



REPUBLIC OF KENYA



**Muasya v Ndundu (Probate & Administration 267 of 2011)
[2022] KEHC 11072 (KLR) (31 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 11072 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
PROBATE & ADMINISTRATION 267 OF 2011**

MW MUIGAI, J

MAY 31, 2022

BETWEEN

MAWEU MUASYA APPLICANT

AND

KANGUTU NDUNDU RESPONDENT

RULING

1. Ndunda Mueti Alias Ndundu Mueti Ngao died on 1st August, 2005 as per Death Certificate serial No. xxxxx.
2. Maweu Muasya xxxxxx petitioned for letters of administration allegedly on behalf of Gabriel Musa Alexander Mwisa xxxxxx vide a Consent filed on 17/5/2011 and annexed the following documents:
 - a. The Death Certificate of Death Certificate No xxxxx - Ndunda Mueti Alias Ndundu Mueti Ngao who died on 1st August, 2005 aged 79 years old and it was issued at Makueni District.
 - b. The Chief's letter dated 7th April, 2011 & 15/4/2011 from Kithembe Location confirmed that the deceased was not married and had no children; that his next of kin was Gabriel Musa Alexander Mwisa who is his brother's son (Nephew).
3. The Deceased left behind property known as Plot No.380 Utithi Settlement Scheme Kibwezi Division as shown by Land Adjudication & Settlement Makueni of 11/4/2003.
4. The Kenya Gazette of 24/6/2011, Maweu Muasya was advertised as son of the deceased and not as alleged proxy of his nephew, son of his brother. The Kenya Gazette of 4/12/2015 amended the same as Maweu Muasya seeking grant of letters of administration intestate to the estate of Ndundu Mueti alias Ndundu Mueti Ngao of Utithi.
5. The Grant of letters of Administration was issued on 15th December, 2015 by Hon. P. Nyamweya - L.J (as she then was) to Maweu Muasya.



Summons For Revocation Dated 16th October 2017

6. Summons for revocation or annulment of grant dated 16th October 2017 was filed on the same date by Kangutu Ndundu (the Objector herein) seeking the following prayers:-
 - a. The Grant of Letter of Administration intestate issued on 15/12/2015 to the Applicant herein pertaining to the estate of the deceased person herein be revoked.
 - b. That costs of taking out this Summons be in the cause.
7. The application was based on the following grounds inter alia that the proceedings to obtain the grant were defective in substance; that the grant was obtained fraudulently by making of false statement and concealing from the Court material facts to the cause; that the aforesaid grant was obtained by means of an untrue allegations of the facts essential in point of law to justify the grant and that this application ought to be granted in the interest of equity and justice.
8. The application was supported by the affidavit sworn by Kangutu Ndundu (objector) stating that: he is a biological son and a beneficiary of the deceased person; that the applicant herein fraudulently filed a petition of letter of administration to the deceased estate herein and indicated that he was a beneficiary and indicated that Gabriel Musa Alexander Mwisu as a nephew and a beneficiary to the deceased; that the said Gabriel Musa Alexander Mwisu fraudulently on 7/05/2011 gave consent to the Applicant to the making of a Grant of Administration intestate; that the two are strangers to the deceased estate herein; that the Objector and his siblings were not cited and/or consulted before the petition and issuance of the grant of letters of Administration herein were issued; that the Chief's letter attached herein was procured in connivance with the Kithembe location Chief; that the deceased's last known place of resident was Utithi location Nzeeka and the Objector filed a letter from the Area Chief of 31/08/2017 confirming the deceased was resident of Utithi Location and he left behind son, Kangutu Ndundu ID xxxxx.
9. The application dated 16/10/2017 despite service to both Respondents; Maweu Muasya and Gabriel Musa Alexander Mwisu as confirmed by filed Affidavit of Service of 24/9/2018 the application was not opposed and on 7th November, 2019 Hon. D.K. Kemei J granted all the orders as prayed as the Respondents did not file any response. The grant was revoked under Section 76 [Law of Succession Act](#).

Chamber Summons Dated 24th December, 2019

10. The Applicant herein filed a Chamber Summons seeking the following orders:-
 - a. That the Court to set aside the Order made on 7/11/2019 revoking the Grant issued to the Applicant on 15/12/2015.
 - b. That the Court grants leave to the Applicant to file a Replying Affidavit in response to the Summons for Revocation of Grant and the summons to be heard on merit.
 - c. That costs of this application be in the cause.
11. The application was based on the following ground inter alia: that the grant was revoked without the Applicant being involved and therefore was condemned unheard; that the Respondent neither served the Applicant with the application nor a hearing notice for the proceedings which resulted to the order revoking the grant; that throughout the proceedings Applicant advocates were Mulwa Isika & Mutia Advocates. The Advocates were not served with the application; that the affidavit of service purporting to show that the Applicant was served with the application are falsehoods and contravenes the law which requires a party presented by an advocate to serve through the advocate; that the Applicant



has never been served with the application or hearing notice and he was only presented/served with a revocation order.

