



REPUBLIC OF KENYA



KENYA LAW
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In re Estate of James Kioko Ndonge (Deceased) (Succession Cause 92 of 1996) [2023] KEHC 21618 (KLR) (31 July 2023) (Ruling)

Neutral citation: [2023] KEHC 21618 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE 92 OF 1996**

**MW MUIGAI, J
JULY 31, 2023**

BETWEEN

AGNES NZOLA NGEE OBJECTOR

AND

JOSEPH MUSAU KIOKO ADMINISTRATOR

RULING

1. Vide a petition received on June 7, 1996, in which the petitioner Joseph Musau Kioko petitioned this Honorable Court for a grant of Letters of Administration intestate of the estate of James Kioko Ndonge (deceased) who died on September 21, 1991 as per death certificate domiciled in Kenya at Kithangaini Machakos.
2. Pursuant to the Affidavit in support of Petition for Letters of Administration Intestate, the deceased died intestate and left his son Joseph Musau Kioko surviving him.
3. The Affidavit in support of Petition for Letters of Administration Intestate mentioned property left by the deceased at the date of his death to be Masii/kithangaini/229.
4. Vide the Gazette notice dated June 21, 1996, Joseph Musau Kioko of PO Box 772 Machakos in Kenya the deceased's son was gazetted for grant of Letters of Administration intestate to the estate of James Kioko Ndonge, late of Masii Location in Kenya who died at Kithangaini on September 21, 1991.
5. Grant for Letters of Administration made on July 22, 1996 and issued by this Honorable Court on July 23, 1996 to Joseph Musau Kioko as personal representatives of the deceased's estate to render a just and true account thereof as required by law.
6. Vide an application dated January 24, 1997, the Applicant sought orders for the grant of letters of administration issued on July 23, 1996 to Joseph Musau Kioko be confirmed. The said application



for confirmation of grant was confirmed by this Honorable court vide Certificate of confirmation on February 11, 1997 to the said Joseph Musau Kioko.

Summons For Revocation

7. Pursuant to Summons for Revocation dated December 20, 2022 and file on January 19, 2023 the Applicant herein (Agnes Nzola Ngee) sought orders:
 - a. That the grant of letters of Administration Intestate and certificate of confirmation of grant granted to Joseph Musau Kioko be revoked/ annulled.
 - b. That this Honorable court be pleased to revoke all transfers and sub divisions in land parcel number Masii/kithangaini/229 and the land registrar be ordered to re-issue the title deed in the name of the deceased
 - c. That the cost of this Application be borne by the Respondent.

Supporting Affidavit

8. Vide supporting affidavit filed on January 19, 2023 sworn by Agnes Nzola Ngee, she deposed that the proceedings to obtain the grant were defective in substance and obtained in secrecy/ fraudulently by the making of a false statement/ or by the concealment from the court of something material to the case. She lamented that the grant was obtained by the means of untrue allegation of a fact essential in the point of law justify the grant; deposing further that being a daughter of the deceased, she survived the deceased herein entitled to a share of the estate; she deposed that the Petitioner obtained a Grant of Letters of Administration Intestate in secrecy and fraudulently without her consent and/ or involvement as a beneficiary of the estate of the deceased herein;
9. The Applicant opined that she was unaware of the succession proceedings until the threat of eviction by the Respondent and that she instructed her advocate to search whether the estate had been secretly administered thus discovering the case; that being guarantors Daniel Ndavi and Joseph Musau Kioko lied on oath that she did not exist; deposing that the Petitioner deliberately misled this Honorable Court by lying that she did not exist.

