



REPUBLIC OF KENYA



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**In re Estate of Kioko Musembi Mutavi (Deceased) (Probate & Administration
489 of 2011) [2022] KEHC 14351 (KLR) (24 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14351 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
PROBATE & ADMINISTRATION 489 OF 2011**

MW MUGAI, J

OCTOBER 24, 2022

**IN THE MATTER OF THE ESTATE OF KIOKO MUSEMBI
MUTAVI (DECEASED**

BETWEEN

**B.NDONGOI KIOKO 1ST APPLICANT
R.MUMBUA KIOKO 2ND APPLICANT
M.KAMENE MULWILA 3RD APPLICANT
A.SYOUTU WAMBUA 4TH APPLICANT
T.AFIA WAMBUA 5TH APPLICANT**

AND

**DANIEL MULI MUTUNGI 1ST RESPONDENT
MARY MUSEO 2ND RESPONDENT
MAKAU NZUKI MUTAVI 3RD RESPONDENT**

RULING

Background

- 1 Kioko Musembi Mutavi died on February 18, 1999.
2. He was survived by the following;
 - i. Mutungi Kioko-Son-Deceased
 - ii. Mary Museo Kioko-Daughter-Married



- iii. Joshua Wambua Kioko-Son-Deceased
 - iv. Ruth Mumbua Kioko-Daughter-Married
 - v. Boniface Ndongoi Kioko-Son-49 Yrs
 - vi. Margaret Kamene Kioko-Daughter-Married
 - vii. Anna Syoutu Kioko-Daughter-Married
 - viii. Elijah Musembi Mutungi-Son-Grandson
 - ix. Teresia Afia Wambu-Daughter-In Law-57 yrs
 - x. Peter Kioko Mutungi-Grandson-34 yrs
 - xi. Moses Munyao Wambua-Grandson-34 yrs.
3. The consent to the making of the Grant was signed by the following;
- a. Mary Museo Kioko
 - b. Ruth Mumbua Kioko
 - c. Boniface Ndongoi Kioko
 - d. Margaret Kamene Kioko
 - e. Anna Syoutu Kioko
 - f. Teresia Afia Wambua
 - g. Peter Kioko Mutungi
4. The Grant of Letters of Administration Intestate was granted to Elijah M Mutungi and Moses Munyao Wambua on September 20, 2011.
5. Vide the Summons for revocation or annulment of Grant dated April 1, 2013 filed by Daniel Muli Mutungi and Ruth Mumbua Kioko the Grant was revoked by court on November 20, 2014 for concealment of material information from the court. They claimed that they had not been listed in the Chief's letter.
6. Vide an application for grant of letters of administration dated and filed on April 12, 2017 which was unopposed by Objectors, the court on October 18, 2017 allowed the application by appointing Daniel Muli Mutungi, Mary Museo Kioko and Makau Musembi Mutungi as the new administrators of the estate and a grant issued on October 18, 2017.
7. On August 25, 2018 the court rectified the Grant issued on October 18, 2017 to read the names of the administrators as per their original Identity Cards as follows Daniel Muli Mutungi, Mary Museo and Makau Nzuki Musembi.

Summons For Revocation And/or Annulment Of Grant

8. The Applicants Summons dated February 15, 21 and filed on February 18, 21 seeks the following orders:-
- 1. That the Grant issued and confirmed on October 30, 2017 be revoked or annulled.



2. Thata fresh grant do issue in the names of Boniface Ndongoi Kioko and Ruth Mumbua Kamungu.
9. The Summons is supported by the affidavit of Boniface Ndongoi Kioko sworn on February 15, 21 on grounds that;
 - a. The proceedings to obtain the grant were defective in substance;
 - b. The grant was obtained fraudulently by the making of false statements and/or by the concealment from the court of some facts material to this case;
 - c. The grant was obtained by means of an untrue allegation of fact essential in point of law to justify the grant;
 - d. On Makau Musembi Mutungi to whom the grant was made is not a beneficiary of the state within the meaning of Section 29 of the Law of Succession Act as he is a step-brother to the deceased.
 - e. Daniel Muli Mutungi to whom the grant was also made is not an immediate beneficiary to the estate of the deceased as he is a grandson to the deceased hence he ranks lower in the order of priority as against the applicant as envisaged in Section 66 of the Act
 - f. Both Boniface Ndongoi Kioko and Teresia Afia Wambua aver that they did not affix their signatures on the consent of making a grant of administration intestate dated June 14, 2011 and yet there appears a signature on the said consent. The consent is therefore a forgery.

