



REPUBLIC OF KENYA



KENYA LAW

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In re Estate of Monicah Kanini Kilungu (Deceased) (Succession Cause 458 of 2010) [2022] KEHC 14290 (KLR) (24 October 2022) (Ruling)

Neutral citation: [2022] KEHC 14290 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE 458 OF 2010**

MW MUIGAI, J

OCTOBER 24, 2022

IN THE MATTER OF THE ESTATE OF MONICAH KANINI KILUNGU (DECEASED)

BETWEEN

DAMIAN MUSYOKA 1ST APPLICANT

COSMAS MUEMA MWALUKO 2ND APPLICANT

AND

PHOEBE MUKUI MUTUNE 1ST ADMINISTRATOR

MUTIO WAMBUA 2ND ADMINISTRATOR

RULING

Background

1. Monicah Kanini Kilungu died on May 10, 2007.
2. The deceased was survived by the following children;
 - i. Bernard Mutinda Kilungu-son-65 yrs
 - ii. Wambua Kilungu-son-61 yrs
 - iii. Boniface Mutisya Kilungu-son-53 yrs
3. A full inventory of the deceased assets as at the date of his death were as follows;
 - a. Mavoko town Block 3/4954
 - b. Mavoko town Block 3/2587
4. The grant of letters of administration intestate was issued to the deceased son Boniface Mutisya Kilungu on August 31, 2010.



5. According to the applicants, the schedule of distribution attached to the summons for confirmation of grant filed in court on October 11, 2012 by Boniface Mutisya Kilungu and marked as 'DM5', the 1st applicant was to get a whole share of Mavoko town Block 3/4954. The schedule of distribution is as follows;

Name	Description of property	Share of heirs
Wambua Kilungu	Mavoko town Block 3/2587	Whole share
Damian Musyoka	Mavoko town Block 3/4954	Whole share

6. Boniface Mutisya Kilungu died on March 30, 2013. He was substituted with Phoebe Mukui Mutune and Mutio Wambua who were issued with a new grant of letters of administration on February 8, 2019.
7. Vide summons for confirmation of grant filed June 4, 2019 supported by the affidavit of the 1st administrator/respondent the respondents sought for confirmation of the grant which was confirmed and a certificate of confirmation was issued on October 28, 2019 containing the following schedule of distribution;

Name	Description	Share of heirs
Phoebe Mukui Mutune Mutio Wambua	Mavoko town Block 3/4954	To be registered in the name of Phoebe Mukui Mutuna
	Mavoko town Block 3/2587	To be registered in the name of Mutio Wambua

8. The consent to the confirmation of grant was signed by the following;
1. Grace Ndinda Mutinda
 2. Joseph Muasa Wambua
 3. Joseph Nzioka Mutisya
 4. Munyao Wambua
 5. Cosmus Kilungu Wambua
 6. John Mutuku Wambua
 7. Paul Mutune Mutisya

Amended Summons For Revocation And/or Annulment Of Grant

9. The 1st and 2nd applicants amended summons dated November 29, 2021 and filed on December 6, 2021 seeks the following orders:-
1. That the grant of letters of administration intestate issued on February 8, 2019 to Phoebe Mukui Mutune and Mutio Wambua and the certificate of confirmation thereof dated October



28, 2019 be revoked, annulled and/or rectified to include the applicants herein as purchasers and/or liabilities in the deceased's estate.

