



REPUBLIC OF KENYA



**In re Estate of Nthambi Kiilu Muange (Deceased) (Succession Cause
540 of 2008) [2023] KEHC 24400 (KLR) (24 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24400 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE 540 OF 2008
MW MUIGAI, J
OCTOBER 24, 2023**

BETWEEN

**MUENI NGUMA 1ST APPLICANT
EVELYNE KANINI KIILU 2ND APPLICANT
JACINTA MUMBUA KIILU 3RD APPLICANT
JOHN MUTUKU KIILU 4TH APPLICANT
GLADYS MUTHONI KIILU 5TH APPLICANT
ISABEL MUTINDI KIILU 6TH APPLICANT
ERIC MUTINDA KIILU 7TH APPLICANT
NICHOLAS MUANGE KIILU 8TH APPLICANT**

AND

SERAH NZIVULU MUSYOKI RESPONDENT

RULING

Court Record

1. The deceased Nthambi Kiilu Muange died on 13/06/2007.
2. The Petition for letters of administration intestate was filed on 4/9/2008 and listed one daughter; Serah Nzivulu Musyoki.
3. The assets include Masii/Embui/793 and Masii/Mbaani/353.
4. The Petition was gazetted in Kenya Gazette on 22/7/2008 the grant was issued to Serah Nzivulu Musyoki



5. The grant was confirmed on 17/6/2009 and properties comprising the estate of the deceased were distributed to the Administrator.
6. The Application was brought by 8 Applicants *vide* Chamber Summons dated 19/9/2022 and they sought conservatory orders to preserve the of assets that comprise of the deceased's estate pending hearing and determination of the summons for revocation of grant.
7. The Court Orders of 22/9/2022 by this Court granted the conservatory order to preserve the Estate of the Deceased pending the hearing and determination of the summons for revocation of the grant.

Summons For Revocation Of Grant

8. The Objectors/Applicants herein filed summons for revocation of grant dated 19th September, 2022 pursuant to Section 26, 29, 40,45 and 76 of the Probate and Administration Rules of the [Law of Succession Act](#) and all enabling provisions of the law.
9. The Applicants sought the following orders;
 - a. That pending the hearing and determination of this summons, a conservatory order do issue to preserve the assets of the estate of the late Nthambi Kiilu Muange as contained in the certificate of confirmation of grant dated 17.06.2009 which are land parcel no. Masii/Embui/793 and Masii/Mbaani/353.
 - b. That the grant of letters of administration issued on 27/10/2008 and the certificate of confirmation of grant dated 17/06/2009 with respect to the estate of Nthambi Kiilu Muange be annulled and/ or revoked.
 - c. That a restriction order do issue prohibiting any further distribution, sale, transfer and disposition of any kind with regard to the properties contained in the impugned certificate of confirmation of grant dated 17/06/2009, being land parcel no. Masii/Embui/793 and Masii/Mbaani/353 until further representation of the estate of Nthambi Kiilu Muange is made.
 - d. That any distribution, transfers and dispositions of any kind and/ or by the Administrator with respect to the estate of the deceased herein be declared unlawful, null and void and the registration of the land parcel no Masii/Embui/793 and Masii/Mbaani/353, be restored back to the estate of Nthambi Kiilu Muange.
 - e. That the costs of this application be borne by the Administrator/ Respondent.

Replying Affidavit By Petitioners

10. On 7th October, 2022 the Petitioner filed her Replying affidavit sworn on 06/10/2022 deposing as follows;
 - a. That it was not true that the 1st applicant was legally married to her late mother in a woman-to-woman marriage popularly known as "iweto" in the Kamba tradition as no dowry payment was done as is required by the Kamba traditions and laws with regards to the said marriage.
 - b. That to the best of her knowledge, the 1st applicant herein was a servant of her late mother who decided to move in with her children during the lifetime of her late mother as she was not living at home with her mother and such her mother appreciated the company.
 - c. That under the Kamba tradition, when a woman is married by another woman, it is usually for the benefit of the husband and as such to the extent that the 1st applicant was married by her



mother then it was for the benefit of her late father and therefore the 1st applicant would only have been entitled to inherit her late father's estate and that her father did not acknowledge her as the wife and as such she could not be able to benefit from the estate of her late parents.