Replying Affidavit by Kangutu Ndundu Dated 19th May, 2020

12. That the Applicant is not an administrator of the estate of the deceased herein as the said grant issued to him earlier was revoked by the order of this Court on 7/11/2019 after he failed to participate in the proceedings after being duly served with the same and Affidavit of service duly filed.
13. The allegations of not being served are false as the Objector took the process server to the Applicant and his conspirator one Gabriel Alexander Musa and were served in the presence of the Objector.
14. That being a son to the deceased he was entitled to petition for the said letters of administration in place of his deceased mother.
15. That the Applicant herein lied to Court that he was the sole beneficiary of the deceased as his petition was neither preceded by a citation or disclosure to the Court that the deceased had a wife and children.
16. That their Area Chief wrote a letter to this Court confirming the true beneficiaries of the deceased estate hence the applicant petition to this court was a fraud.
17. That the Applicant filed an ELC suit against the Objector and others in Makindu Law Courts and the same has no relevance to the application of challenging the grant issued to the applicant herein.
18. On 23/11/2021 the court ordered the parties to file written submissions within 21 days each.
19. On 15/02/2022 the Court confirmed that all the parties complied with the order of 23/11/2021 and filed their submissions accordingly.

Submissions

Applicant's Submissions

20. The Applicants submits that on the issue of whether the Applicant was duly served – in the case of *Shadrack Arap Baiywo –vs- Bodi back* KSM CA Civil Appeal No. 122 of 1986 [1987] eKLR, the CoA quoting Chitale and Annaji Rao; the Code of Civil Procedure Volume II page 1670 stated that:

“There is a presumption of service as stated in the process server’s report and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of the service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross – examination given to those who deny the service.”

21. The Applicant further stated that the Respondent allegation of service is based on pure falsehood and contravenes the law which require a party represented by an advocate be served through the Advocate. In the case of James *Kanyiita Nderitu & Another vs Marios Philotas Ghikas & Another* [2016] eKLR the Court of Appeal explained the nature and effect of an irregular judgment as follows:-

“In an irregular default judgment, on the other hand judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In



addition the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reasons why such judgment is set aside as of right and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system.”

22. The applicant submits that the same order be set aside as prayed and the Applicant be granted leave to file replying affidavit in response to the summons for revocation of grant and the summons be heard on merit.
23. The applicant further submits that he should be given a chance to defend himself since he was never fully served nor his advocate. In the case of *Abmednasir Abdikadir & Company Advocates –vs- National Bank of Kenya ltd* [2007] eKLR the Judge observed that:

“The act of authorizing or employing a solicitor to act on behalf of a client constitutes the solicitor’s retainer by that client. Thus, the giving of a retainer is equivalent to the making of a contract for the solicitor’s employment..”
24. On the issue whether the grant was dismissed without merit the Applicant submitted that the order in the matter was irregular and ought to be set aside.

Respondents Submissions

25. On the issue of whether the Applicant was served with the summons for revocation of grant was privy to the hearing date the Respondent submitted that he personally called the Applicant and another, they met and immediately directed the process server to personally serve the Applicant and an Affidavit of service was duly filed. The Respondent cited the Case of *Atlas Copco Customer finance limited –vs- Polarize Enterprises limited* [2014] eKLR where Kamau J, held that proof of service is not material to whether or not the party acknowledged service. The Respondent submit that there was proper service of the summons for revocation of grant and the Applicant cannot hide on technicalities in order to defeat the fact that the proceedings before this court and filed by himself were a fraud; facts he has not disputed in his application.
26. On the issue whether the Applicant’s pleadings before Court raise material facts to warrant setting aside of the orders of 7th December 2019 the Respondent submit that there is no draft Replying Affidavit on record that would have been used to weigh the triable issues in the Applicants application and nothing gives a glimpse as to why he petitioned for letters of Administration before this Court yet he was neither a beneficiary nor creditor to the deceased’s estate; why he obtained a Chief’s letter from another jurisdiction and not from where the deceased and his family resided and deceased was buried, which is the same residence his children reside to date; why he presented before this court sureties who are strangers to the deceased and his family. It is also submitted that the grant of letters of administration were issued in 2015 it is four years down the line and the Applicant has never moved a step to have it confirmed hence it is safe to have the orders remain in effect so as to give the Respondent enough space to file a cross – petition.
27. On the issue of the consequences of setting aside the orders of 7th December 2019 the Respondent submitted that the estate will go to the applicant and with no guarantee of the safety of the estate there being sufficient evidence on record that there was fraud committed by the applicant therefore the orders to remain in force pending the filing of a cross – petition by the Respondent or any subsequent



application in relation the orders of this court and in regards to the Applicants application which is still on record.

