



REPUBLIC OF KENYA



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In re Estate of Kilonzo Nzioka (Deceased) (Miscellaneous Appeal E004 of 2022) [2022] KEHC 10373 (KLR) (20 June 2022) (Ruling)

Neutral citation: [2022] KEHC 10373 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS APPEAL E004 OF 2022**

MW MUGAI, J

JUNE 20, 2022

IN THE MATTER OF THE ESTATE OF KILONZO NZIOKA (DECEASED)

BETWEEN

REGINA MUTHEU MUSEMBI APPLICANT

AND

ROSE MUMBUA KILONZO RESPONDENT

RULING

1. The deceased herein, Kilonzo Nzioka died on August 5, 2020 at Kitane.
2. The Respondent herein, Rose Mumbua Kilonzo in her capacity as a widow filed petition and applied for Letters of administration intestate in the estate of the deceased herein before the Senior Principal Magistrate's Court at Kangundo vide Succession Cause No E113 of 2021.
3. In the affidavit in support of the Petition for Letters of Administration Intestate, the deceased was survived by the following beneficiaries;
 - a. Regina Mutheu Musembi-daughter
 - b. Ann Ndinda Sila-daughter(deceased)
 - c. Mwanza Kilonzo-son
 - d. Patrick Muthama Kilonzo-son
 - e. Jane Koki Kilonzo-daughter
 - f. Thomas Musui Kilonzo-son
 - g. Rose Mumbua Kilo-2Nd Wife



- h. Stanslous Muisyo Kilonzo-son
 - I. Nicholas Mutuku Kilonzo-son
 - j. Muneo Muisyo-daughter
 - k. Irene Katunge Kilonzo-daughter
 - l. Benard Nzyoka Kilonzo-son
 - m. Cecilia Ngina Kilonzo-daughter
4. In the Consent to making of Grant dated April 22, 2021 Stanslous Muisyo Kilonzo, Nicholas Mutuku Kilonzo, Muneo Muisyo, Irene Katunge Kilonzo, Benard Nzyoka Kilonzo and Cecilia Ngina Kilonzo consented to the letters of administration to the estate of the deceased herein being granted to the Respondent herein, Rose Mumbua Kilonzo of PO BOX 81-90131 Tala.
5. As per the Assistant Chief of Katine Sub-Location, Regina Mutheu Musembi, Ann Ndinda Sila-daughter (Deceased), Mwanza Kilonzo, Patrick Muthama Kilonzo, Jane Koki Kilonzo and Thomas Musui Kilonzo are the children of the deceased's 1st Wife, Lucia Katilo Kilonzo (Deceased).
6. According to the Applicant, the Grant of letters of administration in the estate of the deceased herein was issued on September 1, 2021 to Rose Mumbua Kilonzo.

Summons for revocation and/or annulment of grant of letters of administration

7. The Applicant/Objector, Regina Mutheu Musembi sought the following orders:-
- 1. The Grant of Letters of administration issued on September 1, 2021 to Rose Mumbua Kilonzo be revoked or annulled.
 - 2. There be a stay of further proceedings and/or application for confirmation of Grant in Kangundo Senior Principal Magistrate Court Succession Cause No E113 of 2021 in the Matter of the Estate of Kilonzo Nzioka (Deceased) until the Revocation/annulment proceedings are heard and determined.
 - 3. The said Kangundo Succession Cause No E113 of 2021, In the Matter of the Estate of Kilonzo Nzioka (Deceased) be transferred to this Hon. Court for hearing and final determination.
 - 4. The Grant of Letters of administration be therefore given of Regina Mutheu Musembi and Rose Mumbua Kilonzo.
 - 5. Such further orders as this Hon Court may deem fit to grant.
8. On February 15, 2022, under certificate of urgency application filed by the Applicant on February 14, 2022, this Court halted/stayed the Confirmation of Grant proceedings in Kangundo Succession Cause No E113 of 2021, In the Matter of the Estate of Kilonzo Nzioka (Deceased) pending the hearing and determination of the Summons.
9. The Summons is based on grounds that the proceedings to obtain the Grant was defective in substance and was obtained fraudulently by relaying false statement and/or concealment from the Court of material particulars.



