



**In re Estate of Kithumbu Nyaga Elija (Deceased) (Miscellaneous Application
205 of 2015) [2019] KEHC 5189 (KLR) (24 July 2019) (Ruling)**

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Neutral citation: [2019] KEHC 5189 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
MISCELLANEOUS APPLICATION 205 OF 2015**

FN MUCHEMI, J

JULY 24, 2019

IN THE MATTER OF THE ESTATE OF KITHUMBU NYAGA ELIJA (DECEASED

BETWEEN

VIOLET NGITHI KITHUMBU 1ST APPLICANT

ELIJAH NYAGAH KITHUMBU 2ND APPLICANT

AND

JOSEPHINE RWAMBA NJUE 1ST RESPONDENT

JAMES NAMO 2ND RESPONDENT

RULING

A. Introduction

1. This is the ruling for the application dated 22nd October 2015 seeking for revocation of the grant dated 6/3/2012 issued to the respondents herein.
2. The application is grounded on the fact that the respondent obtained the grant by fraudulent concealment of material facts specifically that the 1st respondent failed to reveal that the deceased had other children and beneficiaries and as such failed to involve all necessary parties in the application for grant.
3. In response, the 1st respondent swore an affidavit on behalf of himself and the 2nd respondent in which she deposed that she was opposed to the application for revocation on the grounds that she was the only wife of the deceased, that she had duly filed the petition for grant and given public notice to all and that there had been no objection from any one up to the confirmation of the grant.
4. The parties filed submissions to dispose of the application.



B. Applicants' Submission

5. The applicants submit that the grant issued to the respondent is defective as it did not involve all the parties entitled to the estate of the deceased especially the applicants and other children of the deceased. It was further submitted that the 2nd respondent was not a beneficiary of the deceased but a casual worker who worked for the deceased. As such the applicants submitted that the grant had been obtained by the fraudulently making of a false statement.
6. The cases of *Re Estate of Wahome Mwenje Ngonoro Deceased* [2016] eKLR, *Jamleck Maina Njoroge v Mary Wanjiru Mwangi* [2015] eKLR and the Court of Appeal case of *Musa Nyaribari Gekone & 2 Others v Peter Miyienda & Another* [2015] eKLR where the courts revoked grants for material non-disclosure.
7. It was further submitted that the respondents had failed to comply with Rule 26 of the Probate and Administration Rules as was held in the case of *Al-Amin Abdulrehman Hatimy v Mohamed Abdulrehman Mohamed & Another* [2013] eKLR in which the court held that the law of succession by virtue of rule 26 requires any application for issue of a grant must be accompanied by a consent duly signed by all persons entitled in the share of the same estate.

C. Respondents' Submissions

8. The respondents submitted that the birth certificates annexed to the supporting affidavit were not proof that the applicants were either children or dependants of the deceased and relied on the unreported case of *Nyahururu HC Succ case No. 35 of 2017 Maxwell Mwangi v Joseph Muriithi Mwaniki* where the court held that it was the duty of the protestor to prove his case on a balance of probabilities and having not produced any other evidence of how he obtained the certificate, it was his duty to call the registrar of birth and deaths.
9. It was also submitted that the burden of proof was above a balance of probabilities which the applicants had not met and as such their claim failed. The case of *Urmila Shah v Barclays Bank International Limited & Another* [1979] KLR 76 was cited where it was stated that allegations of fraud must be strictly proven and although the standard of proof may not be as heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.

D. Analysis & Determination

10. The applicants depone that they are the sons of the deceased and that their late father had three wives including the 1st petitioner/administrator who was the 3rd wife. That the deceased had children with the first and second wife.
11. The 2nd applicant states that his mother was the 2nd wife and had two children namely Elijah Nyaga Kithumbu (himself) and Kevin Kithumbu Juma who is deceased but is survived by two children namely Jonathan Naga Juma and Margaret Adash Juma.
12. The first wife is the mother of the 1st applicant namely Violet Ngithi Kithumbu and Alex Murimi Kithumbu. Upon the demise of the deceased the family as a whole discussed succession and agreed that the estate be administered by three people each to represent each of the three houses of the deceased but the 1st respondent moved secretly to court and invited a stranger the 2nd respondent to be her co-administrator. The estate was inherited by the 1st respondent and her children thus disinheriting the four children of the deceased.



13. The applicant also disputes the jurisdiction of the Runyenjes Principal Magistrate who issued and confirmed the grant on ground that the estate is valued over Kshs. 20,000,000/=.
14. It is also alleged that the grant was confirmed only one day after the grant of letters of administration which is against the law.
15. The 1st respondent denies that the deceased had more than one wife. According to her, she was the only wife of the deceased. However, the applicants do not deny that the 1st respondent was a wife to the deceased but said that she was the 3rd one since the 2nd and 3rd wives were the mothers of the applicants. In the further affidavit sworn by the 2nd applicant, photographs of the 1st respondent as the widow of the applicants among others as the children of the deceased during burial; the burial programme including the names of the applicants as the children of the deceased among others was also annexed.
16. It reads in part: -

“He (deceased) got married to Josephine Rwamba in 1994 and they were blessed with two sons.... His other children from previous marriages were Violet Wangithi, Alex Murimi, Elijah Nyaga and Kevin Juma.....