2. That this hon court do grant a temporary injunction against the administrators/respondents herein, their agents, servants, employees, relatives and/or any persons acting on their behalf from alienating, disposing transferring or in any way dealing with parcel of land Mavoko town Block 3/4954 otherwise known as Mavoko town Block 3/86738 which forms part of the deceased's estate pending the hearing and determination of this application.
3. That the cost of these proceedings be provided for.
10. The amended summons is supported by the affidavit of Damian Musyoka sworn on even date on the ground that the grant and the certificate of confirmation of grant were obtained fraudulently, deceitfully, by making false statements and/or concealment from the court of certain material facts.
11. According to the applicants they have a purchasers interest and/or liabilities to the deceased estate in parcel of land namely Mavoko town Block 3/4954 otherwise known as Mavoko town Block 3/86738 having purchased the parcel of land from the 1st administrator/respondent's late husband one Boniface Mutisya Kilungu with the authority of the deceased herein and with the consent of the 2nd administrator/respondent's late husband one Wambua Kilungu.
12. According to the applicants, the parcel of land was to be registered on behalf of the 1st applicant and on behalf of all other purchasers/interested parties and thereafter the 1st applicant was to transfer part of the land to other purchasers as captured in the mode of distribution annexed and marked as 'DM5'.
13. According to the applicant when the administrators herein substituted the 1st administrator/respondent's late husband as the administrator of the estate they never notified the court of the existence of liabilities and/or purchasers /interested parties in the land.
14. According to the applicants, the 1st administrator/respondent transferred the title in her name in total disregard of the applicants and other purchasers/interested parties beneficial interest. He asserted that in the year 2020, the administrators/respondents subdivided parcel of land Mavoko town Block 3/4954 into Mavoko town Block 3/86737 and Mavoko town Block 3/86738 with a motive to deprive the applicants and other purchasers of their interest in the parcel of land.
15. According to the applicants *vide* a letter dated January 18, 2021 demanded that the applicants and other purchasers to immediately vacate from the parcel of land and as a result of the demands, the 1st administrator/respondent started attacking and demolishing some of the said purchasers/occupants structures in total disregard of the law which led to them reporting the matter to Joska police post to intervene.
16. According to the applicants, they have been staying on the parcel of land since the year 2006, a period of 15 years and they have buried some of their relatives and loved ones on the same parcel of land. He asserted that the administrators/respondent had never raised any complaints.
17. According to the applicants they are only claiming their rightful share and that of all other purchasers in the deceased's estate and not to disinherit the beneficiaries of the estate hence in the interest of justice that the orders sought herein be granted lest they suffer irreparable loss/damage.

Replying Affidavit

18. In opposition to the summons, the 1st respondent filed a replying affidavit dated December 16, 2021 on January 17, 2022 wherein she has averred that the summons is bad in law and incompetent, an abuse of



the court process, unmeritorious and ill advised. According to the deponent, her deceased husband or the deceased herein did not sell the parcel of land to the applicants hence the purported sale agreement is false. She averred that the applicants are trespassers on the parcel of land.

19. According to the deponent, there is an pending case before the Environment and Land Court Case No E012 of 2021 seeking their eviction. She averred that the averments in the supporting affidavit are false and misleading. She urged the court to dismiss the summons in the interest of justice.

Further Affidavit

20. In response, the 1st applicant swore a further affidavit on January 31, 2022 wherein he has averred that the 1st respondent's affidavit is full of falsehoods, malice, concealments and the same is a total misrepresentation of facts. According to the 1st applicant, the deceased herein while alive gave the late 1st respondent's husband permission, consent and authority to sell the parcel of land as evidenced by the sale agreement.
21. According to the 1st applicant, the respondents stand to suffer no prejudice as she has never lived on the parcel of land all her life unlike the applicants and other interested parties who have all along occupied the parcel of land.

Applicants Submissions

22. On behalf of the applicants, it has been submitted that they bought the parcel of land from the 1st respondent's late husband one Boniface Mutisya Kilungu with the consent of the deceased herein. According to the applicants they paid all the required purchase price but unfortunately the deceased herein and Boniface Mutisya Kilungu died before completing the transfer of the parcel of land to them.
23. According to the applicants, the 1st respondent took advantage of the death of her husband by obtaining the grant of letters of administration without notifying the applicants and all other parties who had interest in the parcel of land. According to the applicants, the 1st respondent concealed their existence and transferred the parcel of land to herself and the 2nd respondent contrary to the existing arrangement between the applicants and the late Boniface Mutisya Kilungu as well as the schedule of distribution which had listed the applicants and consented to by all beneficiaries. According to the applicants they are purchasers for money or money worth and as such they are a liability in the estate and ought not and/or should not have been excluded in the substituted succession process herein.
24. It has been submitted that the grant and the certificate of confirmation of grant should be revoked and/or annulled or rectified to include the applicants as purchasers and/or liabilities of the deceased's estate since the process of obtaining them was marred with fraud and misrepresentation or concealment of material facts. According to the applicants in the succession cause filed by the 1st administrator/respondent's late husband awaiting confirmation, the 1st applicant was to be given the whole parcel of land on his own behalf and on behalf of all the other purchasers/interested parties to which after the transfer to him, he was to subdivide and transfer to other purchasers as agreed between themselves and as per the annexed mode of distribution 'DM-5'.
25. According to the applicants they have satisfied the principles of granting an injunction against the respondents. It has been submitted that the 1st applicant was to be given the whole parcel of land herein but the 1st respondent concealed the fact that her late husband had commenced the succession cause in the estate of the deceased herein and filed a mode of distribution which expressly included the 1st applicant.



