



REPUBLIC OF KENYA



**In re the Estate of M'rethara Ikuri (Deceased) (Succession Cause
41 of 2019) [2022] KEHC 11352 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 11352 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
SUCCESSION CAUSE 41 OF 2019**

LW GITARI, J

JULY 28, 2022

IN THE MATTER OF THE ESTATE OF M'RETHARA IKURI (DECEASED)

ROSE KAINDA KITHINJI..... 1ST APPLICANT

ANASTACIA GAAJI M'THARA..... 2ND APPLICANT

-VERSUS-

ROBERT MBAE M'THARA RESPONDENT

JUDGMENT

1. This cause relates to the estate of M'Rethara Ikuru alias Rethara Ikuru alias Ithaara Gikuru (deceased) who died intestate on December 10, 1987. The Respondent herein is the deceased's son. He applied for and was issued with a grant of letters of administration in respect to the estate of the deceased.
 1. It is not in dispute that the deceased was polygamous and left behind two widows:
 - i. Edith Gature M'Ithara
 - ii. Anna Kangai M'Ithara (Deceased)
 2. It also not in dispute who the beneficiaries of the deceased are. The house of Edith Gature M'Ithara had 9 issues:
 - i. Robert Mbae M'Ithara
 - ii. Thomas Mbae M'Ithara (deceased)
 - iii. Kiruja M'Ithara
 - iv. Anderson Njiri Simon
 - v. Elias Kithinji Simeon
 - vi. Catherine Kanini Mbae



- vii. Lucy Muthoni M'Ithara
 - viii. Joyce Mukwanyaga Njagi
 - ix. Francis Kamunde
3. On the other hand, the second house of Anna Kangai M'Ithara had the following 5 issues:
 - i. Genesio Mndaka M'Ithara
 - ii. Anastacia Gaaji M'Ithara
 - iii. Josyline Miuraithe
 - iv. Rose Kainda Kithinji
 - v. Jane Karimi Linus
 4. The deceased's estate comprised of two (2) known properties namely:
 - i. LR No Muthambi/Erega/66 measuring approximately 10 acres; and
 - ii. LR No Muthambi/Erega/168 measuring approximately 3.927 acres.
 5. By a judgment delivered on November 20, 2018, the lower court confirmed the grant in the following terms:
 - i. The 7 sons to inherit Muthambi/Erega/66 in equal shares of 1.42 acres each.
 - ii. The 8 women (including Edith) inherit Muthambi/Erega/168 in equal shares of 0.491 acres each.
 6. Presently before this court is the summons for revocation of grant dated October 14, 2019. It primarily seeks for the revocation of the certificate of confirmation of grant dated November 26, 2018 issued in Chuka CM Succession Cause No 339 of 2016 and for costs of the application to be in the cause.
 7. The application is premised on the grounds on the face of it and it is supported by the affidavit of Rose Kainda Kithinji sworn on October 14, 2019. She depones that the Applicants herein were not involved in the proceedings before the lower court despite being daughters of the deceased. She further depones that proceedings in the lower court were defective on account of the Respondent's failure to disclose all the material facts.
 8. The application is opposed by the Replying Affidavit sworn by Robert Mbae M'Ithara on October 28, 2019. He depones that the applicants have always been informed of all developments in the succession cause and attended court, thus should not claim that they were not aware of the proceedings in the lower court. the Respondent further contends that if the applicants were aggrieved by the decision of the lower court, then they ought to have filed an appeal challenging the same.
 9. The Application was canvassed by way of viva voce evidence as well as written submissions.

The Applicants' Case

10. The 1st Applicant testified as PW1. She is the deceased's daughter and sister to the Respondent. It was her contention that she was not heard in the lower court proceedings. According to her, the deceased had three (3) parcels of land, but the Respondent only indicated two (2) parcels in the lower court.



She alleged that the property that was omitted was land parcel No 5694 which is located at Rumuruti. She further alleges that she never signed any consent on the mode of distribution that was proposed before the lower court.

