



In re Estate Elizabeth Wanjiru Nderitu (Deceased) (Succession Cause 2940 "A" of 2006) [2022] KEHC 12022 (KLR) (Family) (27 May 2022) (Ruling)

Neutral citation: [2022] KEHC 12022 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 2940 "A" OF 2006**

MA ODERO, J

MAY 27, 2022

**IN THE MATTER OF SUBSTITUTING (SUSAN WANGUI MBARI (DECEASED) AS AN ADMINISTRATOR OF ESTATE OF ELIZABETH WANJIRU NDERITU (DECEASED)
IN THE MATTER OF APPOINTING JOHN MUREITHI NDERITU AS CO-ADMINISTRATOR OF THE ESTATE ELIZABETH WANJIRU NDERITU (DECEASED)**

RULING

1. Before this court for determination is the chamber summons dated November 15, 2021 by which the applicant John Mureithi Nderitu seeks orders That:-
 - “ 1. Spent
 2. The firm of M/S Mutembei Chabari & Co. Advocates LLP be granted leave to come on record for the Applicant.
 3. The Honourable court be pleased to revoke the grant rectified on October 19, 2021 appointing John Mbari Mburu as a Co-administrator of the estate of Elizabeth Wanjiru Nderitu.
 4. The Honourable court be pleased to substitute name of Susan Wangui Mbari with the name of John Mureithi Nderitu as co-administrator in the grant of administration for the estate of Elizabeth Wanjiru Nderitu.
 5. Costs be in the cause.”
2. The application was premised upon article 159(2)(d) of *the Constitution* of Kenya 2010, sections 76(d)(f)(e), 81 and 47 of the *Law of Succession Act* and Rules 44 and 73 of the *Probate and Administration Rules 1980* together with all enabling provisions of the law and was supported by the affidavit of even date and the Supplementary affidavit dated February 10, 2022 both sworn by the Applicant.



3. The respondent John Mbari Mburu opposed the application through his Replying Affidavit dated January 14, 2022 and the Further Affidavit dated 11th February 2022.
4. The application was canvassed by way of written submissions. The Applicant filed the written submissions dated February 28, 2022 whilst the Respondent relied upon his written submission dated March 25, 2022.

Background

5. The Succession Cause concerns the estate of Elizabeth Wanjiru Nderitu (hereinafter ‘the Deceased’) who died in Nairobi on September 16, 2006 having left a written will dated August 14, 2006. A copy of the Deceased’s Death Certificate Serial Number 02263 appears as Annexure ‘CD1’ to the Petition for Grant of Probate with written will dated December 1, 2006.
6. The Deceased was survived by the following persons: -
 - (a) Grace Muthoni Wanjohi – Daughter
 - (b) Susan Wangui Mbari – Daughter
 - (c) John Mureithi Nderitu – son
 - (d) Esther Nyawira Nderitu – Daughter
 - (e) Charles Wahome – son
 - (f) Catherine Wambui Nderitu – Daughter
 - (g) Jacqueline Wanjiru – Granddaughter
7. In her will the Deceased appointed her daughters Grace Muthoni Wanjohi, Susan Wangui Mbari and her son John Mureithi Nderitu (the Applicant herein) as executors and Trustees. Following the demise of the Deceased the Applicant rescinded his right to be appointed as executor under the Will. Accordingly, Grant of Probate with written will was on November 5, 2007 issued to the two daughters of the Deceased Grace Muthoni Wanjohi and Susan Wangui Mbari. The Grant was duly confirmed on August 14, 2006.
8. Thereafter on December 30, 2013 one of the Executors Susan Wangui Mbari passed away leaving Grace Muthoni Wanjohi as the sole Executor of the estate. The surviving Executrix then filed an application dated 24th August 2021 seeking to have the Respondent John Mbari Mburu who was the widower of Susan Wangui Mbari appointed as Co-Administrator of the estate. The application was allowed on October 19, 2021 and the Grant was re-issued in the name of the two Administrators. A copy of this rectified Grant appears as in the file.
9. The applicant avers that he was neither consulted nor was he served with the application dated August 24, 2021 seeking to include the Respondent as a Co-Administrator. He argues that the Respondent is a stranger to the estate.
10. The applicant therefore prays that the Grant issued on October 19, 2021 be revoked and that in the interest of the estate the Applicant be appointed as Co-Administrator to replace the Respondent.
11. The respondent John Mbari Mburu filed the Replying affidavit dated January 14, 2022 in opposition to the application. He averred that he was co-opted as Administrator to represent the interest of his late wife Susan Wangui Mbari and their children who are beneficiaries to the estate of the Deceased. That when his late wife was taken ill she issued him with a power of Attorney dated August 24, 2013



which enabled him to assist the Administrator of the estate in discharging her duties as Executor. That he has attended family meetings and has assisted in the distribution of the estate.

12. The respondent asserts that he has no personal interest in the estate of the Deceased and that the assets which were bequeathed to his late wife have now all devolved to their children. That he only accepted to be appointed as Co-Administrator because the applicant categorically refused to support the succession cause and refused to contribute towards the expenses of the estate and distribution.
13. The respondent disputes the applicant's claim that he has been involved in taking care of a beneficiary of the estate, Charles Wahome who is mentally impaired. He states that the applicant has been reckless and has been unable to sustain a business whilst the respondent is an upstanding member of society. He urges the court to dismiss the current application in its entirety.