26. The applicants have urged this court to revoke the grant and therefore as the successful litigants costs should be awarded to them.

Respondents Submissions

27. On behalf of the respondents, it has been submitted that the burden of proving that the grant ought to be revoked lay on the applicants. According to the respondents, the sale agreements did not disclose that the deceased sold the property or was the seller or a witness in the agreements. It has been submitted that other agreements were drafted after the demise of the deceased and without confirmation of the grant.
28. According to the respondent, the agreements did not involve other deceased's beneficiaries hence are false. It has been submitted that there is no document to prove that the 1st administrator/respondent late husband had any authority from the deceased herein to dispose off the property hence in violation of section 45 and 82 of the LSA and the court cannot protect such purchasers.
29. As to whether the applicants were notified of the succession proceedings, it has been submitted that the deceased never sold any property to them. According to the respondents, the applicants are not beneficiaries of the deceased hence the respondents did not have any obligation to notify them about the transaction of the deceased's estate.
30. According to the respondents this court's jurisdiction is limited to succession matters hence its bereft of the jurisdiction pursuant to article 162(2) and 165(5) of the Constitution to make a finding in one way or the other with regard to whether the alleged sales were valid and resulted in the applicants acquiring a stake in the deceased's estate. Reliance was placed on the case of In re Estate of Prisca Ong'ayo Nande (deceased) [2020] eKLR.
31. The respondents have urged the court to find that the applicants have not demonstrated or proved any ground for revocation of the grant that was issued to the respondents hence the summons dated November 29, 2021 seeking revocation of the grant should be dismissed with costs.

Determination

32. The court has considered the summons, affidavit in support and in opposition and the submissions filed on behalf of the respective parties.
33. The respondents contend that this court is bereft of jurisdiction pursuant to article 162(2) and 165(5) of the Constitution on the issue whether the alleged sales were valid and resulted in the applicants acquiring a stake in the deceased's estate.
34. Nyarangi JA's in the case of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR stated:
- “...jurisdiction is everything. Without it, a court has no power to make one more step...”
35. Section 13(2)(a) of the Environment and Land Act sets out the jurisdiction of the Environment and Land Court on disputes relating title or ownership of land hence this court lacks requisite jurisdiction to determine the validity or enforceability of the sale agreements touching on the deceased's parcels of land. See Re Estate of Stone Kathuli Muinde (Deceased) [2016] eKLR and Joseph Koori Ngugi & another v Stephen Ndichu J Mukima [2017] eKLR.
36. Of significance to note in these proceedings are the applicants assertions that there was concealment of material facts during the confirmation of the grant and the grant was obtained fraudulently hence



a ground set out in section 76 of the *Law of Succession Act* to warrant revocation or annulment of the grant. The court is therefore properly seized with jurisdiction to hear and determine the applicants claim.

37. The applicants basis for seeking revocation or annulment of the grant revolves around parcel of land No Mavoko town Block 3/4954 otherwise known as Mavoko town Block 3/86738. It is not in dispute that the deceased herein was/is the registered proprietor of the parcel of land but on the other hand, the applicants assert that they purchased the parcel of land from the deceased son, the late Boniface Musyoka Kilungu who was the sole administrator of the deceased estate before his demise hence the relevance of the annexed sale agreements in determining whether or not to revoke the grant pursuant to section 76 of the *Law of Succession Act*.
38. The issues that emerge for determinations are;
- a. Whether the grant of letters of administration issued on February 8, 2019 and the certificate of confirmation of grant issued on October 8, 2019 were obtained fraudulently by making of a false statement or by the concealment from the court of something material to the case?
 - b. Whether to order for rectification of the certificate of confirmation of grant issued on October 30, 2019 to include the applicants as purchasers and/or liabilities in the deceased's estate?

Whether the grant of letters of administration issued on February 8, 2019 and the certificate of confirmation of grant issued on October 30, 2019 were obtained fraudulently by making of a false statement or by the concealment from the court of something material to the case?