Respondents Replying Affidavit

10. In opposition to the Summons, the 1st Respondent filed a replying affidavit dated April 21, 2021 wherein he has stated that the Grant was obtained using true allegations under African customary law. According to the 1st Respondent, he was chosen by the deceased as the administrator of the estate in the presence of the 1st Applicant and other grandson two weeks before he was killed. He has stated that he selected Makau Nzuki Mutavi (brother) and daughter of the deceased Mary Museo to assist in the administration of the estate in African customary law according to the wishes of the deceased. According to the 1st Respondent, the current administrators are adults.
11. He has stated that all the allegations presented in court on February 15, 2021 by the 1st Applicant's advocate Makau Mulei & Co Advocates are false and untrue allegations and disagrees with them. He stated that the administrators have not forged the Applicants signatures or that the grant was obtained without their signatures. He urged the court to make an order that the law firm of Makau Mulei Advocates pay damages of Kshs 5,000,000/- for the allegations made about them. They want the court to include the buyers as liabilities to the estate.

Applicant's Further Affidavit

12. In response, the 1st Applicant swore a further affidavit on July 6, 2021 wherein he has averred that he is a son of the deceased. According to the deponent, the minutes of the meeting of the children to the deceased that was held on June 12, 2021 establish that the deceased was survived by seven children who jointly appointed Boniface Ndongoi, Ruth Mumbua and Teresia Wambua as administrators of the estate herein.
13. He has averred that for matters intestate a consent must be obtained from all beneficiaries to the estate but the Respondents failed to do so hence the grant was obtained and confirmed without due



notification to the Applicants. According to the deponent, the Applicants signatures were forged. According to the deponent, allowing such a grant would not only be prejudicial but it would have the ripple effect of causing a great injustice to the Applicants hence the Respondents should not be allowed to proceed with administrating the estate as per the Confirmed Grant issued on November 30, 2017.

14. He averred that the court should grant the orders sought in the application.

Affidavit In Support To The Objection To The Replying Affidavit

15. The Objection is supported by the 1st Respondent's affidavit sworn on September 28, 2021 wherein he has averred that advocate Makau Mulei is misleading the 1st Applicant since the land belongs to the deceased. He averred that the buyers land should be included as per the wishes of the deceased.
16. 1st Respondent has urged the court to make an order that from September 29, 2021 no advocate or any law firm should represent any family member in court until they agree on sub-division as per the wishes of the deceased. According to the 1st Respondent, any family member who is not satisfied should represent himself.

Applicants Submissions

17. On behalf of the Applicants, it has been submitted that they have the locus standi to seek revocation of the Grant by dint of being the deceased's children. It has been submitted that the Grant was obtained fraudulently by concealment of material facts from the court. According to the Applicants the Respondents forged some of the signatures on the consent in support of the Grant of letters of administration. It has been submitted that the Respondent has admitted at paragraph 5 of his replying dated April 21, 2021 that he never requested the Applicants for their consent. According to the Applicants, the administrators named in the Grant do not fall under the persons who should be given priority in administering the deceased's estate. It has been submitted that the deceased was survived by three sons, two are deceased and four daughters hence the Applicants therefore rank higher than the Respondent on priority to succeed the estate of the deceased. According to the Applicants, the Respondents rank lower in the consanguinity line hence the Grant should be revoked and a fresh one issue to the rightful administrators.
18. They have submitted that the Petition was filed contrary to Rule 26 of the *Probate and Administration Rules* which amounted to abuse of the court process. According to the Applicants pursuant to Section 76 of the *LSA*, the Grant should be revoked.

Respondents Submissions

19. According to the 1st Respondent, the Applicants are not the only beneficiaries of the deceased. He has submitted that the list of buyers in his supplementary affidavit should be included and an explanation on the money collected from them was used. According to the 1st Respondent, the estate has more than 100 beneficiaries whom he is willing to bring them together before they proceed to subdivision as per the wishes of the deceased.

Determination

20. The court has considered the Summons, Objection, affidavit in support and in opposition and the submissions filed by respective parties.



21. The Summons is premised on Section 76 of the Law of Succession. The power to revoke and/or annul the grant is discretionary. The court has to be guided by the factors set out under the provision. Section 76 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)...

22. Mativo J in *Lucy Wakarima Ngabucha & another vs. George Mwangi Ngabucha & another* [2016] eKLR held that;

“The grounds upon which a grant may be revoked or annulled are thus statutory and it is incumbent upon any party making an application for revocation or annulment of a grant to demonstrate the existence of any, some or all the grounds stipulated in section 76 of the Act. The grounds laid down in section 76 can be divided into the following categories:-

‘the propriety of the grant making process; mal-administration or where the grant has become inoperative due to subsequent circumstances..’

