



In re Estate of Joel Mbithi Gedion Ndumbu (Deceased) (Probate & Administration 1 of 2016) [2022] KEHC 12251 (KLR) (29 June 2022) (Ruling)

Neutral citation: [2022] KEHC 12251 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
PROBATE & ADMINISTRATION 1 OF 2016**

**RK LIMO, J
JUNE 29, 2022**

BETWEEN

**DOROTHY MONTHE NDUMBU 1ST BENEFICIARY
SUSAN KATUNGWA NDUMBU 2ND BENEFICIARY
THOMAS RENE NDUMBU 3RD BENEFICIARY
MATHEW BENJAMIN NDUMBU 4TH BENEFICIARY**

AND

MARY P MBITHI NDUMBU ADMINISTRATOR

RULING

1. This ruling refers to summons for Revocation of Grant previously filed in Machakos High Court vide Misc. No. 165 of 2014. The matter was later transferred to this court and registered under the current Probate and Administration Cause No. 1 of 2016.
2. The Summons for Revocation of Grant. is dated March 3, 2014 and in it the applicants are seeking the following reliefs: -
 - i. Spent
 - ii. Spent
 - iii. That the Petitioner be ordered by this court to render and /or produce full and accurate account of all dealings of the estate to date.
 - iv. Spent
 - v. That the grant of letters of administration of the estate of Joel Mbithi Gedion Ndumbu (deceased) made on October 9, 2012 vide Succ. Cause No. 37 of 2011 be revoked or annulled.



- vi. That costs be borne by the Respondent.
3. The applicants sought to nullify/revoke the grant on the following grounds namely;
 - i. The grant was obtained fraudulently by making of false statements and untrue allegations of fact and concealment of material facts relevant to the case.
 - ii. The proceedings for the making of the said grant were defective in substance in that no consent was obtained (or filed) from other persons entitled to the grant.
 - iii. The grant was made without any notice or information to or the consent of the Applicants who are daughter of the deceased's first wife Ruth Katungwa and children of the late Arnold Ndumbu who was the deceased's son.
 - iv. The Respondent lied and misled the court that the deceased's family had sat, deliberated on and agreed on the matter of the administration of the deceased's estate when no such meeting, deliberations or agreement have ever been held.
 - v. The Respondent lied to and misled the court regarding the identities of the deceased's family members for her own selfish interest by portraying herself as the only wife of the deceased.
 - vi. The Respondent is administering the deceased's estate without any consultation with or knowledge of the Applicants
 - vii. The Respondent is not fit, capable and suitable person to administer the deceased's estate.
 4. The applicants swore a joint affidavit sworn on October 3, 2014 by Dorothy Monthe Ndumbu, Susan Katungwa Ndumbu, Thomas Irene Ndumbu and Mathew Benjamin Ndumbu to support the application for nullification of grant.
 5. In the said affidavit, Thomas Irene Ndumbu and Mathew Benjamin Ndumbu are said to be sons to the deceased while Susan Katungwa Ndumbu is said to be Dorothy Monthe Ndumbu's daughter.
 6. The affidavit seems to be mixed up in respect to the relationship of the applicants to the deceased because one part Dorothy Monthe Ndumbu is described as "our aunt" and on another she is depicted as the one deposing the affidavit in support of the summons for revocation of grant. I will get back to that issue later in this ruling.
 7. The applicants aver that they were not consulted by the petitioner when the succession cause was filed and that there was no family meeting held prior to the filing of the succession cause.
 8. The applicant avers that there was no consent from other family members allowing the petitioner herein to go ahead with the petition for letters of administration and state that they only learnt about this succession cause sometimes in 2013.
 9. They claim that the grant was obtained through fraud and misrepresentations and further claim that the petition specifically failed to describe the existence of Ruth Katungwa and her children.
 10. Susan Katungwa Ndumbu, the 2nd applicant later vide a Notice of Withdrawal dated August 15, 2016 and filed on August 16, 2016 withdrew from this application.
The application was left in the hands of the 3rd and 4th applicants since it became evident that Dorothy Monthe Ndumbu was of unsound mind and could not have made the application in the first place.
 11. In his Oral testimony in court during the viva voce hearing of this application, Thomas Rene Ndumbu, (PW1), the 3rd applicant told this court that the 1st and 2nd applicant withdrew from this application



out of their own volition and he decided to pursue it together with the 4th applicant who is his brother. He testified that he is a grandson to the deceased and that his mother one Jedida Nzasu a daughter to the deceased did not challenge the grant of letters of administration.

