



In re Estate of the Late Githethwa Kibiriri (Deceased) (Succession Cause 153 of 2017) [2023] KEHC 27065 (KLR) (20 December 2023) (Ruling)

Neutral citation: [2023] KEHC 27065 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
SUCCESSION CAUSE 153 OF 2017
CM KARIUKI, J
DECEMBER 20, 2023
N THE MATTER OF THE ESTATE OF THE LATE GITHETHWA KIBIRIRI
(DECEASED)**

BETWEEN

REGINA NYAMBURA GITHETHWA APPLICANT

AND

TERESIAH WANJIRU GITHETHWA ADMINISTRATOR

RULING

1. The Applicant herein vide the summons for revocation and/or annulment of grant dated 24 February 2022 sought for the following orders: -
 - i. Spent
 - ii. Spent
 - iii. That the grant of letters of administration testate issued on 13 February 2018 and the certificate of confirmation of grant issued on 9 May 2019 be revoked and/or annulled.
 - iv. That any distribution done by the administrator/Respondent pursuant to the certificate of grant issued on 9 May 2019 be declared null and void and be cancelled forthwith and all the deceased's assets do revert to the deceased's estate.
 - v. That the costs of this application be paid by the Respondent.
2. Which application is supported by the grounds contained in the annexed affidavit of Regina Nyambura Githethwa and the following reasons and grounds: -



- i. That the Respondent petitioned this honourable court for a grant of representation in respect of the estate of Githethwa Kibiriri, deceased herein whereby a grant of letters of administration testate in respect of the deceased's estate was issued on 13 February 2018 and confirmed on 9 May 2019.
 - ii. That in the aforesaid petition, the Respondent concealed material information with regard to the beneficiaries of the deceased's estate.
 - iii. That the Respondent deliberately presented herself and her children as the only beneficiaries of the deceased estate despite being aware that the deceased's estate had other dependants.
 - iv. That the Respondent failed to include or provide for the Applicant and her children who are also dependants and beneficiaries of the deceased's estate in the distribution of the deceased's estate
3. Additionally, the Applicant filed a supplementary affidavit dated 21 June 2022.
 4. On the other hand, the Respondent filed grounds of opposition opposing the application on the following grounds: -
 - i. That the administrator/Respondent was appointed executor by the deceased pursuant to a Will that has already been admitted to probate.
 - ii. That the summons for revocation therefore is defective in form and substance to the extent that the same does not seek to challenge the validity of the said Will or the appointment of the administrator as executor of the deceased or the mode and manner of distribution espoused by the Will.
 - iii. That the summons for revocation is inconsequential, vague, vexatious and an abuse of the honourable court's process which is liable to be dismissed and/or struck out with costs to the administrator.
 5. The Respondent also filed a replying affidavit deponed by Teresiah Wanjiru Githethwa dated 23 May 2022.
 6. The application was dispensed with by way of viva voce evidence.

Applicant's Written Submissions

7. The Applicant stated that it is evident that the deceased left a written will dated 16 February 2017. That it is also clear that they were not challenging the validity of the written Will of the deceased. That although the Applicant cannot challenge the grant of letters of administration testate issued on 13 February 2018 because of the deceased's Will dated 16 February 2007, she can challenge the certificate of confirmation of grant dated 9 May 2019.
8. Reliance was placed *In re Estate of Abdulkarim Chatur Popat (Deceased)* [2019] eKLR
9. The Applicant submitted that the two issues that arise for determination are: -Whether the Applicant and or her children are dependants of the deceasedWhether the Applicant and or her children were involved in the proceedings leading to confirmation of grant in this cause.
10. The Applicant reiterated that she was married to the deceased in 1987 under Kikuyu Customary Law and she thereafter cohabited and lived together with the deceased at his home at Gichaka Village from 1987 to 1998. That even when she left the home, the deceased used to visit her at Kangui Town and the two continued relating as husband and wife. They were blessed with one child namely John Murigi



