



REPUBLIC OF KENYA



**In Re Estate of Nathaniel Litoro (Succession Cause 573 of 2006)
[2022] KEHC 11559 (KLR) (22 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 11559 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 573 OF 2006**

WM MUSYOKA, J

JULY 22, 2022

IN THE MATTER OF THE ESTATE OF NATHANIEL LITORO

RULING

1. The Motion dated January 25, 2021 is premised on section 76 of the *Law of Succession Act*, Cap 160, Laws of Kenya. It seeks that the grant of letters of administration intestate, confirmed on February 3, 2015 be revoked, and that Idakho/Shikulu/2162 and 2210 be reverted to the name of the deceased. It also seeks that Medina Ndeda Litoro and Paul Litoro, who are named as respondents, be restrained from intermeddling with the estate, and in particular be barred from invading or cutting trees on Idakho/Shukulu/2162. It also seeks that survey works, scheduled for January 29, 2021, be suspended. It also seeks that the estate be shared equally amongst all the heirs in accordance with the wishes of the deceased before he died.
2. The application is at the instance of Francis Injilinya Litoro, who I shall refer hereto as the applicant. The grounds and facts upon which the grant are premised are set out on the face of the application and in the supporting affidavit, sworn on November 25, 2021. He avers that the 1st respondent, Median Ndeda Litoro was his mother, being the widow of the deceased, who was also survived by 3 sons and 2 daughters, being, Jane Litoro, Francis Injilinyi Litoro, Rodah Litoro, Paul Litoro and Harrison Litoro. The deceased died possessed on Idakho/Shikulu/2162 and 2210. He avers that the succession process was obtained secretly and fraudulently, as his consent was not obtained, and the signature appearing in the process was not signed by him. He claims that the administratrix included outsiders or strangers, such as Sofia Ayuma and Mary Andati. He says that the distribution of the estate was done without his knowledge. He accuses the respondents of invading the portion he occupies and cutting down trees, and that surveyors were in process of mapping the land out for subdivision.
3. There is an affidavit of service on record, sworn on March 22, 2021, showing that the application was served on the respondents. There is no evidence that the respondent ever filed an affidavit in reply.
4. The application was disposed of orally on February 14, 2022. The applicant was the first on the stand. He stated that Idakho/Shikulu/2162 was ancestral land, while Idakho/Shikulu/2210 was property that the deceased had bought. He stated that he was working in Busia, when the succession process was



initiated, and he only got to know about it when surveyors came on the ground to subdivide the land. He said that the deceased had not shown them how to sub divide the land. He had allegedly showed him where to build, and said Idakho/Shikulu/2162 was to be shared equally, while they were to agree on the distribution of Idakho/Shikulu/2210. His proposal is that the two parcels of land be shared equally, with each one of them getting 1 acre. He said the signature on the papers proposed to be his was not his.

5. Paul Injilinyi Litoro testified next. He said that the deceased had 7 children 3 sons and 4 daughters. He conceded that the applicant was not involved in the process as they were in bad terms. He stated that Idakho/Shikulu/2162 was to be shared between himself and the applicant, and their younger brother. He asserted that the deceased wanted the property shared equally. He said Idakho/Shikulu/2210 was to be shared equally between him and Francis, with balances going to Harrison Litoro. He said that the deceased shared out Idakho/Shikulu/2162 in his presence, and it was to go to Francis, their mother, Harrison and their sisters.
6. The administratrix testified next. She said the deceased wanted the two elder sons to share the land he bought, with the younger son taking the ancestral land, but with the homes of the two older sons remaining intact, the older sone being Paul and Francis, and the younger son, Harrison.
7. Harrison Litoro did not give sworn testimony, but made an oral statement on February 22, 2022. He stated that he did not wish for the grant to be revoked. He said the deceased had given instructions on distribution, which were to be executed by the administratrix.
8. The application is premised on section 76. Grants of revocation may be revoked on three general grounds. One, with respect of the manner the same were obtained. Two, with respect to the manner the administrators have gone about with administration of the estate. Three, with respect to the capacity of the administrators to administer, either on account of demise of the sole administration or his losing soundness of mind or being adjudged bankrupt.
9. The principal complaints are framed as two. One, the manner the grant was obtained. Two, the manner the estate was administered, in terms of how the administrators handled the confirmation process.
10. On the process of obtaining representation, it is not contested that the applicant, Francis Litoro, was not involved in the process. His name was disclosed in the petition filed herein on 13th September 2006 and in the Chief's letter dated 23rd August 2006, but when Paul Injilinyi Litoro testified on 14th February 2022 he conceded that he worked closely with the administratrix in initiating the succession process, but they did not involve the applicant, as they were not in good terms. In her testimony, the administratrix did not speak to the issue of obtaining grant.
11. I note that the deceased herein was survived by a widow and children. Section 66 of the [Law of Succession Act](#) sets out the order of preference with respect to administration intestate. The surviving spouse is given priority over the surviving children and other relatives of the deceased. Section 66 is not in mandatory terms, and the court has discretion to grant representation without following the order of priority, of course for good cause. See *In the Estate of Gamaliel Otieno Onyiego (Deceased)* [2018] eKLR (JA Makau J) and *Kimari and another vs. Kimari* [1988] KLR (Platt JA, Gicheru & Kwach Ag JJA). A surviving spouse has prior rights to administration over the surviving children. He or she need not obtain the consent of the children, under Rule 7(7) and 26 of the Probate and Administration rules. See *In re Estate of M'ikiara Kimiri* [2018] eKLR (Ong'ino JA) and [In re Estate of Festo Lugadiru Abukira \(Deceased\)](#) [2019]eKLR (Musyoka J). As the administratrix herein survived the deceased as his widow, she had the prior right or entitlement to administer over the applicant, and, she did not need to obtain his consent before she obtained representation. Consequently, I see no reason why I should revoke the grant on the basis that there were flaws in the manner the same was obtained.



