



In re Estate of Bernard Kariuki Thoronja (Deceased) (Succession Cause 1234 of 2007) [2022] KEHC 12847 (KLR) (Family) (5 August 2022) (Judgment)

Neutral citation: [2022] KEHC 12847 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 1234 OF 2007
MA ODERO, J
AUGUST 5, 2022**

BETWEEN

**MARGARET WANGECI 1ST APPLICANT
BENSON MWANGI KARIUKI 2ND APPLICANT
JORAM BERNARD KARIUKI 3RD APPLICANT
JANE WAMBUI KUNGU 4TH APPLICANT
ESTATE OF NAHASHON CHEGE KARIUKI 5TH APPLICANT
ROBERT KIMEMIA KARIUKI 6TH APPLICANT
ESTATE OF EVA NJERI 7TH APPLICANT
ESTATE OF GEOFFREY KAMAU KARIUKI 8TH APPLICANT**

AND

BENSON MUGO KARIUKI RESPONDENT

JUDGMENT

1. Before this Court for determination is the summons for Revocation/Annulment of Grant dated July 3, 2014 by which the Applicant seek the following:-
 - “ 1. Spent.
 2. Spent
 3. That the grant of letters of administration to Benson Mugo Kariuki (The Respondent) made on the 20th December be revoked and/or annulled.



4. That all dealing in the estate of the deceased subsequent to the issuance of the grant, be cancelled, and any assets transferred by the respondent from the estate of the deceased do revert to the estate.
 5. That all monies/income received by the Respondent from the estate whether on account of sale of shares or any other assets of the deceased, be account for and the said monies be deposited in court.
 6. Spent
 7. That this court be pleased to grant any other and/or further orders.
 8. That the costs of this application be borne by the Respondent.”
2. The summon was premised upon sections 47, 76 (a), (b) & (c) of the Law of Succession Act, Rules 44 (1) & (2), 49 and 73 of the Probate and Administration Rules and was supported by the Affidavit of even date sworn By the Geoffrey Kamau Kariuki, the 8th Applicant.
 3. The Respondent Benson Mugo Kariuki opposed the summons through his Replying Affidavit dated August 26, 2014. The summons was canvassed by way of viva voce evidence.

Background

4. The Succession Cause relates to the estate of Bernard Kariuki Thoronja who is said to have died intestate on the April 14, 2003. The Deceased was survived by the following:-
 - (a) Geoffrey Kamau – son – 62 years.
 - (b) Joram Kabathi – son – 60 years
 - (c) Benson Mugo – son – 58 years
 - (d) Nanshan Chege – son – 56 years
 - (e) Kimemia Bernard – son – 52 years
 - (f) Eva Njeri – Daughter – Deceased
 - (g) Benson Mwangi – son – 49 years
 - (h) Jane Wambui – Daughter – 66 years
 - (i) Margaret Wangechi – Daughter – 64 years.
5. The Deceased left behind an estate, which consisted of the following:-
 - (i) 2000 shares in Kagaa Mwireri Company Ltd – 200,000/-
 - (ii) LR Loc 8/Ngerere/Thombotho/194 – 500,000/-
 - (iii) LR Loc 8/Kagaa/614 – 500,000/-
 - (iv) LR Loc 8/Ngerere/Thombotho/357 – 1,000,000/-
 - (v) Unspecified shares with Barclays Bank.
 - (vi) 266 shares with Kenya Commercial Bank – 100,000/-
 - (vii) 10 shares with Wangu Investment Company Ltd



(viii) Plot No. 7 A Kagaa Market 200,000/-

Total Estimated Value 2,500,000/-

Liabilities – NIL

6. Following the demise of the Deceased one of his sons Benson Mugo Kariuki (the Respondent herein) sought and obtained Grant of letters of Administration Intestate which Grant was issued by the High Court on December 20, 2007 (Annexure 'GKK5') to the summons for Revocation of Grant dated July 3, 2014.
7. Thereafter the Respondent filed a summons for confirmation of Grant dated September 7, 2009. A certificate of confirmed Grant dated February 18, 2013 was issued in the name of the Respondent as Administrator of the estate (Annexure 'GKK-10').
8. The Applicants now seek revocation of the confirmed Grant on Grounds that the same was fraudulently obtained by concealment of a material fact being that the deceased left a written will detailing how his estate was to be distributed. The Applicants position therefore is that the Deceased died testate. They state that they wish the estate to be distributed in accordance with the written will of the Deceased.
9. The Applicants also contend that the Respondent deliberately excluded them in the summons to obtain the Grant. That they were totally unaware of this Succession Cause and did not receive any notice of the same. Hence the present summons seeking revocation of the Grant issued to the Respondents.