39. The power to revoke and/or annul the grant is discretionary. The court has to be guided by the factors set out under section 76 of the *Law of Succession Act* (LSA) which provides as follows;

“76. Revocation or annulment of grant

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.”
40. The applicant has the duty to prove any of grounds set out in section 76 of the *Law of Succession Act* before the grant issued is revoked as held by court in *Kennedy Opiche Olela v William Ogida Ochuodho & another* [2014] eKLR.
41. According to the applicants they were not notified of the reinstated succession proceedings as purchasers/interested parties and/or liabilities of the deceased’s estate, a fact which the applicants assert was material but was concealed to the court since they had a purchasers interest. According to the applicants, the respondents ignored the proposed mode of distribution by the 1st administrator/ respondent’s late husband Boniface Mutisya Kilungu as per the schedule of distribution marked ‘DM5’. In the schedule of distribution, the 1st applicant was to get a ‘whole share’ of Mavoko town Block 3/4954.
42. In converse, the 1st respondent has averred that the late Boniface Mutisya Kilungu did not sell any deceased properties to the applicants hence it was unnecessary to get their consent to the mode of distribution. According to the respondents the sale agreements do not bear the name of the deceased herein as the seller. They assert that no document to show the late Boniface Mutisya Kilingu authority to sell has been tendered in court. The respondents are therefore asserting that grant and a certificate of confirmation issued on October 28, 2019 were not obtained fraudulently or they did not conceal any material information to court since the parcel of land was not sold to the applicants.
43. Section 76 empowers the court to revoke or annul a grant suo moto or on the application of any interested party. However it is worth noting that it is not every situation where transgressions by the administrator(s) will lead to revocation or annulment of grant hence the court still has the power under rule 73 of the *Probate and Administration Rules* to make orders to meet the end of justice.
44. In *Re The Estate of the Late Suleman Kusundwa* [1965] EA 247, it was held that:
- “The court is...not obliged to revoke the existing grant, and should only exercise its discretion to do so if useful purpose would be thereby achieved or any right of the applicant safeguarded which could not otherwise be safeguarded...”
45. W Karanja J, in *Ireri Nyaga v Karani Ngari & another* Embu HC Succ Cause No 68 of 2007 [2010]eKLR held that:
- “[A] buyer or purchaser cannot cause an otherwise valid grant to be revoked for the only reason that he was not recognized in the proceedings. As stated earlier in my ruling, his recourse lies in suing whoever sold the property to him and if such person be dead, then he can only sue the administrator of the deceased’s estate. [emphasis added]”
46. The court notes the attached sale agreements do not bear parcels of land Mavoko town Block 3/4954 otherwise known as Mavoko town Block 3/86738 but other parcels of land. The official search from



lands office show that the parcel of land is still registered in the name of Monicah Kanini Kilungu, the deceased herein. The 1st applicant asserted that they started living on the parcel of land since 2006, a period of 15 years. He also emphasized that some families had buried some of their relatives and loved ones on the same parcel of land. The court notes that the first grant of letters of administration was issued to Boniface Mutisya Kilungu on August 31, 2010 whom the applicants claim had sold to them and thereafter he is alleged to have applied for confirmation of the grant *vide* the summons filed in court October 11, 2012. It is not in dispute that Boniface Mutisya Kilungu died March 30, 2013 before the grant was confirmed.

47. The 1st applicant's averred that families started residing on the parcel of land since 2006. According to the death certificate of Monica Kanini Kilungu, she died on May 10, 2007. If it's true that they started residing on the parcel of land since 2006, where are the sale agreements or authority to reside on the parcel of land bearing the name of Monicah Kanini Kilungu as the seller or donor? The respondents have asserted that the applicants have not tendered in court Boniface Mutisya Kilungu authority to sell the parcel of land which the court finds to be true since a copy of the same cannot be found. It then follows that the sale transactions involving Boniface Mutisya Kilungu can only be determined in the ELC court.
48. Section 82(b)(ii) of the LSA provides that no immovable property shall be sold before confirmation of the grant while section 45(1) thereof provides as hereunder:
- Except so far as expressly authorized by this act, or by any other written law, or by a grant of representation under this act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
49. In Munyasya Mulili & 3 others v Sammy Muteti Mulili [2017] eKLR the court held that:
- “...no immovable property shall be sold before confirmation of the grant. Any such distribution of the deceased's properties before confirmation of grant whether by way registration of title, or sale is thus liable to revocation pursuant to the powers granted to this court by section 47 of the Law of Succession Act and rule 73 of the Probate and Administration Rules.”
50. The court finds that the applicants have not demonstrated or established their claim falls under either of the grounds provided in section 76 of the LSA. The order seeking revocation of the grant issued on February 8, 2019. The applicants are 3rd parties/interested parties/purchasers to the succession proceedings and their claim has not been established or agreed on.
51. In re Estate of Juma Shitseswa Linani (Deceased) [2021] eKLR the court held that a grant of representation, and not a certificate of confirmation of grant, according to section 76, would be liable to be revoked or annulled on three general grounds.
52. The order seeking to revoke or annul the grant or certificate of confirmation of grant fails in entirety.

