



REPUBLIC OF KENYA



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**In re Estate of Jacob Nandieki Lukonyi (Deceased) (Succession Cause
296 of 2011) [2023] KEHC 22762 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22762 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
SUCCESSION CAUSE 296 OF 2011
WM MUSYOKA, J
SEPTEMBER 28, 2023**

RULING

1. On May 8, 2018, Kiarie J delivered a ruling herein, where he rendered himself as follows:
 - “4. My perusal of the affidavits filed herein has revealed that the disputes in this estate can only be addressed if the administrators herein did what is expected of them. As it stands now, they have failed to discharge their obligation and this has made the heirs start infighting. I am therefore making the following orders:
 - a. The administrators to move the court in respect of the summons for confirmation of grant dated August 5, 2013 within 30 days of this ruling. Failure to do so, section 76(d) will become operative and the grant herein shall be automatically revoked.
 - b. ...”.
2. My interpretation of the above is that the administration herein has not been concluded because the administrators have failed in their primary duty, which is the distribution of the assets of the estate, something which has caused the heirs and survivors to engage in unnecessary fights. To move the matter forward, the administrators were directed to have the pending summons for confirmation of grant, dated August 5, 2013, heard, and to move court in that behalf in 30 days, failing which section 76(d) of the *Law of Succession Act*, cap 160, Laws of Kenya, would become effective, and render the grant automatically revoked.
3. In case the parties have forgotten, section 76(d) of the *Law of Succession Act* sets out the ground for revocation of a grant where administration has failed. According to that provision, an administration fails when the administrators fail to apply for confirmation of their grant within certain timelines, where there is lack of diligence in administration, and where the administrators fail to render accounts as and when required by the law.



4. Section 76(d) of the *Law of Succession Act* provides:

“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 any interested party or of its own motion-

(a) ...

(b) ...

(c) ...

(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. ...

5. What Kiarie J was telling the administrators, in the ruling above, is that their administration had failed, and fertile grounds existed for revocation of their grant. But he threw to them a lifeline, have the confirmation application heard, to facilitate distribution, and completion of administration, otherwise the grant would stand revoked, should that fail to happen.

6. What I can see from the record is that letters of administration intestate herein were made to the administrators on November 19, 2012, and a grant was duly issued to them, dated November 28, 2012. That grant remains unconfirmed to date, 11 years later. Yet, confirmation ought to be done after expiration of 6 months from the making of the grant, or even earlier, subject to leave of court. The administrators filed a summons for confirmation of grant on August 5, 2013, of even date, which remains unprosecuted to date, 10 years after it was filed. This is what failure of administration is about. When administrators are unable to prosecute an application that they filed 10 years ago, that would be a very clear case of incompetence, paralysis, ineptitude, inability and complete failure. This is what Kiarie J was pointing out on May 8, 2018.

7. Have the administrators acquitted themselves, by doing that which Kiarie J ordered or directed them to do? I do not think so. After May 8, 2018, the matter was fixed for hearing on November 8, 2018, January 31, 2019, May 16, 2019 and October 24, 2019. It is not clear from the court record as to why the matter was not placed before the Judge on those dates. The matter was eventually placed before Kiarie J on June 6, 2020, Mr. Fwaya for the petitioners asked for another date, and was given February 27, 2020. Come February 27, 2020, Ms. Masakhwe and Mr. Wanyama appeared for the administrators. Ms. Masakhwe informed the court that her side had failed to serve Mr. Wanyama, and the matter was adjourned to 4th June 2020. It is not clear what happened on June 4, 2020, but the matter was allocated



another date, November 26, 2020. On November 26, 2020, Mr. Were appeared for some of the parties, and applied for an adjournment, and the matter was put off to January 28, 2021. On January 28, 2021, Mr. Fwaya and Mr. Wanyama appeared for the parties. Mr. Wanyama informed the court that the parties had not agreed on the confirmation application, while Mr. Fwaya said that there was a pending matter between the same parties at the Environment and Land Court, and it would have made no sense for the parties to proceed with the confirmation process, whereupon the court left it open to the parties to move the it appropriately. There was an appearance before the Deputy Registrar on September 9, 2022, who allocated the matter a date for mention on November 29, 2022.

