



**In re Estate of Monica Wanjiru Musasia (Deceased) (Succession Cause 515 of 2005) [2022] KEHC 16901 (KLR) (23 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16901 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
SUCCESSION CAUSE 515 OF 2005**

**WM MUSYOKA, J  
DECEMBER 23, 2022**

**IN THE MATTER OF THE ESTATE OF MONICA WANJIRU MUSASIA  
(DECEASED)**

**JUDGMENT**

1. Am called upon to determine a summons for revocation of grant, dated June 26, 2014. It is brought at the instance of Maudling Ambuga Musasia, who I shall refer hereto after as the applicant.
2. The background is that the deceased died on January 17, 1992. The Chief of Sinoka location wrote a letter, dated September 29, 2005, indicating that she was survived by 4 individuals, being her husband, Musa L Musasia, and Maudling Amboga Musasia, Victor Kelonye Musasia and Peter Logose Musasia, whose relationship with the deceased is not disclosed. The petition herein was at the instance of Victor Kelonye Musasia, in his capacity as son of the deceased. It was lodged herein on October 3, 2005. The survivors are listed as Musa L Musasia, Maudling Ambuga Musasia and Peter Lugose Musasia. She is said to have had died possessed of Kakamega/Nzoia Township/102 and Kakamega/Nzoia-10/145. A grant was duly made on January 9, 2006 to Victor Kelonya Musasia, who I shall refer hereafter as the administrator. The said grant was confirmed on July 27, 2011, and a certificate of confirmation of grant, dated May 4, 2014, was duly issued, devolving Kakamega/Nzoia Township/102 absolutely upon the administrator, and Kakamega/Nzoia-10/145 upon Maudling Amboga Musasia, Peter Lugose Musasia and the administrator.
3. A caveat was thereafter lodged at the registry herein, by Maudling Ambuga Musasia, Ruth Waithera, Grace Kadenyi and Jane Andia, dated June 24, 2014, to effect that nothing ought to be done in the estate of the deceased herein without notice to them.
4. The application dated June 26, 2014 was then filed. It seeks revocation of the grant herein, and the appointment of the applicant as the administrator. It also seeks orders to restrain transfer of the 2 assets of the estate prior to determination of the application. It is argued that the proceedings to obtain the grant were defective, as there was no full disclosure of all the children of the deceased, for the daughters of the deceased had been left out. They are said to be Ruth Waithera, Grace Kadenyi and Jane Andia. Leah Chikunzira Akimbi, another daughter, had died, but she had been survived by children,



being Kevin Odhiambo and Christine Wanjiru. It is also said that the administrator had included the late husband of the deceased, Musa Lugose Musasia, as one of the children. It is further argued that the administrator had given a very low value to the estate assets, and had not disclosed one of them, Kakamega/Trans Nzoia Township/23. He complains that the distribution of the estate was skewed in favour of the administrator, and that he had disinherited all the daughters of the deceased. He further avers that the administrator was resident in the United States of America, which made the applicant, a Kenyan resident, more suitable as administrator. The affidavit sworn on June 24, 2014, by the applicant, in support of the application, largely regurgitates the grounds set out on the face of the application.

