



**Njama & 4 others v Njama (Succession Cause 65 of 1987)
[2022] KEHC 13096 (KLR) (22 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13096 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION CAUSE 65 OF 1987
FN MUCHEMI, J
SEPTEMBER 22, 2022**

BETWEEN

**RICHARD NJERU NJAMA 1ST APPLICANT
JOSEPH KANYINGI NJAMA 2ND APPLICANT
FRANCIS WACHIRA NJAMA 3RD APPLICANT
SIMON MAINA NJAMA 4TH APPLICANT
JOHN NGOTHO NJAMA (DECEASED 5TH APPLICANT**

AND

STEPHEN NDEGWA NJAMA RESPONDENT

RULING

1. The application for determination is dated November 23, 2009 is brought under Section 76 (a), (b) & (c) of the [Law of Succession Act](#) and Rule 44 (3) of the [Probate and Administration Rules](#) seeking revocation of the grant issued on May 18, 2009 and confirmed on July 24, 2009 in favour of the respondent.
2. The deceased in this case died leaving a written will in which he bequeathed his assets to his sons including the respondent. One Mr Amitlal Ghadialy who was by then a practising advocate based in Nyeri was appointed the executor of the will. The widow of the deceased filed intestate proceedings herein and the executor of the will stepped in and objected successfully to said proceedings. The widow then challenged the will but failed to prosecute her application that ended up being dismissed for want of prosecution. This cause then proceeded as a testate succession. However, the executor of the will died before the estate was distributed to the beneficiaries. The respondent who is the first born of the deceased formally took over this cause. Upon being appointed as administrator, he took steps to distribute the estate of the deceased as per the written will. The applicants who are the siblings of



the respondent and sons of the deceased were aggrieved by the appointment of the respondent as the administrator and thus filed this summons for revocation of grant.

3. The Summons was heard by way of viva voce evidence based on the affidavits evidence of the parties. The respondents appeared in person and authorised the 2nd respondent to testify on their behalf.

The Applicants' case

4. PW1, Francis Wachira Njama, the 2nd applicant testified that the deceased had one wife namely Anne Nyaguthii Njama who is now deceased and that the couple were blessed with ten(10) children namely:-
 - a. Stephen Ndegwa
 - b. Esther Wairimu
 - c. John Ngotho (deceased)
 - d. Veronicah Wangeci (deceased)
 - e. Richard Njeru
 - f. Francis Wachira
 - g. Purity Wanjiru (deceased)
 - h. Simon Maina
 - i. Joseph Kanyingi
5. PW1 testified that respondent/petitioner was appointed as an administrator of the estate although he did not serve the applicants with his application dated February 20, 2009 nor did he obtain their consent to being appointed as administrator. The witness further testified that they challenged the validity of the will by the deceased and had filed an Affidavit of protest dated December 2, 2002.
6. PW1 further testified that they came to learn of the grant when the respondent came with police to arrest and evict them from the land where they grew up and that the respondent told the court that he was the sole beneficiary in the estate. Further, he did not annex the will of the deceased to support his petition for grant of probate. The witness contends that the respondent obtained the grant by making false statements or by concealing from the court of some facts material to the case. As such, the proceedings to obtain the grant by the respondent were defective in substance as he did not seek the consent of the applicants and the other beneficiaries as required by law. For those reasons, the applicants pray that the grant be revoked.

The Respondent's Case

7. The respondent herein testified that he did not obtain the grant fraudulently or by making false statements. He stated that the deceased left a will with one Mr Ghadiary having appointed him the executor. He stated that he made an application for revocation of grant dated February 7, 2009 following the death of the executor Mr Ghadiary. He urges the court to treat the supporting affidavit to his application dated February 7, 2001 as a response to this application. Further he testified that the will of the deceased was already in the court file when he filed his application to be appointed the administrator in this cause. He referred to his summons for confirmation of grant dated June 6, 2009 and stated the he followed the will of the deceased in the distribution of the property.
8. The respondent further denied that on being appointed as an administrator, he took police officers to evict the applicants from the land of the deceased. He further testified that it is not true as alleged that



he told the court that he was the sole beneficiary of the estate but said he was the main beneficiary. He further stated that the applicants did not attend court during the issue of the grant. In his application the respondent said that he included the names of the beneficiaries named in the will as follows:-

- a. Stephen Ndegwa Njama
 - b. John Ngotho Njama
 - c. Esther Wairimu
 - d. Charles Ndegwa Njama
 - e. Richard Njeru Njama
 - f. Francis Wachira Njama
 - g. Joseph Kanyingi Njama
 - h. Simon Maina Njama
9. He told the court that he informed all the above beneficiaries that he was obtaining a grant but did not seek their consent. He further stated that there were other beneficiaries who were left out in the will but he denied that he ever lied to the court that he was the sole beneficiary.

