



REPUBLIC OF KENYA



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In re Estate of Mbau Kinyuru alias Mbau Kinyuru Njuguna (Deceased) (Succession Cause 144 of 2017) [2023] KEHC 26734 (KLR) (20 December 2023) (Ruling)

Neutral citation: [2023] KEHC 26734 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
SUCCESSION CAUSE 144 OF 2017
CM KARIUKI, J
DECEMBER 20, 2023
IN THE MATTER OF THE LATE MBAU KINYURU
ALIAS MBAU KINYURU NJUGUNA (DECEASED)**

BETWEEN

**GRACE WANJIKU 1ST APPLICANT
JANE NJERI 2ND APPLICANT
TERESIA WAIRIMU 3RD APPLICANT
RAHAB MUTHONI 4TH APPLICANT
LILIAN WAMBUI 5TH APPLICANT
RUTH WANJIRU 6TH APPLICANT
FRANCIS MUCHIRI 7TH APPLICANT
MARY NJOKI 8TH APPLICANT**

AND

**RACHEL NJOKI MBAU 1ST RESPONDENT
JONATHAN NJUGUNA MBAU 2ND RESPONDENT**

RULING

1. The Applicants, *vide* their Application dated 24/1/2023, sought the following reliefs against the respondents:
 - i. Spent.
 - ii. Spent.



- iii. Spent.
 - iv. That the grant of letters of administration issued to the respondents on 24/9/2019 and the Certificate of Confirmation of grant issued on 11/2/2021 be revoked.
 - v. Alternatively, the certificate of Confirmation of grant issued on 11/2/2021 be vacated and set aside, and the deceased's Estate be redistributed afresh per Section of the *Law of Succession Act* Cap 160 Laws of Kenya.
2. The Applicants rely on the grounds set out on the face of the Application and on the supporting affidavit dated 24/1/2023. The Applicants further rely on a supplementary affidavit dated 11/4/2023.
 3. The Application herein is opposed to a replying affidavit by the first Respondent dated 20/3/2023. The 2nd Respondent supports the Application.
 4. Parties were directed to canvass final argument by way of submissions that they filed.

Applicants submissions

5. The Applicant submits that the Estate herein relates to one Mbau Kinyuru alias Mbau Jonathan Njuguna their late father. That since the inception of these proceedings, the Applicants have never been involved in the matter despite them being legally entitled to the Estate and having not denounced their rights as per the law required.
6. That there is an error apparent on the face of record where the Court proceeded on the wrong assumption that the participation of the 2nd Respondent in the proceedings by extension meant that the Applicants were aware of the proceedings and that he was representing their interest.
7. The Applicants did not consent to the appointment of administrators in the Succession Cause. The Consent is mandatory under Rule 26 (1) and (2) of the *Probate and Administration Rules*. Reliance is made in the case of *Tabitha Wanjiku Mwangi v Anne Muthoni Njuguna & 4 others* (2016) eKLR, the Court held as follows: -

“ Although the written consents are premised on a confirmation of grant the written consents similarly applies to the grant of representation. The grant of letters of administration is regulated by Rule 26 (1) and (2) of Probate and Administration Rules; which provide;

"letters of administration shall not be granted to any Applicant without notice to any other person entitled in the same degree as or in priority to the Applicant"

"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 equity or priority, be supported by an affidavit....

In the instant case the Objectors consents were not obtained, the instant Application is predicated upon the notice of the Petition for grant of letters of administration appearing in the Special Issue of Kenya Gazette of December, 2015. (a copy is attached to the Application) the Objectors were not aware or informed until they saw the matter in the Kenya Gazette, hence the Application to decline the grant of letters of administration. "

8. The Applicants contend that they were not served with the summons for Confirmation of grant application dated 27/8/2020. When the Application came up for hearing on the 8/2/2021, Counsel for the 1st Respondent only confirmed service of the Application upon the advocate for the 2nd



Respondent. The Court did not satisfy itself on service of the Application upon the other 8 children of the deceased the applicants herein before allowing the Application as unopposed.

9. That they did not consent to the proposed mode of distribution where the Estate was shared into two equal portions and which mode of distribution went against the clear provisions of Sections 35 and 40 of the *Law of Succession Act*. Reliance is made on In the case of Re Estate of Mbalu Nzunza Ndambo alias Mbaluka Nzunza (DCD) 2020 eKLR where the Court held that: -

“ 33. Since this Court has the power even on own motion to revoke a grant or certificate of grant I find no substance in the submission that the Applicant ought to have expressly sought for an order for revocation of the certificate as opposed to the grant itself.”

36. In this case the Court having directed that the Applicant be served with the Summons for Confirmation of grant, the failure to do so amounted to a violation of the rules of natural justice and that rendered the proceedings to obtain the Confirmation of grant defective in substance.”