Replying Affidavits

10. The guarantor, one Daniel Ndavi vide his replying affidavit dated and filed on February 8, 2023, deposed that he was only involved in this Succession Cause as a surety/ guarantor to the Petitioner/ Administrator and nothing else and that there is nowhere in the petition where he stated that the Applicant did not exist (annexed and marked affidavits he swore for the petition); he averred that it was the duty of the Petitioner/ Administrator to provide the correct information on beneficiaries and properties of the subject estate to the court; he deposed that if the Applicant was not involved in the hearing of this Succession Cause, it was the fault of the Petitioner herein and he is the to explain to the court why he did not involve the Applicant; lamenting that orders sought against him be dismissed with cost to him.
11. Vide replying affidavit dated March 1, 2023 and filed on March 3, 2023 Sworn by Joseph Musau Kioko, the said affiant stated that their father during his lifetime was working in Tanzania as a soldier before relocating to Kenya. According to him at the time their father relocated to Kenya he left a business and properties back in Tanzania (annexed and marked copies of some of the properties in Tanzania including a club); he deposed further that the Applicant is not a beneficiary of the estate of the deceased especially with regard to the land herein referred to because before their father died, he clearly stated that the he be allocated the whole of his property in Kenya as the Applicant herein together with her



family had been given property in Tanzania and his other deceased sister a property here in Kenya; averring that the Applicant and her husband squandered the property in Tanzania which made their father angry and led to a strain in relationship between their father and the Applicant (annexed and marked letter by the deceased expressing these sentiments);deposing further that the proceedings to obtain the grant followed due legal procedures seen from the court proceedings and that he petitioned the court for grant of letters of administration intestate and the grant was issued.

12. The same grant was gazetted and no one filed an objection after which he petitioned court for confirmation of the said grant (annexed and marked copy of the gazette notice); that the grant was confirmed on February 11, 1997 and subsequently the title was transferred from their deceased father's name to his name after he cleared his father's loan from Standard Chartered Bank where is father had taken a loan of Kshs thirty-five thousand (35,000) before his death in 1996 (annexed and marked copies of title deed in their father's name, title deed in his name and the documents evidencing the discharge of a charge respectively); he deposed that before the promulgation of the new Constitution Kamba customary law did not allow married women to inherit land from their father they were expected to inherit from their husband's estate
13. He denied ever evicting the Applicant from their father's land and that the Applicant has never lived in Masii/kithangaini/229 stating that the court should summon the area chief before this court to confirm the position; he lamented that after the Applicant left her Matrimonial home her sons bought her a piece of land and built for her on the said piece of land that is where she has been residing all these time; according to him, the grant is not defective because at the it was obtained the Applicant was already married and their father had already allocated that parcel of land to him and that Daniel Ndavi and him did not lie because he had two sisters one is deceased and did not include them because they had already been allocated their share of the property by their father;
14. He further deposed that he had previously sold his land to other people and did the Applicant only have to wait until the property is divided to his beneficiaries to take any legal action?; lamenting that he has already divided the land to his heirs and they have already sold their parcels of the land to 3rd parties (annexed and marked a copy of mutation form showing land sub-division); it was his position that the Applicant in 2004 raised issues with the area chief and the area chief summoned him and the issue was amicably resolved.
15. The Chief was well aware of everything that happened (annexed and marked copy of the summons from the area chief); he urged that this Honorable court does justice and not revoke all the transfers because 3rd parties will suffer for reasons which the Applicant would have avoided had she brought her objection on time and that Applicant has not demonstrated any fraudulent acts by himself or Mr. Ndavi; he urged that the Applicant should bear the costs of this application.

Supplementary Affidavit

16. The Applicant vide her supplementary affidavit dated and filed on March 3, 2023 responded to the replying affidavit Sworn by Daniel Ndavi and deposed that Daniel Ndavi made a guarantee to the Honorable Court in paragraph 1 (a-c) of P&A Form 57 as follows: "we will when lawfully required to do so make good any loss which any person interested in the administration of the estate of the deceased may suffer in consequence of breach by the administrator of his duty-
 - a. To collect and get in the estate of the deceased and administer it according to law;
 - b. When required to do so by the court to exhibit on oath in court a full inventory of the said estate and when so required to render an account of the estate and;