23. It is not in dispute that the Applicants are children of the deceased and as indicated in the Chief’s letter. The Applicants’ contest is premised on the manner in which the grant was obtained and the capacity of the administrators, the Respondent herein. They have alleged that their consent to the making of the grant hence the signatures appended on the grant are forged. According to the Applicants some of the administrators rank lower in the order of priority as against the Applicants as envisaged in Section 66 of the *LSA*.

24. While exercising the discretion provided under Section 76 LSA, the court is called upon to take into account the interest of all the beneficiaries entitled to the estate. Mwita J. in the *Albert Imbuga Kisigwa vs. Recho Kawai Kisigwa*, Succession Cause No.158 of 2000 stated:

“(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.”



25. The issues that emerge for determination are;
- a. Whether the Applicants have sufficiently demonstrated that the grant should be revoked under Section 76 of LSA on the grounds that;
 - i. The consent of the Applicants was obtained fraudulently?
 - ii. Makau Musembi Mutungi to whom the grant was made is not a beneficiary of the state within the meaning of Section 39 of the *Law of Succession Act* as he is a step-brother to the deceased.
 - iii. Daniel Muli Mutungi to whom the grant was also made is not an immediate beneficiary to the estate of the deceased as he is a grandson to the deceased hence he ranks lower in the order of priority as against the applicant as envisaged in Section 66 of the Act
 - b. Whether fresh grant do issue in the names of Boniface Ndongoi Kioko and Ruth Mumbua Kamungu?
Whether the signatures appended in the consents to the making of the grant are forgery.
26. It is not in dispute that the names of the Applicants appear in the consent but they contend that the signatures appended on the consent are forged. The Applicants have pointed out that the 1st Respondent has admitted that the Applicants were never requested for their consents. According to the Applicants the failure to obtain their consent was contrary to Rule 26 of the Probate and Administration Rules.
27. Rule 26 of the Probate and Administration Rules provides as follows:-
26.
 - (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.
 - (2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.”
28. The above provision is couched in mandatory terms and it is therefore not optional. It is mandatory for every applicant who wishes to be an administrator to an estate to give notice to every person entitled in the same degree as or in priority to the applicant and such person of equal or lower priority must give consent or renunciation during filing of succession cause.



29. Chemitei J *in the Matter of the Estate of Claudia K. Ouma (Deceased)* [2015] eKLR had this to say about the provision, that;

“...The intention of the drafters of the rules I believe was to bring on board anybody who has an interest in the estate. Further, should there be any objection then the same ought to be raised at an early stage...”

30. The Court in the case of *Antony Karukenya Njeru v Thomas M. Njeru* [2014] eKLR in Meru Succession Cause No. 663 of 2011 held that where persons of equal priority by virtue of Rule 26(2) of the Probate and Administration Rules do not give consent or renounce their rights to petition for the grant then the proceedings to obtain the grant are rendered defective in substance and the grant becomes one obtained by means of untrue allegation of facts essential in point of law.

31. The Applicants have asserted that their signatures in the consent were forged. *In the Matter of the Estate of P. W. M – Deceased* [2013] eKLR that:

“It should be noted that allegations of fraud border on an accusation of commission of a criminal offence. In civil matters, allegations of fraud are treated as more serious than other allegations. Pleadings on fraud are stricter. The allegations should be supported by sufficient particulars. It is said here that the grant was obtained fraudulently; consequently the pleadings on the point ought to be to a higher standard. I note that the particulars of fraud are bare, totally insufficient to support an allegation of fraud.”

32. *In re Estate of Samuel Ngugi Mbugua (Deceased)* [2017] eKLR, the court was of the view that

“The allegation that the said signature was not that of the deceased amounts to a claim that the signature was forged or that fraud was exercised in the procurement of the alleged will. That is to say that someone other than the deceased had affixed that mark on the will with the intent of passing the same as the signature of the deceased. Forgery is a criminal offence. The applicant is in fact imputing criminal conduct on either the person propounding the will or those who were involved in the operation that is purported to have been its execution. The burden of proving forgery lies with the person alleging it. In Elizabeth Kamene Ndolo vs George Matata Ndolo Nairobi Court of Appeal civil appeal number 128 of 1995 it was stated that the charge of forgery or fraud is a serious one, and the standard of proof required of the allegor is higher than that required in ordinary civil cases.’

