



In re Estate of Timothy Mbondo Ndolo(Deceased) Mwangangi Ndolo (Succession Cause 26 of 1984) [2021] KEHC 265 (KLR) (25 November 2021) (Ruling)

Neutral citation: [2021] KEHC 265 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE 26 OF 1984
MW MUIGAI, J
NOVEMBER 25, 2021**

RULING

1. Timothy Mbondo Ndolo died on 11th November 1984.
2. A Certificate of grant was issued to 4th November 1994 to Rodah Mutono Mbondo, Tabitha Mbondo and Daniel Ngao Ndolo
3. The file was reconstructed in 2002 as the original file could not be traced and an order for reconstruction of the file was issued by Nambuye .J (as she then was).
4. On 6th of February 2009, Mwangangi Ndolo filed a Power of Attorney appointing Titus M. Mwangangi to represent him in Succession Cause Number 26 of 1984 and Misc. Civil Suit Number 206 of 2008. Titus Mutua Mwangangi is the son of Mwangangi Ndolo is the objector the administrator of the estate of the estate of Mwangangi Ndolo.
5. Lenaola J (as he then was) heard the matter on 9th of February 2009 and directed that the Power of Attorney be registered for hearing on 23rd of March 2009.
6. On 27th of September 2019, Titus Mutua Mwangangi filed summons dated 26th September 2019 for substitution of Mwangangi Ndolo with his name which was allowed and a grant of letters of administration intestate issued on 22nd of January 2020 by Kemei J. on 22nd January 2020. This was issued to Titus Mutua Mwangangi only.
7. On 10.2.2021 the court gave the following orders the grant issued on 22.01.2020 is hereby revoked as it was issued in error and the grant issued on 16.2.1988 remains in force.
8. On 17.05.21 when the application dated 15.02.2021 and amended on 4.5.2021 came for hearing before Kemei J, parties agreed to dispose it off by way of written submissions.
9. The Petitioners despite service and time have not filed any document in response to the summons.

AMENDED SUMMONS FOR REVOCATION OF GRANT



The Objector/Applicant filed Amended Summons dated 4.5. 2021 and filed on 5.05.2021, the Objector/Applicant seeks the following orders;

- 1) Grant of letters of Administration dated 16.2.1988 and confirmed in 8.11.1994 is revoked and/or annulled.
- 2A) A prohibitory order is issued against the Respondents by themselves, their agents and/or servants restraining them from selling, transferring, sharing and dealing in any manner with Land Parcel No. MUTHETHENI/ KIONYWENI/77 pending the hearing and determination of the Application interparties.
- 2B) A prohibitory order be issued against the Respondents themselves, their agents and/or servants restraining them from selling, transferring, sharing and dealing in any manner with Land Parcel No. MUTHETHENI/KIONYWENI/77 pending the hearing and determination of the main cause.
- 3A. All transfers, Registration and Title Deeds effected by use of the said grants be cancelled and/or annulled.
- 4) The administrators do file an inventory accounting for all assets of the deceased.
- 5) Costs of the Application be provided for.

The Application is supported by the affidavit of Titus Mutua Mwangangi dated 4.05.2021 on the grounds that;

- a. His grandfather had two wives and three sons, Mbondo Ndolo, Mwangangi Ndolo and Kyule Ndolo.
- b. He also had left parcels of land, livestock and a shop and that during a clan meeting held on 22nd of November 1981, Parcel no MUTHETHENI/KIOYWENI/77 was allocated to his father, Mwangangi Ndolo. The shop was to be shared jointly between his father and Mbondo Ndolo, MUTHETHENI/KIOYWENI/63 was to be given to Mbondo Ndolo even though it was purchased jointly. The 2nd Respondent settled on it.
- c. A meeting was called amongst Rhoda Mbondo, Tabitha Mbondo and Ngao Mbondo without his father's knowledge and distributed MUTHETHENI/KIOYWENI/77 among themselves and attempts to cultivate his garden were met with death threats from the Respondent.
- d. The proceedings to obtain the grant were defective in substance in that the grant was issued by the lower court while confirmation was done by the High Court
- e. The grant was obtained fraudulently by making a false statement or by concealment of material information from the court. He opines that the transfer forms marked TMM3 were never executed by his father neither did he petition the court for letters of administration. Further, the grant that was issued on 16th of February 1988 in which Rhoda Mbondo, Tabitha Mbondo and Daniel Mbondo were appointed as administrators could not be traced. That since the agreement of 1981, nothing has changed.