- Githethwa and the deceased accepted and recognized her other two children namely Titus Gitau and Godfrey Ndungu as his own children and the deceased provided for them.
11. It was submitted that PW2 testified and produced a Chief's letter dated 4 October 2018 from Chief Ol Joro Orok Location where she testified that she was the author of the letter and that the Applicant was a wife of the deceased and her said children were children of the deceased.
 12. The Applicant averred that the Respondent and her witness did not produce any proof that the Applicant was the deceased's employee as they stated. That the Respondent did not tell the court how much wages or salary the Applicant was earning and that in the circumstances, the Respondent's evidence that the Applicant was living on the deceased's home as an employee of the deceased is of the weakest nature.
 13. The Applicant stated that her name is Regina Nyambura Githethwa as appears in her national identity card. The Applicant had therefore adopted the deceased's name 'Githethwa' as her surname to reflect her marital status. That the Applicant's last-born child John Murigi Githethwa has the name Githethwa is named after the deceased's father one Murigi.
 14. It was argued that the Applicant had adduced sufficient evidence to enable the court to make a presumption of marriage between the deceased and the Applicant. The Applicant asserted that she had cohabited with the deceased and they lived as husband and wife for 11 years. She stated that they were blessed with one child. That the deceased was involved and was present during the baptism of the Applicant's children as their father. She produced photos of them as a family and PW2 had also recognized her as a widow of the deceased and also recognized her children as the deceased's.
 15. The Applicant further stated that the Respondent and DW1 in their evidence admitted that the Applicant was living at the deceased's home and during the said period the Respondent was living at Timboroa and DW1 elsewhere and so they cannot tell what was happening at the deceased's home from day to day and the nature of the relationship between the deceased and the Applicant during the said period.
 16. Reliance was placed on Section 3 (5) of the *Law of Succession Act, BCC v JMG* [2018] eKLR, *Mary Wanjiku Githatu vs Esther Wanjiru Kiarie* [2010] eKLR, *Beatrice Adhiambo Sijenyi vs. Josephine Kapukha Khisa & 2 Others* [2018] eKLR etc
 17. It was contended that the Applicant was a wife of the deceased and hence a widow of the deceased and a dependant under Section 29 of the *Law of Succession Act*. That the Applicant's child, John Murigi Githethwa being a child of the deceased by birth is also a dependant of the deceased under Section 29 (a) of the *Law of Succession Act*. Further, the remaining two children were accepted by the deceased and lived at the deceased home and were therefore his children by dint of Section 3 (2) of the *Law of Succession Act* and dependants of the estate under Section 29 (a).
 18. In conclusion, the Applicant states that leading to the confirmation of grant, the Respondent did not involve the Applicant and her children in the said proceedings and did not obtain consent from them. Consequently, the Applicant and her children did not participate in the proceedings leading to the confirmation of grant; therefore, those proceedings were irregular and invalid.
 19. They, therefore, prayed that the order of 9 May 2019 confirming the grant of probate be set aside and the certificate of confirmation of grant issued on 9 May 2019 be revoked with costs. They urged the honorable court to exercise its inherent powers and order that the summons for confirmation of grant dated 29 March 2018 be reheard after service of the same upon the Applicant.



Respondent's Written Submissions

20. The Respondent submitted that the following issues present themselves for determination: -Whether or not the Respondent concealed information material to the cause would entitle the honorable court to revoke the grant. Who should bear the costs of this application?
21. The first issue stated that what emerged from the objector's, the Applicant's oral testimony and her witness is a wholly contradictory scenario. Not only was the objector aware of the cause, but she consciously chose to ignore the proceedings. The witness was very much alive to the proceedings and even appeared before confirmation in answer to a summons issued by Hon. Justice Wendoh.
22. The allegations were also untrue because paragraph 21 through 24 of the objector's case seems to show that on 17 May 2017, the objector sought the advice of legal counsel to request the area Chief Ol Joro Orok Location to summon all the beneficiaries of the estate to prepare an introductory letter. Indeed, the said Chief testified that she summoned the Respondent and the objector and issued the Respondent with an introductory letter dated 4 October 2018. Surprisingly, the Chief testified that Hon Justice Wendoh had requested the letter during a court appearance on 27 June 2018.
23. The Respondent submitted that in the objector's testimony in court she stated on oath that sometimes in August 2016 she went to the Chief together with the Respondent which escalated to the Office of the District Commissioner. The protestor felt that the administration was not assisting her and she decided to go to an advocate to ask for assistance. Then, on 4 October 2018, she was finally issued with an introductory letter. This was before she again recanted that evidence in re-examination stating rather that the letter was issued to her in January 2022.
24. It was stated that the Applicant had not proved that she was married to the deceased or that she and the deceased sired and/or adopted the objector's children. That the weight of the Respondent's evidence suggests that no congenial relations existed to elevate the objector from a mere farm help to a widow of the deceased.
25. They submitted that the objector is guilty of laches and cannot be heard complaining that there was no reasonable provision in the Will. That the objector should have sought to challenge the validity of the Will and not the conduct and character of the Respondent, having proven that the objector was aware of the cause filing by claiming that the Respondent was out to disinherit her.
26. The Respondent asserted that the Applicant had not brought herself within conditions/requirements enabling the honourable court to exercise its discretion to give reasonable provision. That the objector has not proved dependency and she has no locus to even attempt to raise a claim on the estate either in challenge of the Will or for reasonable provision. Reliance was placed on *Beatrice Ciamuta Rugamba v Fredrick Nkari Mutegi & 5 Others* [2016] eKLR, *In re Estate of Peter Walter Kowalyczk (Deceased)* [2020] eKLR.
27. They submitted that costs usually follow the event as per Section 27 of the *Civil Procedure Act*, 2010.