- d. That from the photos annexed as MM3 in the supporting affidavit to the application it was clear that the only house that was permanent on the suit property was the house that she had built for her parents and the applicants had never caused to be done any other permanent developments on the suit properties because what they have is a license to be on the suit properties and not interest or right that they can enjoy.
- e. That the license the applicants had obtained from her late mother lapsed upon her death and thus the applicants were squatters in the land and should vacate and if had any claim then should file the claim in the Environment and Land Court.
- f. The assertions that she was not fit to be an administrator of the estate did not suffice owing to the fact that she was the only heir recognized by the law under the law of succession Act and such she did not do any wrong by filing for succession without involving the applicants.
- g. The woman-to-woman marriage the applicants alluded was disputed as woman to woman marriages were considered in Kamba traditions in distribution of the estate of the deceased before the commencement of the Law of Succession Act and thus the act does not recognize woman to woman marriages or children born of such marriages.
- h. The properties known as Masii/Embui/793 and Masii/Mbaani/353 were already registered in her name and therefore no longer formed part of the estate of her late mother and thus this court lacked jurisdiction to make any order of cancellation of the titles as this was within the jurisdiction of the Environment and Land Court.
- i. The Applicants were nowhere when her mother was unwell and eventually died as she covered for all the treatment expenses as well as the burial expenses and that even if the applicants were to be found as heirs she would still be entitled to the biggest share of the estate of her mother.
- j. That she has never committed any fraud or concealed any information in obtaining the grant as she is the only beneficiary of the estate of her late mother and if she was to be removed as an administrator she would suffer irreparably as the applicant wanted to enjoy the estate of her late mother to her exclusion.

Hearing

11. On 3/5/2023, Mueni Nguma testified that she was in Court with her 7 children and she stated she was married to the deceased under iweto and relied on her Witness Statement of 21/2/2023 and pleadings filed in this matter. She also exhibited photographs of her house where she resides on the property since 1992 to date. She confirmed the Respondent was/is her daughter and was/is entitled to her share.
12. There was no cross examination by Respondent despite service and taking dates in Court she refused to attend Court or send any representation/information for the Court to consider.

Submissions

Objectors' /Applicants' Submissions

13. The Applicants filed their submissions dated 25th May 2023, in which the applicants raised the following legal issues;



- a. Whether the 1st objector/ applicant was married to the deceased under Kamba Customary law?
 - b. Whether the objectors / applicants are entitled as Beneficiaries to the estate of the deceased herein?
 - c. Whether the threshold test for revocation or annulment of grant under section 76 has been satisfied?
 - d. Whether the Administratrix/ respondent is fit to take out letters of administration and administer the estate of the deceased?
 - e. What is the position on all the transfers and dispositions with respect to the estate of the deceased undertaken by the administratrix?
14. As to whether the 1st objector was married to the deceased under Kamba Customary Law, reliance was placed in the case of *Re Estate of Anthony Mutonga Ndolo [Deceased] [2019] eKLR(P&A 683 of 2010)* to define woman to woman marriage. It is submitted that the 1st applicant averred that she was the widow to the deceased having been married to her through woman-to-woman marriage in accordance with the Kamba customs. The 2nd – 8th applicants are their children, born and raised and their permanent residence is situated in the land parcel no. Masii/Embui/793 which forms part of the estate
 15. It is submitted that evidence in court equally confirmed that the administratrix/ respondent was aware of the union in 1992 as they were sharing the same compound with her late mother and co-applicants who were raised and were living on the deceased parcel of land and even their close relatives, village elders, neighbours knew and recognized such marriage.
 16. It was submitted that the applicants came to court with their witnesses and were ready to be cross examined by the respondent so as to seek any clarification but she however failed to show up in court thus the evidence given by the applicants in court remained uncontroverted and deemed as unchallenged.
 17. It is further submitted that the applicant proved their case on a balance of probability that the 1st applicant was married to the deceased in a woman to woman marriage under the Kamba traditions and is buttressed by the fact that the 1st applicant and her children have been living in the deceased estate for more than 31 years since 1992 and her children had assumed the deceased middle name Kiilu as their surname as confirmed by copies of their identity cards .
 18. As to the issue of whether the objectors/ applicants are entitled as Beneficiaries of the estate of the deceased herein? It is submitted that the 1st applicant averred that she was a widow to the deceased and the 2nd -8th applicants were their children born and raised in their permanent residence in land parcel no. Masii/Embui/793 which formed part of the estate and close relatives and neighbours recognized them in such capacities.
 19. It was submitted that they have all along been waiting for the distribution of the deceased's estate and came to know of the succession proceedings when they made a follow up upon noticing strangers in the deceased's estate and became suspicious that succession may have been done without their knowledge and consent. They later confirmed that the respondent was issued with a chief's letter which did not confirm all the beneficiaries of the deceased estate. Section 29 of the *Law of Succession Act* provides for the meaning of a dependant as wife and children of the deceased whether or not maintained by the deceased prior to his death. Reliance was placed in the case of *re Anthony Mutonga Ndolo (deceased) [2019]* it was submitted that this union is meant to continue a generation and thus the children of the



