



**In re Estate of TNK (Deceased) (Succession Cause 1414 of 2017)  
[2022] KEHC 16379 (KLR) (Family) (16 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16379 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**FAMILY**

**SUCCESSION CAUSE 1414 OF 2017**

**MA ODERO, J**

**DECEMBER 16, 2022**

**BETWEEN**

**MWT ..... APPLICANT**

**AND**

**PKN ..... RESPONDENT**

**JUDGMENT**

1. Before this court for determination is the summons for Revocation of Grant of Probate dated August 26, 2021 by which the Applicant MWT seeks the following orders:-
  - ' 1. Spent
  2. Spent
  3. That the confirmed grant of letters of administration issued to PKN on 12<sup>th</sup> March be revoked.
  4. That all subsequent acts effected on the strength of the said grant be set aside and the court be pleased to issue a fresh grant of representation.
  5. That in the alternative, a reasonable provision be made for the Applicant herein out of the deceased's net estate.
  6. That the costs of this application be provided for.'
2. The summons which was premised upon section 26, section 29 and section 76 of the *Law of Succession Act*, Cap 160 Law of Kenya, was supported by the Affidavit of even date and the Further Affidavit dated November 24, 2021 sworn by the Applicant.



3. The Respondent PKN (as executor of the estate of the Deceased) opposed the summons through his Replying Affidavit dated October 12, 2021 and his supplementary Affidavit dated May 10, 2022.
4. The summons was canvassed by way of viva voce evidence in open court. Each side called one (1) witness in support of their case.

### Background

5. This Succession Cause relates to the estate of TNK(hereinafter ‘the Deceased’) who died testate on March 1, 2016 at the Aga Khan Hospital in Nairobi. A copy of the Death Certificate Serial Number xxxx is annexed to the summons for Grant of Probate dated November 14, 2017. The Deceased left behind a written Will dated July 3, 2001 in which he detailed the manner in which he wished his estate be distributed.
6. The Deceased was survived by the following persons-
  - (i) MWT – wife
  - (ii) LWN – Daughter (Deceased)
  - (iii) SWN– Daughter – (Deceased)
  - (iv) JWK– Daughter
  - (v) JNN– 2<sup>nd</sup> wife
  - (vi) PKN – son
  - (vii) CWK– Daughter
  - (viii) VKN– son (Deceased)
7. The assets left behind by the Deceased as indicated in the Petition for Grant of Probate dated November 14, 2017 included the following

#### Assets

Assets	Estimated value (Kshs)
Ruiru Township/xx	30,000,000.00
Ruiru West Block 1 (Githunguri) xx	3,000,000.00
xxxx Mercedes	600,000.00
36 EABL shares	8,000.00
xxxx	250,000.00
I share in Wakulima Ruiru Stores Ltd	20.00
Total	33,858,020.00

#### LIABILITIES



Liabilities	Value (Kshs)
Nil	0.00
	Total Net Assets 33,858,020.00

8. In his written Will the Deceased appointed his two (2) sons PKN and VKN as Executors and Trustees. The said Executors filed in court the summons for Grant of Probate dated November 14, 2017. A Grant was duly issued to the two on March 12, 2018. Following the demise of the 2<sup>nd</sup> Executor VKN the Grant was rectified and re-issued on July 28, 2020 in the name of the sole surviving Executor PKN.
9. On August 26, 2021 the Applicant who is the 1<sup>st</sup> wife of the Deceased filed this summons seeking to have the Grant revoked.

### **The Evidence**

10. The Applicant relied on her Affidavit dated August 26, 2021. She states that she was the 1<sup>st</sup> widow of the Deceased. That she got married to the Deceased at Riara Catholic Church in [particulars withheld] on August 9, 1960. A copy of the marriage certificate serial Number xxxx is annexed to the Applicants Supporting Affidavit.
11. The Applicant told the court that she and the Deceased bore three (3) daughters together but unfortunately two (2) of their daughters are now deceased. That the only surviving child of their union is JWK.
12. The Applicant concedes that the Deceased died testate having left a written will dated July 3, 2002. She confirms that the will was read out to the family (herself included) by the Advocates Messrs Kaplan & Stratton Advocates. The Applicant claims that the Deceased made no provisions for her in his written will and laments that she was disinherited and is now reduced to living like a pauper yet the estate has assets. The Applicant prays that the court make orders for reasonable provisions made to her out of the estate of the Deceased.
13. The Applicant further alleges that certain properties belonging to the Deceased were omitted from the list of assets annexed to the Petition for Grant of Probate. Specifically the Applicant claims that the properties known as WH in Ruiru Town and LR No xxxx (K Estate) all of which belonged to the Deceased are missing from the list of Assets.
14. The Applicant complains that as the only lawful wife of the Deceased, she has been discriminated against. She denies the allegations by the Respondent that she and the Deceased had been separated for forty three (43) years prior to his death. The Applicant told the court that the Deceased filed a petition at the Milimani Court seeking to divorce her but states that the said Petition was dismissed by the court. She states that the distribution of the estate is inequitable. She therefore prays that the Grant issued to the Respondent be revoked.
15. As stated earlier the summons was opposed. The Respondent PKN told the court that he is the sole surviving Executor of the Deceased's will dated July 3, 2001.
16. The Respondent concedes that the Applicant was a wife to the Deceased but states that the two had been separated for approximately forty three (43) years. He avers that the Applicant and her daughters JK were both present when the written Will was read out to the family on March 15, 2016.