Analysis and Determination

28. Having considered the application herein, the affidavits to it, and the parties' rival submissions, the main issue that arises for determination is whether the grant of letters of administration testate issued to the Respondent on 13 February 2018 and the certificate of confirmation of grant issued on 9 May 2019 should be revoked and/or annulled.



29. Section 76 of the *Law of Succession Act* provides for revocation of grants. It states as follows:-

“

“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 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 employing 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 more extended period as the court order or allows, 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. that the grant has become useless and inoperative through subsequent circumstances.”

30. Principally, what the Applicant sought to challenge in this application is the certificate of confirmation of grant dated 9 May 2019. She submitted that although she cannot challenge the grant of letters of administration testate issued on 13 February 2018 because of the deceased's Will dated 16 February 2007, she can challenge the certificate of confirmation of grant dated 9 May 2019. The Applicant sought the revocation mentioned above because she was the deceased's wife, having been married to him in 1987 under Kikuyu Customary Law, and she cohabited and lived with him at his home in Gichaka Village from 1987 to 1998.

31. Additionally, the Applicant asserted that they were blessed with one child, John Murigi Githethwa and that the deceased accepted and recognized her other two children, Titus Gitau and Godfrey Ndungu, as his children and the deceased provided for them. She also underpinned her case on the letter dated 4 October 2018 from the Chief- Ol Joro Orok Location, which indicated that the Applicant was the wife of the deceased and her said children were children of the deceased.



32. As was held in *re Estate of Prisca Ong'ayo Nande (Deceased)* [2020] eKLR and which decision I find persuasive -

“ 16. Section 76 of the *Law of Succession Act* has nothing to do with the confirmation of grants. It carries no provisions relating to what a court should do with confirmation orders or certificates of grant confirmation. Indeed, the provision says nothing about the powers prescribed for the court to intervene in the confirmation process once orders are made on a confirmation application. The only connection between the confirmation of grants and revocation of grants is that set out in section 76 (d) (i) of the *Law of Succession Act*. It has nothing to do with a grant having been confirmed. Instead, it deals with situations where a personal representative or holder of a grant or administrator has failed to apply for confirmation of their grant. Section 76 of the Act relates to confirmation of grants to that minimal extent, not with confirmation itself, but the failure to apply for confirmation. A person aggrieved by the orders made concerning a confirmation application, which is encapsulated in the certificate of confirmation of grant, has no remedy under section 76 of the *Law of Succession Act*, for that provision does not envisage revocation of certificates of confirmation of grants.

17. I have very closely perused the *Law of Succession Act* provisions, and I have not come across any provision that provides a remedy to a person aggrieved by confirmation orders. Sections 71, 72, and 73 of the *Law of Succession Act*, which deals with the confirmation of grants, do not address the question of redress for parties unhappy with the confirmation process, nor do they generally deal with flaws in the confirmation process. As stated above, section 76 has nothing to do with the confirmation process and provides no relief to anyone unhappy with it. In the absence of any provision in the *Law of Succession Act* for relief or redress for persons aggrieved by such orders, the aggrieved parties have only two recourses under general civil law, that is to say, appeal and review, to the extent that the same is permissible under the *Law of Succession Act*. I believe that one can also apply for the setting aside or vacating confirmation orders, where the same is obtained through abuse of procedure.....”

33. Further, the learned judge in *re Estate of Juma Shitseswa Linani (Deceased)* [2021] eKLR held that where a person is unhappy with the process of confirmation of grant, such a person ought not to move the court under Section 76 for revocation of grant. Instead, the person should file an appeal against the orders made by the court on distribution or apply for review of the said orders. This is because the court confirming a grant largely becomes functus officio so far as confirmation of the grant is concerned and cannot revisit the matter unless upon review.

34. Under Section 76, a court may revoke a grant so long as the grounds listed above are disclosed, either on its motion or on the application of a party. Even when the court revoked the grant suo moto, there must be evidence that the proceedings to obtain the grant were defective in substance or that the grant was obtained fraudulently by the making of a false statement or by concealment of something material to the case or that the grant was obtained employing untrue allegation of facts essential in point of law or that the person named in the grant has failed to apply for confirmation or to proceed diligently



with the administration of the estate. In the case of *Tirus Mwaniki Njiru vs Jane Igandu* (2021) eKLR, Njuguna J. held that:-

“These grounds ought to be proved with evidence as the power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds but not to be exercised whimsically or capriciously.”