8. The matter of the summons for confirmation of grant, dated August 5, 2013, and the directions given by Kiarie J on May 2018, were apparently ignored after that, and were pushed to the backburner, for on November 29, 2022, it transpired that an application, dated January 2, 2022, had been filed, and the parties were asking to be given directions. A date for mention was allocated, February 8, 2023. On February 8, 2023, none of the parties attended court, and the Judge allocated March 15, 2023, for hearing of the summons, dated January 2, 2022. On March 15, 2023, that summons was placed before me, Mr. Wanyama was in attendance, and he asked me to give directions on its disposal. Whereupon, I directed that that it be canvassed by way of written submissions. I fixed it for mention on May 16, 2023, to receive the submissions. On May 16, 2023, Mr. Were appeared for the parties, and informed me that they had not filed written submissions, and craved for indulgence. I put off the matter to July 11, 2023, on which date Mr. Wanyama appeared, and informed me that they had not filed submissions, and told me that he was relying entirely on the supporting affidavit.
9. The chronology of events after the directions of May 8, 2018, point to a complete disinterest in the completion of administration, and a total disregard of the directions given by the court.
10. Be that as it may. What is the application dated January 2, 2022 all about? Is it meant to implement the directions given by Kiarie J on May 8, 2018? The said application effectively seeks the removal of one of the administrators of the estate. As it is premised on section 76 of the [Law of Succession Act](#), it is an application for revocation of grant, but affecting only 1 of the administrators. There is no provision in section 76, which allows revocation of a grant in the manner proposed in that application. What emerges from that application is that the administrators have been unable to speak with one voice on the administration. However, that of itself is not enough ground to have one of them removed. Disagreements or divergencies, in the opinions of the administrators, on how to advance the administration, can be no excuse for failing to prosecute the pending confirmation application for 10 years. What ought to have been done, is that any administrator, not agreeing with the proposals on distribution, in the said application, ought to have filed an affidavit of protest, and then the court would have conducted an oral hearing on the issues, and thereafter rendered itself on them. The dispute on whether the alleged sale to the third party was valid or not could, at the hearing of the confirmation application, be referred to another court, in terms of rule 41(3) of the [Probate and Administration Rules](#), for determination, in separate proceedings. I note that the deceased died a polygamist, and left a large family. 4 administrators were appointed to represent the different houses, and it is to be expected that all 4 could not always read from the same script.
11. Rule 41(3) of the [Probate and Administration Rules](#) provides as follows:

“41.

Hearing of application for confirmation

(1) ...

(2) ...



- (3) Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71(2) of the Act, proceed to confirm the grant.
- (4) ...”

12. Kiarie J directed the administrators, on May 8, 2018, on how to progress the matter to distribution. 4 years 4 months down the line, the confirmation application has not been heard, and nothing serious is being done to conclude the matter. The same infighting that Kiarie J mentioned, in the ruling of May 8, 2018, is still in full display. I accordingly invoke section 76(d) of the *Law of Succession Act*, and declare a total failure of administration, consequent upon which I revoke the grant of November 19, 2012. Fresh administrators will have to be appointed, who shall not include the administrators appointed in the grant of November 19, 2012. I shall, at the delivery of this ruling, allocate a date for mention of this matter, to receive names of the proposed new administrators. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA ON THIS 28TH DAY OF SEPTEMBER 2023

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Appearances

Mr. Were, instructed by Gabriel Fwaya, Advocate for Francis Wesonga Nandieki, James Okelo Nandieki and Eugene Nyongesa Nandieki.

Mr. Wanyama, instructed by Wanyama & Company, Advocates for Leonard Wafula Makhanu.