The Applicants' Submissions

10. The applicants reiterate the averments in their affidavit and submit that since their application is unopposed, it ought to be considered by this court. The applicants further submit that the respondent admitted in court on March 30, 2022 that he did not serve them with his application dated February 20, 2009 seeking the grant of administration which confirms the fact that the grant was obtained irregularly.
11. The applicants submitted that the grant ought to be revoked because from the respondent's testimony dated March 30, 2022, the proceedings to obtain the grant were unprocedural, irregular and defective in substance and that he concealed material facts from the court. The applicants further argued that the respondent lied to the court that he was the sole beneficiary in the will. Further, the applicants contend that LR No Aguthi/Muruguru 382 in the will and in the grant is a non-existent property in that it did not exist in the records of the Land office at the time the grant was confirmed. The copy of register and the map show a sub-division made on February 12, 1986 by the deceased, one year after making the alleged will dated June 12, 1985. Moreover, the deceased died on May 16, 1987, a year after effecting the sub-division without making a subsequent codicil for an existing written will. The applicants contend that the absence of a codicil in respect of the sub-division indicates that the will was a fraud and the same illegality goes to the root of the grant thereby invalidating it.

The Respondent's Submissions

12. The respondent relies on the affidavit sworn in support of Summons for revocation and appointment as administrator dated February 20, 2009 as well as Summons for Confirmation of grant dated June 16, 2009. He reiterated that as this was a grant of probate of written will with the will annexed, he did not require the consent of the other beneficiaries nor was he required in law to serve them with the application.
13. The respondent submits that the written will dated June 12, 1985 had appointed the late ATD Ghadialy Advocate as the executor of the will. Mr Ghadialy petitioned for the grant of probate of the written will annexed and was issued with the grant of written will on November 4, 2002.



Unfortunately, the executor passed away on October 15, 2007 before the estate was distributed. The respondent contends that since the October 15, 2007, the applicants did not bother with the succession cause until the respondent applied to revoke the grant of probate on February 26, 2009. This was meant to facilitate the distribution of the deceased's estate for the benefit of the beneficiaries.

14. The respondent relies on Rule 7(6) of the Probate & Administration Rules and submits that there is no requirement to obtain consent from the other beneficiaries but from the executors named in the will. Mr Ghadialy was already deceased and the respondent submits that his death certificate was provided to the court. He further submits that there is also no requirement to serve the application upon the other beneficiaries named in the will. As such, the respondent contends that in the absence of proof of any requirement to serve the other beneficiaries or to obtain their consent, the applicants have failed to prove their case. The respondent further submits that the applicants have not alluded to any defect in the proceedings to obtain the grant, they have not sworn to any fraud or false statement and they have not stated any false allegation was made.
15. It is further submitted that the allegation that he told the court that he is the sole beneficiary does not hold water as paragraph 5 of his supporting affidavit to the summons dated February 20, 2009 bears out clearly that he told the court that 'That I am the main beneficiary of the written will of Njama Weru, the deceased herein and thus should be appointed administrator.'
16. The respondent avers that he distributed the estate according to the will of the deceased which was not challenged.
17. The respondent acknowledges that the decision to revoke or uphold a grant of representation is a discretionary one on part of the court as was held in the case of *Jane Njeri Nderi vs Rachel Wangari Nderi* (supra).

Issues for determination

18. The main issue for determination here is whether the applicant has presented sufficient evidence to warrant revocation or annulment of the grant confirmed on July 24, 2009.

The Law

Whether the applicant has presented sufficient evidence to warrant revocation or annulment of the grant.

19. Section 76 of the *Law of Succession Act* gives the court the powers to revoke a grant provided the grounds stipulated therein have been met. The section provides:-

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 has ordered or allowed; 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
- iv. The grant has become useless and inoperative through subsequent circumstances.

20. The circumstances in which a grant can be revoked were discussed in the case of *In the Matter of the Estate of LAK (Deceased) [2014] eKLR* :-

' Revocation of grants is governed by Section 76 of the *Law of Succession Act*. The relevant portions of Section 76 are paragraphs (a), (b) and (c) since the issues raised relate to the process of the making of a grant. A grant may be revoked where the proceedings leading up to its making were defective, or were attended by fraud and concealment of important matter, or was obtained by an untrue allegation of a fact essential to the point.'

21. Notably, the power to revoke or uphold a grant is a discretionary one on part of the court. This principle was enunciated in the persuasive decision in *Albert Imbuga Kisigwa vs Recho Kawai Kisigwa Succession Cause No 158 of 2000* where Mwita J stated:-

' Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not 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.'

22. The record shows that the widow of the deceased Anne Nyaguthii Njama petitioned for letters of administration intestate in this cause in 1987. Thereafter, the executor of the will filed an objection and cross-petition. The widow later filed an application seeking to be allowed to challenge the said will on the ground that she was not aware of any will made by the deceased and that the will was not genuine. The application was later dismissed for want of prosecution five (5) years later rendering this cause a probate succession. Following the death of the executor, the respondent was appointed the administrator of the estate upon revocation of the grant in favour of the executor on grounds that the same had become useless and inoperative. The grant was confirmed on July 24, 2009 thus distributing the estate of the deceased to the beneficiaries.