- c. When so required by the court to deliver up the grant to the court.
17. She lamented that it is on the basis of the aforementioned guarantee that she prayed the application be allowed.
18. Consequently, vide her supplementary affidavit dated and filed on March 22, 2023 in response to the replying affidavit of Joseph Musau Kioko, she deponed that their father did not own any property in Tanzania that could devolve to the beneficiaries as inheritance and that their father used to send money to their mother to buy properties in Kenya; deposing that what is annexed as a list of properties in Tanzania is a budget meant to improve a rental club which belonged to the Government of Tanzania rented by her father; averring that as per the replying affidavit the Respondent willfully calculated to disinherit her by alleging that she is not a beneficiary of the estate of her deceased father and that she never squandered her father's properties as alleged and that there never existed a strain in relationship between her and her father since her father and her children lived together in Tanzania after being abandoned by her husband;
19. The Applicant further lamented that the succession of the property of her deceased father was not subject to Kamba Customary law as her father died on 1991 in the pendency of *Law of Succession Act* which came into force in 1981 and that she is a deceased's daughter hence a child regardless of her gender as provided under Section 29 of the *Law of Succession Act*; she averred that Daniel Ndavi and the Respondent herein lied under oath by concealing her existence and that of her sister Teresiah Themba Kioko who died on August 25, 2009 leaving behind 6 children.
20. According to her, she is not malicious as alleged but rather took action as soon as she learnt that the grant had been fraudulently been obtained and can be revoked at any time if is found to have fraudulently obtained; it was her position that the signature on the replying affidavit is a forgery as the same is a scan which does not even match the signature appended by the respondent on the petition for grant of letters of administration filed in Court.
21. The matter was canvassed vide written submissions.

Submissions

Applicant's Written Submissions

22. The Applicant herein vide her submissions dated April 27, 2023 and filed on April 28, 2023 raised issues for determination which she submitted on sequentially.
23. On the issue of whether the applicant is a beneficiary of the estate of the deceased, it was the contention of the applicant that she is a beneficiary of the estate of the deceased within the meaning of Section 29 (a) of the *Law of Succession Act* Cap 160 which defines a beneficiary to mean:
- (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, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, 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.



18. It was submitted for the Applicant that from the above definition of who is a beneficiary, the Applicant is a beneficiary of the estate of the deceased by virtue of being a daughter of the deceased.
19. Regarding whether the concealment of the applicant as a beneficiary of the subject estate warrants revocation or annulment of the grant, reliance was placed on Section 76 (a, b, c) of the Succession Act which provides that 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;
20. Similarly, reliance was made on the case of Jamleck Maina Njoroge v Mary Wanjiru Mwangi (2015) eKLR, where the court discussed the circumstances when a grant may be revoked as follows:
- “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.”
21. It submitted that what should be contained in a petition for grant of letters of administration is set out in Section 51 (2) (g) of the Law of Succession Act which states as follows:
- “51 (2) Every application shall include information as to—
- in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;”
22. Submitting that the Law of Succession Act commands full disclosure of a deceased’s beneficiaries in the application for grant anything short of that the grant cannot stand. Reliance was on the case of Re Estate of Joseph Kilonzo Musyoka (deceased) 2018 eKLR, Further Rule 40 (4) was quoted which states:
- “Where the deceased has died wholly or partially intestate the applicant shall satisfy the court that the identification and shares of all persons beneficially entitled to the estate have been ascertained and determined.”
23. Consequently, in the case of Re Estate of Moses Wachira (deceased) (2009) eKLR, it was observed that
- “I am certain that had the applicants been made aware of the application for the confirmation of grant by being served they would have brought to the fore their aforesaid interest in the estate of the deceased and the resultant grant would have taken care of those interests. Further had the respondent been forthright and candid and included the applicants as beneficiaries of a portion of the estate of the deceased as purchasers for value, the court in confirming the grant would have taken into account their interest in the estate of the deceased. As it is therefore the grant was obtained fraudulently by making of a



false statement and or concealment from court of something material to the cause. The respondent knew of the applicants' interest in the estate of the deceased yet she chose to ignore them completely in her petition of letters of administration intestate. She also ignored them completely when she applied for the confirmation of the grant”