The Hearing

10. Hearing of the summons commenced before this court on June 15, 2021. On that date, Mr Kirimi Advocate was present for the Applicants whilst Mr Bare represented the Respondent. Due to problems with internet connectivity, the court adjourned the hearing and directed that the matter would proceed in open court on July 27, 2021.
11. On July 27, 2021 the Respondent appeared in person and sought for an adjournment on Grounds that his Advocate had travelled and was not available to attend court. The application for adjournment was vehemently opposed by counsel for the Applicants. The court reluctantly allowed the Adjournment and directed that the hearing would proceed on August 11, 2008.
12. On August 11, 2008 Mr Kirimi for the Applicants was in court ready to proceed. There was no appearance either by the Respondent or his Advocate. The court ruled that since the hearing date had been taken in the presence of the Respondent the hearing would proceed, notwithstanding his absence.
13. PW1 Joram Bernard Kariuki was the 3rd Applicant who testified on behalf of the other Applicants. He relied upon his witness statement dated August 10, 2020. PW1 stated that and the other Applicants are all children of the Deceased and beneficiaries to his estate. He states that the Applicants were unaware that the Respondent had filed and obtained a Grant of letters of Representation to the estate of the Deceased.
14. PW1 claims that the Deceased died testate having left a Written Will dated February 22, 1994 which has not been challenged. That the Applicants were not served with any citation issued in the matter. That the mode of Distribution of the estate is skewed in favour of the Respondent and that the Respondent has left out their three (3) sisters in the distribution of the estate. He asks that the Grant issued to the Deceased be revoked.



15. PW2 Nelson T. Muritih was at the material time the Assistant Chief of KahuroSub-location from 1987 to 2005 and was also a nephew to the Deceased. PW2 told the court that he was aware of the dispute concerning the estate of the Deceased. He describes the Respondent as a well known habitual criminal.
16. PW2 testified that on May 23, 2005 he received from the Chief a summons directing the Applicants to appear before the Chief on May 31, 2005 to sign a consent form in respect of the Succession Cause. He stated that he duly served the summons on the Applicants as well as on the Respondent.
17. That on May 31, 2005 a meeting was held in the Chiefs Office and PW2 states that he was present in said meeting. That the Applicants all declined to sign a consent form issued by the Public Trustee arguing that their Father had left a Written Will. The Respondent disputed the existence of any will. PW2 denies the Respondents allegations that it was he who influenced the Applicants not to sign the consent. He also denies having issued the Respondent with a burial permit.
18. PW2 stated that thereafter on June 6, 2005 the Chief of Mugoiri Location wrote to the District Officer a letter dated 6th June 2005 indicating that the Applicants had refused to sign the consent. (Copy of said letter is annexed at Page 34 of the Applicants list of Documents dated 10th August 2020).
19. Upon close of oral evidence, leave was granted to file written submissions. The Applicants filed their written submissions dated August 25, 2021.

Analysis and Determination

20. I have carefully considered the material placed before the court, the evidence adduced before the court as well as the written submissions filed by the all parties. The *Evidence Act*, places the burden of proof of any fact on the person who wishes to rely on the same Section 107 of the *Evidence Act* Cap 80, Law of Kenya provides as follows: -

“Burden of Proof

- (1) Whoever desires any court to give judgment as to any legal or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
21. The question for determination in this cause are:-
 - (a) Whether the Will dated 22/2/1994 is valid
 - (b) Whether the Grant of Probate with written will issued by this court ought to be revoked.

(i) Validity of Will

22. It is not in dispute that the Deceased herein passed away on April 14, 2003. A copy of his Death Certificate Serial No. 701232 is annexed at Page 28 of the Applicants Bundle of Documents dated August 10, 2020. It is also not in dispute that the Deceased was survived by the Applicants and the Respondent who are all the children of the Deceased. Likewise, no dispute exists regarding the extent of the estate.
23. The Applicants assert that the Deceased left a written will dated February 22, 1994 detailing how his estate was to be disturbed after his death. Their position is that the deceased did not die intestate and



as such, the Petition for Grant of letters of Administration Intestate filed by the Respondent is *void ab initio*.

24. On his part the Respondent denies the existence of any Written Will. He insists that his late father died intestate. The Respondent further argues that the alleged Will is not valid.
25. A copy of the Will dated February 22, 1994 allegedly written by the Deceased is annexed at page 26 of the Applicants Bundle of Documents. The alleged will is written in Gikuyu and an English translation of the same is found at page 27 of the Bundle.
26. The statutory requirements for a written will are set out in Section 11 of the [Law of Succession Act](#) Cap 160 Laws of Kenya which provides as follows:-

“No written will shall be valid unless—

- (a) the testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;
- (b) the signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;
- (c) the will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.” (own emphasis)