He has left behind a widow and six (6) children...”
17. The 1st respondent did not controvert the evidence annexed to the further affidavit. In her replying affidavit, she general denies that the deceased had more than one wife. If this was true, it would be expected that the 1st respondent would specifically deny the evidence of the burial programme and the photographs which she did not.
18. The evidence of the minutes of the burial committee produced by the 1st respondent does not include the names of the children of the deceased. In my view, the two documents do not bear much weight in that they were superseded by the burial programme and the family photographs which support the case of the applicants.
19. As for Nation Newspaper death announcement which excludes the names of the applicants as children of the deceased, I take note of the fact that the 1st respondent as the surviving widow is the one who stood in priority to the children in the burial arrangements which must have been conducted at her home. She was therefore at an advantage over the applicants in influencing the contents of the newspaper death announcement. This in my view explains the omission of the applicants’ names.
20. The applicants have stated that they are ready to go for DNA to prove that they are children of the deceased.
21. The 1st respondent did not respond to this proposal; I believe because it is not likely to favour her case.
22. I have considered the evidence of both parties and I find that the applicants have established that the deceased had three wives and that he was survived by one widow the 1st respondent herein and six (6) children including the applicants.
23. The circumstances in which a grant may be revoked or annulled are set out in Section 76 of the [*Law of Succession Act*](#) 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.

24. After looking at the arguments of the parties, I proceed to determine the following issues: -

- a) Whether the deceased was survived by other wives and children.
 - b) Whether 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.
25. In any judicial proceeding, parties must make full disclosures to the court of all material facts to the case including succession cases. This general rule of law emphasizes utmost good faith (*uberimae fidei*) from parties who take out or are subject of the court proceedings. The said responsibility is part of justice itself. Accordingly, non-disclosure of material facts undermines justice and introduces festering waters into the pure streams of justice; such must, immediately be subjected to serious reverse osmosis to purify the streams of justice, if society is to be accordingly regulated by law.
26. The applicants argue that the 1st respondent failed to disclose that apart from herself, there were other beneficiaries to the deceased's estate. The inclusion of the 2nd respondent as an administrator is faulted for the reason that he had no connection to the deceased. The 1st respondent refutes this by urging that the applicants have failed to prove that they are beneficiaries of the deceased either as children or dependants.
27. It has not been denied that the 2nd administrator James Namo Njeru is a stranger to the estate of the deceased and as such he is not ranked in priority under Section 66 over the applicants who are the children of the deceased and some of whom must have been adults then.
28. The birth certificates are official documents admissible in evidence unless there is evidence of forgery from the opposite party which is not the case herein. If the respondent disputes the authenticity of the document, the burden shifts on him to so prove. It is not for the applicants to call for the register in the present circumstances as suggest by the respondent.
29. The grounds upon which a grant may be revoked or annulled are 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 above grounds. A close look at Section 76 shows that the grounds 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.

30. It is trite law that if a grant was obtained fraudulently by making of a false statement or by the concealment from the court of something material to the case; or that the grant was obtained by means of untrue allegation of fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently, such a grant can be revoked or annulled. The law permits the court to revoke a grant on its own motion or on application by an interested person.
31. In the matter of the Estate of Robert Napunyi Wangila, HC SUCC No 2203 OF 1999 Koome J summarised the grounds for revocation of a grant under Section 76 as follows, when the procedure followed in obtaining the grant is defective in substance, when the grant is obtained fraudulently by making a false statement, making an untrue allegation of fact essential in point of law to justify the grant and or when the person who has the grant has failed to proceed diligently with the administration of the estate.
32. The evidently deliberate omission by the respondents to involve the applicants at the time of filing these proceedings, failing to list them among the beneficiaries or seek their consent or renunciation was in my view in bad faith and amounts to concealment of material facts. It is clear that the respondents were aware of the existence of the applicants and other beneficiaries as the same were cited in the deceased's eulogy.
33. I reach a conclusion that the proceedings leading to the issuance of the grant are defective in substance and that material information was not disclosed to the court in that had the court been made aware that there were other beneficiaries who were interested in the deceased's estate, the court would have hesitated to issue the grant.
34. It is my finding that the acts of the respondents in excluding the applicants from these proceedings amount to fraudulently procuring the grant as well as non-disclosure of facts material to the case.
35. Consequently, I find that the application is merited and it is hereby allowed on the following terms: -
 - a) That the grant issued to the respondents and confirmed on 6th March 2012 is hereby revoked.
 - b) That in the interests of justice, the 1st respondent Josephine Rwamba Njue, the 1st applicant Violet Ngithi Kithumbu and the 2nd applicant Elijah Nyaga Kithumbu are hereby appointed joint administrators of the estate.
 - c) That any transmissions, transfers of any of the assets of the deceased arising from the grant confirmed on 6th March 2012 are hereby nullified and that the assets shall revert to the name of the deceased.
 - d) That the administrators to jointly or separately file summons for confirmation of grant within sixty (60) days.
36. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 24TH DAY OF JULY, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Mr. Njage for Respondent



Ms. Muriithi for Masaka for Applicants