- f. The Kenya Gazette shows the Applicant was a petitioner whilst the grant is devoid of his name. It shows Rhoda Mbondo, Tabitha Mbondo, Mwangangi Ndolo and Daniel Mbondo as administrators.
- g. The petition was filed in the lower court while the grant was confirmed in the High Court.
- h. The Respondents did not declare all the assets of the deceased by omitting MUTHETHENI/KIONYWENI/63 as well as family land held by Kyule Ndolo. Further, that parcel no MUTHETHENI/KIONYWENI/77 was bought by the Applicant's father alone.
- i. When his father conducted a search, he found that MUTHETHENI/KIONYWENI/77 had been distributed vide Succession Cause no 26 of 1984 and the transfer by transmission forms were not properly executed by all executors/ Administrators
- j. The Respondents did not produce an inventory or account of administration as required under section 83 of the Law of Succession Act.

OBJECTOR/APPLICANT SUBMISSIONS

10. The Objector filed submissions dated 26.05.2021 the grant should be revoked, while relying on Section 76 of the *Law of Succession Act, Cap 160* of the Laws of Kenya, he submitted that the gazette notice and the grant of letters of administration intestate was processed and granted in the Lower Court while the certificate of confirmation of grant in the high court as indicated by annexures TMM-3, TMM-4 and TMM-5 respectively. He submitted that his father never signed any of the pleadings filed, neither did he sign the transfer by transmission forms.
11. In addition, that the deceased owned MUTHETHENI/ KIONYWENI/63, a shop in Kionyweni Market, a parcel of land at MUTHWANI, KAANI AND MUTHETHENI/ KIONYWENI/12. MUTHETHETHENI/ KIONYWENU/77 was acquired by the objector and the same he opines was included in the estate to disinherit him and this prohibitory orders were necessary.
12. He stated that the grant was thus obtained fraudulently by means of untrue allegations of fact hence necessitating the revocation and/or annulment of the grant. He relied on the case of *NELSON MUNGUTI NGUYA VS JOSEPH MUTUA & 2 OTHERS* (2017).
13. As to whether the transfers, registration and title deeds effected using the grant should be recalled and/ or cancelled, he submitted in the affirmative and relied on Section 47 of the Law of Succession Act that provides;

The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient

He also relied on Rule 73 of the *Probate & Administration Rules* that provides that;

Nothing in this rule shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.



14. He submitted that Section 93 (1) of the Law of Succession Act provides that

All transfers of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act

15. However he referred the court to the case of *Adrian Nyamu Kiungu vs Elizabeth Karimi Kiungu and another [2014] eKLR* stated that this section does not protect and validate a person by whom representation was obtained fraudulently. The same was reiterated *Monica Adhiambo vs Maurice Odera Koko [2016] eKLR* where the same was reiterated and the court further stated that the underlying objective of the Law of Succession Act is to ensure that the beneficiaries of the deceased person inherit property.

16. The objector/Applicant also referred the court to *Re Estate of Angelo Titita Kilungu (DCD) [2020] Eklr* where Odunga J directed that all title deeds and transfers effected by use of the said instruments be recalled and cancelled.

17. As regards whether the administrators should account for the deceased properties, he placed reliance on Section 83(e) of the Law of Succession Act that provides for the duties of administrators to include;

within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;

18. That in the case of Nelson Munguti Nguya case where the petitioner was ordered to give an account of all dealings on the property.

19. As regards costs, he opined that the same was to be given at the discretion of the court and placed reliance on rule 69 of the Probate and Administration Rules.

PETITIONERS' SUBMISSIONS

20. The 1st Administrator/Protestor did not file any submissions despite directions to file the same granted on 16.6.2021.

DETERMINATION

21. The Court considered the pleadings and submissions by the Objector /Applicant only issue for determination is whether the Applicant is entitled to the orders sought of revocation and/or annulment of grant.

Section 76 of the Law of Succession Act provides 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 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.

22. *In the matter of the Estate of L A K – (Deceased) [2014] eKLR*, the Court held that;

Revocation of grants is governed by Section 76 of the Law of Succession Act. The relevant portions of Section 76 are paragraphs (a), (b) and (c) since the issues raised relate to the process of the making of a grant. A grant may be revoked where the proceedings leading up to its making were defective, or were attended by fraud and concealment of important matter, or was obtained by an untrue allegation of a fact essential to the point.