17. The Respondent denies that any of the Deceased's properties were omitted from the list of Assets. He states that the Deceased gifted out most of his properties during his lifetime and that the Will dealt primarily with his residuary estate which was to be held in trust absolutely for the 2<sup>nd</sup> wife of the Deceased JNN whom he married under Kikuyu Customary Law.
18. The Respondent concludes that the present summons for revocation of Grant is will advised and ill conceived. That the same does not meet the threshold provided by section 76 of the Law of Succession Act. He prays that in the interest of justice and fairness this summons for revocation of Grant be dismissed.

### **Analysis and Determination**

19. I have carefully considered this summons for revocation of Grant of Probate, the Reply filed thereto, the evidence adduced by the parties as well as the written submissions filed. The two issues which arise for determination are as follows:-
  - (i) Whether there exist sufficient Grounds to revoke the Grant issued on March 12, 2018 as rectified on July 28, 2020.
  - (ii) Whether the Applicant is entitled to reasonable provision from the estate.

#### **i. Revocation of Grant**

20. The grounds upon which a Grant may be revoked are set out in section 76 of the Law of Succession Act 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.'

21. This provision of the law was expounded upon by the court in the case of *Re Estate Of Prisca Ong'aya Nande (Deceased) 2020 eKLR* where it was held as follows: -

' A grant of letters of administration may be revoked on three general grounds. The first is where the process of obtaining the grant was attended by problems. The first would be where the process was defective, either because some mandatory procedural step was omitted, or the persons applying for representation was not competent or suitable for appointment, or the deceased died testate having made a valid will and then a grant or letters of administration intestate was made instead of a grant of probate, or vice versa. It could also be that the process was marred by fraud and misrepresentation or concealment of matter, such as where some survivors are not disclosed or the Applicant lies that he is a survivor when he is not, among other reasons. The second general ground is where the grant was obtained procedurally, but the administrator, thereafter, got into problems with the exercise of administration, such as where he fails to apply for confirmation of grant within the time allowed, or he fails to proceed diligently with administration, or fails to render accounts as and when required. The third general ground is where the grant has become useless and inoperative following subsequent circumstance, such as where a sole administrator dies leaving behind no administrator to carry on the exercise, or where the sole administrator loses the soundness of his mind for whatever reason or even becomes physically infirm to an extent of being unable to carry out his duties as administrator, or the sole administrator is adjudged bankrupt and, therefore becomes unqualified to hold any office of trust.'

22. The Applicant contends that the proceedings for obtaining the Grant of Probate as well as the confirmed Grant were defective in substance as not all the properties of the Deceased were listed in the Petition. The Applicant states that she and the Deceased jointly acquired the following properties none of which was listed in the Petition.

- a. LR No xxx (Karugu Estate)
- b. Ruiru/Ruiru West Block xxx
- c. LR No Kiambaa/Kanunga/xxx
- d. Nairobi Block xxx
- e. LR No xxx Garissa Road.

23. Firstly, the Applicant has not tendered before the court any evidence that the above mentioned properties were infact registered in the name of the Deceased.

24. Secondly, the Respondent explained that the Will of the Deceased dealt mainly with his 'residual' estate as the Deceased had already gifted away most of his properties during his lifetime. The Respondent has provided a reasonable explanation regarding the status of each of the listed properties. In paragraph (8) of his Replying Affidavit dated October 12, 2021 the Respondent stated as follows:-

- ' a) LR No xxx Karugu Estate – The property was purchased solely by the deceased through a mortgage obtained in 1973 from National Bank of Kenya.



Subsequently the deceased transferred the property to himself and NN by the indenture dated July 27, 2003. The property is currently in the name of JNN. (Attached and marked as PKN-3 is the mortgage documents and the Indenture dated July 27, 2003).

- b. Ruiru/Ruiru West Block xxx – I am not aware of such property. However, there is Ruiru West Block xxx which is the subject of an ownership dispute in Milimani ELC No 616 of 2005.
- c. LR Kiambaa/Kanunga/xxx – the property was sub-divided into Kiambu/Kanunga/xxx and xxx and gifted to the Applicant and her family during the deceased’s lifetime, and as captured in the Deceased’s Will.
- d. Nairobi Block xxxx – I am aware that it was sold in 2002 during the deceased’s lifetime.
- e. LR No xxxx – the property was purchased in 1977 and jointly registered to the deceased and JNN  
(Attached and marked as PKN-4 is a copy of the title over LR No xxxx).
- f. LR No xxxx Garissa Road – The property was acquired in 1982 and registered under the names of KK and PM as trustees of 20 other shareholders. The deceased has shares equivalent to 120 acres. As stated in his will he intended to gift it during his lifetime, which he did. The 1<sup>st</sup> individual title was registered in 2013 as Gatuanya/Ngiloba xxxx in the names of PKN, VKN and JNN. The property was never registered under the deceased’s name.’

