



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Estate of Peter Murati Abuko (Deceased) (Succession Cause  
194 of 1988) [2023] KEHC 3882 (KLR) (28 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3882 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
SUCCESSION CAUSE 194 OF 1988  
WM MUSYOKA, J  
APRIL 28, 2023**

**RULING**

1. I got seized of this matter on 4<sup>th</sup> July 2018. By then the initial administrator, Vincent Tindi Murati, appointed on 18<sup>th</sup> July 2003, had died, on 6<sup>th</sup> March 2008. He had also, by then, been substituted by his son, the current administrator, Joseph Abuko Tindi, vide an order by Njagi J, made on 7<sup>th</sup> March 2018. The new administrator had also, by that date, filed the summons for confirmation of grant, dated 14<sup>th</sup> March 2018, on 14<sup>th</sup> March 2018.
2. The summons for confirmation of grant came up for hearing on 4<sup>th</sup> July 2018. The administrator turned up in court in the company of Patrick Abuko, Godfrey Ambichi, Rodgers Chilade and Julius Omutachi. I was informed that all those before me were grandsons of the deceased. I was also informed that the deceased also had 7 granddaughters, all of who were said to be married, and had not signed any of the documents filed in court. As the granddaughters had not been disclosed in the filings, and had not signed the relevant consents, I decided to postpone the confirmation application, to allow the granddaughters to come on board, and file their papers. I adjourned the matter.
3. At the next appearance, on 27<sup>th</sup> September 2018, the administrator turned up with Florence Alwoka, Celestine Mukolwe, Elizabeth Malikia, Mildred Ayako and Pamela Khahoya. Florence Alwoka, Celestine Mukolwe, Elizabeth Malikia and Mildred Ayako indicated to me that they were aware of the proceedings, and had no objection to the distribution that the administrator had placed before me. Pamela Khahoya informed me that she was not aware that the estate of the deceased was being distributed, and was unaware of the proposals on distribution of the estate that had been placed before me. I directed that Pamela Khahoya be served with the application dated 14<sup>th</sup> March 2018, and informed her that she was at liberty to file an affidavit of protest, if she did not agree with what was being proposed. I stood the matter over to 26<sup>th</sup> November 2018.
4. Come 26<sup>th</sup> November 2018, other individuals entered the scene, being Francis Nduku Abuko and Achando Murati. They had filed a summons for revocation of grant, dated 23<sup>rd</sup> November 2018. I directed that the said application be served on all affected, and that the matter be mentioned on 6<sup>th</sup> March 2019. On 6<sup>th</sup> March 2019, I was informed that the applications, dated 14<sup>th</sup> March 2018 and 23<sup>rd</sup>



November 2018, had all been responded to by the various parties, and I directed that the 2 applications, inclusive of the protest comprised in the affidavit sworn on 29<sup>th</sup> October 2018, be disposed of by way of oral evidence, and I allocated a date for the hearing of the combined applications, being 29<sup>th</sup> April 2019.

5. I elected to hear both simultaneously, as section 71(2)(a) of the *Law of Succession Act*, Cap 160, Laws of Kenya, empowers the court, at confirmation, to also look into how the grant was made, and to consider whether, after its making, the administrator went about administration of the estate in accordance with the law. That would mean that section 71(2)(a) enables the court to consider the issues that are the subject of section 76(a)(b)(c)(d) of the *Law of Succession Act*. For that reason, a summons for confirmation of grant and a summons for revocation of grant can be disposed of simultaneously, and there would be no need to keep a summons for confirmation of grant in abeyance, to await determination of a summons for revocation of grant filed subsequently. That would mean that the applicants in the summons for revocation of grant dated 23<sup>rd</sup> November 2018 should have filed an affidavit of protest, instead of a summons for revocation of grant, and raised the issues raised in their revocation application in the affidavit of protest. A summons for revocation of grant can be treated as a protest to the confirmation application.

6. For avoidance of doubt, sections 71(2)(a) and 76(a)(b)(c)(d) say as follows:

Confirmation of grants

- (1) .....
- (2) the court to which application is made, or to which any dispute in respect thereof is referred, may –
  - (a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or
  - (b) if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 inclusive, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be unadministered; or
  - (c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other all assets of the estate then in his hands or under his control; or
  - (d) ...
- (3) .....
- (4) ....."
  - (1) .....
  - (2) the court to which application is made, or to which any dispute in respect thereof is referred, may –
    - (a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or
    - (b) if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 inclusive, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be unadministered; or



- (c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other all assets of the estate then in his hands or under his control; or
- (d) .....
- (3) .....
- (4) ....."