10. The Applicants submit that they deserve a hearing on the mode of distribution of the Estate of their deceased father and that the mode of distribution which was allowed *ex parte* before considering the number of children in each house was in breach of Section 40 of the *Law of Succession Act*.
11. They submit that, the Estate ought to have been distributed equally amongst the surviving wife and nine (9) children of the deceased and not otherwise. Reliance is made on In the case of In Re Estate of John Musambayi Katumanga (Deceased) 2014 eKLR .

Respondent Submissions

12. The Respondents submit that the summons dated 6 December 2021, the 2nd Respondent and the Applicants herein sought for the setting aside of the confirmation proceedings of 8 February 2021, and for them to be granted unconditional leave to file affidavit of protest to the summons for Confirmation dated 27 August 2020. In essence, the Applicants were litigating on the distribution of the Estate, whereas in the current summons the Applicants are seeking fresh re-distribution of the Estate.
13. The issues that were in the summons dated 6 December 2021 are more or less the same issues that are litigated in the current summons. In the summons dated 6 December 2021, the Applicants were challenging the consent that had appointed the administrators of the Estate. In essence, they were challenging the process that led to the appointment of the administrators. In the current summons, the Applicants have sugar coated their prayer to that of revocation of the grant of letters of administration.
14. They contend that, the issues relating to the process of appointment of administrators were fully addressed in this Court's judgement delivered on 28 July 2021. The Applicants herein fully participated in the hearing of the summons dated 6 December 2021, and the issue of appointment of administrators was directly in issue in the said summons.
15. They argue that, in the summons dated 6 December 2021, the Applicants had sought for leave to file affidavit of protest to the Confirmation of grant. In the current summons, the Applicants are seeking for the Estate to be redistributed afresh in terms with section 35 of the *Law of Succession Act*. This issue of re-distribution is the same issue that was litigated in the summons dated 6 December 2021, and upon considering the facts of the case, this Court found no merits in the said prayer. In the summons dated 6 December 2021 the Applicants had stated that they were not served with summons for Confirmation



- and that they were not agreeable to the mode of distribution. The same ground has been advanced in the current summons.
16. They thus submit that, it is evident that the issues in the current summons are similar to the issues that were conclusively determined in the summons dated 6 December 2021. The current summons is thus *res judicata*, and as such the Court lacks jurisdiction to hear and determine. Reliance is made on *Kennedy Mokuia Ongiri - v- John Nyasende Mosioma & Florence Nyamoita Nyasende* [2022] eKLR.
 17. Further they argue, the alternative prayer in the current summons is totally misplaced. The prayers sought are not anchored on any known provisions of the law. The Court is not clothed with jurisdiction to vacate and set aside certificate of Confirmation of grant. It is well settled that jurisdiction emanates from express provisions of the law. The Applicants cannot thus move the Court to grant prayers that are not within its jurisdiction. Reliance is made on *In re Estate of Prisca Ong'ayo Nande (Deceased)* [2020] eKLR.
 18. They submit that, the Applicants' names were listed in the P & A 5, and as such it is misleading for the Applicants to state that the Court was not aware of them. The 1st Respondent filed the summons for Confirmation dated 27 August 2020 whereby she sought for distribution of the Estate. In her proposed mode of distribution, the 1st Respondent distributed the Estate as follows; -
 - a) Plot No. 466 South Kinangop to be shared in equal shares among the following; ■
 - i) Rachael Njoki Mbau
 - ii) Jonathan Njuguna Mbao to hold in trust for himself and for family members of the house of Tabitha Nyambura Mbau
 19. By indicating that the half share of the Estate was to be distributed to the house of Tabitha Nyambura Mbau, the 1st Respondent was recognizing the interests of the Applicants. Reliance is made on *In re Estate of Benjamin Kiregenyi Muiri (Deceased)* [2022] eKLR.
 20. The Respondent contend that, the Court heard the summons for Confirmation, and it proceeded to render its judgement on the distribution with full facts of who were the beneficiaries of the Estate. In ground (d) of the current summons, the Applicants have expressly admitted that the Court considered the 1st Respondent's mode of distribution, and proceeded to adopt it. This implies that the summons for Confirmation was considered on merits.
 21. The Court thus conclusively determined how the Estate was to be distributed. The Court became *functus officio* the moment it gave its verdict on merit based mode of distribution of the Estate. The Applicants cannot thus unprocedurally move the Court to sit on its own Decision and vary it as if it is the appellate Court. If the Applicants were not satisfied with the distribution by the Court, the only other available option was to appeal against the said verdict. Reliance is made on *In Sylas Njeru M'Rithaa v M'Rithaa Thaara* [2019] eKLR.
 22. In the ruling of this Court delivered in this suit on 20 December 2022, the Court.
 23. The revocation of grant of letters of administration is guided by the provisions of section 76 of the *Law of Succession Act*, which states; -
 - 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;

The circumstances in which a grant can be revoked were discussed in the case of In re the Matter of the Estate of L.A.K. (Deceased) [2014] eKLR:

“Revocation of grants is governed by Section 76 of the Succession Act. The relevant portions of Section 76 are paragraphs (a), (b), and (c) since the issues raised relate to the process of making 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 an important matter, or was obtained by an untrue allegation of a fact essential to the point.”

