



REPUBLIC OF KENYA



**In re Estate of Mendi Njoki Kinyua (Deceased) (Civil Appeal 37 of 2019)
[2023] KEHC 22929 (KLR) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22929 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL 37 OF 2019
LM NJUGUNA, J
SEPTEMBER 29, 2023
IN THE MATTER OF THE ESTATE OF MENDI NJOKI KINYUA
(DECEASED)**

BETWEEN

JOSPHAT NGUCHIA KINYUA 1ST APPELLANT

GEORGE GICHOHI KINYUA 2ND APPELLANT

AND

NANCY WANGECI WANGUHU RESPONDENT

JUDGMENT

1. The appellants have filed a memorandum of appeal being dissatisfied by the decision of Hon EO Wambo (SRM) delivered on May 2, 2019 seeking orders that:
 - a. The orders issued in the application dated December 11, 2017 in Kerugoya CM Succession Cause no 169 of 2017 be set aside and the grant be revoked;
 - b. The estate of the deceased be distributed equally among the three children of the deceased; and
 - c. Costs of the appeal be to the appellants.
2. The said appeal is premised on the grounds that the learned magistrate erred in law and facts in finding that:
 - a. The grant as confirmed in favour of the respondent is proper;
 - b. The appellants were not entitled to the estate of their mother; and
 - c. The application filed by the appellants did not meet the threshold for revocation of grant.



3. The brief facts are that the appellants filed summons for revocation or annulment of grant dated December 11, 2017 relating to grant of letters of administration issued on November 15, 2017 at Kerugoya in the Chief Magistrate's Court. The said grant was confirmed and certificate of confirmation of grant was issued on September 27, 2017. The application was premised on grounds inter alia that the administrator/beneficiary who is the respondent herein failed to disclose that the deceased was survived by 3 children, thereby leaving out the appellants from the inheritance. That the respondent, while petitioning for the letters of administration, misled the court by producing the chief's letter from a different sublocation and not where the deceased was domiciled at the time of death. That she concealed her ill motives by lying to the court that she had a sick child in order to compel the court to confirm the grant under certificate of urgency.
4. The respondent filed her replying affidavit to the summons for revocation of grant and deposed that at the time of the death of the deceased, she was living with her at her home in Kirinyaga and therefore, the chief's letter emanated from that location. That the property in the estate of the deceased were bequeathed by their late father through succession to the deceased and his children.
5. That the respondent and the deceased were joint coffee and tea farmers and the proceeds of the farming were channeled to Bingwa Sacco Society Limited which she claimed belongs to her absolutely. That the deceased's shares in Gikanda Farmers Co-operative Sacco Limited were transferred to the respondent before her death. That by a written will, she bequeathed the moneys in bank accounts to the respondent. The respondent further stated that the grant was obtained legally and the appellants have no claim over the estate herein. That in any event, the 2nd appellant has not given authority to the 1st appellant to act on his behalf.
6. In the lower court, the learned magistrate declined to revoke the grant and stated that the applicants therein had no claim over the estate of the deceased. It is based on this finding that the appeal herein lies.
7. In the appeal herein, the court directed parties to file their submissions and both of them complied.
8. The appellants submitted that the respondent lied to the court that she was an only child while disregarding the appellants who are her siblings. That by the chief's introduction letter she was named as the only child which fact is misleading to the court. That the deceased died intestate and the existence of a will as alleged by the respondent is not true and by disinheriting the appellant's their rights under Article 27 of the constitution have been contravened.
9. That upon the death of the late Kinyua Gichohi who was the husband of the deceased herein, the estate was distributed and the respondent got the lion's share of the estate as shown in the certificate of confirmation of grant issued on March 29, 2007. That the respondent has now laid claim on all of the estate of the deceased herein and has not shared the same with her siblings and in the absence of a will as she has claimed. It was their allegation that this grant ought to be revoked as it meets the requirements envisioned in Section 76 of the Law of Succession Act.
10. The respondent submitted that the application for revocation of grant did not meet the threshold for revocation as set out in Section 76 of the Law of Succession Act. That she is the rightful heir of the estate of the deceased because she and the deceased invested jointly in the estate. That the respondent has been operating the accounts in Bingwa Sacco Society Limited and constructively upon death of the deceased, the same would remain in the control of the respondent.
11. It was her case that before the deceased died, she had given the proceeds of Co-operative bank, Kenya Commercial Bank and Barclays Bank to the respondent and therefore the appellants could not lay claim on them. That gifts inter vivos is not a strange application of the law as was applied in the case of



Joseph Wairuga Munga Vs Mikielina Ngina Munga (2016) eKLR. That the deceased had distributed her estate during her lifetime and so the appellants have no right to contest such distribution after her death.