24. The Applicant further relied on the cases of *Re of Kamau Kingora* (2020) eKLR and *Re Estate of Mbuli Mutari (deceased)* (2017) eKLR, and submitted that the Respondent's actions amount to fraud, deceit and breach of the law of Succession and thus all the proceedings totally defective in nature and goes to the root of succession and such the court should exercise its discretion and revoke the grant as prayed.
25. On the issue of whether the Respondent committed perjury, Reliance was made on Section 108 of the *Penal Code* defines perjury as follows;
 108. Perjury and subornation of perjury
 - (a) Any person who, in any judicial proceeding, or for the purpose of instituting any judicial proceeding, knowingly gives false testimony touching any matter which is material to any question then pending in that proceeding or intended to be raised in that proceeding, is guilty of the misdemeanor termed perjury.
 - (b) It is immaterial whether the testimony is given on oath or under any other sanction authorized by law.
 - (c) The forms and ceremonies used in administering the oath or in otherwise binding the person giving the testimony to speak the truth are immaterial, if he assent to the forms and ceremonies actually used.
 - (d) It is immaterial whether the false testimony is given orally or in writing.
 - (e) It is immaterial whether the court or tribunal is properly constituted, or is held in the proper place or not, if it actually acts as a court or tribunal in the proceeding in which the testimony is given.
 - (f) It is immaterial whether the person who gives the testimony is a competent witness or not, or whether the testimony is admissible in the proceeding or not.
26. Further, reliance was made on the case of *R v Clegg* (1868) 19 LT 47 (EA 1851, the court held that the false statement must be made deliberately, not inadvertently or by mistake. The statement must be material, so significant to the case, rather than of negligible relevance. The statement may be an opinion offered by an expert witness who does not genuinely hold that opinion.
27. Contending that it is not in dispute that Daniel Ndavi was the guarantor/ surety in the succession cause. Urging that the said surety deliberately lied under oath on a fact material to the instant cause by swearing an affidavit of justification of proposed sureties guaranteeing to make good any loss that may be suffered by any person interested in the administration of the estate as a consequence of breach on the part of the administrator.
28. Similarly, the Applicant relied on the case of *David Omwenga v Republic* (2015) eKLR, to buttress Perjury.
29. As to the issue of whether the letters relied upon by the respondent are a forgery and thus inadmissible in court, it was the Applicant's position that the letters annexed to the replying affidavit alleging bad blood between the Applicant and her deceased father are forgery as the same was not signed. Opining that the letter allegedly written by the deceased is dated May 25, 1960 while the letter being responded



to was allegedly written on December 12, 1960. and that the alleged letters were written in Kamba language and have not been translated into a language of court and a certificate of translation filed to that effect which according to the Applicant is against the rules of evidence.

30. Regarding the issue of whether the transfers and sub divisions in Masii/ Kithgaini/229 should be revoked, it was submitted that upon revocation of grant in si only right and just all the actions which were undertaken by virtue of the be reversed and / or revoked reason being that the actions were founded on illegalities and are therefore null and void and bound to fail. Reliance was on the case of *Macfoy v United Africa Company Limited* (1961) 3 AALER 1169 at page 1172, Lord Deinning stated as follows:

“If an Act is void, then it is in law a nullity and not a mere irregularity. It is not only bad but incurably bad. There is no need for an order of the court to set it up aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

31. It was urged that actions undertaken with regards to the impugned grant be revoked and reversed and specifically the cancellation off all the transfers and sub divisions on land parcel number Masii/ Kithgaini/229 and the registrar be ordered to re issue the title deed in the name of the deceased herein and prayed that this Honorable Court finds favor of the Applicant and allows the summons for revocation or annulment of grant dated December 20, 2022.