12. He conceded that he was not staying with the deceased at the time of his death and that he was not residing on any of the properties comprising the estate. He however insisted that the deceased (grandfather) assisted him in paying his school fees though he had no document to demonstrate. He further stated that the deceased organized for a fundraiser for his school fees when his father died in 1996.
13. He further testified that his late grandmother Ruth Katungwa Ndumbu had been divorced by the deceased and that he said Ruth was the mother of his late father Arnold Ndumbu.
14. He further conceded that his grandmother Ruth Katungwa was given a share of the estate and that his mother benefited from that share.
15. Jedidah Nzasu Ndumbu (PW2) mother to PW1 testified and stated that she was married to the late Arnold Ndumbu, son to the deceased. She also testified that she lived with the 1st applicant who she stated was of unsound mind from 2004 to 2016. She stated that she had not raised any issue with the administration of the estate but her sons were. She also confirmed that she was aware that distribution of properties between the deceased and his first wife was done through divorce proceedings. According to her the first wife, her mother in law did not get all the properties as was directed by the court and specifically, what she referred to as property No. 1 in the decree. She further stated that she was aware that the Respondent had sold what she referred to as parcel No. 47 but indicated that she did not have any evidence to prove the allegation. She also stated that the property did not form part of the estate of the deceased. She also stated that the deceased pre-deceased his first wife Ruth Katungwa but even so, the first wife did not pursue any claim on the estate of the deceased because she was reportedly sick. The witness also stated that the deceased paid school fees for her sons but she did not have proof of the same. She also indicated that she was the administrator of the estate of the deceased's first wife and that she had given the 1st applicant a share of her mother's estate. She also confirmed that she organized a clan meeting in which the Respondent did not participate in.
16. Alexander Mwangangi (PW3) an uncle to the deceased testified that the deceased herein was married to 3 wives namely;
 - i. Ruth Katungwa Ndumbu (deceased)
 - ii. Elizabeth Ndumbu
 - iii. Mary Ndumbu

He testified that the 2nd wife stayed with the deceased for one year before leaving for good. He further stated that he knew that the deceased separated/divorced the 1st wife and that the Petitioner resided in Mulango/Wikililye/1369. He further testified that he was aware that after divorce, the properties belonging to the deceased were divided and Ruth (1st wife) was given her share by court which gave 50% share of all the properties.

17. According to PW3, the first wife (Ruth Katungwa) predeceased her husband the deceased herein. He told this court the deceased was a clergy man and that he went to England for 15 years for studies before coming back to serve at Anglican Church in Kitui. He testified that the petitioner herein was married to the deceased between 1986 and 1987 and that she came and occupied the house in parcel No. 1369 which house according to him was opened with pomp and colour with many Senior government officials in attendance.



18. The witness further testified that Thomas Numbu and Mathew Ndumbu the applicants herein, are grandchildren to the deceased and were born in Nairobi. He further added that their father the late Arnold was a son to the late Ruth Katungwa and the deceased herein.
19. He also testified that the 2nd wife Elizabeth Chaka who was from Taita left after she disagreed with the deceased. He further stated that she only got one son with whom she left with in 1984 and never to return. He faulted the petitioner for using her influence as a member of County Assembly to exclude other beneficiaries. He stated that the applicant has a stake in the estate of deceased herein and should be considered.
20. David Munyoki (PW4) informed the court that he was a member of the Aoni Clan and knew the family of the deceased well. He however also stated that he did not interact with the deceased, his first wife or their children. He stated that the deceased had three wives and that he attended a clan meeting on August 20, 2016 which was scheduled in an attempt to resolve disputes between the Respondent and PW2 but the Respondent was not in attendance.
21. Emily Kathinya (DW1) testified that she was a sister to the deceased. She testified that the deceased had 2 children with his first wife Ruth (deceased) and that they were blessed with 2 children namely Dorothy Ndumbu and Arnold Ndumbu.