- 1st applicant are considered to belong to the woman undertaking the marriage (the deceased) herein and her husband.
20. On the issue of Whether the threshold test for revocation or annulment of grant under section 76 has been satisfied? It was submitted that the applicants had been waiting for the distribution of the deceased estate and came to know about succession proceedings when they made a follow up upon noticing strangers in the deceased estate and learnt about a chief's letter which had maliciously left the applicants out as the rightful beneficiaries.
 21. The Applicants submitted that section 76 of the [Law of Succession Act](#) provides that a grant of representation, whether confirmed or not, may at any time be revoked or annulled if the court decides either on application by any interested party or on its own motion. It was submitted that the petitioner completely left out the applicants while filing the succession cause as evidenced in the documents. She stated in her replying affidavit that she excluded the applicants as she did not recognize them as heirs and beneficiaries and this was a clear indication that the law was violated under rule 26 of P & A rules which is to get consent from all beneficiaries of the deceased estate before filing a petition.
 22. It is submitted that there was non-disclosure of the material fact that the 1st applicant and her children were actually residing in the land parcel No. Masii/Embui/793 which formed part of the estate of the deceased for more than 31 years. The respondent committed an illegality by initiating these proceedings with a letter of introduction from the chief that maliciously leaving out the applicants in the succession cause.
 23. The applicants/ objectors further submitted that they had proved on a balance of probabilities that the respondent misrepresented the facts, acted fraudulently and withheld material facts and that the impugned grant deserves to be revoked and /or annulled. Reliance was placed on the case of the Estate of Magangi Obuki(deceased) [2020] eKLR where in affirmation of disclosing all the material facts before a court of law while seeking letters of administration and confirmation thereof.
 24. As to Whether the Administratrix/Respondent is fit to take out letters of administration and administer the estate of the deceased?, it was submitted that section 66 of the [Law of Succession Act](#) gives a list of persons whom a grant in intestacy can be made and that it is clearly demonstrated that the administratrix hands are tainted with illegalities and in light of the foregoing, the administratrix/ respondent is not fit to take out letters of administration to administer the estate of the deceased. That the respondent does not rank pari passu with the 1st objector/ applicant who isa spouse of the deceased and that at best she ranks in the same hierarchy with the 2nd -8th applicants who are the children of the deceased.
 25. On the issue of What's the position on all transfers and dispositions with respect to the estate of the deceased undertaken by the administratrix, it is submitted that the respondent was threatening to evict the objectors/ applicants from the estate properties since the titles were in her name despite the fact that this was the only place, they call home and use the land for farming as their means of the subsistence. The administratrix in her replying affidavit acknowledged that the estate properties are already registered in her name and alleges that they no longer form part of her late mother's estate and that this court lacks jurisdiction foe cancellation of the titles. It was submitted that this Court has jurisdiction to hear and determine the issues raised in the summons since the estate properties were registered in the name of the respondent through succession which the succession process is being challenged. Reliance was placed in the case of Estate of Magangi Obuki (deceased) [2020] eKLR(supra) where in a similar circumstance to this case, the court ordered cancellation of such titles.