5. The administrator replied to the application, *vide* his affidavit sworn on July 21, 2014. He avers that when the deceased passed on in 1992, she was survived by her late husband, the late Leah, Ambuga, Ruth, Victor, Grace, Peter and Jane. He states that a meeting was held in 2005, witnessed by the area Chief, where the family decided that he should be the administrator. He states that he did not leave any of the beneficiaries out at confirmation. He says that the late husband of the deceased died in 2013. He accuses the applicant and the daughters of the deceased of having bad motives. He argues that being resident outside the country does not impede his duties as administrator.
6. Directions were given on October 9, 2014, for disposal of the application by way of *viva voce* evidence, and were reiterated on September 29, 2016.
7. The hearing commenced on October 16, 2014, with the administrator on the witness box. He played 3 audio recordings, in Ki-Maragoli, where he alleged that his father distributed land to some of his sons in the first recording. He said that the recordings were done in the United States of America, by himself, at a time when their late father visited for treatment. The first recording has a voice saying that all the children were to get a share of the land. 7 acres were given to Ambuga. 5 acres to Peter. He was to retain 3 ½ acres for himself. Kelonye was to get 6 acres. Kelonye was to go to Maragoli, where he was born, and get land there. The administrator said that he did the first recording in 2000 in the United States of America, in the presence of Peter and his own family. He stated that the letter from the Chief cited only 4 survivors. He said that the survivors or beneficiaries were more than 4. He stated that in his confirmation application, he listed only 4 of the survivors. He confirmed that their late father was indicated a child of the deceased, and said that that was done by error. He said that the 2 assets listed in the confirmation application were in the name of the deceased. He said that his mother had not left a will. He said that he did not obtain the consents of his siblings before he petitioned for administration. He said that his father had directed that the female children be left out of the distribution.
8. The applicant testified on June 24, 2021. He said that he was the first-born son of the deceased. He said that the administrator had omitted the daughters of the deceased. He asserted that in his affidavit, the applicant, he had listed all the daughters, who had been omitted. He further stated that his consent was not sought when the administrator applied for administration. He said that the daughters of the deceased did not agree to be left out. He also said that the administrator did not inform him when he sought representation. He averred that the deceased died intestate, for she left no will, whether oral or written. He further stated that at confirmation, the administrator allocated himself 17 ½ acres, to the applicant 7 acres and to Peter 5 acres, and left nothing for the daughters. He said that he wanted the court to include all the children of the deceased, and to have all share the estate equally. He sought that the grant be revoked, the confirmation orders be set aside, and that he be appointed a co-administrator of the estate, with the administrator. He said that the assets in question were in the name of their father, before they were transferred to the name of the deceased prior to her death. He said he was not aware whether the administrator spent his resources to save estate assets.



9. At the end of the oral hearings, written submissions were filed by both sides. I have read through them and noted the arguments made in both.
10. This is a fairly straightforward matter. It for revocation of grant. Revocation is provided for under section 76 of the *Law of Succession Act*, Cap 160, Laws of Kenya. There are 3 general grounds upon which a grant may be revoked. One, is where the proceedings to obtain the grant were beset with challenges. The first is where the process had defects, and the second is where there was misrepresentation or fraud or concealment of matter from the court. Two, is where the grant was properly made, without the challenges mentioned in One, but the administrator appointed faced difficulties with administration, by either failing to apply for confirmation of grant within the timelines set, or failing to diligently administer the estate, or failing to render accounts as and when required to by the law or as directed the court. It may be referred to as failure of administration by an administrator who is properly in office. Three, is where the grant has become useless or inoperative. This could be because the sole administrator has died, or has been adjudged bankrupt, or has become mentally or physically infirm and unable to administer the estate.
11. Of the 3 general grounds, the applicant has premised his application on the first, problems at the stage of obtaining representation. Of course, he also points to problems during confirmation of grant, but such are not a ground for revocation of a grant, going by *In re Estate of Prisca Ong'ayo Nande (Deceased)* [2020] eKLR (Musyoka, J). He complains that the daughters of the deceased were not disclosed at the time grant was sought, and that his consent was not sought. The administrator admitted at the oral hearing, that he did not disclose the daughters of the deceased, ostensibly as their father had said that they should not be given anything. He also conceded that he did not inform the sons of the deceased that he was petitioning for representation.
12. The process of applying for representation is governed by section 51 of the *Law of Succession Act*, which provides for filing of documents, where certain bits of information ought to be disclosed. The grant herein was sought in intestacy, and, therefore, the relevant provision is in section 51(2)(g), which requires disclosure of all the surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of the deceased then dead. This provision requires disclosure of every surviving member of the family of the deceased, whether that person will eventually take a share in the estate or not.
13. Section 51(2)(g) states as follows:
  - “ 51. Application for grant
    - (1) .....
    - (2) Every application shall include information as to—
      - (a) .....
      - (b) .....
      - (c) .....
      - (d) .....
      - (e) .....
      - (f) .....