11. On cross examination, PW1 confirmed that she did not have any document to show that the deceased owned the land she claims. She contends that the deceased had distributed his land during his lifetime and given the two houses their respective shares. The Respondent is also alleged to have received land from the deceased. It was her testimony that the land her mother received was on a valley and hence impossible to build on. She thus proposed that land parcel no Muthambi/Gatua/168 be shared equally indicating that the family of the Respondent received LR No Muthambi/Erega/66.
12. PW2 was Jane Karimi, also the deceased's daughter. The Respondent is her brother although from a different mother. She also alleged that she was not involved in the lower court proceedings and that she never signed any consent on the proposed mode of distribution of the deceased's estate. On cross examination, it was her testimony that the deceased had distributed his land to his two wives but did not give the daughters a share of the estate. She further stated that their mother received LR No Muthambi/Erega/66 and the daughters subsequently received land from their mothers.

The Respondent's Case

13. The Respondent testified as DW1. He relied on his Replying Affidavit sworn on October 28, 2019 in which he deponed that the Applicants were called to the Chief's office after he filed the cause in the lower court. According to him, each of the beneficiaries of the deceased got their share of the estate. He claims that the land in Rumuruti has no title deed and that is why he never mentioned it in the lower court proceedings. He further claimed that he did not know where the said land is located but that he knew that it belonged to the deceased. He stated that LR No Muthambi/Erega/168 was never given to either the daughters of the deceased or their mothers. He confirmed that LR No Muthambi/Erega/66 is the one that was given to them. In addition, the Respondent stated that he had sold a portion of the estate to a buyer before the grant was confirmed. He further confirmed that he did not involve the 1st Applicant.
14. DW2 was Anderson Thiri Simon, another son to the deceased. He testified that the deceased had two (2) land parcels LR No Muthambi/Erega/66 and LR No Muthambi/Erega/168. He corroborated DW1's contention that the deceased distributed his estate in his lifetime and that gave his sons equal shares. He contends that the deceased also gave land to his sister who was unmarried but she did not give land to the Applicant as she was married. According to him, he sold his portion of the land before the proceedings in the lower court were filed.
15. DW3 was Joyce Mukwanyaga, a daughter of the deceased. She adopted her Replying Affidavit sworn on July 21, 2021 as her evidence. She deponed that she was not informed when the case in the lower court was filed but was satisfied with the share that her mother was given. She did not know the outcome of the case and stated that she was not interested in any portion of the estate as their mother had already given them a portion of the land.

Issue for determination

16. The main issue for determination is whether the applicants have established sufficient ground for the revocation of the subject confirmed grant.



Submissions:

2. The applicant filed submissions through their advocates Basilio Gitonga Murithi & Associates. Her contention is that she seeks revocation of the grant issued by the trial magistrate in Chuka CM Succession Cause No 339/2016 in favour of the respondent who is the administrator of the estate. They are urging the court to note that they were not parties to the proceedings before the lower court and that crucial information was not disclosed to the court. That the respondent conceded before this court that he had benefitted from the property of the deceased prior to his demise and that had received proceeds of sale of part of the estate prior to the confirmation of the grant. That is the applicant's contention that the grant was defective in substance and is good for revocation as provided under Section 76 of the *Law of Succession Act*. (Cap 160 Laws of Kenya) to be referred to as the Act. The applicant relies on. *In Re Estate of Joshua Munyi (deceased) 2021 eKLR*.
3. The applicant in opposing the submission by the respondent's contention that the only avenue open to them was appeal, submit that they were not parties in the trial before the trial magistrate and so they reserve the right to seek revocation of the said grant.

For the respondent, submissions were filed by Kijaru & Company Advocates who urge the court to find the applicants are daughters of the deceased who had distributed his properties during his lifetime and the daughters had received a share out of land parcel No Muthambi/Erega/66 where they each got 0.25 acres each and in common share with their respective mothers having a life interest. That the sons were to get equal shares out of Land Parcel No Muthambi/Erega/168 which measures approximately ten (10) acres.

