



**In re Estate of Wilson Mwamba Nyamongo (Deceased) (Succession Cause 2217 of 2004) [2023] KEHC 19150 (KLR) (Family) (26 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 19150 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
SUCCESSION CAUSE 2217 OF 2004**

**MA ODERO, J**

**MAY 26, 2023**

**IN THE MATTER OF THE ESTATE OF WILSON MWAMBA NYAMONGO (DECEASED)**

**BETWEEN**

**JOSEPH PHILLIP NYAMONGO ..... APPLICANT**

**AND**

**NAFTAL OGWOKA MWAMBA ..... RESPONDENT**

**JUDGMENT**

1. Before this Court for determination is the summons for Revocation or Annulment of Grant dated 9<sup>th</sup> September 2009 filed by the Objector/Applicant Joseph Phillip Nyamongo Nyagami seeking the following orders:-

- “ 1. That the grant of letters of administration issued to Naftal Ogwaka Mwamba through Succession Cause No. 2217 of 2004 be revoked or annulled.
2. That instead, the letters of administration be re-issued to two petitioners namely Joseph Philip Nyamongo Nyangami and Naftal Ogwoka Mwamba.
3. That the said Naftal Ogwoka Mwamba be compelled to table and present accounts to this Honourable Court on how he has been administering the estate belonging to the deceased (Wilson Mwamba Nyamongo), Josiah Nyangami Mwamba (my deceased father) and myself as from 20<sup>th</sup> September, 2004 when he was issued with letters of administration intestate regarding Plot No.171 at Eastleigh Section 111, Nairobi and Plot No.8 at Laitigo Settlement Scheme.



4. That the costs of this application be provided for”.
2. The Summons which was premised upon Sections 47 and 76 of the *Law of Succession Act*, Cap 160, laws of Kenya, and Rules 44(1)(2) and 73 of the *Probate and Administration Rules* was supported by the Affidavit of even date sworn by the Applicant.
3. The Respondent Naftal Ogwoka Mwamba in his capacity as the Administrator of the estate of the Deceased opposed the Application by way of the Replying Affidavit dated 26<sup>th</sup> January, 2020.
4. The matter was canvassed by way of written submissions. The objector filed the written submissions dated 3<sup>rd</sup> February, 2023 whilst the Respondent relied upon his written submissions dated 2<sup>nd</sup> February, 2023.

### **Background**

5. This Succession cause relates to the estate of the late Wilson Mwamba Nyamongo (hereinafter ‘the Deceased’) who died intestate on 21<sup>st</sup> January, 1989. A copy of the Death Certificate Serial Number 235780 is annexed to the Petition for Grant of letters of Administration intestate dated 20<sup>th</sup> September, 2004.
6. The Deceased was survived by the following persons:-
  - (a) Naftal Ogwoka Mwamba – son
  - (b) Dorica Mwangi Mwamba – widow
  - (c) Josiah Nyangami Mwamba – son (deceased)
  - (d) Steve Nyamongo Mwamba – son
  - (e) Eunice Gesare Ombaki – daughter
  - (f) Grace Kwamboka Nyangeri – daughter
  - (g) Nyamongo Mwamba Dennis – son
  - (h) Geoffrey Makoyo Mwamba – son
7. The estate of the Deceased was said to comprise of the following assets:-
  - (a) Eastleigh Section iii Plot No.171
  - (b) Laitigo Settlement Scheme Plot No.8
  - (c) Nyabisia In-bassi-loc.plot No.461
  - (d) Riyabo In Bassi-loc. Plot No.
8. Following the demise of the Deceased, one of his sons Naftal Ogwoka Mwamba (the Respondent herein) sought and obtained Grant of letters of Administration intestate. The Grant was issued to the Respondent on 20<sup>th</sup> September, 2004. The Grant is yet to be confirmed.
9. The objector herein who is a grandson to the Deceased then filed this Summons seeking revocation of the Grant which had been issued to the Respondent. The objector states that he is the eldest son of the first wife of one Josiah Nyangami Mwamba (deceased) who was a son to the Deceased herein. That in his capacity as a grandson to the Deceased he is a beneficiary of the estate and ought to have been consulted and his consent obtained before the Grant was issued.



10. The Objector avers that he is a joint owner of Plot No.17/eastleigh Section iii Nairobi and of Plot No.8 at Laitigo Settlement Scheme both of which are listed as assets belonging to the estate of the Deceased. In his capacity as, joint owner of the two properties the objector submits that he ought to be listed as a joint administrator of the estate of the Deceased.
11. The objector further alleges that the signature of some of the Dependents appearing on the consent used to obtain the letters of Administration are not genuine. He asserts that the Respondent cannot be trusted to fairly administer the estate of the Deceased.
12. Finally, the objector urges the court to revoke the Grant issued to the Respondent on 20<sup>th</sup> September, 2004 and to order that a fresh Grant be issued jointly to himself and the Respondent.
13. The Respondent confirms that he was appointed as the Administrator of the estate of the Deceased. He denies the allegation by the objector that he has mismanaged the estate.
14. The Respondent denies the objectors claim that the objector's late father had a proprietary interest in any of the properties comprising the estate of the Deceased. The Respondent categorically denies the objector's claim that he is a joint owner of the Eastleigh Plot and the Laitigo Plot.
15. The Respondent insists that all the beneficiaries of the estate gave consent to his Petition for Grant of letters of Administration. He denies that the objector is a beneficiary to the estate of the Deceased.
16. The Respondent terms the Summons for revocation of Grant as premature since the estate is yet to be distributed. He urges that said application is frivolous, vexatious and amounts to an abuse of court process. The Respondent urges the court to dismiss this summons in its entirety.