- 23. On 16th of February 1988, the Senior Resident Magistrate Court at Machakos issued grant of letters of Administration intestate CITATION HCRM. 26 OF 1984 to RODAH MUTONO MBONDO, TABITHA MBONDO AND DANIEL NGAO NDOLO which were allegedly confirmed by High Court at Machakos and issued on 8th November 1994 and issued to RODAH MUTONO MBONDO, TABITHA MBONDO AND MWANGANGI NDOLO
- 24. The Gazette notice referred to being Gazette notice no 3041 of 26th July 1985 refers to the Senior Resident Magistrate court citation and names the administrators as RODAH MUTONO MBONDO, TABITHA MBONDO MWANGANGI NDOLO AND DANIEL NGAO NDOLO.
- 25. The transmission attached indicated that it is for 2 parcels of land, MUTHETHENI/ KIONYWENI/12 & 77 yet each plot would ideally have its own forms.
- 26. Worthy of note is that a similar application was filed on 21st of February 2002 around the time this file disappeared.
- 27. The Court finds from the Court record, that the parties were irregularly engaged in filing parallel matters/suits in both High Court and Senior Resident Magistrate’s Court in Machakos. Both matters had/have similar Succession Cause 26 of 1984 in both Courts as shown by Exhibit 3 & Exhibit 4 and Kenya Gazette of 26th July 1985 which gazetted the SRM’s Court Petition for the Estate of Timothy Mbondo Ndolo filed by Rodah Mutono Mbondo, Tabitha Mbondo, Mwangangi Ndolo & Daniel Ngao Ndolo all as administrators of the deceased’s estate.
- 28. The letters of administration were granted on 16th February 1988 as shown by Exhibit 3. The Certificate of Confirmation of a Grant was also issued in the High Court on 8th November 1994 again for the estate of Timothy Mbondo Ndolo issued to Rodah Mutono Mbondo, Tabitha Mbondo, Mwangangi Ndolo and distributed the suit properties; Muthetheni/Kionyweni/77 & Muthetheni/ Kionyweni/12 between the administrators equally.



29. The Applicant/Objector, Titus Mutua Mwangangi, son of Mwangangi Ndolo, one of the administrators of his grandfather's estate Timothy Mbondo Ndolo learnt that between 13th-14th October, 2001 when the administrators held a family meeting they shared land parcel Muthetheni/Kionyweni/77 which belonged to his late father. The Applicant's father, went to Land Registry, and made a search which disclosed that the suit property. Muthetheni/Kionyweni/77 was distributed vide Succession Cause No 26 of 1984 and found the transfer by transmission forms and they were not properly attested and/or executed by all administrators as shown by documents annexed as Exhibit 2a & b. These Transmission Forms were signed by the Senior Magistrate Court on 16th February 1988 as confirmed by the matter that was before the Magistrates Court and the petition for grant of letters of administration was gazetted on 26th July 1985 and grant was issued to the administrators by Rodah Mutono Mbondo, Tabitha Mbondo, Mwangangi Ndolo & Daniel Ngao Ndolo. The Applicant's father, Mwangangi Ndolo, did not sign any of the documents. Thereafter, the Court file went missing until reconstruction of the Court file.
30. The grant of letters of administration intestate were granted to Rodah Mutono Mbondo, Tabitha Mbondo, Mwangangi Ndolo & Daniel Ngao Ndolo in Succession cause 26 of 1984 in SRM's Court. The grant was confirmed in the High Court the Administrators were Rhoda Mutono Mbondo, Tabitha Mbondo & Mwangangi Ndolo and his father was given ½ Muthetheni/Kionyweni/77 & Muthetheni/Kionyweni/12. His late father never applied for grant or confirmed grant of the estate of the deceased, his grandfather, Timothy Mbondo Ndolo.
31. The grant was obtained in the Magistrates' Court and confirmed in the High Court which was irregular as there was no order of transfer of the matter from one Court to another. Secondly, it seems that there parallel proceedings over the same estate in both the Magistrate's Court and High Court which is procedurally irregular. The conduct amounted to fraud as parties withheld crucial information and failed to disclose to each Court that a similar matter was in the other Court. Thirdly, it turns out that the administrators listed in both the grant and confirmed grant are not identical; in the grant there is Daniel Ngao Mbondo and in the confirmed grant he is left out and no explanation is given.
32. The Objector/Applicant annexed to the application Minutes of clan/ family meeting of 22nd November, 1981 that outlined how the assets of the estates of Mbondo Ndolo and Mwangangi Ndolo would be distributed. This agreement was not disclosed in the family meeting of 13th/14th October 2001 or in Court as the proposed mode of distribution was considered in the confirmed grant. The distribution included Muthetheni/Kionyweni/77 which belonged to Mwangangi Ndolo exclusively as he purchased the land and excluded Muthetheni/Kionyweni/63, family land held by Kyule Ndolo.
33. This act of omission by administrators was contrary to Section 71 of Law of Succession Act proviso; where it provides;

