



REPUBLIC OF KENYA



**In re Estate of Samuel Wahome Gatheru (Deceased) (Succession Cause 284 of 1996) [2022] KEHC 16662 (KLR) (20 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16662 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
SUCCESSION CAUSE 284 OF 1996  
FN MUCHEMI, J  
DECEMBER 20, 2022  
IN THE MATTER OF THE ESTATE OF SAMUEL WAHOME  
GATHERU (DECEASED)**

**BETWEEN**

**ALICE WANJIRA NJOROGE ..... 1<sup>ST</sup> APPLICANT  
REGINA WANJA WAHOME ..... 2<sup>ND</sup> APPLICANT  
GLADYS WANGUI WAHOME ..... 3<sup>RD</sup> APPLICANT  
JOHN NDURA WAHOME ..... 4<sup>TH</sup> APPLICANT**

**AND**

**FESTUS GATHERU WAHOME ..... 1<sup>ST</sup> RESPONDENT  
WACHIURI WAHOME ..... 2<sup>ND</sup> RESPONDENT  
JACKSON KINYORI WAHOME ..... 3<sup>RD</sup> RESPONDENT  
PATRICK MBOGO WAHOME ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

**Brief facts**

1. The parties herein are children of the deceased with a long-standing dispute on the distribution of two estates of the deceased and of their late mother. The deceased in this succession cause died on January 1, 1994 and was survived by his widow Rebecca Muthoni. The widow petitioned and was appointed the sole administrator of the estate. The grant was confirmed on July 21, 2000 and the entire estate was bequeathed the administrator solely.



2. Subsequently, the 4<sup>th</sup> applicant, 2<sup>nd</sup> & 3<sup>rd</sup> respondents filed summons for revocation of grant dated December 13, 2000 and the court revised the distribution of the estate whereas the widow and her sons benefited in the distribution.
3. Before the administration of the estate was concluded, the deceased's widow passed on. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents were appointed administrators in the estate of their late mother Rebecca Muthoni Succession Cause No 490 of 2009. At one time in this cause, the court directed that the two succession causes be consolidated and heard together. On application of some of the parties, the court later directed that the two succession causes be heard separately. On May 7, 2013 the court issued grant *de bonis non* to the respondents to proceed with the administration of the estate of the deceased herein from where their deceased administrator had reached.
4. The applicants seek revocation of the grant *de bonis non* issued on May 15, 2013 on grounds that their brothers the respondents herein had disinherited them in the estate of the deceased alleging discrimination on grounds of gender. This summons also sought for conservatory orders to restrain the respondents from disposing of the assets of the deceased in this cause namely Kagaari/Kanja/1863, Kikumuyu/Karia/17, Kikumuyu/Karia/68 and Plot No 1 Ngurumo which prayer was allowed but is now spent. The applicants also sought for orders for consolidation of this cause No 284 of 1996 with succession No 490 of 2009.
5. The 2<sup>nd</sup> & 3<sup>rd</sup> respondents filed grounds of opposition dated February 23, 2017 opposing this application. In addition, the 2<sup>nd</sup> respondent filed a replying affidavit dated February 18, 2014.

#### **The Applicants' Case**

6. The applicants state that before the demise of the deceased, he expressed his wishes that the female children would inherit land and in 1989, the applicant avers that he indicated that she builds her home on LR No Kikumuyu/Kiria/17 which she did.
7. The applicant states that their mother was originally the sole administrator of the estate of their father but the respondents filed an objection later to oppose the transfer of the estate to her contrary to the wishes of the deceased. The applicant further states that two of the petitioners at one time threatened to kill their mother and the three daughters if the respondents were given what their father bequeathed to them.
8. The applicant is apprehensive that if the respondents are left to administer the estate they will lock out all the female children of the deceased from inheriting their father's estate. The applicant further avers that the 4<sup>th</sup> applicant suffers from mental health and that the respondents will most likely exclude him from the distribution of the estate. The applicant avers that the ruling dated June 2, 2010 deliberated the issues as per their father's wishes and pray that it be adopted as an order of this court.