### **Analysis and Determination**

17. I have carefully considered the application before this court, the reply filed thereto as well as the written submissions filed by both parties. The two issues for determination are:-
  - (i) Whether the Grant issued to the Respondent should be revoked; and
  - (ii) Whether the Administrator should be ordered to file accounts

#### **i. Revocation of Grant**

18. The grounds upon which a Grant may be revoked are set out in Section 76 of the [Law of Succession Act](#) Cap 160, laws of Kenya which provides as follows:-

“76. 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 an 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 allegations 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”.

19. In the case of *Re Estate of Prisca Ong'aya Nande (Deceased)* 2020 eKLR the court held as follows:-

“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 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 circumstance, 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”.

20. The objector herein asserts that as a grandson of the Deceased being the elder son of the 1<sup>st</sup> wife of the Deceased's son, he is a beneficiary to the estate of the Deceased. This is not infact the case.

21. Section 29 of the *Law of Succession Act* sets out the meaning of the term ‘dependant’ as follows:

For purposes of this part, ‘dependant’ means...



- a. The wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
  - b. Such of the deceased's parents, step-parents, grandparents, grandchildren, step-children, children whom the deceased had taken into his family as his own, as were being maintained by the deceased immediately prior to his death; and
  - c. Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.
22. Under Section 29(b) the grandchildren of a Deceased would only be considered as dependant if the Deceased had taken them into his family and was maintaining them immediately prior to his/her death. No evidence has been tendered nor indeed is it alleged by the objector that he had been taken into the family of the Deceased or that the objector was being maintained by the Deceased immediately prior to his demise. It is the father of the objector not the objector himself who being a son of the Deceased would be considered as beneficiary to the estate.
  23. The objector claims to have a proprietary interest in the Eastleigh Plot and the Laitigo Plot both of which have been listed as assets belonging to the estate of the Deceased. The objector claims to be a joint owner of the two parcels of land.
  24. The Respondent denies this claim and explains that whilst the late father of the objector had intended to buy out the Deceased's share in the said parcel of land, this did not materialize as the Deceased died before any such transactions occurred.
  25. The objector has not availed any documentary evidence to prove that he is a joint owner of the two parcels of land. On the other hand, the Respondent has annexed to his Replying Affidavit a copy of the Title Deed for LR No.171 Eastleigh Section Iii Nairobi (Annexure NOM '1') which indicates that the property is jointly owned by the Respondent, the Deceased and one Elam Lugongo Musungu. Nowhere does the name of the objector or his late father appear on said Title Deed.
  26. In any event if the objector claims a proprietary interest in any of the properties left behind by the Deceased then the proper place for him to pursue and prosecute such claim is in the Environment and Land Court which is the court mandated to determine question of the ownership and occupation of land. This court is a Probate Court mandated only to supervise the distribution of the estate to the genuine beneficiaries of the estate. The objector's claim to the property of the Deceased cannot be determined in this probate court.
  27. The objector has alleged that some of the signatures appearing on the consent attached to the Petition for Grant were not genuine. He claim that some of the beneficiaries purported to have signed the consent dated 14<sup>th</sup> August, 2003 were out of the country and states that they have denied having signed consent.
  28. By this claim the objector is alleging that the Respondent obtained the Grant fraudulently. Indeed, the objector is alleging that forgery occurred with respect to that consent form. An accusation of fraud once must be specifically proven. Allegations of fraud and/or forgery are serious allegations which border on Criminal activities and therefore must be proven with specificity.
  29. The objector has not given the names of the beneficiaries who signatures were allegedly forged on the consent dated 14<sup>th</sup> August, 2003. No beneficiary has filed an Affidavit supporting the objector's allegation and explaining that they did not in actual fact sign the consent in question.



30. The fact that a beneficiary resides abroad does not preclude the possibility that he /she signed the consent. The beneficiary may have travelled to Kenya to sign the consent or the form may have been sent to him abroad for signature. I find the objector's allegations of fraud to lack substance as there is no proof to support said allegations.
31. Finally, the objector insists that he ranks equally with the Respondent regarding the administration of the estate of the Deceased and demands that he be appointed as a joint administrator of the estate.
32. It must be remembered that the Deceased died intestate. The Deceased did not leave a written will in which he named executors to manage/distribute his estate.
33. Section 66 of the *Law of Succession Act* provides a general guide as to those who will be given preference to administer the estate of a Deceased as follows.