The respondent submits that all the beneficiaries were involved in the proceedings before the lower court. The respondent submits that Section 40, 37-39 of the Act is applicable to the estate of a deceased person who was polygamous and dies intestate. He relies on *Mary Rono -v- Jane Rono & Another CA Eldoret CA 66/2002* where the court held that Section 40 of the Act is applicable and the distribution should be made to the house s according to the number of children in each house and adding the wives as additional unit to the number of children in each house. The respondent submits that most of the beneficiaries have extensively developed their parcels of land and revocation and redistribution would displace most of the beneficiaries, particularly those who benefitted during the lifetime of the deceased. In this regard he relies on Rahab Njeri Kariuki -v- Joyce Waruguru Kariuki & 2 Others and *Morogo A Mugun alias Moroko Makumu (2019)*. The respondent has urged the court to consider his proposed mode of distribution as it fare and in accordance with the mode of distribution by the deceased during his lifetime.

Analysis

17. Revocation of grants is governed by Section 76 of the *Law of Succession Act*, Cap 160 of the Laws of Kenya (hereinafter the 'Act') which provides 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.'

18. Under Section 76 of the Act, a court may revoke a grant if some or all the grounds listed above are disclosed either on its own motion or on the application by a party.

19. The Applicants herein contend that they were not parties to the proceedings before the lower court and that crucial information was not disclosed to the court. They further contend that the administrator had failed to seek the consent of all persons protesting the confirmation of the grant contrary to the provisions of the law.

20. In determining the protest, the lower court considered the fact that the consent to the confirmation of grant had not been signed by the daughters.

21. From the court record, however, there is an affidavit of protest to confirmation of grant sworn by Joseline Mukwanjeru on February 3, 2016. Paragraph 3 of the said affidavit indicates that the same was sworn for and on behalf of and with authority of Genesio M'ndaka M'ithara, Anastacia Gaji M'ithara, Rose Kainda and Jane Karimi. None of those mentioned in the said affidavit have challenged the authenticity of the said affidavit. The affidavit was a protest to the proposed mode of distribution. This affidavit shows that the applicants were involved in the succession having authorized Joseline Mukwanjeru, one of their own to swear the affidavit on their behalf. The Act requires that before the court confirms the grant of Letters of Administration it must be satisfied that as to who the beneficiaries of the estate are and their respective shares. Section 71 of the *Law of Succession Act* provides:-

' (1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.

- (2) Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may- (a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or



- (b) If it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 inclusive, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be unadministered; or (c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control; or (d) postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case: Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed the grant shall specify all such persons and their respective shares. (2A) Where a continuing trust arises and there is only one surviving administrator, if the court confirms the grant, it shall, subject to section 66, appoint as administrators jointly with the surviving administrator not less than one or more than three persons as proposed by the surviving administrator which failing as chosen by the court of its own motion. 3) The court may, on the application of the holder of a grant of representation, direct that the grant be confirmed before the expiration of six months from the date of the grant if it is satisfied- (a) that there is no dependant, as defined by section 29, of the deceased or that the only dependants are of full age and consent to the application;
- (b) That it would be expedient in all the circumstances of the case so to direct. (4) Notwithstanding the provisions of this section and sections 72 and 73, where an applicant files, at the same time as the petition, summons for the immediate issue of a confirmed grant of representation the court may, if it is satisfied that-
- (a) There is no dependant, as defined by section 29, of the deceased other than the petitioner;
- (b) No estate duty is payable in respect of the estate; and
- (c) It is just and equitable in all circumstances of the case, immediately issue a confirmed grant of representation.'

This is buttressed by Rule 41 of the *Probate and Administration Rules*. The grant which confirmed considered all the beneficiaries of the deceased, the estate and what each of them was entitled to out of the known estate of the deceased.