She also stated that the deceased had 3 children with Mary the Petitioner herein, adding that she brought in 2 children who were adopted by the deceased.
22. The witness certified that Dorothy and Arnold ought to get a share of the estate from their mother, Ruth. She further clarified that the 2 applicants were quite young when the deceased passed on and was not aware if the deceased took over any responsibility over them.
23. She further testified that the applicants should get their shares from their grandmother Ruth owing to the fact that the properties of the deceased were divided into half with one half going to the deceased herein and the other half going to the late Ruth after the divorce.
24. Muema Mwini (DW2) stated that the Respondent was married in 1982 customarily after the deceased divorced his first wife. He also stated that he became aware about the problems in deceased family when PW2 reportedly conspired with her late husband to beat the deceased which resulted with the deceased moving to parcel No 1365. He also stated that he was not aware whether the deceased used to pay school fees for the 3rd and 4th Applicants. Further that the first wife was given parcel No. 137. He also stated that the deceased was buried on parcel No. 1369 while the first wife was buried on parcel No. 147.
25. Mary Mbithi Ndumba, (DW3) and the Petitioner herein, stated that she got married to the deceased in 1982 after divorce proceedings between the deceased and his first wife (Ruth) were concluded in 1988. She also stated that the deceased and his first wife had 2 children. She indicated that she excluded mention of the first house in her petition for letters of administration because there was a court decree which divided properties between the deceased and the first wife in their divorce proceedings. She also stated that she excluded her son Gideon in the petition but stated that he was aware and consented to the mode of distribution as well her other two children. She stated that the share of property given to the first wife should devolved to her children upon her death. She also testified that the deceased did not take care of the 3rd and 4th Applicants as he was already retired and were not his dependants. She added that the fundraiser held to raise school fees for them was organized by other family members and doctors. She stated that she resides in parcel No. 1369 where the house she lives in stands. She also stated that she did not include vehicles belonging to the deceased as they had been sold. She also testified that she did not include parcel LR No. Mulango/Wikililye/3 as it was given to her by her mother in law and the property did not belong to the deceased. She indicated that the parcel was still



in her mother in law's name and not the deceased. According to her the 1st house got a bigger share of the estate. She added that she could not trust the clan members to arbitrate over their family dispute because they were biased.

Analysis and determination

26. This court has set out the applicants case as well as the respondent's case. The matter before this court is a Summons for Revocation of Grant brought under Section 76 of the [Law of Succession Act](#) which states 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”

27. The procedural aspect of the application is provided under Rule 44 of the [Probate and Administration Rules](#) which provide as follows: -

- “ a. Where any person interested in the estate of the deceased seeks pursuant to the provisions of Section 76 of the Act to have a grant revoked or annulled he shall, save where the court otherwise directs, apply to the High Court for such relief by summons in Form 107 and, where the grant was issued through the High Court, such application shall be made through the registry to which and in the cause in which the grant was issued or, where the grant was issued by a resident magistrate, through the High Court registry situated nearest to that resident magistrate's registry.
- b. There shall be filed with the summons an affidavit of the applicant in Form 14 for revocation or annulment identifying the cause and the grant and containing the following particulars so far as they are known to him;