Revocation or annulment of grant

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

7. I have included section 71(2)(b) and (c), as they are also relevant, in terms of giving an indication as to what the court should do where it finds, at confirmation, that the grant was not properly obtained, or the administrator had not, after he obtained the grant, whether properly or not, administered the estate in accordance with the law, or he would not administer it in accordance with the law upon his confirmation. These provisions empower the court to confirm the grant, but remove the administrator, and give the confirmed grant to someone else to complete administration of the estate. In other words, revoke the grant, issue a fresh one on the spot to someone else and confirm it.

8. So what happened on 29<sup>th</sup> April 2019? I took or recorded oral evidence from Joseph Abuko Tindi, and he was cross-examined by Julius Omutachi Tindi, Francis Nduku Abuko, Pamela Khahoya Mutsotso and Achando Murati. After that I adjourned the matter to 27<sup>th</sup> June 2019, for further hearing. On 27<sup>th</sup> June 2019, the matter could not be reached, and I asked the parties to come back on 13<sup>th</sup> November 2019. On 13<sup>th</sup> November 2019, I recorded evidence from Francis Nduku Abuko, and he was cross-examined by Godfrey Amutachi Ambachi and Pamela Khahoya. I adjourned the matter at 3.00 PM, for lack of time, and stood it over to 4<sup>th</sup> March 2020.

9. The matter was not placed before me on 4<sup>th</sup> March 2020, indeed it did not come back to me, until 2<sup>nd</sup> December 2022, when the file was brought to my Chambers, with a handwritten note, by PJO Otieno J, saying as follows:
- “ Good morning Judge. I was to work on a judgment here only to realize that all proceedings were taken by you. Would you mind doing the judgment?”
10. When I perused the file, I noted that after the file left my hands, on 13<sup>th</sup> November 2019, it was placed before Njagi J, F. Amin J and PJO Otieno J, and various proceedings were conducted, and various orders were made and directions given.
11. The matter was placed before Njagi J, on 4<sup>th</sup> March 2020, when it should have come before me for further hearing, as it transpired that I was scheduled to hear criminal matters that week and Njagi J civil matters, hence the matter was placed before him, on account of that mix-up in scheduling. Njagi J was informed that an objector had died, and that the parties required time to apply for substitution. That was granted, and the matter was fixed for mention on 2<sup>nd</sup> April 2020. The matter was placed before Njagi J next on 13<sup>th</sup> October 2020, when the court was told the same thing, that the 1<sup>st</sup> objector had died, and that there was need to substitute. The parties were given 10<sup>th</sup> December 2020, for further mention.
12. After that the matter moved from Njagi J, who had since been transferred, to F Amin J. The matter was placed before F Amin J on 10<sup>th</sup> December 2020, when it was given another date for mention, on 22<sup>nd</sup> February 2021. On 22<sup>nd</sup> February 2021, F Amin J did not sit, and the matter was given 8<sup>th</sup> March 2021, at the registry, as the date for mention. On 8<sup>th</sup> March 2021, it was directed, F Amin J, that the court would hear the objector, in the absence of the application for substitution, and that viva voce evidence would be taken on 2<sup>nd</sup> June 2021. Come 2<sup>nd</sup> June 2021, F Amin J was informed that the substitution application had been filed that morning; whereupon the court granted leave to each party to file and serve applications as they deemed fit. The matter was then listed for mention on 7<sup>th</sup> July 2021. On 7<sup>th</sup> July 2021, directions were given, by F Amin J, for service of a substitution application, filed on 20<sup>th</sup> June 2021, upon the petitioners, and the matter was listed for hearing on 28<sup>th</sup> July 2021. On 28<sup>th</sup> July 2021, F Amin J allowed the application for substitution, by consent, and directed that the objection be heard on 8<sup>th</sup> December 2021, with further directions that the parties file and exchange witness statements. On 8<sup>th</sup> December 2021, the hearing did not happen, as the Advocate for one of the parties, sought time to file witness statements, and the matter was adjourned to 28<sup>th</sup> February 2022, for hearing. On 28<sup>th</sup> February 2022, some form of hearing was conducted, on the revocation application. The record is not coherent on what transpired at that hearing, but at the end of it, the parties were directed to file further affidavits, and the matter was fixed for mention on 6<sup>th</sup> April 2022, for compliance.
13. The matter then moved from F Amin J, after she left the station, to PJO Otieno J, on 7<sup>th</sup> June 2022, when the court was informed that what was pending was the revocation application. The court directed the administrator to file an affidavit to support the application for confirmation of grant within 14 days. It was directed that the revocation application be treated as the protest to the confirmation application, and that the application be disposed of by way of written submissions, within 14 days. The matter was then mentioned on 29<sup>th</sup> July 2022, when it was allocated a date for judgment, on 14<sup>th</sup> November 2022. On the date when judgment was due for delivery, that is to say 14<sup>th</sup> November 2022, the parties were informed that the evidence had been recorded by me, and, therefore, the judgment would be delivered by me, on 2<sup>nd</sup> February 2023.