33. Hon Gikonyo J in the case of *Alex Mwenda Mwirigi V Rodah Karimi Jadiel*, Succession Cause No337 OF 2011, on 2nd November, 2016 held that:

(5) I will not re-invent the wheel. This is an application for revocation of under Section 76 of the *Law of Succession Act* CAP 160 of the laws of Kenya and I only need to ask whether it satisfies the threshold provided in law? Given the arguments being presented, the most apt grounds to be met are, whether:

a. The proceedings to obtain the grant were defective in substance;

b. 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; and



c. 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.

(6) Upon consideration of all the facts of the case, the affidavit, oral and documentary evidence before me, I see three major arguments emerging, namely; (1) the Respondent forged the signatures of the Applicant in applying for grant of letters of administration; (2) the Applicant was not provided for at all; and (3) the Respondent concealed some of the assets of the deceased.

The Respondent argued that the Applicant and his grandfather were aware of these proceedings and she gave the example of the presence of the father in law at the issuance of and signed the letter by the chief. Here, I must state that forgery is a very serious allegation and would require strict proof based on quite preponderant amount of evidence. But, none was adduced in this case. I expected some report to the police or investigation to have been afoot on that allegation. I will not, therefore, rely or make any finding on the allegation of forgery at this stage. That matter ends there for now. (Emphasis added).

34. This Court's view is that the allegation that the signatures appended as the Applicants consents to appointment of administrators and issuance of the grant is deemed as fraud /forgery requires a higher standard of proof which the Applicants have not established. In the absence of Document Examiner's Report or similar evidence to prove the Applicant's claim of forgery, this Court will not determine the question of fraud/forgery unless tangible and cogent evidence placed on record. Suffice, is that this Court finds the Applicants were not involved and did not participate in the Succession proceedings as their consents were not obtained.

35. Section 66 of the LSA provides as follows:

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-

- (a) surviving spouse or spouses, with or without association of other beneficiaries;
- (b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;
- (c) the Public Trustee; and
- d) creditors:

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.

34. While Section 39(1) of LSA which falls under Part V deals with situations where the intestate has left no surviving spouse or children and provides that:

Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority-

- (a) father; or if dead
- (b) mother; or if dead



- (c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none
- (d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none
- (e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.

34. *In Re The Estate of the Late Suleman Kusundwa* [1965] EA 247, the Court stated 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. In the present case such rights of inheritance as the applicant possesses, outside the will, are sufficiently safeguarded by the assurance given by the Administrator-General. Therefore I decline to revoke the existing grant, a revocation which would entail needless expense; but it is qualified by declaring that the provisions of the annexed will, in which he purported to leave the whole of his property to his nephew, the second respondent, shall be given effect to only in respect of such portion of the deceased’s property as he was entitled to dispose of by will under the applicable law of inheritance.”

- 34. The Respondents allegation that the deceased appointed his brother under African Customary Law in advance prior to his death, this fact is not borne out by the law.
- 35. Any estate where the deceased died before the advent of *Law of Succession Act*, the customary law applies.
- 36. Any estate where the deceased died after commencement of *Law of Succession Act* July 1, 1981 the LSA applies mutatis mutandis.
- 37. Any estate where the deceased died after the *Constitution* of Kenya 2010 was inaugurated as the COK 2010 applies as supreme law where applicable and LSA.
- 38. Therefore, in the instant case the deceased died on February 18, 1999 and therefore unless by a valid will, the Deceased could not legally appoint the Respondents as administrators of the estate in advance in an intestate estate.
- 39. The Respondents were not and could not legally be not appointed by the deceased as administrators but only as executors in a valid Will.
- 40. The Respondents failed to comply with Section 66 of LSA and Rule 26 of Probate and Succession Rules in appointment of administrators from the beneficiaries of the estate and by obtaining consents.

Disposition

- a. In the upshot, the court finds grant obtained was irregularly and unlawfully obtained by virtue of Section 76 LSA and is hereby revoked.
- b. The beneficiaries to meet discuss and agree on list of Administrators maximum 4 within 60 days and may write officially to Deputy Registrar Machakos High Court for normal processing.
- c. In default the Public Trustee shall take over the administration of the estate effective 2023.



d. Any aggrieved party may apply to Court.

e. There shall be no orders as to costs.

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

M.W MUIGAI

JUDGE

IN THE PRESENCE OF:

MS KUI FOR APPLICANTS – PRESENT ON LINE

DANIEL MULI - RESPONDENT – PRESENT IN COURT

GEOFFREY/PATRICK - COURT ASSISTANT(S)

HCSC CAUSE NO 489 OF 2011 (RULING)