- i. whether the applicant seeks to have the grant revoked or annulled and the grounds and facts upon which the application is based; and
 - ii. the extent to which the estate of the deceased has been or is believed to have been administered or to remain un-administered, together with any other material information."
28. An applicant seeking to revoke a grant can cite any of the grounds cited by the above section of the law and if it is proven then the court can revoke a grant.
 29. In this matter the applicants initially were 4 when this application was filed but it would appear that the names of 1st and 2nd applicants may have been added without their express consent because when one reads the affidavit sworn on March 3, 2014 done in support of the Summons for Revocation of Grant one would notice a glaring issue where the deponent state "Dorothy Monthe Ndumbu our aunt is a daughter of the deceased.....". This evidently shows that whoever was deponing to that fact was someone other than the said Dorothy Monthe Ndumbu. The said Dorothy also appears to have some mental disability given the testimonies given towards that end by many witnesses who testified in this matter.
 30. What is apparent is that the 3rd & 4th applicants from the beginning were the aggrieved parties and filed application on their own. This finding is based on the notice of withdrawal filed by Susan Katunga Mburu dated August 15, 2016 and filed in court on August 16, 2016.
 31. Having said that, there is nothing preventing any interested person from moving the court for revocation of grant so long as he/she can establish or prove the existence of any ground cited under Section 76 of the *Law of Succession Act*.
 32. In this matter, the applicants have listed fraud as ground to have the grant revoked.
 33. On this ground, the Applicants state that the Respondent failed to disclose to the court that the deceased had a first wife and children borne from the first marriage. The Applicants also state that the Respondent misdirected the court to believe that the whole family of the deceased discussed and agreed to the filing of the petition for letters of administration or consented to the mode of distribution. They add that the Respondent failed to include her own son Gideon Ndumba in form 37 B which is the form for Consent to the Mode of Distribution of Estate of a deceased person.
 34. On her part, the Respondent contends that she had her own reasons for the non-disclosure and admitted that she left the named persons for a reason. In regard to her own son, she indicated that the same was an inadvertent error but that her son was well aware of the process and consented to the mode of distribution adding that he was even present in court when the confirmation was being done.
 35. On the part of the first family, Respondent stated that the first wife was accorded her share of the estate of the deceased at the time of their divorce. She relied on a Decree extracted in relation to Civil Suit No. 554 of 1981 (S.0). The decree showed the mode of distribution of properties between the deceased and his first wife. The Respondent alleged that since the first wife had already received a share during the divorce proceedings, her children i.e the late Arnold Ndumbu and Dorothy Nbumbu ought to have benefited from her estate and not from the estate of the deceased. With regards to Dorothy Ndumbu, the Respondent stated that she was entitled to benefit from the estate of her mother, and that the same applied to the 3rd and 4th applicants whom she indicated could only claim from the estate of their father, Arnold Ndumbu who in turn could only benefit from the estate of his mother, the deceased's first wife.



36. Having heard the respondent testify in court and the applicants this court is not persuaded that the petitioner set out to defraud anyone of their right share when she filed the petition for letters of administration. She appeared to have acted in good faith because she even left out her own son, Gideon out of some inadvertence. The same was not deliberate because she included him as a beneficiary. The big question in my view to be answered in order to resolve this matter is whether the applicants were left despite being bona fide dependants. Who is a “dependant”?
37. Section 29 of Law of Succession Act defines a “dependant” as;
- “ a. the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death
 - b. such of the deceased’s parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sister, and were being maintained by the deceased immediately prior to his death.” (Emphasis Added)
38. This court has carefully evaluated the evidence tendered in this matter and find that the two applicants herein, were grandchildren to the deceased and very young at the time the deceased passed on and were not maintained by the deceased in immediately prior to his death. They were residing in Nairobi with their mother Jedidah who is alive and testified in this court. She stated on oath that she had no issue with the administration of the estate in this matter and that her sons had raised issues. She stated that her husband the late Arnold Ndumbu predeceased the deceased herein and added that her husband was also son to Ruth Katungwa Ndumbu who filed a matrimonial cause and obtained half the estate of the deceased. She quite correctly pointed out that when her mother in law has died she has pursued for letters of administration in respect to her estate. It is that estate that the applicants herein can lawfully stake claim. This court finds that the fact that the deceased and the respondent may have attended a fundraiser to raise their school fees does not translate to a responsibility. The claims made by the applicants that the deceased used to visit and assisted in payment of school fees was not supported by the evidence tendered before me.
39. In the premises this court finds that the applicants have not established the element of dependency as defined under Section 29 of Law of Succession Act to enable them stake any claim or interest on the estate of their grandfather.
40. In the end this court for the aforesaid reasons finds no merit in the Summons for Revocation of Grant dated 3rd March 2014. The same is disallowed but I make no order as to costs.

DATED, SIGNED AND DELIVERED AT KITUI THIS 29TH DAY OF JUNE, 2022.

HON. JUSTICE R. K. LIMO
JUDGE