26. Reliance was placed on the Case of Succession Cause No. 63 of 2006 in the estate of Muthengi Mulungu Masyuko (deceased) where the court was faced with a situation similar to the one at hand involving a woman to woman marriage. It was finally submitted that the applicants had proved their case to the required standards. They have demonstrated that the grant as obtained was tainted with illegalities and the court was urged to grant the orders sought in the summons for revocation or annulment of grant dated 19/9/2022 as prayed

Respondents' Submissions

27. The respondents had not filed their submissions at the time of this judgement.

Determination

28. The Court considered the Court record, pleadings and written submissions of parties through their respective Counsel and the main issue is whether the grant and confirmed grant may be revoked or not
29. The revocation of grant is provided for by Section 76 LSA as follows;

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
30. In the case of *Albert Imbuga Kisigwa v Recho Kawai Kisigwa*, Succession Cause No.158 of 2000, Hon. 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.
31. In *Re Estate of Prisca Ong'ayo Nande (Deceased)* [2020] eKLR Hon. W. Musyoka J observed;

Under section 76, a court may revoke a grant so long as the grounds listed above are disclosed, either on its own motion or on the application of a party. 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 of 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 circumstances, 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.

32. The Applicants lay the following claims /allegations as the basis for revocation of grant;
- a) The Administrator/Respondent herein was issued and or caused to be issued with a chief's letter dated 10/7/2008 which letter did not confirm all the family members and thus the rightful beneficiaries of the deceased whom this estate relates.
 - b) That the proceedings to obtain the Grant and Certificate of Confirmation of grant were thus defective in substance.
 - c) That the Grant as confirmed was obtained fraudulently by the making of false statements and by the concealment from the Court of things material to the case.
 - d) That the Administrator did not inform and did not seek consent from the Applicants herein who are also beneficiaries of the estate of the deceased.
33. Section 51 LSA which provides;
51. Application for grant
- (1) Every application for a grant of representation shall be made in such form as may be prescribed, signed by the applicant and witnessed in the prescribed manner.
 - (2) Every application shall include information as to—
 - (a) the full names of the deceased;
 - (b) the date and place of his death;
 - (c) his last known place of residence;
 - (d) the relationship (if any) of the applicant to the deceased;
 - (e) whether or not the deceased left a valid will;
 - (f) the present addresses of any executors appointed by any such valid will;
 - (g) 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;
 - (h) a full inventory of all the assets and liabilities of the deceased; and (i) such other matters as may be prescribed
- And Rule 26 of the Probate and Administration Rules that provides as follows: -



26.

- (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 entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.”

34. These provisions were not complied with in the process of obtaining letters of administration intestate; the beneficiaries’ names were omitted and written consents were not obtained to aid in pursuit of the grant. Therefore, the grant of letters of administration confirmed on 17/6/2009 is hereby revoked under Section 76 (a) LSA.
35. On the issue of woman to woman marriage, Reliance was placed in the case of *Re The Estate of Priscilla Nduta Gitwande (deceased)*[2006] eKLR Justice Rawal revoked the grant of representation made to the Administratrix who was the traditional wife in woman to woman marriage on the grounds that the marriage had not satisfied the customary requirements in order to be recognized as a valid marriage under customary law since the deceased a (woman) had a biological daughter.
36. Similarly in the case of *Millicent Njeri Mbugua V Alice Wambui Wainaina* [2008] eKLR it was held that woman to woman marriage in the circumstances was not valid because dowry of the woman to be married had not been paid as was required by custom since the other woman had been accompanied by her husband. The court considered the requirements of a valid woman to woman marriage under customary law included, that the husband of the woman marrying another must have died, that the woman marrying must have been left childless by her deceased husband, that she must have been past her childbearing years, that she must have paid dowry to the family of the woman she was marrying and she must have subsequently arranged for a man from her deceased husband’s age group to have intercourse with her wife.
37. In *re Estate of Anthony Mutonga Ndolo (Deceased)* [2019] eKLR D. K. Kemei J referred to Lady Justice Nyamweya in the matter of the *Estate of Muthengi Mulungu Masyuko (deceased)* [2017] eKLR was faced with a case involving a woman to woman marriage under Kamba customs (“iweto”). She held as follows:-