Respondent's And Sureties' Submissions

32. Vide their Submissions dated May 4, 2023 and filed on May 8, 2023, the Respondent and surety submitted that the application is a mere afterthought and is purely based on greed and malice on the part of the Applicant.
33. On the issue of whether the Applicant is a beneficiary of the deceased and what was the position of the repealed Constitution with regard to succession, it was their submission that the succession proceedings in this matter were done in the year 1996 after the Respondent petitioned the court for grant of Letters of Administration intestate and by that time the repealed Constitution was still in force. Contending that Article 84 (4) (b) of the repealed constitution stated that the aspects of nondiscrimination shall not apply to matters of devolution of property upon death.
34. It was their case that married women were not allowed to own property because they were expected to inherit from the estate of their husbands and in as much as it was unfair that is what was being practiced. Urging that the Applicant is not a beneficiary of the estate of the deceased because she was left for property to manage which she misused and that she already inherited from the estate of her husband aside from selling his father's property in Tanzania and using up all the money with her husband. Contending that this Application is driven greed and malice.
35. It was contended further that the other sister who is now deceased was also settled with a piece of land in Kenya before the deceased died. Urging that married women before the Kenyan 2010 *Constitution* were not allowed to inherit from estate of their father. Reliance was on the case of *Kibicho v Kibicho & Another* (1990) KLR 330, in which the court held that:

“Under the customary law of Kikuyu community, a married woman could not inherit from her father's estate. The court reasoned that the daughter upon marriage became a member of her husband's family and any right of her family's property were lost.”



36. Consequently, they relied on the case of *Wangari v Mathai & Another* (1987) KLR 48, in which the court held that:

“ A married woman was not entitled to inherit her father’s property under the customary law of Kikuyu community that the property would be inherited by the deceased’s male relatives and the woman would not have any right to claim it”

37. .Regarding the issue of whether the Application dated December 20, 2022 was brought in reasonable time, they submitted that grant of letters of administration in this matter was confirmed in the year 1996. Urging that before the grant was confirmed it went through the pre requisite stages including publishing the same in the Kenya gazette. Contending that the Applicant had a chance before the grant was confirmed to raise her objections yet she did not and that why is she coming to raise issues of being left out after twenty-seven (27) years later?

38. It was their position that this application is not brought in good faith at all and not reasonable time. Opining that the Applicant knew very well that she was left for property in Tanzania and further the husband left her a matrimonial home. Contending that this Application is a mere afterthought brought to court after many years whereas if it was brought earlier it would have avoided many innocent parties from being affected.

39. As to the issue of whether there was concealment of material facts, it was submitted that it is not true that the Applicant was left out in the succession cause because at the time the Respondent petitioned for grant of letters of administration the Applicant was already married and lived in her matrimonial home and that their deceased father was very clear that Masii/ Kithgani/229 was the Respondent’s inheritance and he and his family were to continue living there as this was their home even at the time of the deceased death.

40. It was their position that the grant is an open process done in the court, how would the Respondent have concealed facts if at all he filed the petition for grant in court and that a letter dated 13/1/2001 was written by the Applicant to the Assistant Chief in which the Applicant complained of being secluded but the Chief handled the matter then. Urging that can the Applicant still allege that she had never been informed of the probate matter until when she was evicted? Contending that there was no concealment of facts the Applicant was well aware of the entire process yet she did not move the court appropriately she was indolent.

41. Regarding the issue of whether the grant should be revoked, it was their submission that before the promulgation of the new Constitution, women in many communities were not allowed to own land and that Kamba married women were expected to inherit from the estate of their husband by virtue of becoming part of their husband’s family and they even take the name of their husband. In as much as the same was unfair to women that was the law and practice. Reliance was placed on the case of *in the Matter of M’Ngarithi M’Miriti alias Paul M’Ngarithi M’Miriti (deceased)* (2017) KLR, as follows:

Discrimination of daughters in inheritance

From the arguments coming through, it is clear issues to do with discrimination based on gender and sex have emerged. There were bad times in the heavily patriarchal African society; that being born as daughter disinherited you. And so, even the judicial journey to liberate daughters from being so down-trodden by the patriarchal society in Kenya on matters of inheritance has been long and painful. As a matter of fact, due to the constitutional architecture of our nation at the time, before 2010, we only saw pin-prick thrusts and rapier-like strokes by courts on these persistent patriarchal biases. But, things changed when Rono



v. Rono [2008] 1 KLR 803 delivered the downright bludgeon-blow on these discriminatory practices against women in inheritance; it splendidly paid deference to the international instruments against all forms of discrimination against women especially the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). And, I am happy to say that from thence, there are many cases- and the number is rising by the day as courts implement the Constitution- which state categorically that discrimination in inheritance on the basis of gender or sex or status is prohibited discrimination in law and the Constitution.