Provided that in cases of intestacy, the grant of letters of administration shall not be confirmed until the Court is satisfied as to respective identities and shares of all persons beneficially entitled; and when confirmed the grant shall specify all such persons and their respective shares.

BETTY SATION KISOSO V PRISCILLA JERUTO KISOSO, *SUCCESSION CAUSE NO. 2119 OF 2010*, the Court rendered itself as follows:

[24] On the issue of confirmation of grant, the circumstances that can lead to the revocation of grant have been set out in Section 76 Law of Succession. For a grant to be revoked either on the application of an interested party or on the court's own motion there must be evidence that the proceedings to obtain the



grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.

MARTIN MAINA NDEGWA V CHARLES THIONGO KANYORO & 3 OTHERS, SUCCESSION CAUSE NO. H.C. 121 OF 2010, [2016] eKLR the Court pointed out thus;

I have also looked at the summons for revocation of grant and I am persuaded that it raises serious issues which need to be resolved by the court and in the event of the orders in question being enforced; the said application may be rendered nugatory. The applicant in the said application has alleged fraud and concealment of material facts.

E. A. Francis in his book discussing fraud observes inter-alia as follows: -

- i. No definition is given, either by statute or judicial decision of what constitutes fraud, nor, it seems, is any such decision possible.
- ii. Fraud, for the purposes of these provisions, must be actual and not constructive or equitable fraud.
- iii. Fraud must involve an element of dishonesty or moral Turpitude.

In the case of *Assets Co Ltd vs Mere Roibi*, Lord Lindley stated as follows:

".....that by fraud in these Acts is meant actual fraud, i.e., dishonesty of some sort, not what is called constructive or equitable fraud-an unfortunate expression and one very apt misled, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud."

34. After carefully examining the application for Revocation of Grant/Amended Summons this Court is satisfied that the grant of letters of administration issued on 16th February 1988 in Resident Magistrate's Court Machakos and confirmed grant of 8th November 1994 issued by High Court Machakos were obtained fraudulently by the making of a false statement and/or by the concealment from both Courts, that parallel proceedings over the same estate of Timothy Mbondo Ndolo in Succession 26 of 1984 in both Courts. This was/is highly irregular as no transfer was made to either Court, the details in each file on grant and administrators were different.
35. The mode of distribution in the confirmed grant was not in compliance with Section 71 of law of Succession Act that ALL beneficiaries were/are identified and their shares of the deceased's estate before confirmation of the grant is issued. The administrators concealed material information of the family Agreement of 21st November 1981 on distribution of the estate.
36. On 16th June 2021 & 27th September, 2021, parties before Trial judge Hon. D. K. Kemei were granted time to file Response to the Application and submissions. The respondent /Petitioners did not do so. They did not attend Court physically/virtually nor were they represented by Counsel. No reasons or explanation was offered to Court to consider. Therefore, the Court reserved the matter for Ruling on 26th October 2021.

37 The summons being on unopposed and no evidence been tendered in rebuttal in effect means that the orders sought are granted.

DISPOSITION



- 1) Grant of letters of Administration dated 16.2.1988 and confirmed grant of 8.11.1994 are hereby revoked/annulled.
- 2) A prohibitory order is hereby issued against the Petitioners/Respondents either by themselves, their agents and/ or servants restraining them from selling, transferring, sharing and dealing in any manner with Land Parcel No. MUTHETHENI/KIONYWENI/77.
- 3) All transfers, Registration and Title Deeds effected on Land Parcel No. MUTHETHENI/KIONYWENI/77 are cancelled and/or/ annulled.
- 4) The administrators do file an inventory accounting for all assets of the deceased.
- 5) Each Party to bear own costs.

DELIVERED SIGNED & DATED IN OPEN COURT VIRTUALLY ON 25TH NOVEMBER 2021.

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF;

Mr. Nthiwa for the Applicant

No appearance - for Respondent

Geoffrey - Court Assistant