“When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interest of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-

- a. Surviving spouse or spouses, with or without association of other beneficiaries;
- b. Other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;
- c. The Public Trustee; and
- d. Creditors:

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will”.

34. The ranking of the beneficiaries of a person who died intestate is provided under Part V of the Act. Section 38 of the Act provides that where (as in this case) the intestate has left surviving children but no spouse then the net estate shall devolve upon the surviving children equally.
35. The Respondent is one of the surviving children of the Deceased. He ranks in priority to the Deceased who is a grandson of the Deceased.
36. The Objector complained that his consent was neither sought nor obtained before the Grant was issued to the Respondent. He prays that on this ground the Grant be revoked.
37. The Objector did not rank equally in the administration of the deceased's estate with the Respondent, and could not therefore be required to be given notice or to give consent to the succession proceedings. The requirements as to such notice and consent are in this regard provided in Rule 26 of the *Probate and Administration Rules* as follows:-

- “(1) 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 entitle in equality or priority, be



supported by an affidavit of the applicant and such other evidence as the court may require.

- (3) Unless the court otherwise directs for reasons to be recorded, administration shall be granted to a living person in his own right in preference to the personal representative of a deceased person who would, if living, have been entitled in the same degree, and to a person not under disability in preference to an infant entitled in the same degree.”

38. There is no legal requirements that consent be sought and obtained from a grandchild before a Grant may issue to a surviving child of the Deceased. Accordingly, the failure to seek and obtain the consent of the objector does not render the Grant issued to the Respondent defective.

39. Based on the foregoing, I find that the objector has failed to advance any valid grounds to have the Grant issued on 20<sup>th</sup> September, 2004 revoked. I therefore dismiss this prayer

### **(ii) Presentation of Accounts**

40. The objector has alleged that the Respondent has been mismanaging the estate of the deceased. The Respondent denies this allegation. Once again, the objector’s allegation lacks specifics. He has not availed any evidence before court to prove instance of alleged mismanagement by the Respondent.

41. It is trite law that the relationship between an Administrator of an estate and the beneficiaries thereof is fiduciary in nature. The Administrator has a statutory duty to account to the beneficiaries regarding his administration of the estate.

42. The duties of an Administrator are clearly set out in Section 83 of The *Law of Succession Act*, Cap 160 Laws of Kenya. Sections 83(e) and (9) of the said Act provide as follows:-

“ 83

- (a) .....
- (b) .....
- (c) ....
- (d) .....
- (e) to produce to the Court, if required by the Court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the Deceased and a full and accurate account of all dealing therewith up to the date of the account.
- (f) Subject to Section 55 to distribute or retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this Section and the income therefrom, according to the respective beneficial interests therein under the Will or on intestacy, as the case may be.
- (g) to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the Court, either of its own motion or on the application of any



interested party in the estate, to produce to the court a full and accurate account of the competed administration.” [own emphasis]

43. In the case of *Re: Estate of Julius Mimano (Deceased)* [2019] eKLR, Hon Justice William Ouko stated as follows:-

“Although the personal representative has legal title akin to that of an owner, the property does not belong to them. They only hold it in trust for the eventual beneficiaries thereof, that is those named in the will, in cases of testate succession, and those identified at confirmation of grant, in cases of intestacy. They would also be holding it for the benefit of creditors and any other persons who might have a valid claim against the estate. That would mean that they are trustees of the estate, and, indeed, the *Trustee Act*, Cap 167, Laws of Kenya, defines trustees to include executors and administrators. In the circumstances, therefore, the personal representative would stand in a fiduciary position so far as the property is concerned, and owes a duty to the beneficiaries to render an account to them of their handling of the property that they hold in trust for them. The duty to render accounts to beneficiaries arises from the trust created over estate property when the same vests in the personal representative to hold on behalf of the beneficiaries.” [own emphasis]

44. The production of Accounts therefore, is a key component of the process of Administration of an estate which enables the court to assess whether they Administrator has been faithful in his duties. The law empowers the court either on its own motion or upon application to order an Administrator to produce a full and accurate inventory of the assets and liabilities of the estate as well as a full and accurate account of all dealings with the estate.

45. It would appear that from September, 2004 when the Grant was issued no such accounts have been filed. The beneficiaries are entitled to know how the estate is being managed. Accordingly, I do grant prayer (c) of this summons.

### Conclusion

46. Based on the foregoing this court makes the following orders.

- (1) Prayers (a) and (b) of the Summons dated 9<sup>th</sup> September, 2009 are dismissed entirely.
- (2) The Administrator/Respondent Naftal Ogwoka Mwamba is directed to file within sixty (60) days full list of the assets and liabilities of the estate of the Deceased Wilson Mwamba Nyamongo as well as full and accurate accounts to show how he has managed said estate from 20<sup>th</sup> September, 2004 to date.
- (3) This being a family matter each side will bear its own costs.

**DATED IN NAIROBI THIS 26<sup>TH</sup> DAY OF MAY, 2023.**

.....  
**MAUREEN A. ODERO**  
**JUDGE**