42. It was submitted that the grant in this matter was confirmed in the year 1996 when the repealed Constitution was still in force and that revoking this grant would mean that the law is acting retrospectively and it would affect all the beneficiaries and all the third parties who have bought the land. Urging that prejudice herein would be suffered by the Respondent, his beneficiaries and the third parties who bought their land in good faith. Reliance was on the case of Mathew Njenga Njogu & Another v Rosemary Muthoni Njue (2021) eKLR.
43. It was their submission that the Applicant applied for revocation 26 years after confirmation of grant yet she could have approached this court before the land was divided among the beneficiaries and sold to third parties.
44. On the issue of whether the Respondent and surety should be arrested, it was their position that the Applicants asked this court to commit the Respondent and surety to jail because they lied under oath and they obtained grant in secrecy. Urging that according to Kamba Traditional law only males were entitled to own properties thus the Respondent listed himself as the only beneficiary and that Applicant has never ever lived on Masii/ Kithgani/229 only the Respondent his father, mother his wife and children are the ones who have ever lived on that land because their deceased father bought that land specifically so that the Respondent could have a place to call home.
45. Contending that Mr. Daniel Ndavi on the other hand was just a surety in this matter and he was well aware that the Respondent was the only beneficiary to the said parcel of land. Urging that both surety and the Respondent should not be committed to jail because they did not lie and secondly they did not obtain the grant in secrecy and that the petition was done in open court and the Appellant had the liberty to go to the court and inquire again why did she wait for all those years?
46. Regarding the issue of whether the Applicant was evicted from the suit property and whether she should be charged for perjury, it was their position that the land in question as the land was bought eleven (11) years after she was married. Urging that the land in question was not the Applicant's childhood home and that she has never lived there. Urging that the Applicant now lives in a decent home purchased for her by her sons. Reliance was made on Section 108 Penal Code Provides:

Any person who, in any judicial proceeding, or for the purpose of instituting any judicial proceeding, knowingly gives false testimony touching any matter which is material to any question then pending in that proceeding or intended to be raised in that proceeding, is guilty of the misdemeanor termed perjury.
47. It was the Respondent's contention that the Applicant should also be charged for perjury under Section 108 of the Penal Code for lying openly to this court that she was evicted because she a woman yet she has never lived on the said land. Urging that why is she using the gender card to satisfy her interest and that the Applicant has never been evicted.
48. As regards the issue of whether the signature and letters presented Respondent have been forged, it was submitted that the signature belongs to the Respondent and that the Respondent is now 84 years



old and that the standard procedure in case of suspected forgery, is subjecting of the document to an official document examiner hence it is the court to give an order to an expert witness to ascertain the legitimacy of any document.

49. As to the issue of whether the Respondent transfers done in Masii/ Kithgani/229 should be revoked, it was their case that equity helps the vigilant not the indolent and that it would not be unfair to say that the Applicant was indolent because in as much as a grant can be revoked at any time what damages or prejudice would it suffer. Urging that the Applicant's baseless entitlement cannot upset the lives of countless third parties who acquired the property in good faith.
50. As to the issue of whether the Applicant is entitled to the Prayers sought, it was their submission that the Application is a mere afterthought, malicious fueled by greed and prejudicial to the Respondent, the surety, Respondent's beneficiaries and all the 3rd parties who already bought the land years ago and those who bought some pieces of the land recently. Urging that the Applicant should not be granted these prayers because she acted in bad faith. Contending that the court should dismiss the application with costs to the Respondent.