10. According to the Applicant, the Grant was obtained by means of untrue allegations of facts essential on point of law to justify the grant. According to the Applicant, the deceased family is polygamous hence each house or family ought to be represented by a family member as trustee of their share of the estate but the Respondent obtained the letters of administration alone contrary to Section 58 and 84 of *Law of Succession Act*, Cap 160.
11. According to the Applicant, none of the family members of the 1st House were included/involved/or consented to the making of the Grant and several assets have deliberately/fraudulently been omitted from the list of assets before the proceedings in the Trial Court.
12. The Applicant's view is that the Trial Court is bereft of pecuniary jurisdiction since the value of deceased estate is over Kshs 20,000,000/- hence the Succession Cause should be transferred to this Court. According to the Applicant, it is in the interest of justice that the Summons seeking revocation of the Grant be allowed as prayed.
13. The Summons is supported by the Supporting affidavit of the Applicant sworn on February 9, 2022. The Applicant averred that she is a daughter of the 1st House of the late Kilonzo Nzioka (Deceased) whose estate is subject to these proceedings and the Trial Court proceedings at Kangundo Law Courts.
14. According to the Applicant, she is willing to administer the estate of the deceased in accordance with the Law of Succession for the sake of the interest of the 1st House. According to the Applicant, she equally qualifies to be a trustee jointly with the Respondent/Administrator.

Replying Affidavit

15. In opposition to the Summons, vide her replying affidavit sworn on March 10, 2022, the Respondent, Rose Mumbua Kilonzo averred that the Applicant's Summons has only one goal which is to scuttle determination of the Succession Cause No E113 of 2021 filed at Kangundo Law Courts.
16. According to the Respondent, she is the surviving widow of the late Kilonzo Nzioka who died intestate on August 5, 2020. The Respondent averred that being a widow of the deceased and pursuant to Section 66 of the *Law of Succession Act*, she ranks first in priority to the Applicant.
17. According to the Respondent, all the beneficiaries of the deceased were acknowledged in the Petition as shown in Form P & A 5 and also in the Chief's letter.
18. The Respondent averred that she is not aware of any property left out of the Petition and if any is left out, it is the duty of the Applicant to demonstrate its existence to Court. According to the Respondent, it is the Applicant who is in possession of the alleged documents since the deceased was living with the 2nd Wife immediately before his demise.
19. According to the Respondent, the value of the estate is not Kshs 20,000,000/-. The Respondent averred that the Summons is an abuse of the court process since no revocation of grant has been filed before the Senior Principal Magistrate Court.
20. The Respondent has urged this court to assist in expeditious determination of the matter since she is elderly and sickly. According to the Respondent, the Applicant has approached this Court in bad faith and with unclean hands and to accord herself more time to use motor vehicle registration number xxxx. The Respondent urged the court to dismiss the Summons dated February 27, 2022 be dismissed with costs.



Applicant's Submissions

21. On behalf of the Applicant, it is submitted that the deceased had a polygamous family consisting of two wives and/or two houses. It is submitted that the deliberate failure by the Respondent to include members of the 1st House and obtain their consent or renunciation amounted to concealment of material facts. According to the Applicant, the failure to obtain their consent was contrary to Rule 26 of the *Probate and Administration Rules*.
22. Reliance was placed on the case of *Al-Amin Abdulrehman Hatimy v Mobamed Abdulrehman Mobamed & Another [2013] eKLR* where the court held that the law of succession by virtue of Rule 26 requires that any application for issue of a Grant must be accompanied by a consent duly signed by all persons entitled in the share in the same estate.
23. It is submitted that there must be a representative from each house as required under Section 58(1) (a) and 84 of the Law of Succession hence a new Grant should be made jointly to the Applicant and the Respondent.
24. Regarding the pecuniary jurisdiction of the Magistrates Court at Kangundo, it is submitted that since several assets were not listed in the schedule of assets in the estate of the deceased herein, the estate of the deceased is then estimated to be in excess of Kshs 20,000,000/-.
25. The Applicant placed reliance on the ownership documents she has attached to her supporting affidavit to the Summons. The Applicant urged this Court to find that it is the appropriate Court to hear and determine this matter to conclusion.

