



REPUBLIC OF KENYA



**In Estate of James Maina Nzioki (Deceased) (Succession Cause
186 of 2014) [2022] KEHC 14930 (KLR) (28 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14930 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 186 OF 2014**

**JN ONYIEGO, J
OCTOBER 28, 2022**

IN THE MATTER OF THE ESTATE OF OF JAMES MAINA NZIOKI (DECEASED)

IN THE MATTER OF

CYRUS MAINA 1ST APPLICANT

TABITHA GATHONI MAINA 2ND APPLICANT

RULING

1. The deceased herein died intestate on March 20, 2014 at Pandya Hospital. He was survived by the following survivors
 - a. Tabitha Gathoni-wife
 - b. Cyrus Mutunga-son
 - c. Allan Waweru –son
 - d. Paul Nzioki-son
 - e. Hope Nyaguthie –daughter-minor
 - f. Joy Jamie –daughter-minor
2. The deceased left landed properties, two m/vs and shares in safaricom and funds in Equity, K-Rep and Kcb bank. A grant of letters of administration intestate was issued to Cyrus and Tabitha jointly on October 15, 2015 and later confirmed on August 5, 2016. It was rectified at the request of the administrators on February 13, 2018 so as include shares in Ken.Gen.
3. According to the confirmed grant Plot sub-division No 7031(Original) 4824/10)/MN was given to Tabitha absolutely and the rest of the assets were to be transferred to the administrators to hold in trust of Allan Waweru and Paul Nzioki in equal share.



4. Later, via a summons for revocation dated April 26, 2021, Cyrus moved this court seeking orders;
 5. Spent.
 6. That this honourable court do issue a temporary restraining order to Tabitha Gathoni Maina the respondent herein restraining her from administering the estate of the deceased pending hearing and determination of the application for revocation and/or annulment of the grant of letters of administration filed herewith.
 7. That this honourable court do order and direct the respondent to provide for accounts for the estate of the deceased.
 8. Costs of the application be provided.
5. The application is premised on the grounds stated on the face of it and the supporting affidavit of Cyrus Mutunga Maina sworn on April 26, 2021. It was averred that the late James Maina Nzioki died on March 20, 2014 and a grant of letters of administration made on October 15, 2015 to him and the respondent. That the said grant was wrongfully, unlawfully and or improperly confirmed due to the following reasons;
- a. The confirmation of grant was obtained fraudulently by the respondent by purporting to have consent of the beneficiaries and by purporting to be the only beneficiary of the deceased's estate in exclusion of the other beneficiaries.
 - b. The confirmation of grant was obtained by means of untrue allegations.
 - c. The proceedings used to obtain the grant were defective and mischievous as he was not informed of the same.
6. He further stated that the respondent had sold part of the estate and had already invited some people with a view of selling the remaining properties. That the respondent transferred all the properties to her name to the exclusion of the other beneficiaries. Further, the respondent had demolished their house leaving them homeless.
7. He averred that the respondent had refused to give accounts of Acapulco Club Kisimani on Plot No 464 /MN and Plot No 1458 situated in Makueni County. That the respondent was harassing the other beneficiaries and that the estate was in danger of being wasted resulting to substantial loss on their part.
8. The applicant filed a supplementary affidavit sworn on June 3, 2021 thus stating that after conducting search at the land registry, he established that Plot No 7031 (Original 4824/10) MN was transferred to the respondent by way of an assent in 2019. That he did not sign the assent and if it was purportedly signed by him, then it was fraudulent, forged and/or ill intended in the manner the estate was being managed. He demanded the same to be produced before court for verification of signatures.
9. He further stated that the respondent has unlawfully administered the estate of the deceased rendering the true beneficiaries destitute yet the estate was sufficient. That their last born brother was sickly and could not get treatment as the respondent converted their father's businesses into her own and was also chasing them way from the businesses.
10. In response, the respondent filed a replying affidavit sworn on June 7, 2021. She stated that the applicant had not approached the court with clean hands and termed the application as vexatious. She stated that all beneficiaries were present during the confirmation of the grant thus the claim of fraud is just malice. She further stated that all the beneficiaries gave their consent except Hope Nyaguthie Maina and Joy Jamie Maina who were and are still minors.