35. In deciding whether the grant herein can be revoked suo moto. I critically considered the Applicant's evidence and the Respondent's reply. The Applicant insisted that she was the deceased's wife. In *Njoki vs Mathara and Others* Civil Appeal No. 71 of 1989 (UR), Kneller J. A held that:

- “(i) The onus of proving a customary marriage is on the party who claims it.
- (ii) The standard of proof is the usual one for civil action, balance of probabilities,
- (iii) Evidence as to the formalities required for a customary law marriage must be proved to the above standard.”

36. Having analyzed PW1 and PW2's oral submissions and her evidence thereof, it is my considered view that the same failed to prove a balance of probabilities that the Applicant was married to the deceased. PW1 stated that the dowry was paid to her mother by the deceased but provided absolutely no evidence of the same. She also did not provide evidence that the said John Murigi Githethwa was the deceased's child apart from a copy of his national identity card, which I find is not sufficient proof of the deceased being his father. The Applicant did not provide his birth certificate or anything to indicate that the deceased was his father. Further, there is no proof that the deceased had taken in the Applicant's two children and raised them as his own.

37. Additionally, it has been held repeatedly that a Chief's letter alone in succession proceedings is not proof of marriage or lack thereof. PW2 stated that she did her due diligence before issuing the letter and gathered information from village elders, e.g., John Kibuita, indicating that the Applicant was a wife. Perhaps the said elder should have been called to provide evidence proving that she was indeed the deceased wife. In any case, I find that PW2's letter had no value to the Applicant's case that she was the deceased's wife or that her children were the deceased's. Further, it is my considered finding that the production of photographs of the deceased with the Applicant and her children or John's national identity card did not add any probative value to the Applicant's case. The Applicant's case was starving of substantial evidence to prove her assertions.

38. Instructively, the Respondent produced a letter dated 14 December 2005 from the Ministry of Home Affairs, mainly the District's Children Office in Nyahururu, stating that after a lengthy discussion in their office from 26 July 2002 to 27 September 2002, the Applicant, who was the complainant then failed to produce evidence to prove any marriage between her and the deceased and further advised that the deceased was not obligated to support the three children since they do not belong to him. She was not married to their mother. It appears that the Applicant interacted with the deceased at one point in her life, which even the Respondent acknowledged, but the said interaction was not in the capacity of a wife. Perhaps it was in the capacity of an employee, as the Respondent stated; I find more truth in that. After their interaction ended, the Applicant has been on a long quest to extort the deceased and his family under the guise that she was married to him and that her children were his. The quest must end now. Ultimately, I find that the Applicant was not the deceased's wife, that her three children were not the deceased's, and that they cannot be considered beneficiaries and/or dependents of the deceased's estate.



39. Going back to my initial assertion, the Applicant premised her application on the process of confirmation of the grant. A certificate of confirmation of a grant is not a grant of representation. In any event, the certificate of confirmation of grant is a mere formal expression of the orders made by the court on a confirmation application. A grant of representation is not equivalent to a certificate, it is not an extract from some order, and it is the order itself, appointing administrators, and it is the court granting representation. The orders to confirm a grant remain unaffected by revocation or annulment of the certificate of confirmation. The proper thing to do should be to have the confirmation orders vacated and, after that, the certificate of confirmation of grant annulled, following the setting aside of the orders from which it draws its life.
40. Moreover, Section 76 of the *Law of Succession Act* does not provide any provisions for what a court should do with confirmation orders or certificates of confirmation of grant. It has nothing to do with confirmation of grants. It carries no provisions relating to what a court should do with confirmation orders or certificates of confirmation of grant. Indeed, the provision says nothing about the powers prescribed for the court to intervene in the confirmation process once orders are made on a confirmation application. The only connection between the confirmation of grants and revocation of grants is that set out in Section 76 (d) (i) of the *Law of Succession Act*. It has nothing to do with a grant having been confirmed. Instead, it deals with situations where a personal representative or holder of a grant or administrator has failed to apply for confirmation of their grant.
41. The proper thing that the Applicant should have done is to have the confirmation orders vacated and, after that, the certificate of confirmation of grant annulled, following the setting aside of the orders from which it draws its life. However, in the instant case, the same would have been futile given my considered finding that she was not a wife to the deceased, neither were her three children, the deceased's children and therefore, she is a total stranger to the deceased's estate.
42. In light of the foregoing, I hereby make the following orders;
- i. The court hereby dismisses the summons for revocation of the grant dated 24 February 2022 with costs to the Respondent.

DATED, SIGNED, AND DELIVERED AT NYANDARUA THISTH DAY OF DECEMBER 2023

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C KARIUKI

JUDGE