- 24. It is thus upon the Applicants to anchor the prayer for revocation on any of the above grounds.

Issues Analysis And Determination

- 25. After going through proceedings on record, pleadings, and submissions herein filed, I find the issues are as follows: Is the Application meritorious? What is the order as to costs?
- 26. The summons dated 6 December 2021, the 2nd Respondent and the Applicants herein sought the setting aside of the confirmation proceedings of 8 February 2021 and for them to be granted unconditional leave to file an affidavit of protest to the summons for Confirmation dated 27 August 2020. In essence, the Applicants were litigating the distribution of the Estate, whereas, in the current summons, the Applicants are seeking fresh re-distribution.
- 27. The issues in the summons dated 6 December 2021 are more or less the same issues litigated in the current summons. In the summons dated 6 December 2021, the Applicants were challenging the consent that had appointed the administrators of the Estate. In essence, they were challenging the process that led to the appointment of the administrators. In the current summons, the Applicants have changed the prayer to that of revocation of the grant of letters of administration.
- 28. The issues relating to the appointment process of administrators were thoroughly addressed in this Court’s judgment delivered on 28 July 2021. The Applicants herein fully participated in the hearing of the summons dated 6 December 2021, and the appointment of administrators was directly issued in the said summons.
- 29. In the summons dated 6 December 2021, the Applicants sought leave to file an affidavit of protest to the Confirmation of grant. In the current summons, the Applicants are seeking for the Estate to be redistributed afresh in terms of section 35 of the *Law of Succession Act*. This re-distribution is the same issue litigated in the summons dated 6 December 2021, and upon considering the facts of the case, this Court found no merits in the said prayer. In the summons dated 6 December 2021, the Applicants stated that they were not served with a summons for Confirmation and were not agreeable to the distribution mode. The same ground has been advanced in the current summons.
- 30. Thus, the issues in the current summons are similar to those conclusively determined in the summons dated 6 December 2021. The current summons is thus res judicata, and the Court lacks jurisdiction



to hear and determine. Reliance is made on the case of Kennedy Mokuia Ongiri - v- John Nyasende Mosioma & Florence Nyamoita Nyasende [2022] eKLR, where the Court held -

“Whether a claim is allowed or dismissed by consent, default, or after a contested hearing, the need for finality is the same in each instance. The need for finality is why such an Application as was before the Court dated 5/10/2017 must be refused. In determining whether res judicata had arisen, there was no purpose to be served in inquiring into the reasons given or not given in the earlier Application before the Application was rejected. To permit such a broad inquiry effectively requires a trial on the correctness of the earlier Decision, directly undermining the principle of finality and allowing an Appeal on one’s or colleague’s Decisions”.

31. The alternative prayer in the current summons is misplaced. The prayers sought are not anchored on any known provisions of the law. The Court is not clothed with jurisdiction to vacate and set aside a certificate of Confirmation of grant. It is well settled that jurisdiction emanates from express provisions of the law. The Applicants cannot thus move the Court to grant prayers not within its jurisdiction. Reliance made on the case of re Estate of Prisca Ong'ayo Nande (Deceased) [2020] eKLR, which held; -

“31. Jurisdiction is at the core of the exercise of power by a court. Where there is no jurisdiction, the Court cannot exercise power without violating the rule of law and legality principles. It was in that context that the Court of Appeal, in Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd [1989] eKLR, stated:

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for continuing proceedings pending other evidence. A court of law downs its tools regarding the matter before it the moment it holds the opinion that it is without jurisdiction."

32. Applicants' names were listed in the P & A 5, and it is misleading for the Applicants to state that the Court was unaware of them. The 1st Respondent filed the summons for Confirmation dated 27 August 2020, whereby she sought the distribution of the Estate. In her proposed mode of distribution, the 1st Respondent distributed the Estate as follows; -

Plot No. 466 South Kinangop is to be shared in equal shares among the following; Rachael Njoki Mbau, Jonathan Njuguna Mbao will hold the trust for himself and the family members of the house of Tabitha Nyambura Mbau.