#### **The 2<sup>nd</sup> & 3<sup>rd</sup> Respondents' Case**

9. The 2<sup>nd</sup> & 3<sup>rd</sup> respondents contend that the matter is *res judicata* and the court is functus officio and therefore lacks jurisdiction to entertain the application. The 2<sup>nd</sup> & 3<sup>rd</sup> respondents further argue that this application does not disclose any reasonable cause of action and is fatally defective in that the issues raised are vague and ill-defined as it is not clear whether the applicants want to have the limited grant or the main grant revoked and be appointed as the administrators of the estate. The 2<sup>nd</sup> respondent contends that the applicants are seeking for the revocation of the grant issued on July 7, 2008 however they have not expressly stated so. The 2<sup>nd</sup> & 3<sup>rd</sup> respondents contend that the application filed is intended to frustrate the implementation of the orders of this court dated July 7, 2008.



10. The applicants filed a further affidavit and stated that they have not been approached to distribute the estate since the instant application is pending. Further, the applicants contend that they have been left out of the distribution of their father's estate and they therefore cannot sign any documents until the issue of distribution is determined.

### **The Applicant's Submissions**

11. The applicants submit that the deceased left them instructions that all the female children get 2.5 acres of Kirimukuyu/Kiria/17 and Plot Gaturi/Githimu/1583 which were and are still registered under their mother's name. Furthermore, the applicants contend that the respondents are of the view that the female children ought not to inherit from their father's estate. It is the applicants' view that they ought to be distributed amongst them since the male children were already allocated property. The applicants further rely on section 38 of the [Law of Succession Act](#) and article 27 of [the Constitution](#) and submit that the estate of the deceased ought to be distributed equally amongst all the children irrespective of gender or marital status. The applicants urge the court to revoke the grant issued on May 7, 2013 as allowing the same would amount to disinheriting the female children of the deceased. To support their submissions, they rely on the cases of *In the Estate of Juma Shivo alias Solomon Jumu (Deceased) v Julia Masitsa Lucuma* Succession Cause No. 696 of 2014 and [Peter Karumbi & 4 Others v Dr. Ann Nyokabi Nguithi & 3 Others](#) [2014] eKLR.

### **The 1<sup>st</sup> and 4<sup>th</sup> Respondents Submissions**

12. The 1<sup>st</sup> and 4<sup>th</sup> respondents support the application and submit that the daughters of the deceased were not involved in the instant succession cause after the demise of their mother. It is contended that the estate was distributed amongst the sons and the widow of the deceased. The 1<sup>st</sup> and 4<sup>th</sup> respondents rely on the case of [Wilson Kaberia Nkunja v The Magistrate and Judges Vetting Board & Others](#) [2016] eKLR and submit that the applicants' rights stand to be infringed if the estate is distributed without involving the female children.
13. The 1<sup>st</sup> and 4<sup>th</sup> respondents rely on section 76 of the [Law of Succession Act](#) and the case of [Re Estate of Prisca Ong'ayo Nande \(Deceased\)](#) [2020] eKLR and support the revocation of grant in the interests of justice. They further contend that there was concealment of facts by not introducing the applicants as beneficiaries to the estate rendering the grant ineffective. The 1<sup>st</sup> and 4<sup>th</sup> respondents further submit that the 2<sup>nd</sup> respondent is keen to disinherit the applicants