Respondent's Submissions

26. On behalf of the Respondent, this Court has been urged to take note that no application was made before the Magistrate Court at Kangundo that issued the Letters of administration. According to the Respondent, from the onset it is quite clear that the Applicant was well aware of the Petition being filed since the Applicant and her household were all listed as beneficiaries of the estate of the deceased.
27. In response to the Applicant, submission that she did not sign the consent to the making of the Grant, it is submitted that the Respondent is the widow of the deceased who ranks in priority to the Applicant and the consent of the Applicant was not necessary when taking out the Petition for letters of administration.
28. According to the Respondent, the Petition for letters of administration complied with Section 51 of the *Law of Succession Act* hence the consent of the Applicant was not necessary since she was notified of the Petition as she filed grounds of opposition and submissions before the Lower Court in opposition to the Respondent/Administrator Chamber Summons seeking injunctive orders against her for intermeddling with the estate of the deceased.
29. Reliance was placed on Section 66 of the *Law of Succession Act* and Part V which places a surviving spouse in priority. According to the Respondent, the Applicant and her household are all children of the deceased. It is submitted that there is no superior or equal right to a grant.
30. Reliance was placed on the case of *In Re Estate of Festo Akwera Kusebe (Deceased) [2019] eKLR* where the court held that priority is given to the surviving spouse to the administration of the estate.
31. Regarding the lack of consent from the Applicant and her household to the making of the Grant, it is submitted that Part VI Rule 26(1) of the *Probate and Administration Rules* requires that a notification be given to every person entitled to in the same degree as or in priority to the Applicant but pursuant



to Rule 22(1), the Applicant nor any member of her household ranks in the same degree or in priority and therefore a citation was not necessary before filing the Petition at the Trial Court. Reliance was placed on the case of *Maamun Bin Rashid Bin Salim El-Rubmy vs Haider Mohamed Bin Rashid El-Basamy*[1963]EA where the court held that:

' Where a person claiming to be an heir (or the heir of an heir) of a deceased person applies for a grant of administration, citations should not be issued to other heirs whose existence is disclosed in the Petition having an equal right as a matter of course but only when for some special reason the court sees fit to make such an order.'

32. In *Kiboko v Assistant Land Registrar and Others*[1973]EA Kneller J (as he then was) held that:

' Citation need not be ordered to issue to all persons shown as heirs in the Petition of the deceased for a grant of letters of administration of the estate. They need not be ordered as a matter of course to issue for heirs shown in the petition to have an equal right. They should go forth to anyone shown to have a superior right to take up the grant or for any other special reason.'

33. Odunga J in re *Estate of Mary Ngundu Mwanunga (Deceased) [2020] eKLR* stated that:

' It is therefore clear that unless the Court thinks otherwise, the Citor must be a person who is himself entitled to a grant, in the event that a person with a superior right fails to take up the grant or for any other special reason which is not the case herein. Where two or more persons have equal rights to grant of representation, there is no necessity for a citation to be made unless when for some special reason the court sees fit to make such an order. In those circumstances, one of them is at liberty to apply for grant and the Court may in its discretion join the other persons if it deems fit.'

34. According to the Respondent, she is the only surviving spouse to the deceased hence has superior rights in the application for letters of administration.

35. It is submitted that the Applicant has not disclosed to court why the Respondent had sought an injunction against her.

36. The Applicant had been intermeddling with the deceased's properties since the deceased's demise. According to the Respondent, the Applicant has not satisfied the requirement necessary for revocation and/or annulment of the grant hence the grant issued to the Respondent should not be revoked.

37. Regarding the value of the estate, it is submitted that the Applicant has not furnished court with valuation reports for the assets she claims to have been left out of the Petition for letters of administration or any documentation to prove their existence hence the estate is not worth Kshs 20,000,000/- as submitted by the Applicant. Reliance was placed on Section 107 of the *Evidence Act* on the proposition that he who alleges must prove. It is therefore submitted that Succession Cause No E113 of 2021at Kangundo Law Court should not be transferred to the High Court.

38. According to the Respondent, the Succession Cause cannot even be transferred if indeed the Trial Court does not have pecuniary jurisdiction over the estate of the deceased. Reliance was placed on the case of *Abraham Mwangi Wamigwi vs Simon Mbiriri Wanjiku & Another*[2012]eKLR where the court held that:

' The law relating to transfer of suits from subordinate Courts to the High Court or transfer for that matter is very clear. In *Kagenyi vs Musiramo* (supra), Sir Udo Udoma, CJ made it



clear that an order for the transfer of a suit from one court to another cannot be made unless the suit has been in the first instance brought to court which has jurisdiction to try it.'

39. As to whether the Applicant can be joined as a co-administrator, it is submitted that no application has been made in the Trial Court hence inviting this Court to fetter the discretion of the Trial Magistrate. According to the Respondent, it is clear that the Applicant rarely gets along with the Respondent hence if joined it will result to constant wrangles between them.
40. The Respondent urged the Court to join any other person and not the Applicant to represent the household or the Respondent to remain as the sole administrator. The Respondent has urged this Court to dismiss the Applicant's Summons for revocation and/or annulment of the Grant with costs and allow confirmation of the Grant at Kangundo Law Courts to be heard in order to avoid further delay in the interest of justice.