27. Therefore in order for Will to be deemed valid and enforceable it must bear the signature not only of the testator but must also be attested by the two (2) independent witnesses who saw the testator affix his mark or signature to the Written will.
28. A copy of the will which appears at page 26 of the Applicants Bundle bears the name and signature of the testator (Deceased herein) Bernard Kariuki Thoronja. However, there is no corresponding signature or name by any person who witnessed the Deceased signing the Will. Section 11 (c) makes it clear that a will must be witnessed by at least two (2) competent witnesses who are required to affix their mark or signature on the Will in the presence of the testator. The purported Will of the Deceased does not bear any mark or signature of a witness. Further, no person has been called to testify that they were present and witnessed the Deceased signing this Will.
29. Therefore the document alleged to be the written will of the Deceased is invalid and unenforceable due to failing to meet the statutory requirement that the same be attested by two witnesses. The said document would at best be a wish list by the Deceased but has no force of law. Accordingly, I find and hold that the Deceased died intestate.
30. Moreover this court finds it very strange that the Applicants having in their possession a document which they claim to have been a valid will written by the Deceased took no action to petition the court for Grant of letters of Probate with written will. The Applicants apparently ‘sat’ on this written will and took no steps to actualize what they believed to be the last wishes of their Father. They only ‘fished’



out this document after the Respondent had obtained letters of Administration. This to my mind casts further doubt on the validity of this alleged 'will'.

(ii) Whether the Letters of Administration Issued to the Deceased Ought to be revoked.

31. The Applicants have come to court seeking to have the Grant issued to the Respondent revoked and/or annulled. The circumstances under which a Grant may be revoked are set out in Section 76 of the *Law of Succession Act* Cap 160 Laws of Kenya as follows -

- “(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.

32. The Applicants allege that the Respondent failed to notify them that he had filed a petition for Grant of letters of Administration and claim that the Respondent failed to include them in this Succession Cause. That they were kept in the dark about the process initiated by the Respondent to take out letters of Administration. The Applicants allege that they only became aware of the existence of the Grant issued to the Respondent when the 3rd Applicant received a letter from Kaga Mwireri Co Ltd responding to a demand by the Respondent that the Deceased shares in the company be transferred to him.

33. The Respondent categorically denies the allegation that he deliberately kept the Applicants in the dark regarding the Succession Cause. He states that he Issued citations to the Applicants in respect of the estate of the Deceased and that despite service of said citation all the Applicants failed to enter appearance or to participate in the Succession Cause filed in court.

34. The citation dated March 26, 2007 was filed in court on May 18, 2007. The Citation was addressed to all eight (8) Applicants directing them to enter appearance and to accept or refuse letters of Administration in respect of the estate of the Deceased.

35. *Vide* an Affidavit of service dated August 21, 2007, Justice K. Munyalo an authorized process server averred that he travelled to the homes of each of the Applicants led by the Respondent and served



the citation on each of them. PW1 told the court that the Respondent would never have ventured to his home as they were on bad terms. Aside from the Affidavit of service dated August 21, 2007 the Respondents equally deny having been served with the summons for confirmation of Grant dated September 7, 2009. There is in the file an Affidavit of service dated October 28, 2009 sworn by one Alex Muturi as licenced court process server indicating that in the company of the Respondent he served the summons on all the Applicants.

36. It is clear that there exists a major controversy regarding the service of summons upon the Applicants. Rule 26 of the *Probate and Administration Rules* provide as follows:-

“(1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.”

37. This Rule is couched in mandatory terms. Therefore, service is central and must be proved to the satisfaction of the court.

38. Aside from merely disputing service, the Applicants have not persuaded this court that they were not served as alleged in the Affidavit of service. No application has been made to cross-examine any of the process servers. Though PW1 claims that the Respondent would not have led the process server to his home, the Affidavits indicate that aside from PW1 the other Applicants were served at different locations. There is no way the process server would have known the various different homes of the Applicants unless he was led there by a person who knew them well (the Respondent herein).

39. Each process server has given a clear narration indicating the dates, times and places where service was effect. The Affidavits of service have been sworn by two different process servers, none of whom has an interest in this Succession Cause. The process servers would have no reason to file false Affidavits or lie about service. They had nothing to gain by doing so. I find and hold that the Affidavit of service provide sufficient proof that the Applicants were duly served with the summons in this Succession Cause and therefore had proper notice of the existence of said cause.

40. Rule 22 (1) of the *Probate and Administration Rules* provides: -

“22 citation to accept or refuse to take a grant

(1) A citation may be Issued at the instance of any person who would himself be entitled to a granting the event of the person cited renouncing his right thereto.”

41. If upon proper service the Citor fails to enter appearance and/or file a Petition for Grant within the time specified in the citation then such Citor is deemed to have renounced his/her right to so apply. The Applicants despite having been served with the citation did not enter appearance and none of the Applicants themselves petitioned the court Grant of letters of Administration (even despite their claim to have been aware of a will written by the Deceased).