### **The 2<sup>nd</sup> & 3<sup>rd</sup> Respondents Submissions**

14. The 2<sup>nd</sup> & 3<sup>rd</sup> respondents contend that based on the way the application is framed, it is one of review of the grant arguing that this court lacks jurisdiction to review its orders dated July 7, 2008. It is further submitted that reviewing the orders granted on May 7, 2013 will be an exercise in futility as the revocation of the grant will not confer any benefit upon the applicants. The 2<sup>nd</sup> & 3<sup>rd</sup> respondents further argue that the limited grant is meant to enable enforcement of orders of the court issued on July 7, 2008 and revoking it will only frustrate enforcement of the orders.
15. The 2<sup>nd</sup> & 3<sup>rd</sup> respondents submit that the court lacks jurisdiction by virtue of the matter being res judicata and this court being functus officio. To support their contentions, the 2<sup>nd</sup> & 3<sup>rd</sup> respondents rely on the cases of [Owners of Motor Vessel "Lilian S" v Caltex Oil \(Kenya\) Ltd ; Republic ex parte Japheth Noti Charo v Malindi Land and Environment Court Justice Angote](#) [2014] eKLR and [Raila Odinga & 2 Others v IEBC & 3 Others](#) (2013) eKLR. The 2<sup>nd</sup> & 3<sup>rd</sup> respondents argue that that the court's jurisdiction was limited to distributing the estate and it can only enforce its orders and that is



why it issued a limited grant on May 7, 2013. In the alternative, the 2<sup>nd</sup> & 3<sup>rd</sup> respondents argue that the applicants have not met the principles set out under Order 45 of the *Civil Procedure Rules* warranting the grant of the orders of review. They further argue that the applicants are asking the court to sit on appeal on its own orders

16. The 2<sup>nd</sup> & 3<sup>rd</sup> respondents submit that there was no fraud or concealment of facts when the respondents obtained the grant de bonis non. They submit that the court process in obtaining the two grants was free, fair and all inclusive with all the applicants present and represented by advocates. The 2<sup>nd</sup> & 3<sup>rd</sup> respondents further state that the applicants have not produced any evidence to prove fraud or concealment of facts for the application to succeed pursuant to Section 76 (b) and Rule 44 of the *Law of Succession Act*. They further argue that the applicants are preventing the respondents from enjoying the fruits of the ruling dated July 7, 2008 and at the same time, the applicants do not want to proceed to the court of appeal to challenge the distribution as per the orders dated July 7, 2008.
17. The 2<sup>nd</sup> & 3<sup>rd</sup> respondents submit that the issue of consolidation is res judicata as the court held that the two estates are distinct from each other. They contend that the applicants ought to proceed on appeal on the issue and not bring it in the application as they have. The respondents further argue that the 2.5 acres out of land parcel Kirimukuyu/Kiria/17 belongs to their mother's estate and should be litigated upon in Succession Cause No 490 of 2009 which is the estate of their mother.
18. The respondent raised the issue of want of jurisdiction in reviewing the orders Wakiaga J in regard to the prayer sought herein for consolidating the two succession files. It was argued that interfering with the order of the judge who ruled that the two succession causes are distinct and ought to be heard separately. The principle of res judicata was involved in the matter. I am in agreement with the respondents that the applicants ought to have appealed against the said order to the Court of Appeal. I have no intention of interfering with the said order which was made by a competent court.
19. As far as the issue of revocation of grant is concerned, this court has jurisdiction under Section 76 of the Succession Act and will proceed to delve into the merits of the summons for revocation of grant.
20. Section 76 of the *Law of Succession Act* gives the court the powers to revoke a grant provided the conditions stipulated therein have been met. It states that:-