- (g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased.”

14. In addition to that provision are rules 7(7) and 26 of the *Probate and Administration Rules*. They are specific that where the person petitioning has an equal or lesser right to those not applying, then he should notify them of the petition, which notification is evidenced by some document, either a consent or renunciation of right to apply. There are even mandatory or statutory forms prescribed for that under Rule 26(2). Rules 7(7) and 26(1)(2) provide as follows:

“(7) Where a person who is not a person in the order of preference set out in section 66 of the *Act* seeks a grant of administration intestate he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise its discretion under that section and shall also satisfy the court that every person having a prior preference to a grant by virtue of that section has—

- (a) renounced his right generally to apply for a grant; or
- (b) consented in writing to the making of the grant to the applicant; or
- (c) been issued with a citation calling upon him either to renounce such right or to apply for a grant.”

“26. Grants of letters of administration

- (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.”

15. The importance of making a full and frank disclosure in these applications is underscored in section 52 of the *Law of Succession Act*, which makes it an offence to willfully or recklessly make a statement which is false. The offender can see one jailed for a period not exceeding 1 year, or pay a fine, or both. Of course, there are not many prosecutions founded on section 52, largely because the police and the Director of Public Prosecutions view these as family matters where they need not be involved, but these are serious matters, in respect of which the police ought to get involved to punish those who misled the court.

16. Section 52 provides as follows:

“Any person who, in an application for representation, wilfully or recklessly makes a statement which is false in any material particular shall be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment.”



17. There is no doubt in my mind that the administrator did not comply with section 51(2)(g) and Rules 7(7) and 26(2), and his conduct exposes him to criminal prosecution under section 52. He did not disclose the daughters of the deceased. His application contained false information, for the impression that he created in the eyes of the court was that the deceased did not have daughters, or, put differently, that apart from the 4 who were disclosed, there were no other children. The effect of that non-disclosure was that those not disclosed would not be considered at distribution, and the shares due to them would then go to those disclosed, meaning that those not disclosed would be disinherited.
18. These non-compliances, culminating in disinheritance of the daughters, are enough ground for revocation of the grant herein. I need not say more or consider other issues. The grant herein was obtained through a flawed process, where the administrator concealed from and misrepresented facts to the court. Consequently, I do hereby make the following orders:
- (a) That the grant made herein on January 9, 2006, to Victor Kelonya Musasia, is hereby revoked;
  - (b) That as a consequence of the said revocation, the orders made on July 27, 2011, confirming the grant herein, are hereby set aside, and the certificate of confirmation of grant, dated May 4, 2014, is hereby cancelled;
  - (c) That I appoint Maudling Ambuga Musasia and Victor Kelonya Musasia, administrators of the estate of the deceased, and grant of letters of administration intestate shall issue to them accordingly;
  - (d) That the 2 shall apply for confirmation of their grant within 90 days, whereat they shall involve all the children of the deceased, both male and female;
  - (e) That the matter shall be mentioned after 90 days, for compliance and further directions;
  - (f) That each party shall bear their own costs; and
  - (g) That any party aggrieved has leave of 28 days to move the Court of Appeal, appropriately.
19. It is so ordered.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS 23<sup>RD</sup> DAY OF DECEMBER 2022**

**WM MUSYOKA**

**JUDGE**

**Erick Zalo, Court Assistant**

**Mr. Osango, instructed by Osango & Company, Advocates for the applicant.**

**Mr. Onyango, instructed by AI Onyango & Company, Advocates instructed by the administrator.**

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