14. The principal reason why I had opted to conduct oral hearings on the application for confirmation and the protest to it, and the revocation application, was because none of the 3 parties were represented by Advocates at that time, and they would have better articulated their issues in an oral hearing, rather than by written submissions. I recorded evidence from the administrator and one of the applicants in the application for revocation of grant. The applicant was not cross-examined by all the parties. The protestor did not testify. So, by the time the matter was taken over by my colleagues, I had only fully heard 1 of the 3 parties, that is to say the administrator, Joseph Abuko Tindi. I had heard the second party partially, that is to say, Francis Nduku Abuku, who was 1 of the applicants in the revocation application. The other party, Pamela Khahoya Mutsotso, the protestor, was yet to testify. The parties had not closed their respective cases. The proceedings that were conducted before F Amin J and PJO Otieno J indicate that the oral hearings that I had conducted were abandoned. F Amin J was ready to hear the revocation application, before she left the station, hence the fresh directions that she gave on 28<sup>th</sup> July 2021, for filing and exchange of witness statements. Further fresh directions were given by PJO Otieno J on 7<sup>th</sup> June 2022, for disposal of the 2 pending substantive applications, by way of written submissions. No reference was made to the incomplete oral hearings that I had conducted prior, and that is why I say that they were abandoned. The issue of I, therefore, writing a judgment, based on those incomplete oral hearings, should not arise. I believe I would not do justice to the matter, if I have to write a judgment based on incomplete proceedings. In any case, the directions that I had given on 6<sup>th</sup> March 2019, for viva voce disposal of the matters, were supplanted, countermanded, superseded, overridden and overtaken by, and varied and substituted with the 2 layers of directions given on 28<sup>th</sup> July 2021 by F Amin J and on 7<sup>th</sup> June 2022 by PJO Otieno J. I believe that the matter should now be disposed of in accordance with the latest directions in the file, those given on 7<sup>th</sup> June 2022.
15. I ceased to be seized of this matter on 13<sup>th</sup> November 2019, when it left my control, and was taken over by F Amin J and PJO Otieno J. I note that Njagi J only handled the matter prior to the filing of the substitution application, and he did not handle substantive matters. The substitution application could be handled separately, from the substantive applications, by another Judge, after which the matter could be reverted to me to complete hearing the principal applications, for confirmation and revocation. Once the substitution application was disposed of, by F. Amin J, on 28<sup>th</sup> July 2021, the matter should have been referred back to me, to complete the oral hearings on the 2 substantive applications, for confirmation and revocation. That was not done. F Amin and PJO Otieno J took over conduct of the 2 partially heard substantive applications, and to dispose of them, in a manner different from the one that I had adopted. The directions by F Amin J and PJO Otieno J are still in place, for they have not been varied or vacated. It is not proper and right, in the circumstances, to push the matter back to me. Having effectively taken the matter over from me, PJO Otieno J should have handled it to completion.
16. Let the matter be placed before PJO Otieno J, for disposal, in accordance with his directions of 7<sup>th</sup> June 2022, or for other or further directions. In the event there is a dispute, the matter may be escalated to the Chief Justice, for allocation of a Judge to finalize it. It is so ordered.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS 28TH DAY OF APRIL 2023**

**WM MUSYOKA**

**JUDGE**

**Mr. Erick Zalo, Court Assistant.**

**Appearances**



**Ms. Wilunda, instructed by EA Wilunda & Company, Advocates for the applicant.**

**Joseph Abuko Tindi, the administrator, in person.**

**Pamela Khahayo Mutsotso, the protestor, in person.**