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.
21. The applicants contend that the grant ought to be revoked because it was obtained fraudulently and by concealment of material facts. To support their arguments, the 1<sup>st</sup> and 4<sup>th</sup> respondents contend that the 2<sup>nd</sup> respondent did not introduce the applicants as beneficiaries to the estate and hereby concealed those material facts. The 2<sup>nd</sup> respondent on the other hand contends that there was no fraud or concealment of facts while procuring the grant. The proceedings were all inclusive and the applicants were present throughout with their counsels. I have perused the court record and noted that the grant issued on May 7, 2013 is a grant “de bonis non” limited to completing the administration of the estate pursuant to the orders of July 7, 2008 which distributed the estate as follows:-
  - a) Kirimukuyu/Kiria/17 – 2.5 acres to Rebecca Muthoni
  - b) Kirimukuyu/Kiria/17 – 1.1 acres to Patrick Mbogo Balance of acres in Kirimukuyu/Kiria/17 and parcel No Kagaaria/Kanja/1863 to be shared equally between Wachiuri Wahome, Mary Waithiegeni, Festus Gatheru, Jackson Kinyori and John Ndura
  - c) Kirimukuyu/Kiria/68 – Patrick Mbogo absolutely
  - d) Kirimukuyu/Kiria/Plot No 1- Rebecca Muthoni absolutely.
22. The court expressly stated that it was guided by the distribution suggested in the family meeting held on September 17, 2000. Upon perusal of the said minutes, the record does not show that the applicants attended the said meeting. Their respective names are missing from the minutes and neither are they listed alongside the respondents as beneficiaries in the estate. It is very clear that the only female child that is on the list was single at the time, a fact that is admitted by the 2<sup>nd</sup> respondent. It is clear that the respondents left out the applicants from the family meeting as shown by the attendance list. The applicants were not listed as beneficiaries of the estate. The court therefore was made to believe that all the beneficiaries of the deceased were as listed in the minutes dated September 17, 2000 and thus distributed the property as per the agreement reached during the meeting that excluded the applicants. The omission of the applicants from list of beneficiaries and the failure to invite them for the family meeting was designed to disinherit them in my view. Although the 2<sup>nd</sup> and 3<sup>rd</sup> respondents claim that the applicants were present in court and that they were represented by their advocates, the record of the court does not support the said averment.
23. Following the death of the original administrator, the children of the deceased ought to have agreed on who among them was to take over the administration of the estate and then approach the court for its action. In this case, the respondents took over as administrators without the consent or the involvement of the applicants who are rightful heirs of their deceased father’s estate.
24. When the respondents appeared before the court seeking for the grant de bonis non and in pursuit of the distribution of the estate, they did not disclose to the court that there were other beneficiaries who existed and who ought to have been involved in the distribution. The respondents were under an obligation to notify their sisters whether married or not about the application for the grant and get them participate in the distribution of the estate which they failed to do. This is confirmed by the 1<sup>st</sup> and the 4<sup>th</sup> respondents who supported this application.



25. Section 76 of the Act empowers the court to revoke the grant on its motion or on application of any party. Such an intervention by the court must be aimed at achieving fairness and justice for all the parties involved.
26. Having analysed the evidence, the facts and the submissions for the parties in this application, I am of the considered view that the applicants have established that the grant de bonis was obtained by the respondents by concealment of facts that were material to the case. As for the grant made to Rebecca Muthoni Wahome and confirmed in her favour, it is my considered view that it became inoperative upon her death and could not be used to distribute the estate of the deceased.
27. Consequently, I allow the summons revocation of grant and make the following orders:-
- a) That the grant *de bonis non* issued to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondent's is hereby revoked.
  - b) That the grant issued to Rebecca Muthoni Wahome and confirmed on July 21, 2000 is hereby revoked by this court on its own motion.
  - c) That any titles, if any created by the two revoked grants are null and void and shall be cancelled forthwith and all the assets of the estate shall revert to the name of the deceased.
  - d) The following beneficiaries are hereby appointed as administrators of the deceased's estate to represent the interests of the other beneficiaries
    - i. Gladys Wangari Wahome
    - ii. Wachiuri Wahome
    - iii. Festus Gatheru Wahome
  - e) The administrators jointly or any of them are hereby directed to file summons for confirmation of grant within forty-five (45) days.
28. Each party to meet their own costs.
29. It is hereby so ordered.

**DATED AND SIGNED AT NYERI THIS 20<sup>TH</sup> DAY OF DECEMBER, 2022.**

**F. MUCHEMI**

**JUDGE**

**Ruling delivered through video link this 20<sup>th</sup> day of December, 2022**