Whether to order for rectification of the certificate of confirmation of grant issued on 38.10.19 to include the applicants as purchasers and/or liabilities in the deceased's estate

53. Having found that the applicants have not made their case for revocation or annulment of the grant, it is needless to order for rectification of the certificate of confirmation of grant issued on October 30, 2019 to include the applicants as purchasers. The applicants have not demonstrated they have a purchaser's interest since the parcel of land was sold to them before the grant was confirmed. The applicants have



not demonstrated their claim for rectification of the certificate that falls under section 74 of LSA. It is not an error within the meaning of section 74 of LSA.

54. In the matter of the estate of Hasalon Mwangi Kabero [2013]eKLR the court held that;

“The provisions in section 74 and rule 43 are extremely restricted. They permit rectification of grants in three clearly defined cases:-

- (a) errors in names and descriptions of persons or things;
- (b) errors as to time or place of death of the deceased;
- (c) in cases of a limited grant, the purpose for which such limited is made;

55. The order for rectification of the certificate of confirmation of grant is dismissed in its entirety.

56. Accordingly, the court is not satisfied that the grant and the certificate of confirmation of grant were obtained and confirmed by the making of a false statement or by the concealment from the court of something material to the case.

57. In light of the prevailing and competing legal interests; on the one hand beneficial interest that involves transmitting beneficial interest to beneficiaries of deceased’s estate is a mandate bestowed to this court and exercised as provided by the provisions of Law of Succession Act.

58. On the other hand, the applicants claim propriety interest and possessory rights over the same properties after distribution of the estate was effected under summons for confirmation of grant.

59. This court lacks requisite jurisdiction to determine ownership/title/occupation/use/claim of land. Parties herein disclosed pendency of Environment and Land Court Case No E012 of 2021.

60. In the circumstances, this court having distributed the estate shall maintain *status quo* to enable warring parties pursue their claim in the ELC. At this stage the grant cannot be rectified to include applicants unless & unless they establish/prove their claim to the estate.

61. In the case of Prisillah Wanja Kibui v James Kiongo Kibui & Charles Wambugu Gitonga ELC 170 of 2011 it was held as follows;

Status quo is defined in Black’s Law dictionary as “the situation as it exists”

In my view an order to status quo to be maintained is different from an order of injunction both in terms of the principles for grant and practical effect of each. While the latter is an substantive equitable remedy granted upon establishment of a right, or at interlocutory stage, a prima facie case, among other principles to be considered, the former is simply an ancillary order for preservation of the situation as it exists in relation to pending proceedings before hearing and determination thereof.

Disposition

1. The applicants amended summons for revocation of grant dated November 29, 2021 and filed on December 6, 2021 lacks merit and the same is dismissed in its entirety.
2. The applicants claim shall be ventilated in the pending suit in ELC E012 of 2021 until then *status quo* is maintained to the suit properties that comprise of the deceased’s estate.
3. The applicants may file suit against the seller, Boniface Mutisya Kilungu (deceased) through suing the administrator of his estate.



4. Whereas the beneficial interest is already transmitted to the beneficiaries of the estate of the deceased, a claim of proprietary interest is raised and can only be determined in the ELC suit pending hearing and determination.
5. In the circumstances therefore, the beneficiaries may reside and/or use the properties but not to sell subdivide transfer or register until the matter in ELC is determined.
6. The land register shall await the outcome / decision before registration of the beneficial and/or proprietary interest.
7. Costs of the application shall be borne by the applicants.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 24TH DAY OF OCTOBER, 2022
(VIRTUAL/PHYSICAL CONFERENCE)**

M.W MUIGAI

JUDGE

IN THE PRESENCE OF:

NO APPEARANCE - FOR APPLICANTS

NO APPEARANCE - FOR RESPONDENTS

GEOFFREY/PATRICK -COURT ASSISTANT