Determination

41. I have considered the Summons, affidavit in support and in opposition as well as the submissions and cases relied upon.
42. The issues that emerge for determination are as follows;
 - a) Whether the grant of letters of administration issued on September 1, 2021 should be revoked.
 - b) Whether the stay of further proceedings and/or application for confirmation of grant in E113 of 2021 in the Matter of the Estate of Kilonzo Nzioka (deceased) until that revocation/annulment proceedings are heard and determined.
 - c) Whether the Succession Cause E113 of 2021 Kangundo Law Courts ought to be transferred to High Court Machakos.
43. The Summons is premised on Section 76 of the *Law of Succession Act*, Cap 160, Laws of Kenya. The said provision 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 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—



44. In *Albert Imbuga Kisigwa v Recho Kavai Kisigwa,-Succession Cause NO 158 OF 2000*, Hon Mwita J on November 15, 2016, noted thus:

- (13) Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not a discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the court to invoke section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased's estate and ensure that the action taken will be for the interest of justice.

45. In *Alex Mwenda Mwirigi V Rodah Karimi Jadiel, Succession Cause No 337 Of 2011*, Hon Gikonyo J November 2, 2016 held that:

- (5) I will not re-invent the wheel. This is an application for revocation of under Section 76 of the *Law of Succession Act* CAP 160 of the laws of Kenya and I only need to ask whether it satisfies the threshold provided in law? Given the arguments being presented, the most apt grounds to be met are, whether:
- (a) The proceedings to obtain the grant were defective in substance;
 - (b) 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; and
 - (c) 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.

46. Upon consideration of all the facts of the matter derived from pleadings on record, the instant application, replying affidavit and written submissions, documentary evidence before me, I see major argument emerging, namely;

- a) Annexed to the Petition for letters of administration filed in Kangundo Law Courts is the Chief's letter dated April 20, 2021 by Chief of Katine Sub Location to Deputy Registrar Kangundo Law Court sets out clearly that the deceased had 2 houses namely;
Lucia Katilo Kilonzo 1st Wife – (deceased)
 - a. Regina Mutheu Musembi-daughter
 - b. Ann Ndinda Sila-daughter(deceased)
 - c. Mwanza Kilonzo-son
 - d. Patrick Muthama Kilonzo-son
 - e. Jane Koki Kilonzo-daughter
 - f. Thomas Musui Kilonzo-son
Rose Mumbua Kilo-2nd wife
 - g. Stanlous Muisyo Kilonzo-son



- h. Nicholas Mutuku Kilonzo-son
- i. Munee Muisyo-daughter
- j. Irene Katunge Kilonzo-daughter
- k. Benard Nzyoka Kilonzo-son
- l. Cecilia Ngina Kilonzo-daughter

47. According to the Respondent, that the Applicant had not satisfied the requirement necessary for revocation and/or annulment of the grant hence the grant issued to the Respondent should not be revoked.
48. The Court finds that contrary to the Chief's letter, the petition outlined the children of the deceased together without disclosure that there were 2 houses and 2 wives of the deceased. Further the Consent to making grant the written consents were/are by the children of the 2nd house only and the children of the 1st house though listed as beneficiaries of the deceased's estate were not included/listed to append their written consents and signatures to making of grant.
49. The Respondent submitted that despite Rules 22 & 26 of Probate and Administration Rules by virtue of Section 66 of the LSA being the surviving wife /widow of the deceased she ranks in priority to the children of the deceased and therefore consents of the Applicant and her siblings were not required. If that position holds true, then her own children ought not to have appended their written consents as they did as the Respondent ranked in priority to her own children.
50. Secondly, where beneficiaries and/or administrators file petition for grant of letters of administration intestate it is not a legal requirement to cite other beneficiaries to notify them of the petition but to provide the Consent to making the grant form with their names to append written consents by appending signatures, if not in agreement then their part of the Form will be blank. This then calls for filing of objection to making of grant proceedings to be conducted first and the Court shall determine who are beneficiaries and/or administrators of the estate of the deceased under Section 66 of the LSA.
51. In the instant case, I find no evidence on record to confirm that the Children of the 1st house were involved/contacted/notified to give their written consents in filing and seeking grant of representation of the deceased's estate.
52. Therefore, this Court finds that the Respondent and/or beneficiaries of the 2nd House obtained the grant of representation by the concealment from the court of something material to the case contrary to Section 76(b) LSA by excluding the children of the 1st house as per the Chief's letter and did not obtain written consents of the 1st House beneficiaries of the deceased's estate.
53. The Court finds from the above consideration that the grant issued on September 1, 2021 is revoked / annulled by virtue of Section 76 LSA.