12. From a perusal of the lower court file, the grounds of appeal and submissions herein, the main issue for determination is whether the appellants made sufficient case to warrant revocation of the grant.
13. It is important that before I delve into the issue for determination, I must clarify that even though throughout the pleadings there is mention of a written will and copy produced, the same will not be discussed in this decision as was well observed by the lower court. The issue of testacy or intestacy is at the very core of succession proceedings and will guide the course taken by the court. In the present case, the subject of appeal is a grant of letters of administration intestate. The existence of a written will should have been brought up at inception of the succession proceedings in the estate of the deceased. Therefore, this court will not entertain any arguments to the effect that there was a written will, valid or otherwise.
14. I have also noted that the grant of letters of administration was issued on November 15, 2017 and following confirmation of the same, a certificate of confirmation of grant was issued on September 27, 2017. The latter cannot possibly have been issued before the former. I therefore cannot tell whether this was a mere inadvertence.
15. That having been said, Section 76 of the *Law of Succession Act* provides:

“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 has ordered or allowed; 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
 - iv. The grant has become useless and inoperative through subsequent circumstances.”



16. The circumstances under which a grant may be revoked were discussed in the case of *In the Matter of the Estate of LAK (Deceased)* [2014] eKLR where it was held:-

“Revocation of grants is governed by Section 76 of the *Law of Succession Act*. The relevant portions of Section 76 are paragraphs (a), (b) and (c) since the issues raised relate to the process of the making of a grant. A grant may be revoked where the proceedings leading up to its making were defective, or were attended by fraud and concealment of important matter, or was obtained by an untrue allegation of a fact essential to the point.”

17. On the first issue of whether the grant issued on November 15, 2017 should be revoked, the court record shows that the succession proceedings were initiated with a letter from the Chief of Kerugoya Location, one Daniel Mugo Kagwi. In this letter, the deceased’s usual place of residence was stated as Gatundu village, Mathira Subcounty in Nyeri County but that she had moved to Kerugoya location in Kirinyaga County where she was domiciled at the time of her death. The letter also stated that the respondent herein was the only daughter and beneficiary of the deceased. The letter even attempted to list the assets left by the deceased.
18. The requirement of a letter from the chief is not etched in the *Law of Succession Act* but rather, it is a procedural requirement to help the court to identify the correct beneficiaries in a succession cause. Therefore, we ought not pay more regard that we ought to in considering the contents of letter, save for the fact that it discloses the deceased and her family/beneficiaries. These were also the sentiments of the court in the case of *In re Estate of Mukhobi Namonya (Deceased)* [2020] eKLR where it was held:

“...it is critical that I deal with the importance of the letter from the Chief. It is not a requirement of the law, for it is not provided for in the *Law of Succession Act*, Cap 160, Laws of Kenya, nor in the Probate and Administration Rules. It was a device resorted to by the court to assist it identify the persons who survived the deceased, for the court has no mechanism of ascertaining the persons by whom the deceased was survived save by relying on officers of the former provincial administration, who represent the national government at the grassroots and are in contact with the people, and therefore, the best suited to assist the court identify the genuine survivors of the deceased.”

19. With this in mind, I do note that the said letter does not in essence disclose that the deceased was survived by the appellants and the respondent as her children. It categorically states that the respondent is “the only legal beneficiary” to the estate of the deceased. Additionally, I have noted that form P&A.5 being the affidavit in support of petition for letters of administration did not include the appellants as the children of the deceased. Ordinarily, under part 4 of the affidavit, all the beneficiaries surviving the deceased should be listed, whether or not they are benefiting from the estate. The grant was issued to the respondent on the basis of the information presented before the court, starting with the chief’s letter as introduction and then [the petition for letters of administration. The respondent followed up for confirmation of the said grant within the stipulated period. That the respondent tried to access the moneys held in Bingwa Sacco but the consent of the 1st appellant was requested for, and that is when he knew about the grant issued to the respondent.
20. From perusal of the succession proceedings, it is my view that the grant was issued based on a falsehood. While making an application under section 76 of the *Law of Succession Act*, the fraud or falsehood must



be pleaded and proved. In the case of *In re Estate of Kiura Wari (Deceased)* (Succession Cause 266 of 2007 & 264 of 2006 (Consolidated)) [2022] KEHC 10009 (KLR) the court stated as follows:

“Where fraud is pleaded, the burden and standard of proof was well explained by the court of Appeal in *Kuria Kiarie & 2 Others Vs Sammy Magera* [2018] eKLR held thus:

The law is clear and we take it from the case of *Vijay Morjaria Vs Nansigh Madhuisngh Darbar & Another* (2000) where Tunoi JA (as he then was) stated as follows; It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” [Emphasis added].”

21. At the point of petitioning for the grant, the respondent led the court to believe that she is the only beneficiary of the estate even though she knew that she had 2 brothers. I do find 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.
22. In the end, the appeal herein is allowed and I do make the following orders:
 - a. The orders issued in the application dated December 11, 2017 in Kerugoya CM Succession Cause no 169 of 2017 are hereby set aside;
 - b. The grant issued on November 15, 2017 is hereby revoked; and
 - c. Each party shall bear their own costs.
23. It is so ordered.

DELIVERED, DATED AND SIGNED AT KERUGOYA THIS 29TH DAY OF SEPTEMBER, 2023.

L. NJUGUNA

JUDGE

.....for the Appellants

.....for the Respondent