Analysis and Determination

14. I have carefully considered the application before me, the Affidavits filed in reply thereto as well as the written submissions filed by both parties.
15. Prayer (2) of the Application seeking that the firm of M/s Mutembi Chabari & Co. Advocates LLP be permitted to come on record for the Applicant was allowed by consent of both parties on November 15, 2011. That prayer is now spent.
16. The applicant has prayed to have the rectified Grant issued on October 19, 2021 revoked on grounds that the same was obtained fraudulently and by concealment of material facts. Section 76 of the [*Law of Succession Act*](#), cap 160 Laws of Kenya provides for the grounds upon which a Grant may be annulled/revoked 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—
 - (i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or
 - (ii) to proceed diligently with the administration of the estate; or
 - (iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
 - (e) that the grant has become useless and inoperative through subsequent circumstances”.
17. The applicant alleges that the rectified Grant was obtained without his knowledge input and/or consent. He claims that he was never served with the summons dated August 24, 2021 seeking substitution of an Administrator



18. A close look at the record reveal that this allegation by the Applicant is not true. In the file is an Affidavit of service dated October 19, 2021 sworn by Nyaramba Mariera an authorized process-server confirming that he effected service of the summons upon the Applicant on October 6, 2021 at Nanyuki town along the Kieni- Nanyuki Road where he met and personally served the Applicant. Indeed there is a notice of Appointment of Advocate dated October 18, 2021 filed by the firm of Kinuthia Anthony & Company Advocates who came on record for the applicant. It is clear that having been served with the summons the applicant moved with haste to appoint a lawyer to act for him.
19. The process server indicates that the applicant received the summons but refused to sign as an acknowledgment of receipt. No doubt the Applicant is laboring under the misapprehension that since he declined to sign an acknowledgement he can deny service. This is not the case. The affidavit of service coupled with the applicants move to appoint counsel to act for him convinces this court that the applicant was properly served with the summons. He failed and/or declined to put in a response and did not put in any papers to oppose the appointment of the respondent as Co-Administrator. The Application was heard and the Respondent was included as Co-Administrator. I find that the Applicant was duly notified but did not act. He cannot cry foul now – his non-inclusion was of his own doing.
20. The applicant now prays to be allowed to replace the respondent as Co-Administrator. He argues that he was the original Executor appointed by the Deceased. He further submits that the Respondent is a stranger to the family. Whilst it is true that the Deceased named the applicant as one of the Executors of her will, the applicant himself declined that appointment and left it to his two sisters to take up administration of the estate. He is only now seeking to take up the role as Executor in an attempt to edge out the respondent.
21. The claim that the respondent is a stranger to the family is not entirely true. The respondent was a son-in-law to the Deceased having married one of the daughters of the Deceased. Minutes of family meetings annexed by the respondent indicates that the respondent attended and participated in family meetings. The respondent stated that he stepped in to assist the remaining Executor when his wife who was a Co-Executor fell ill. There is nothing to show that the respondent has acted in a manner to benefit himself or that he has otherwise acted in a manner detrimental to the estate.
22. The applicant also claims that the surviving Administrator Grace Muthoni Wanjohi has been unable, unwilling and reluctant to transmit the remaining part of the estate. Again, this is not entirely true. The Administrators have explained how the parcels of land pending distribution being LR No. 6346, LR No 6437 were surveyed in the year 2007. A fee note was issued for the sub-division but the family found the cost to be too high. They then appointed another surveyor in 2011. The second surveyor issued his Fee Note and was paid a deposit in October 2012. From 2015 to 2018 the Executors were dealing with the issue of extension of leases when one of the Executors Susan Wangari Mbari passed away.
23. Upon the appointment of the respondent as Co-Administrator the distribution process proceeded and the Co-Administrators paid a sum of Kshs 1,586,752/- as lease Renewal Fees towards the process. It is clear from the narration above that the Administrators have not been sitting by idly. They have been moving the process of distribution forward.
24. The Applicant submits that the Respondent is working in cahoots with the other beneficiaries of the estate to disinherit him with intention of leaving him destitute. No evidence has been adduced to support this serious allegation. On the contrary the Administrators averred that each beneficiary now has their own beacon certificate and the remaining property has been surveyed, subdivided and fenced and is only awaiting issuance of Titles.



25. The Applicant dismisses the affidavits filed by the other beneficiaries in support of the respondent as being “full of blatant lies and falsehoods”. He has not given specifics of the lies and/or falsehoods contained in said affidavits.
26. In my view to revoke the Grant at the tail end of the distribution process would be detrimental to the estate as it may necessitate that the entire process of sub-division be started all over again. The family (aside from applicant) appear to be very comfortable with the respondent as Co-Administrator. I note that the other beneficiaries Grace Muthoni Wanjohi, Esther Nyawira Nderitu and Catherine Wambui Nderitu have all sworn Affidavits opposing the revocation of Grant. None of them is willing to have the Applicant whom they describe as irresponsible appointed as an Administrator.
27. Rule 73 of the *Probate and Administration Rules* allows a court

“to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court”
28. I am of the view that the appointment of the respondent as co-Administrator was of benefit to the estate, which can now be distributed in accordance with the written will left by Deceased.
29. I find no merit in this application for revocation of Grant. The same is dismissed in it’s entirety. This being a family matter each side will bear its own costs.

DATED IN NAIROBI THIS 27TH DAY OF MAY 2022.

.....
MAUREEN A. ODERO
JUDGE