33. By indicating that the half share of the Estate was to be distributed to the house of Tabitha Nyambura Mbau, the 1st Respondent recognized the Applicants' interests. Reliance is made in re Estate of Benjamin Kiregenyi Muiri (Deceased) [2022] eKLR, where the Court held; -

“The petitioner was forthright about the applicants being the beneficiaries of the deceased and further included the applicants as beneficiaries of a portion of the Estate of the deceased. Therefore, in confirming the grant, the Court considered the Applicant's interests in the deceased's Estate. The applicants, therefore, cannot claim that the grant ought to be revoked because it was obtained fraudulently by concealment of facts”.

34. The Court heard the summons for Confirmation and proceeded to render its judgment on the distribution with full facts of the Estate's beneficiaries. In-ground (d) of the current summons,



the Applicants have expressly admitted that the Court considered the 1st Respondent's mode of distribution and proceeded to adopt it. This implies that the summons for Confirmation was considered on merits.

35. The Court thus conclusively determined how the Estate was to be distributed. The Court became *functus officio* when it gave its verdict on the merit-based mode of distribution of the Estate. The Applicants cannot thus un-procedurally move the Court to sit on its own Decision and vary it as if it is the appellate Court. If the Applicants were not satisfied with the distribution by the Court, the only other option was to appeal against the said verdict. Reliance is made on the case of *Sylas Njeru M'Rithaa v M'Rithaa Thaara* [2019] eKLR, where the Court held;

“The Magistrate court was competent as was the High Court. Indeed, the principle is that there must be an end to litigation, and this Court cannot sit on appeal of a high court decision to facilitate that end in defiance of express orders of the High Court. Until and except where a higher court overturns the high court decision, this Court shall be bound by it”.

36. In the ruling of this Court delivered in this suit on 20 December 2022, the Court;

“If the Respondents were unhappy with the Court's findings, they should have appealed instead of hoodwinking the Court into appealing its own Decision by alleging that the same was not considered. The doctrine of *functus officio* prevents this Court from revisiting the matter, which is the basis of their instant Application on merit-based engagement, considering that it had already issued a ruling. In *Menginya Salim Murgani v Kenya Revenue Authority* [2014] eKLR, the Supreme Court held; -

“It is a general principle of law that a court, after passing a judgment, becomes *functus officio* and cannot revisit the judgment on merits, or purport to exercise a judicial power over the same matter, save as provided by law.”

37. The revocation of the grant of letters of administration is guided by the provisions of section 76 of the [*Law of Succession Act*](#), which states; -

“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 motion.

that the proceedings to obtain the grant were defective in substance;

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;

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;

The circumstances in which a grant can be revoked were discussed in the case of *In the Matter of the Estate of L.A.K. (Deceased)* [2014] eKLR:

“Revocation of grants is governed by Section 76 of the 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 an important matter, or was obtained by an untrue allegation of a fact essential to the point."

38. It is thus upon the Applicants to anchor the prayer for revocation on any of the above grounds. The Applicants have not based the summons on any of the above grounds. The Applicants have not advanced any grounds stated under section 76 of the *Law of Succession Act*.
39. The initial administrators in the Estate of the deceased were Tabitha Nyambura Mbau and the 1st Respondent. In due course, the said grant was revoked. During the pendency of the cause, Tabitha Nyambura Mbau died and was substituted by the 2nd Respondent. On 24 September 2019, the Court appointed the Respondents as the Administrators. This Court confirmed the appointment made on 24 September 2019 in its ruling of 28 July 2022.
40. The Applicants have not demonstrated how they regard the said process of appointment of administrators as being contrary to the provisions of the law. It is thus the Court's findings that the Applicants have not brought the prayer for revocation of a grant within the provisions of section 76 of the *Law of Succession Act*.
41. In sum, the Court does not have jurisdiction to revoke a certificate of Confirmation on any other ground apart from the failure of the administrator to move the Court for Confirmation of the grant within one year. It is thus inappropriate for the Applicants to seek revocation of a confirmed grant on grounds not provided for. This was the holding of this Court in re Estate of the Late Epharus Nyambura Nduati (Deceased) [2021] eKLR where the Court held;
 - “ 32. However, how Confirmation is undertaken is not one of the grounds, under Section 76, for revocation of a grant. The only consideration in Section 76, relating to Confirmation, is where the same is not sought or obtained within one year of making the grant. The Court shall, therefore, not exercise its mind on the issue mentioned above despite the evidence of glaring inconsistencies”.
42. Thus, the Court finds no merit in the Application and thus makes the orders;
 - i. The Notice of Motion dated 24/1/2023 is dismissed with orders that the Application costs be and are hereby awarded to the respondents and assessed at ksh 10,000.

DATED, SIGNED, AND DELIVERED AT NYANDARUA THIS 20TH DAY OF DECEMBER 2023

C KARIUKI

JUDGE