22. That notwithstanding, the present application seeks principally for the revocation of the certificate of confirmation of grant. Sections 53 and 54 of the Act provides for forms that a grant may take by stating as follows:

' Forms and Grants



53. Forms of grant

A court may—

- (a) Where a deceased person is proved (whether by production of a will or an authenticated copy thereof or by oral evidence of its contents) to have left a valid will, grant, in respect of all property to which such will applies, either—
 - (i) Probate of the will to one or more of the executors named therein;
or
 - (ii) If there is no proving executor, letters of administration with the will annexed; and
- (b) If and so far as there may be intestacy, grant letters of administration in respect of the intestate estate.

54. Limited grants

A court may, according to the circumstances of each case, limit any grant of representation which it has jurisdiction to make, in any of the forms described in the Fifth Schedule to this Act.'

23. From the above provision, the question then that arises is whether a certificate of confirmation of a grant is in fact a grant of representation intestate or the equivalent of a grant, to be revoked or annulled through Section 76 of the Act. This question was considered in the persuasive case of [*In re Estate of Prisca Ong'ayo Nande \(Deceased\) \[2020\] eKLR*](#) where the court opined that a certificate of confirmation of grant is not a grant of representation. In that case, the court expressed itself as follows:

' Grants of representation take the form stated in sections 53 and 54 of the [*Law of Succession Act*](#). They are either a grant of probate or of letters of administration intestate or of letters of administration with will annexed or limited grants. A certificate of confirmation of grant does not take any of those forms, and it cannot possibly, therefore, be a grant of representation. It is a document extracted from the orders that a court makes after confirmation of a grant under section 71 of the [*Law of Succession Act*](#), as evidence the fact that a grant of representation has been confirmed. It should be emphasized that the confirmation process does not produce another grant. The grant sought to be confirmed, through that process, remains intact, after confirmation. Whereas a grant of representation appoints personal representatives or administrators, the certificate of confirmation does not do anything of that sort. All what it does is to confirm that the court has approved the persons appointed under the grant to continue to administer the estate, with a view to distribute it in accordance with the distribution schedule approved. A certificate of confirmation of grant is akin to that order or decree that is extracted from a ruling or judgement made by a court; it is an extract of the orders that the court makes on an application for confirmation of grant. Quite clearly, therefore, a certificate of confirmation of grant is not a grant of representation, and for that reason it is not available for revocation under section 76 of the [*Law of Succession Act*](#).'

24. At paragraph 14, the court in proceeded to state a follows:

' 14. In any event, as the certificate of confirmation of grant is a mere formal expression of the orders made by the court on a confirmation application, the revocation of the certificate, if



at all it is revocable under section 76, which I continue to assert that it is not, would be of little consequence, for it is only the certificate that would be affected by such an revocation order, since the orders on confirmation, from which it is extracted would remain intact. The certificate is a mere extract, its revocation would not affect its source, the orders of confirmation of grant. 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 on confirmation of a grant remain unaffected by a revocation or annulment of the certificate of confirmation of grant. The proper thing to do should be to have the confirmation orders vacated and thereafter the certificate of confirmation of grant annulled, following the setting aside of the orders from which it draws its life. Otherwise, failure to vacate the orders would mean that a fresh certificate could still be extracted from the same orders. The confirmation and the certificate are two separate or different things.'

Considering the provisions of Section 76 of the Act I am persuaded by this finding. This is the correct interpretation of Section with respect to a grant and certification of grant.

25. It is trite that that a party is bound by its pleadings, and the court only decides a matter based on the pleadings before it. The court should therefore not invoke the power to revoke the grant when there is no prayer for it. It thus follows that there is no proper application before this court for revocation of the grant of letters of administration intestate made in this matter. I agree with the respondents contention that the applicants should have filed an appeal as what is challenged is the finding of trial magistrate on the mode of distribution of the estate.