11. She went further to state that at the time of the death of the deceased herein, the estate was not doing well financially due to the following reasons;
 - a. They were running a business under the name and style of Sortune General Supplies and as at 30.01.2015 it had arrears of Kshs 5,565,478.63 owed to KCB Bank. She had to repay the loans through tailor made instalments such as taking personal loans.
 - b. The deceased was hospitalized for a long time before his untimely demise, accruing a huge medical bill (Kshs 1,067,415) which she paid through fundraising from family and friends.
12. She averred that upon the demise of the deceased, she was left with the responsibility of taking care of the children who were at the time of school going age to which she paid their school fees and continues to do so. That she has always involved all her step children in the administration of the estate of the deceased. Further, as per the confirmation of grant, she had agreed to transfer shares to the applicant herein.
13. She deposed that to prevent the properties of the estate from wasting away, she employed workers to take care of the same and in particular, plot No 1458 Mangelete scheme (which houses the family home in Mtito) and Sub Division No 461 Zone 5/7 No 13 Mtito Andei and L.R No 1310 (Mangelete Settlement Scheme).
14. It was her claim that despite the applicant being a co-administrator, he does not help in the administration of the estate of the deceased. Thus, she took it upon herself to administer the estate by ensuring that the expenses in terms of utility bills and land rents and rates as and when they fall due are made. That the only property that she has dealt with exclusively is Subdivision No 7031 which was the matrimonial property vested to her via assent which the applicant executed. That house on Plot No 1458 Mangelete Scheme was open for the applicant to reside in in case he was facing hardship on accommodation.
15. Regarding business known as Acapulco club, she averred that it was a partnership between her and the deceased and upon the demise of the deceased, she was left with life interest on the same and therefore cannot be distributed as an asset of the estate of the deceased.
16. She stated that the applicant had not established sufficient cause to warrant the orders being sought herein to be granted and urged the court to dismiss the summons with costs.
17. The respondent filed a supplementary affidavit sworn on 8th September, 2021 and reiterated the content of her affidavit sworn on June 7, 2021.
18. The application was canvassed by way of written submissions.
19. The applicant through his advocates A.N Atancha & Company Advocates filed written submissions dated July 7, 2022. Counsel submitted on four issues namely;
 - a. Whether the respondent is guilty of fraud as alleged/stated by the applicant.
 - b. Whether the applicant is co-administering the estate with the respondent.
 - c. Whether the respondent has distributed the estate as per the confirmation of grant amended on the February 13, 2018 and dated March 9, 2018.
 - d. Whether the applicant has been disinherited by virtue of the confirmation of grant No 3 above.
20. On the first issue, counsel submitted that the respondent is guilty of fraud in managing the estate of the deceased as she mischievously caused the confirmation of grant to be amended/rectified where his name



- was removed as a co-administrator. Further, the amendments and rectification were done without the consent of the applicant or his knowledge. That the respondent had not given reasons why she had not distributed the estate to the beneficiaries.
21. On the second issue, counsel submitted that he was removed from being co-administrator fraudulently as the rectification of certificate of confirmation of grant was done without his knowledge or consent.
 22. Regarding the third issue, counsel submitted that the respondent had not distributed the estate as per the certificate of confirmation to the other beneficiaries whereas they are all of age.
 23. Fourthly, it was counsel's submission that by virtue of the rectified certificate of confirmation of grant dated March 9, 2018, he was removed and or disinherited from the estate of his father.
 24. The respondent through her advocates Wanjugu-Waweru & Associates filed written submissions dated July 6, 2022. Counsel submitted that the prayer for an injunction against the respondent restraining her from administering the estate and provision of accounts of the estate by the respondent are misplaced.
 25. On the restraining order, counsel submitted that the same falls under order 40 of the *Civil Procedure Rules* which rule is not applicable under rule 63 of the *P&A Rules*. Counsel relied on the *Law of Succession* book by WM Musyoka at Page 179 and the case of *Albert Imbuga Kisigwa v Recho Kawai Kisigwa* [2016] eKLR on the applicability of the *Civil Procedure Rules* in succession matters where both the writer and the judge held that the same is excluded unless expressly allowed under Rule 63. Counsel urged that on that ground alone the order should not be granted.
 26. Counsel further submitted that the application was wanting in form and substance. According to learned counsel, the elements for revocation of a grant as provided under Section 76 of the *Law of Succession Act* and the holding in the case of *Albert Imbuga Kisigwa v Recho Kawai Kisigwa* (*supra*) had not been established as there was no proof that that the grant was fraudulently, wrongfully, unlawfully and or improperly obtained and confirmed.
 27. On whether the grant was obtained by means of untrue allegation, counsel relied on Rule 26 and 40(8) of the *Probate and Administration Rules* to express the position that all beneficiaries who were of the age of 18 years and above participated in the process of applying for the letters of administration. That the summons for confirmation of the grant was amended to make provision for joy Jamie to which the co-administrator and the applicant appended his signature.
 28. Counsel relied on the case of *Matheka and Another v Matheka* (2005)1EA 251(CAK) and *Jamleck Maina Njoroge v Mary Wanjiru Mwangi* (2015) eKLR for the proposition that a party seeking revocation of a grant must prove the ingredients set out under Section 76 of the law of Succession Act. That the applicant was not deserving of the orders sought as the respondent diligently managed the estate and continues to do so to date.