42. PW2 who was a witness called by the Applicants themselves confirmed by his witness statement that the Applicants were all invited to the Chiefs office where they were invited to sign a letter of consent to confirmation of the Grant.

43. PW2 told the court that in his presence the Applicants all declined to sign the consent. The Applicants were all persons well known to PW2 as he was their relative. In light of the testimonies by PW2 the Applicants cannot claim to have been unaware of the petition filed by the Respondent.



44. I find that the Applicants were notified by way of service and through their local chief and Assistant chief of the existence of this Succession Cause. They opted not to do anything about it. None of the Applicants filed an objection to the petition to the summons for confirmation of Grant and none filed any objection to the mode of distribution of the estate. They all sat pretty only to be galvanized into action when the Respondent moved to distribute the estate as indicated in the confirmed Grant dated 18th February 2013. I find and hold that the applicants were fully aware of the existence of this Succession Cause but opted not to take any legal action in response thereto.
45. I have perused the petition filed by the Respondent on May 18, 2007 seeking Grant of letters of Administration Intestate. The Petition include the names of all the Applicants as beneficiaries to the estate. The Respondent has not left out any of his siblings. I have also perused the consent to confirmation of Grant dated August 29, 2008. The same includes the names of all the Applicants with an indication that they declined to sign said consent. This is the correct position going by the testimony of PW2.
46. The Applicants appear to have been labouring under the misapprehension that if they failed to respond to the summons and failed to sign the consent then no Grant would issue. This is not the case. The Applicants are now merely trying to rectify their own default which has been persistent. It is too late – the horse has already left the stable. The law has taken its course. The Respondent as one of the children of the deceased had every right to petition the court for Grant of letters of Administration in respect of the estate of the Deceased. The Respondent included all the children of the Deceased in his Petition. He invited them to participate in the proceedings but they declined. There is no allegation that any of the assets of the Deceased have been left out of the inventory provided by the Respondent. The Certificate of Confirmed Grant dated June 20, 2011 has made provision for the other beneficiaries. Consequently, I find that no grounds have been established to warrant the revocation of the Grant Issued to the Respondent.
47. That having been said I have perused the certificate of confirmed Grant dated February 18, 2013. The schedule provides for the mode of distribution of the estate as follows:-



Name	Description of property	Share of Heirs
Geoffrey Kamau Kariuki Joram Kabathi Kariuki Nahashon Chege Kariuki Kimemia Kariuki Benson Mwangi Kariuki	Loc 8/Ngerere/ Thombotho/194	Equal shares
Benson Mwangi Kariuki	Loc. 8/Kagaa/614 – (0.81 Hac.) Plot No. 7 ^A Kagaa Market Mugoiri 266 shares – KCB Ltd Wangu Invest. Shares – 10 NIC bank shares – a/c No. 13894 Barclays Bank Shares – 8,545 Co-op Bank Shares – 50 Kagaa Mwireri Co. Ltd – 2,000	
Geoffrey Kamau Kariuki Joram Kabathi Kariuki Nahashon Chege Kariuki Kimemia Kariuki Benson Mwangi Kariuki	Loc 8/Ngerere/ Thombotho/357 (3.2 acres)	Jointly in equal shares

48. I note that the estate is to be distributed to all the beneficiaries except the daughters of the Deceased. The *Law of Succession Act* provides under section 38 that –

“ 38 where an intestate has left a surviving child or children but no spouse, the net estate shall, subject to the provisions of sections 41 and 42 devolve upon the surviving child if there be only one or equally divided among the surviving children.” (own emphasis)

49. Therefore, the estate ought to be divided amongst all the children of the Deceased daughters included.

50. The daughters of the Deceased do have the option to waive their right to inherit but such waiver must be done personally in writing by each daughter. In the absence of such waiver I do in exercise of courts powers under section 47, *Law of Succession Act*. I hereby set aside the mode of Distribution in the confirmed Grant dated February 18, 2013. I direct that the parties sit down and agree on a mode of



distribution including all the beneficiaries and subject to section 42 taking into account any properties which may have already been disposed of by the Respondent.

51. Finally and in conclusion this court makes the following orders:-

- (1) The summons for revocation of Grant is dismissed.
- (2) The schedule of Distribution dated February 18, 2013 is hereby set aside.
- (3) Parties to present a new schedule of Distribution of the estate to court within twenty one (21) days.
- (4) If parties are unable to agree on a new schedule of Distribution the court will hear the parties Only on the question of distribution of the estate.
- (5) This being a family matter each side will pay its own costs.

DATED IN NAIROBI THIS 5TH DAY OF AUGUST, 2022.

MAUREEN A. ODERO

JUDGE