25. In the circumstances, I am not persuaded that there was a deliberate concealment of the assets comprising the estate of the Deceased. As such, the proceedings to obtain the grant cannot be said to have been defective in nature.

**(ii) Reasonable provision**

- 26. The Applicant told the court that she got married to the Deceased under Statutory Law on August 6, 1960. The annexed copy of their marriage certificate (Annexure ‘MWT 1’) is proof of this marriage. The Respondent concedes that the Applicant was a wife to the Deceased with whom the Deceased bore three (3) daughters.
- 27. Whilst the Respondent claims that the Deceased and the Applicant had been separated for forty three (43) years the Applicant denies this and insists that their marriage was still subsisting at the time when the Deceased died.
- 28. In any event no evidence was tendered by any party to show that the marriage between the Deceased and the Applicant had ever been dissolved. The Deceased himself at Paragraph 7 of his written Will acknowledge the Applicant as his ‘wife’. Accordingly, I find that the Applicant is a wife (widow) of the Deceased and is therefore a dependant under section 29 of the Law of Succession Act.
- 29. The Applicant claims that the Deceased disinherited her in his written Will as no provision was made for her. She laments that she is now living like a pauper.
- 30. The Respondent disputes the Applicants claim that no provision was made to her in the written Will. He cites Paragraph 7 of the will dated July 3, 2001 which provides as follows:-

‘ I Declare as follows:-

- a. At the time of making this will, I am presently married to Mary Wanjiku (my ‘first wife’) from whom I separated in 1973 and who I am presently in the



process of divorcing. I have two surviving adult daughters from such marriage namely LWN and JWK. I am not making any provision for such persons in my Will because I consider that I have fully discharged all of my obligations to them during my lifetime. For instance, I made a gift of 4 acres of land originally known as LR No Kiambaa/Kanunga/xxx to my first wife. The land was in fact sub-divided into two plots being numbered Kiambaa/Kanunga/xxx and xxx, the former plot was transferred to my first wife's father LMF in or about 1974 who subsequently gifted the land to my first wife in or about 1992. I transferred the latter plot directly to my first wife in or about 1974. Further, subject to that and to what is stated below concerning the assistance I have given to the daughters of my marriage to my first wife, since we separated my first wife has not been dependant upon me in any way. So far as my said daughters are concerned, I have supported them by assisting with the costs of their maintenance, education and benefit including their accommodation from time to time and the said JWK is now married.

- b. I am not making further provision for said daughter CWN save as provided for in clause 4 (c) hereof (or to the extent that such plot of land is given to her during my lifetime) because she is married and is adequately provided for and supported by her husband.'

31. From this paragraph, it is clear that the Deceased did recognize the Applicant in his Will and did in fact make provisions for her. As indicated in the Will this property known as Kiambaa/Kanunga/xxx was divided into two being Plots xxx and xxx. Parcel No Kiambu/Kanunga/xxx is currently registered in the name of the Applicant having been transferred to her on December 2, 1975. A copy of the Green Card (Annexure PKN-5 to the Supplementary Affidavit dated May 10, 2022) is proof of this fact. Indeed, under cross-examination the Applicant admits that:-

' The Green card indicates that Plot xxx was registered in my name on December 2, 1975.'

32. With regard to Plot No Kiambu/Kanunga/xxx the same was granted to the Applicants daughter JWK and TN (the Applicants grandson) on November 23, 2012. A copy of the Green Card appears as Annexure PKN-6 to the same Supplementary Affidavit.

33. Therefore, the claim by the Applicant that she was not provided for by the Deceased is simply not true. The Applicant argues that Plot xxx was in fact left by the Deceased to her late father one LMF. That it was her late father who transferred the land to her and not the Deceased. However, the Deceased has explained in his Will that he transferred Plot xxx to the father of the Applicant who in turn transferred the same to the Applicant.

34. The Applicant therefore did receive a share of the estate of the Deceased and her claim for reasonable provision has no basis.

The principle of Testamentary freedom' is a sacrosanct in law. Courts are reluctant to interfere with and/or tinker with a written will except in very exceptional circumstances. No exceptional circumstances have been shown to exist in this case.

35. Based on the foregoing I find no merit in this summons for revocation of Grant. The same is dismissed in its entirety. Each party to bear its own costs.

**DATED IN NAIROBI THIS 16<sup>TH</sup> DAY OF DECEMBER, 2022.**

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**MAUREEN A. ODERO**

**JUDGE**