Determination

28. The Court has considered the application, pleadings and submissions by respective parties and the issue for determination is whether the Court orders of 7th November, 2019 by Hon. D.K. Kemei J that granted all the orders as prayed in the Summons for revocation and annulment of grant issued on 15/12/2015 to the Applicant herein.
29. The Applicant asserts that he was not duly served with the application as deposed in the filed Affidavit of Service and furthermore, he had advocates on record and service ought to have been through the advocates on record. The service was not in terms of Order 5 Rule 3 CPR 2010 and the Affidavit of Service was full of falsehoods. The Applicant sought to have fair hearing under Article 50 of COK 2010.
30. The Respondent filed detailed account of process of service to the Applicant and Co Respondent to the Summons for Revocation by Process Server, Peter Mwangi Njoroge and reiterated that service was proper as provided by the law. Secondly, the Respondent indicated that the Applicant's response would not raise any triable issue as the Applicant lacked legal capacity to file for petition for letters of administration of the deceased's estate.
31. Order 5 Rule 8 CPR 2010 provides;
Service to be on defendant in person or on his agent
 - (1) Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient.
 - (2) A summons may be served upon an advocate who has instructions to accept service and to enter an appearance to the summons and judgment in default of appearance may be entered after such service.
32. The service of the Summons for Revocation of Grant to the Applicant/Respondent would be in compliance with Order 5 CPR if served directly to the Applicant and Co -Respondent even if he had advocate on record. The Respondent confirmed that he led the Process Server to the place at the bodaboda stage as he had arranged with the Applicant. He witnessed the service upon Maweu Musa and Gabriel Alexander Musa. The issue of the accusations and counteraccusations on the effect of service would only be resolved through viva voce evidence. For now suffice is to state prima facie service was effected.
33. The 2nd issue is whether, the Applicant is prejudiced without being allowed to participate in the revocation of grant application hearing and determination.

Section 66 of Law of Succession Act prescribes parties eligible for appointment as Administrator (s) of deceased's estate by the Court as follows;

Preference to be given to certain persons to administer where deceased died intestate

When a deceased has died intestate, the Court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom [CAP. 160 Law of Succession [Rev. 2018] 26] a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—

- (a) surviving spouse or spouses, with or without association of other beneficiaries;



- (b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;
- (c) the Public Trustee; and
- (d) creditors:

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.

34. From the above outline of possible Appointments of Administrators by the Court, the Applicant is not a surviving son, daughter, or child of the deceased or any blood relative of the deceased as outlined in Part V of the Act and is therefore not eligible for appointment as administrator of the deceased's estate.
35. The Petition for letters of Administration filed to obtain a grant, the Applicant while on record claimed he was authorized by one Gabriel Musa Alexander Mwisu to act on his behalf as per a Consent filed; it was not established why Gabriel Musa Alexander Mwisu could not pursue the grant for letters of administration of his late Uncle's estate directly. Gabriel Musa Alexander Mwisu claimed to be a nephew to the deceased, son to deceased's brother who was not named or known and in the Kenya Gazette the Applicant claimed to be the son of the deceased which was false. Cumulatively, these circumstances disclose a blatant attempt to defraud the beneficiaries of the deceased's estate their inheritance. The material non-disclosure that the Applicant and Co Respondent were not blood relations of the deceased was valid ground to revoke the grant.
36. This Court notes with concern contents of letter dated 25/9/2019 to Registrar High Court Machakos from Deputy County Commissioner Kibwezi Sub County. The Letter alluded to purchasers of land from the deceased herein and claimed have written Agreements and ownership cards from the Lands Office. The letter indicates that the Applicant herein Maweu Muasya upon obtaining grant of deceased's estate sold a portion of the land to Martin Masila and a scuffle ensued leading to a Police case. Hence the need for the Court to determine Legal Administrator of the estate of the deceased and owners of Plot 308 Utithi Adjudication Section.
37. As of now legally, Maweu Muasya and/ or Gabriel Musa Alexander Mwisu are not eligible for appointment as Administrators as required by Section 66 LSA as neither of them is surviving son of deceased or any other blood relation to the deceased.
38. Any sale conducted using the illegal grant is void as no sale can take place until the grant is confirmed as required by Section 55 & 82 (b) (ii) LSA. They can only be held individually responsible for their actions.
39. To 3rd parties/Purchasers that have legal claims to the estate of the deceased shall await the Respondent, Kangutu Ndundu to file for petition for grant of letters of Administration within 60 days of this Ruling. Objectors are at liberty to contest issuance of grant as provided by Section 67-70 LSA. After grant is issued, 3rd Parties /Purchasers may pursue legal claims against the Administrator of deceased's estate in ELC Court as regards sale, title and ownership of land.
40. In default of filing petition for grant of letters of administration within 60 days, the Court by virtue of Section 66 LSA shall issue the grant to the Public Trustee who shall sue or be sued on behalf of deceased's estate.



Disposition

1. The application filed on 31/12/2019 to set aside Court order of 7/11/2019 revoking the grant of 15/12/2015 is dismissed with costs to Respondents.
2. The Respondent, Kangutu Ndundu to file for petition for grant of letters of Administration within 60 days of this Ruling.
3. In default of filing petition for grant of letters of administration within 60 days, the Court by virtue of Section 66 LSA shall issue the grant to the Public Trustee who shall sue or be sued on behalf of deceased's estate.

**DELIVERED SIGNED & DATED IN OPEN COURT AT MACHAKOS ON 31ST MAY 2022
(VIRTUAL CONFERENCE)**

M.W. MUIGAI

JUDGE