Section 66 LSA provides for 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 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.

54. The Court exercises its right under Section 66 LSA on appointment of administrators of deceased's intestate estate to ensure fairness and equity amongst the family of the deceased. This Court orders issuance of a fresh grant in the joint names of Regina Mutheu Musembi the eldest daughter of the 1st wife, the late Lucia Katilo Kilonzo, to safeguard rights and interests of the beneficiaries of the 1st house in the administration and distribution of deceased's estate and Rose Mumbua Kilonzo, surviving widow of the deceased to safeguard interests and rights of beneficiaries in the 2nd house in administration and distribution of the deceased's estate.
55. On whether the stay of further proceedings and/or application for confirmation of grant in E113 of 2021 in the Matter of the Estate of Kilonzo Nzioka (deceased) until the instant application of revocation/annulment proceedings is heard and determined is spent and overtaken by events as this Court granted stay of proceedings on February 5, 2022 so as to allow the present application to be disposed of before the summons for confirmation of grant was/is heard and determined and the estate of the deceased is distributed.

Whether the Succession Cause E113 of 2021 Kangundo Law Courts ought to be transferred to High Court Machakos.

56. The Applicant submitted that the Succession Cause E113 of 2021 regarding the pecuniary jurisdiction of the Magistrates Court at Kangundo, it is submitted that since several assets were not listed in the schedule of assets in the estate of the deceased herein, the estate of the deceased is then estimated to be in excess of Kshs 20,000,000/-. The estate of the deceased is stated to have exceeded the Trial Court's pecuniary jurisdiction.
57. The Respondent submitted in opposition to transfer of the matter to the High Court stated regarding the value of the estate, submitted that the Applicant had furnished the Court with valuation reports for the assets she claims to have been left out of the Petition for letters of administration or any documentation to prove their existence and hence the estate is not worth Kshs 20,000,000/- as submitted by the Applicant. The Respondent relied on the burden and standard of proof by tendering evidence as provided by Section 107 of the Evidence Act on the proposition that he who alleges must prove their claim.
58. The question or issue of jurisdiction of the Court is an integral part of hearing and determination of disputes presented through the justice system. Therefore, jurisdiction is a matter raised at the earliest opportunity and/or as a Preliminary objection. The issue is heard before/by the Trial Court first so as to determine jurisdiction and not render proceeding void abinitio.
59. This Court cannot determine the issue of jurisdiction of the Trial Court at this stage as the issue has not been raised and addressed before the Trial Court and thereafter any aggrieved party by the Trial Court decision may approach the High Court.



60. Secondly, in concurrence with the Respondent, at this stage the left out/ omitted assets that comprise of the estate of the deceased have not been disclosed and their value determined. Therefore, this Court in the absence of tangible evidence of assets and valuation reports that confirm the estate is in excess of the pecuniary jurisdiction of the Trial Court at Ksh 20,000,000/- cannot order transfer or hear the matter for want of jurisdiction.
61. Section 47, 48 & 49 of LSA provide the jurisdiction of the High Court and the Magistrates Courts, both Courts apply the Law of Succession Act but the Magistrate's Court is subject to pecuniary and territorial jurisdiction. So, the question/issue of jurisdiction shall be first raised addressed and determined before the Trial Court.
62. In that event, the transfer of Succession Cause E113 of 2021 is premature. For now the matter will be heard and determined before Kangundo Law Courts unless and until the issue of jurisdiction is heard and determined.

Disposition

1. The application/summons filed on February 14, 2022 is partly upheld and granted and partly denied and dismissed.
2. The grant issued on September 1, 2021 is revoked under Section 76(b) LSA.
3. A fresh/new grant is to be issued in joint names of Applicant Regina Mutheu Musembi & the Respondent Rose Mumbua Kilonzo as administrators of the deceased's estate.
4. The stay of proceedings of Succession Cause E 113 of 2021 is hereby vacated.
5. The Succession Cause shall be heard and determined in Kangundo Law Courts and the issue of jurisdiction maybe raised before the Trial Court.
6. Being a family matter, each party bears its own costs.

It is so ordered

DELIVERED, DATED AND SIGNED IN OPEN COURT AT MACHAKOS THIS 20TH DAY OF JUNE 2022 (VIRTUAL CONFERENCE).

M.W. MUIGAI

JUDGE