On the other hand, I find that the court has had occasion to consider the complaints by the applicant. The respondent has urged the court to find that the deceased had distributed his properties and the beneficiaries moved to their respective portions which they have extensively developed. This is asserted by Joyce M'Kiraithe a daughter of the deceased in her affidavit sworn on July 21, 2021 where she has deponed that all the daughters in house No 1&2 received a share in Land Parcel No Muthambi/Erega/66 of 0.25 acres each which was done without favourism and there was no objection. She further testified that one unmarried daughter Lucy Muthoni was given her share of 0.25 acres. This is also stated in the affidavit of Thomas Nyaga Muthara. This is confirmed by other beneficiaries. Section 42 (a) of the Act provides that when the estate of the deceased is being distributed, consideration should be had to gifts made by the deceased during his lifetime. These are known as gifts inter vivos. Section 42 (a) provides: -

'(a) An intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house.'

Such gifts are considered and may lead to beneficiary's share being reduced at the distribution of the net intestate estate being. The distribution by the trial magistrate though stating that the proposed distribution was skewed and prejudiced against some of the beneficiaries, proceeded to give the women a lesser share than the men. The court had discretion to distribute the estate.

My view is that consideration should have been made to the distribution made by deceased intervivos so as not to interfere with the occupation and the development made by the beneficiaries. In the exercise of the discretion the court must therefore consider principles of fairness and equity. See [*Rahab Njeri Kariuki -v- Joyce Waruguru Kariuki & 2 Others*](#) where Justice Ngaa held that-

' The court observed that in sharing the net intestate of an intestate who is polygamous deceased person, the court exercises a discretion and is required to bear in mind the principle of fairness and equity and not equality among the beneficiaries.'



This was also an observation made by Mumbi Ngugi J, as she then was in Morogo A Mugun alis Moroko 2019 eKLR where she stated that in my view, the deceased in this case had, prior to his death considered how he wished to have property distributed after his death.'

In this case, the trial magistrate failed to consider the gift inter vivos and ended up giving the daughters almost the same portion they were allocated by the deceased but on a different portion than the one the deceased had proposed in his lifetime. This ignored the distribution by the deceased. The proposed mode of distribution by the respondent is in line with the wishes of the deceased. This should therefore have been the consideration by the trial magistrate when distributing the estate. In the circumstances I find that the mode of distribution by the respondent should be upheld. I find that the respondent involved all the beneficiaries in the succession, none of the beneficiaries were left out and there was no dispute as to the properties forming the net intestate estate of the deceased.

I find that the application lacks merits. I dismiss the application as the applicants were considered proceedings before the trial magistrate. The estate be distributed as follows:-

- a. LR No Muthambi/erega/66- (Daughters) in equal shares.
 1. Anastasia Gaaji Baruthi (Deceased) – her Heirs- 0.25 acres.
 2. Josyline Mukwanjeru M'Raithe - 0.25 acres
 3. Rose Kamunda Kithinji - 0.25 acres
 4. Jane Karimi Linus - 0.25 acres
 5. Catherine Kanini Mbae - 0.25 acres
 6. Joyce Mukwanyaga Njagi - 0.25 acres
 7. Edith Gaturo Mithara - 0.25 acres
 8. Lucy Muthoni Amhara - 0.25 acres

- b. LR No Muthambi/erega/66 -(Sons)- In equal shares of acres. Robert Mbae M'Ithara -1.34 acres Genesisio Njeru M'Ithara -1.34. acres Thomas Nyaga M'Ithara -(Deceased) (his heirs to get – 1.34 acres Kiruja M'Ithara -1.34 acres Anderson Njirii M'Ithara -1.34 acres Francis Kamundi M'Ithara -1.34. acres Elias Kithinji M'Ithara -1.34 acres. LR No Muthambi/erega/168 - In equal shares of 0.56 acres.- Robert Mbae M'Ithara Genesisio Njeru M'Ithara - Thomas Nyaga M'Ithara (Deceased) – to the rightful -beneficiaries . Kiruja M'Ithara Anderson Njirii M'Ithara Francis Kamundi M'Ithara Elias Kamundi M'Ithara.

This is in line with the way the deceased had distributed his estate in his lifetime. Parties to bear their own costs.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 27TH DAY OF JULY 2022.

L.W. GITARI

JUDGE

28/7/2022

The Judgment has been read out in open court.

L.W. GITARI

JUDGE