23. The petitioners contend that the said grant was obtained by the respondent fraudulently and by non-disclosure of material critical to the case. It is alleged that the respondent told the court that he was the sole beneficiary of the deceased and that this information misled the court to issue the grant to the respondent.

24. The respondent argues that the law does not require him to serve the applicants with his application to be appointed as an administrator nor does he require their consent. Rule 7 (6) of the Probate and Administration Rules stipulates:-

Where the grant sought is one of letters of administration with a written will annexed the applicant shall satisfy the court before the issue of the grant that every executor appointed by the will who is living



at the time of the application either has consented in writing to the issue of the grant to the applicant or has renounced his executorship or has been issued with a citation calling upon him either to renounce his executorship or to apply for a grant of probate of the will.

25. The applicants rely on the grounds that the respondent obtained the grant of probate for the will fraudulently and failed to disclose facts that were material to the case. It was also alleged that consent was never sought from the applicants by the respondent in this appointment as administrator. The respondent testified that he was not obligated to seek consent of the applicants in that he was taking over from the deceased executor of the will the late Ghadialy. It was further contended that the law does not provide for such consent. The respondent denies that he used fraudulent means to obtain the grant.
26. The provisions of Rule 7(6) of the Probate & Administration Rules requires that any person applying for letters of administration must seek written consent of every executor of the will who is living at the time. In this case, the sole executor was deceased and there is no requirement in law to see consent from any of the beneficiaries as the applicants want the court to believe.
27. The applicants accused the respondent of lying to the court during the appointment as administrator by describing himself as the sole administrator in the will which allegation was denied. The respondent referred the court to his supporting affidavit of his application dated February 7, 2009 whereas he stated 'that I am the main beneficiary of the written will of the deceased'. In the proceedings of May 18, 2009, the respondent's counsel addressed the court and said that the respondent was 'sole' beneficiary. In my view, this was a statement from the bar made by his advocate and should be attributed to the respondent because it is not evidence of the respondent. What stands as evidence is the respondent's affidavit sworn on February 25, 2009. Furthermore, the statement by the counsel cannot be used as a ground for revocation of grant for it is not the respondent's evidence. The statement has no relevance to the provisions of Section 76 of the Succession Act.
28. Having been appointed the administrator, the respondent was duty bound to apply to correct any mistakes in the grant by applying for rectification of grant as provided by Section 74 of the Act. There was also no requirement of service on the applicants of the application dated September 14, 2009 which was aimed at correcting description of two parcels of land and the acreage.
29. The 1st applicants came into these proceedings on December 2, 2002 and filed his affidavit protest to the will dated December 2, 2002. He took over as his counsel the firm of Kebuka Wachira & Company who was appearing for his mother earlier in this cause. It is therefore not true that the applicants came to know of the existence of these proceedings after the estate was distributed. The executor of the will died on October 15, 2007 five years after the 1st applicant had filed his affidavit of protest which application was never prosecuted. This confirms that the applicants were aware of these proceedings long before the respondent applied for revocation of grant in favour of the executor. It is therefore not true that the applicants were not aware of these proceedings.
30. The applicants state that they were not served with the summons for confirmation of grant dated September 14, 2009. It is not in dispute that the applicants were provided for in the will and that the duty of the administrator was to distribute the estate as provided in the will. The participation or otherwise of the applicants would not have changed the contents of the will. I have perused the grant and note that the respondent in distribution of the estate followed the will to the letter. The respondent could have informed the beneficiaries as a matter of courtesy even though the 1st applicant, was already a party in the proceedings. However, the failure to inform them does not contravene any legal provision and neither does it constitute a ground for revocation of grant in a testate succession.



31. The issue of failure to annex the will to the application dated February 20, 2009 by the respondent was raised. However, the record shows that the will was filed by the executor Mr Ghadialy long before the respondent applied to take over the cause. It was already a part of the record. The failure to annex the will which was already in the file cannot be a ground for revocation.
32. It is imperative to note that the mere inclusion of the land reference number of the mother title LR Aguthi/Muruguru/382 in the will and in the certificate of confirmation of grant does not invalidate the will or the grant as argued by the applicants. The respondent realised the anomaly and rectified the mistake through rectification of grant. The respondent cannot be blamed for the omission by the deceased to include a codicil for the property that he caused to be sub-divided two years after making his will roping in new land reference numbers LR Aguthi/Muruguru/1061 and 1062.
33. I have considered the evidence of the parties and their submissions vis a vis the provisions of Section 76 of the Act. I am of the considered view that the applicants have failed to demonstrate any fraud or concealment of facts material to the ease on part of the respondent in obtaining the grant issued and confirmed on July 24, 2009.
34. Having not proved any of the grounds for revocation of grant, I hereby find no merit in this application and dismiss it accordingly.
35. Each party to meet their own costs.
36. It is hereby so ordered.

DATED AND SIGNED AT NYERI THIS 22ND DAY OF SEPTEMBER, 2022.

F. MUCHEMI

JUDGE

RULING DELIVERED THROUGH VIDEO LINK THIS 22ND DAY OF SEPTEMBER 2022