Determination

29. I have considered the application, the response thereof and rival submissions by counsel for both parties. Issues that emerge for determination are;
 - a. Whether the grant should be revoked
 - b. Whether the respondent should provide for accounts for the estate of the deceased.
30. The applicant herein has brought the application under Rule 44(i) of the *Probate and Administration Rules* and Section 76 of the *Law of Succession Act*. He sought restraining orders pending hearing and



determination of the application which is already overtaken by events and provision for accounts for the estate of the deceased by the respondent. On the other hand, the grounds he laid in support of his application relate to revocation of the grant and not restraining orders.

31. On whether the grant should be revoked, the applicant argued that the confirmation of the grant of letters of administration to the respondent was obtained through proceedings that were defective in substance, fraudulently obtained by the making of false allegations to justify the grant and by means of untrue allegations of facts to justify the grant. On the other hand, the respondent argued that save for the minors, all beneficiaries were present and gave consent during the confirmation of the grant thus the claim of fraud is pure malice.
32. Revocation is provided for under Section 76 of the *Law of Succession Act* which provides;
76. 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.
33. The applicant and the respondent herein jointly petitioned this court for grant of letters of administration. The same was granted on October 7, 2014 and issued on October 15, 2014. The two administrators then filed summons for confirmation of grant on August 11, 2015. The summons were supported by the affidavit of the two administrators who appended their signatures to the same and a consent signed by the two and one of the beneficiaries Allan Waweru Maina.
35. The two administrators then moved this court for amendment of summons for confirmation to include Joy Jamie Maina and rectification of details of some of the properties. The same was confirmed on July 18, 2016 and amended certificate of confirmation issued on August 5, 2016. In the certificate for confirmation of grant, the court directed that the assets of the estate be transferred to the administrators to hold in trust of Allan Waweru Maina and Paul Maina in equal shares. The administrators further applied for rectification of the certificate of confirmation of grant on the number of shares in Kengen. The same was rectified and a certificate of confirmation issued on February 13, 2018.



36. From the assent copy annexed in the respondent's affidavit dated June 7, 2021 it shows that the same was executed by both the applicant and the respondent on May 26, 2017. Further, from the court's record the applicant was present in court on December 7, 2015 for confirmation of the grant.
37. From the history of this case, it's apparent that the applicant herein participated in the whole process of obtaining the grant to confirmation of the same and at no point was he removed as an administrator or as a beneficiary nor disinherited by the respondent. Therefore, the claims that confirmation, amendments and rectifications were obtained without his knowledge or consent and or fraudulently or by concealment of material facts and or by proceedings that were defective is not substantiated.
38. In arriving at the above conclusion, I derive guidance from the holding in the case of *Albert Imbuga Kisigwa v Recho Kawai Kisigwa*, Succession Cause (*supra*), in which Mwita J. made remarks on the guiding principles for the revocation of a grant as follows;
- “(13) 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.”
39. Similar position was held in In *Jamleck Maina Njoroge v Mary Wanjiru Mwangi*(2015)eKLR where it was held that it was incumbent upon the party seeking revocation of a grant to prove the elements set out under section 76 of the law of succession Act. In the circumstances of this case, the applicant has casually approached the court while clothed with untruths and dishonesty.
40. On provision of accounts for business known as Acapulco Club on Plot No 464 and for Plot No 1458 situated in Makueni County, the applicant has not submitted on the same neither has he given any sufficient reasons to warrant the granting of the said order. In any event, the two beneficiaries of the estate Allan and Paul who are of age now have not complained yet they are adults. Infact as a co-administrator he is equally under obligation to account for the estate.
41. The upshot of the above is that the application dated April 26, 2021 lacks merit and it's hereby dismissed. However, inspite of the fact that the application herein has been dismissed, the administrators are under obligation to ensure that all properties if any that have not been transferred, are transferred to the beneficiaries as per the confirmed grant without any further delay.

DATED, SIGNED AND DELIVERED IN MOMBASA VIRTUALLY THIS 28TH DAY OF OCTOBER 2022

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J.N.ONYIEGO

JUDGE