12. Regarding the process of confirmation of the grant, problems with the process of confirmation of the grant is, under section 76, not a ground for revocation of the grant. Under section 76, the confirmation process is only relevant in cases where the administrator fails to apply for confirmation of their grant within the timelines set out in the law. In this case, the grant was confirmed. There was no lapse with respect to that, and, therefore, issues touching on confirmation cannot be a ground for revocation of the grant.
13. From what I have stated above, therefore, it cannot be said that the applicant has established a case for revocation of the grant herein, and I shall not revoke the same.
14. It would appear that the principal complaint by the applicant is with respect to the manner the estate was distributed at confirmation of the grant. That came out clearly at the oral hearing. He clearly does not agree to the distribution which was placed before and confirmed by the court. The question that should arise is whether problems are confirmation should be a good ground for revoking the grant. I have already dealt with that above, at paragraph 12. Faults at the confirmation process are not a ground, under Section 76, for revoking the grant. What the aggrieved party ought, ideally, to do, is to seek review of the confirmation orders, or their setting aside, or appeal against them. In the spirit of Article 159 of *the Constitution* and of the inherent powers of the court, set out in Rule 73 of the Probate and Administration Rules, I shall treat the application before me as one seeking review or setting aside of the confirmation orders of February 3, 2015.
15. Applications for review or setting aside of court orders focus on the process leading up to the grant of the orders. For review, Rules 63 of the Probate and Administration Rules adopts the processes in the Civil Procedure Rule on review. Review is allowed where there is an error apparent on the face of the record, or there is discovery of some evidence that was not available when the orders were being made, or other sufficient reason. for setting aside, which Rule 63 of the Probate and Administration Rules does not import it into probate practice, but a court can by way of inherent power, consider whether a party was properly excluded in the process, in determining whether to reverse its earlier orders to allow the party to be heard, if he had that right to be heard in the first place.
16. The confirmation application, dated 29th April 2014, listed the surviving spouse, the 4 daughters of the deceased and the 3 sons of the deceased. There are signatures against the names of the children, in the affidavit of the administratrix, sworn on 29th April 2014, as well as in the consent on distribution, filed on 29th October 2014, simultaneously with the application. Clearly, the signatures in the consent on distribution and in the affidavit are not the same. The applicant has said he was not involved in the process, something which Paul Litoro, who claims to have worked on with the administratrix concedes. That, no doubt, is admission that the signatures on the affidavits and the consent, purported to be of the applicant are false. It would also raise doubts as to the authenticity of the signatures of the rest of the surviving children, save for Paul Litoro.
17. The confirmation hearing happened on 3rd February 2015. The record reflects that the persons in attendance were Mary Andati Chaula, Rhoda Khati Injilinya and Paul Injilinya. The court intervened the administratrix and Rhoda Khati. It would appear that apart from the administratrix, there were only 3 other persons in attendance. 4 other children of the deceased were not in court. Although, Rule 40(8) of *Probate and Administration Rules* allows the court to go on to confirm a grant where there is a form 37 on record, duly signed by all the survivors or beneficiaries, caution should always be exercised, as some of the signatures could be forgeries, hence Rule 41(1) of the Probate and Administration rules empowers the court to hear all the persons, beneficially interested in the estate, at confirmation, be they protestors who have filed affidavits under Rule 40(6) or beneficiaries who have executed a consent in form 37. Significantly, in this case, it has been conceded that the applicant was not involved



in the process. Nothing was said about the involvement of the other children. Yet, despite the non-involvement of the applicant, the documents placed before the court, that is the affidavit of the administratrix of 29th October 2014 and the consent on distribution in form 37, purport to bear his signature. That would mean that his signature on that document was false, and the process was clouded in fraud. It would explain why he is so hell bent in opposing the confirmation process, and of not recognizing the process of implementation of the confirmation orders, by way of the surveying of the land for subdivision. Pushing on with this flawed process, where some members of the family were not involved, can only breed more division and hard feelings.

18. In view of what I have stated above, it is my holding that the process of confirming the grant herein, was not above board. The process did not involve all the survivors of the deceased. It was also tainted with fraud, as false signatures were obtained and placed before the court, purported to be some of the beneficiaries. Consequently, the said process cannot hold.
19. I shall accordingly set aside the confirmation proceeding of 3rd February 2015 and the resultant orders. As a consequence, the certificate of confirmation of grant issued on 9th February, 2015, based on the confirmation orders of 3rd February 2015, is hereby cancelled. The administratrix shall file a fresh confirmation application, in which she shall involve all the children of the deceased, be they sons or daughters, and have them sign the relevant documents, if they be so minded, or to file affidavits of protest to the proposals on distribution. The matter shall thereafter be listed for further directions on disposal. It is so ordered.

**RULING DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS
22ND DAY OF JULY, 2022**

W.M. MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant

Mr. Indimuli, instructed by Walonya Indimuli & Company, Advocates for the applicant

Medina Ndeda Litoro, the administratrix in person.

