. Whether the grant of letters of administration dated 23rd January 2020 ought to be revoked;
 - ii. Who should bear the costs of the Application.

Whether the grant of letters of administration dated 23rd January 2020 ought to be revoked

23. As to the answer to this issue, the court stands guided by provisions of the *Law of Succession Act* as to the circumstances under which a confirmed grant maybe revoked. The Act under section 76 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 grant where 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 the confirmation of grant within one year from the date thereof, or such longer period as the court orders or allow; or



- ii. To proceed diligently with the administration of the estate; or
- iii. To produce to the court, within the prescribed time, 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 in operative through subsequent circumstances.”

24. In the instant Application, the Applicants claim to be beneficiaries of the estate of the late Jonathan Muia Mumo by virtue of being his daughters. The fact that they are daughters of the late Jonathan Muia Mumo has been admitted by all the parties. Do they qualify to be beneficiaries to the estate of the deceased? The [Law of Succession Act](#) under Section 38 provides as follows;

38. Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.

25. Article 27 of [CoK](#) 2010 provides:

Every person is equal before the law and has the right to equal protection and equal benefit of the law. Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres. The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

26. It is clear the [Constitution](#) and the Act recognize all children regardless of their gender or their marital status.

27. Consequently, the Applicants have come to court seeking the revocation of a grant in which they are not included yet they are qualified beneficiaries. The legal framework for revocation of a grant as earlier outlined above foresees instances where some of the beneficiaries are left out. Subsection 76(c) [LSA](#) particularly correctly captures the circumstances in the instant Application;

- a. 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;

28. The petitioner did confirm that he indeed omitted the names of the beneficiaries ‘inadvertently’. A look at the list of beneficiaries dated 27th June 2008 shows only seven children, both sons and daughters, without the Applicants. As per the 2nd Objector’s averments, the Applicants opted be left out since they were ‘already married’. An entire reading of the record shows that the Objectors had no interest to with the Applicants’ sharing in the estate of their father, reason she states that ‘they can be included but be asked whether they would want a share of the estate.



29. In the case of *Peter Karumbi Keingati & 4 others v Dr Ann Nyokabi Ngutbi & 3 others* CA 235 of 2014 (2014) eKLR Mwilu, Kiage & M’Inoti JJA stated as follows:

‘As regards the argument by the Applicants that married daughters ought not to inherit their parent’s property because to do so would amount to discrimination to the sons on account of the fact that the married daughters would also inherit property from their parent’s in-laws, this court takes the view that the argument as advanced is disingenuous. This is because if a married daughter would benefit by inheriting property from her parents, her husband too would benefit from such inheritance. In a similar fashion, sons who are married, would benefit from property that their wives would have inherited from their parents. In the circumstances therefore, there would be no discrimination. In any event, the decision by a daughter or a son to get married has no bearing at all to whether or not such son or daughter is entitled to inherit the property that comprise the estate of their deceased parents. The issues that courts would grapple with during distribution are the issues anticipated by Section 28 of the Law of Succession Act. This court is of the view that the time has come for the ghost of retrogressive customary practices that discriminate against women, which have a tendency of once in a while rearing its ugly head to be forever buried. The ghost has long cast its shadow in our legal system despite of numerous court decisions that have declared such customs to be backward and repugnant to justice and morality. With the promulgation of the Constitution 2010, particularly Article 27 that prohibits discrimination of persons on the basis of their sex, marital status or social status, among others, the time has now come for those discriminative cultural practices against women be buried in history.’

30. See: *Samson Rukunga Kiogora v Zipporah Gaiti Rukunga* [2011] eKLR

31. It is evident is that the Applicants did not give their consent to the mode of distribution of the estate since they were not parties to the proceedings. As beneficiaries, this goes against the provisions of Rule 26 of the *Probate and Administration Rules* provides as follows :-

26. 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.
- (2) 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.”

32. Revocation of a grant is a discretionary power that must be exercised judiciously and only on sound grounds but not to be exercised whimsically or capriciously. (See *Albert Imbuga Kisigwa v Recho Kavai Kisigwa*, Succession Cause No.158 of 2000).

33. The court in *Jamleck Maina Njoroge v Mary Wanjiru Mwangi* (2015) eKLR 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.”

34. It is a sad practice among the community to note that most women, once married, are not allowed to inherit from their biological parents’ estate. This is however an archaic custom which ought to be done away with in view of the fight for non-discrimination on women in matters land inheritance. The *Constitution* of Kenya is very clear when it comes to rights to land. In particular, sub-section (f) of Article 60 calls for elimination of gender-based practices on land matters. Men and women are entitled to equal rights in accessing, possessing, owning and transacting in land matters. The protection to women’s right to own property is envisaged under Article 40 of the *constitution* and should be protected in the same magnitude as the other fundamental rights and freedoms.
35. That said, it is notable that the Applicants have come to court two years after the impugned grant was confirmed. Does this render their Application null? The reason they have given for having come to court at this juncture is that they were not aware of the succession proceedings. This was quite indolent bearing in mind it is almost twenty years since the demise of their father. However, laws of natural justice and principles of the *Constitution* of Kenya as enshrined under Article 159 would call upon the courts to overlook procedural technicalities and focus on the substance of the matter. Though it may not be easy to prove ulterior motive of the Petitioners as alleged by the Objectors, the same would still not hold water since the Applicants made the Application and swore the Affidavit by themselves without any proof of coercion.
36. The court further takes notice of the length of time this matter has taken in court courtesy of myriads of litigation. It is unfortunate that the exclusion of some beneficiaries is only being disclosed at this point. Will this then alter the distribution of the estate of the deceased? The Applicants can opt to fight for their legally bestowed right of an inheritance from the estate of their father. If this is the case, distribution will have to be freshly done to include them. They can as well decide to surrender, renounce and consent to the already issued mode of distribution since the same would make easier the process for the rest of the beneficiaries.
37. This Court noted the sentiments expressed by Counsel for parties; one that confirmation of grant was by the Court and not agreement by beneficiaries and two, the Applicants wanted to stop distribution of the deceased’s estate as portions of land where their mother lived were sold. Clearly, although the matter was resolved by the various Rulings high lighted above there are underlying issues to be resolved amongst the family of the deceased.

Disposition

38. Against this background, the Applicants’ notice of motion dated 27th June 2021 is allowed under the following terms;
 1. The grant of letters of administration confirmed on 23rd January 2020 is revoked under Section 76 of *LSA*
 2. The Applicants and all beneficiaries listed in the Chief’s letter of 9/6/2022 to meet with Administrators discuss and propose/agree on the proposed mode of distribution of the deceased’s estate.
 3. The Administrators shall thereafter file Summons for Confirmation of Grant after consultations proposals and/or consents from/by beneficiaries.
 4. If any party shall still be aggrieved after filing of Summon for Confirmation, the party shall file Protest to be heard before Confirmation of grant.



5. The parties/Advocates are at liberty to pursue Court -annexed mediation if it will expedite matters and appear before Deputy Registrar for screening within 30 days from the Ruling.
6. Further Mention after 90 days/3 months before this Court on a date to be obtained by either party from/through DR MHC.
7. Each party shall bear their own costs since this is a family matter.

**DATED, SIGNED AND DELIVERED IN MACHAKOS THIS 28th DAY OF MARCH, 2023.
(VIRTUAL/PHYSICAL CONFERENCE)**

M.W MUIGAI

JUDGE