“.... an iweto marriage under Kamba Customary law is described in Restatement of African Law Volume is the Law of Marriage and Divorce (1968) by Eugene Cotran at page 26 as follows:-

Woman To Woman Marriage. Where a husband dies leaving a childless widow who is past child – bearing, the widow may marry a wife (iweto) by giving ngaswya to her family in the usual way. The widow then selects a man (mutuanya) from her late husband’s relatives to have sexual intercourse with her wife and any children resulting from such cohabitation are regarded as the children of the widow and her deceased husband. This form of marriage can also take place during the lifetime of a husband where the wife is barren or has not produced male children.



It is therefore apparent that whether or not the 5th Objector was married as a second wife or in an iweto marriage, her children are considered children of the deceased and are therefore beneficiaries.”

38. The Court also relies on Article 2 (4) of *the Constitution* & Section 3 (2) of *Judicature Act* on application of African Customary law where it is not inconsistent with *the Constitution* and/or repugnant to justice and morality or contrary to any written law. The iweto marriage was recognized and acceptable in Kamba Community.
39. In the instant case, The Objector/ Applicant submitted that she was a widow to the deceased Nthambi Kiilu Muange having been married through woman-to-woman marriage in accordance with the Kamba customs, the 2nd – 8th applicants are their children, born and raised in the land parcel No. Masii/Embui/793 which forms part of the estate. The Applicant filed pleadings, written Statement and testified in Court. The Respondent objected in her pleadings but did not controvert the Applicant’s claim /evidence. Evidence in Court confirmed that the objectors’ close relatives, village elders, neighbours among others knew them and recognized them in such capacity.
40. Therefore, this Court finds that the arrangement of woman-to-woman marriage existed in this case and is recognized as evidenced in the Objectors’ submissions and witness testimonies. They have proved that their permanent residence is situated in the land parcel No. Masii/ Embui/793 which forms part of the Estate of the deceased. The objectors have proved that they are beneficiaries to the Estate of the deceased with the Respondent.

Disposition

1. The grant of letters of administration of confirmed on 17/6/2008 is revoked under Section 76 of LSA.
2. The Registrar of Title is hereby directed to cancel the transfer of land parcel No. Masii/Embui/793 and Masii/Mbaani/353 in the name of Serah Nzivulu Musyoki and the same revert to the name of Nthambi Kiilu Muange(deceased)
3. A new/fresh grant of letters of administration shall issue to the following Administrators;
 - a. Serah Nzivulu Musyoki
 - b. Mueni Nguma
4. The Applicants/Objectors and ALL beneficiaries of the estate of the deceased to meet with Administrators and discuss and propose/agree on the proposed mode of distribution of the deceased’s estate.
5. The Administrators shall thereafter file Summons for Confirmation of Grant after consultations proposals and/or consents from/by beneficiaries.
6. If any party shall still be aggrieved after filing of Summon for Confirmation, the party shall file Protest to be heard before Confirmation of grant.
7. Each party shall bear their own costs since this is a family matter.

It is so ordered.

JUDGMENT DELIVERED DATED SIGNED IN OPEN COURT IN MACHAKOS ON 24/10/2023. (VIRTUAL/PHYSICAL CONFERENCE)

M.W.MUIGAI



JUDGE