Determination

51. The Court considered the pleadings and submissions on record and issue for determination is whether the Applicant should inherit from the deceased's estate and/or the grant is revoked or not.
52. Mativo J. similarly in his decision of 29th January, 2016, in the case of *Angelas Maina v Rebecca Waiyego Mwangi & Another*, Succession Cause No 692 of 2012, stated thus;
- “Under Section 76, the Court has discretionary power when faced with application for revocation. It can make such orders as it considers fit in the circumstances. The court is not bound to issue revocation even where the case has been set out under Section 76. In Kipkurgat Arap Chepsior and Others v Kisugut arap Chepsior, the court declined to grant the prayer for revocation, but instead entered the names of the applicants in the grant as beneficiaries. In the matter of the estate of Jonathan Mutua Misi-deceased the applicant sought revocation on grounds that it had been obtained on false statements. He was a son of the deceased and his name had been omitted from the list of survivors and instead of ordering a revocation, the court directed that his name be included in the list. (Emphasis added)”
53. In the case of *Albert Imbuga Kisigwa v Recho Kawai Kisigwa*, Succession Cause No158 of 2000, Mwita J. in a decision rendered on 15th November, 2016, noted thus:
- (13) Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not a discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the court to invoke section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased's estate and ensure that the action taken will be for the interest of justice.
54. In the instant case, it is not contested the deceased died in 1991 before the advent of *Constitution 2010* but even then the Petitioner contests that the grant was obtained by fraud or material non-disclosure by excluding the Applicant as a child of the deceased and beneficiary of deceased's estate. He stated he applied for grant of letters of administration intestate as the deceased allocated his properties to his children and specifically the property herein to him and thus sought the grant and obtained the only property allocated to him.



55. He denied ever evicting the Applicant from their father's land and stated that the Applicant has never lived in Masii/kithangaini/229. He urged that the Court should summon the area Chief before this court to confirm the position; he lamented that after the Applicant left her Matrimonial home her sons bought her a piece of land and built for her on the said piece of land that is where she has been residing all these time.
56. The said affiant stated that their father during his lifetime was working in Tanzania as a soldier before relocating to Kenya. According to him at the time their father relocated to Kenya he left a business and properties back in Tanzania (annexed and marked copies of some of the properties in Tanzania including a club). The deceased left him Masii/Kithangaini/229 he clearly stated that the he be allocated the whole of his property in Kenya. The Applicant herein together with her family had been given property in Tanzania and his other deceased sister a property here in Kenya. The Applicant and her husband squandered the property in Tanzania which made their father angry and led to a strain in relationship between their father and the Applicant (annexed and marked letter by the deceased expressing these sentiments).
57. The Applicant contests she is daughter of the deceased who was disinherited from the father's estate and there was material non-disclosure and concealment of material facts and therefore the grant is defective. The Applicant stated that she was married and together with her husband they were allocated property by the deceased in Tanzania which they disposed off. The Applicant does not deny that she resided in Tanzania. This Court finds that there are competing assertions by Applicant and Respondent and for this Court to make an informed decision the Court should hear viva voce evidence.
58. Secondly, due to the span of time since 1996, when the grant was confirmed, a lot of water has gone under the bridge and therefore, if it is established the Applicant was not allocated any portion/property from her father's estate, the Court shall add her to the list of beneficiaries to be allocated land but not revoke the grant.
59. By the above cited case-law, revocation of grant is at judicial discretion of the Court, if no wrongdoing is shown by any party and the Court takes into account the interests of all beneficiaries on board, the grant shall not be revoked but add the omitted and disinherited beneficiary to comply with mandatory provisions of the Law of Succession Act 1981.

Disposition

1. The matter shall be heard interpartes for the Applicant to establish her claim before grant is revoked and/or the Applicant is added to list of beneficiaries.
2. Case management before Deputy Registrar Machakos High Court and hearing date.
3. Court annexed Mediation may be considered if agreed Parties/Counsel to appear before Deputy Registrar Machakos High Court for screening.

RULING DELIVERED SIGNED.DATED IN OPEN COURT IN MACHAKOS ON 31ST JULY 2023.(VIRTUAL/PHYSICAL CONFERENCE)

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

Ms Muthoki for the Objector/Applicant



Ms Nymunto - For the Administrator/Respondent
Geoffrey/Patrick Court Assistant(s)

