



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**FAMILY DIVISION**  
**SUCCESSION CAUSE 1065 OF 2009**  
**ALSO SUCCESSION CAUSE No 59 OF 2007**

**IN THE MATTER OF THE ESTATE OF ELIAS NJOROGE NDUNGU (DECEASED)**

**R U L I N G**

1. The Court has before it an Application brought by Summons. The Summons is seeking dismissal of an earlier Summons for Revocation of a grant of Letters of Administration Intestate for the Estate of Elias Njoroge Ndungu. The Summons that the Applicants would wish to have dismissed is the Summons for Revocation of the Grant of Letters of Administration. The Summons is brought under **Section 68,69 and 71** of the **Law of Succession Act, Cap. 160** and **Rule 49 and 73** of the **Probate and Administration Rules**. The Application seeks the following Orders:

- "1. That the Application be certified as urgent and service be dispensed with in the first instance.*
- 2. That the applicants summons dated 11.05.2009 and filed on 11.05.2009 for revocation or annulment of grant issued to Purity Wairimu and Hannah Gathoni on 07.05.2009 be dismissed for want of prosecution.*
- 3. That the costs of this application be borne by the applicant in any event".*

2. The Grounds relied upon are that:

- a) The objector has not taken any steps to prosecute the objection or protest for a period of over 6 years since it was lodged*
- b) THAT the objector has not demonstrated to the court sufficient reasons and grounds to justify and sustain the summons after failing to provide the court with relevant information in support of the protest.*
- c) THAT it will be met (sic) and in the interests of justice for this honourable court to grant the orders prayed as the delay in prosecuting the summons has greatly prejudiced the interests of the dependants, some of whom are in urgent need of school fees.*

The Summons is supported by the joint Affidavit of Purity Wairimu and Hannah Gathoni. The Affidavit informs the Court that each has been appointed a joint Administratrix of the Estate of the Deceased. The Grant was confirmed on 7th May 2009 and a copy is Exhibited as **PWHG 1**. The tenor and content of the Supporting Affidavit is telling. I will come to that later.

3. The background facts as they appear from the documents are that the Deceased passed away on 31st August 2006 at Kisii District Hospital. There was a Petition for the Administration of his Estate filed by Hannah Gathoni Njenga and Purity Wairimu Njoroge. The Petition was presented on 7th June 2007 before the Senior Principal Magistrates Court in Limuru and was given the Number **LIMURU SPMCC CAUSE No. 59 OF 2007**. It was supported by a Letter from the Assistant Chief Kijabe Sub-Location, setting out the purported "next of kin and beneficiaries" of the Deceased. Interestingly the Letter from the Chief is dated 21st February 2007 yet it is said to have been Exhibited to the Affidavit of Hannah Gathoni Njenga dated 12th February 2007. The Consent was signed by only two of the persons alleged to be the Children of the Deceased. Although the Petitioners admit that the Objector is their "mother in law" she is not included in the list of dependants nor was her consent obtained for the Grant. The Petition was advertised by Gazette Notice No 432 dated 18th September 2007 but not advertised until 15th January 2008, nearly 4 months later. The Letters of Administration were issued in Limuru on 22nd May 2008 by Hon. Resident Magistrate A.M. Aminga. On 11th May 2009 the Mother of the Deceased challenged the grant of letters of administration to the Petitioners. The Lawyer acting for the Objector Messrs B.G. Wainaina & Co Advocates wrote to the Senior Principal Magistrate setting out that the Grant was being challenged in the high Court at Nairobi. The Letter states categorically "*We would appreciate if you would stay further proceedings pending this determination of the said Application. We have attached a copy of the Application for your records*". The Letter was received because it is stamped and is exhibited by the Petitioners as "PWGH 3". However, the same Resident Magistrate A.O. Aminga issued a Certificate of Confirmed grant for the Estate. The Certificate of Confirmed Grant bears two dates 23rd December 2008 and 7th May 2009. The Schedule sets out that the assets comprising the Death Benefits and Gratuity from the Deceased's employer Tifey Limited be shared between the two alleged widows. The Property was to vest in Purity Wairimu Njoroge. There is no mention whatsoever of the shares of the alleged children of the Deceased or that their shares would be held in trust. The Application now before the Court states that "*the delay in prosecuting the summons has greatly prejudiced the interests of the dependants, some of whom are in urgent need of school fees*". There is no evidence of who are the "dependants" in need of school fees nor of the institutions which they are alleged to attend.

4. The Application was brought under a certificate of urgency that asked the Court to hear the matter ex parte. That is a far cry from the usual procedure of requiring the party alleged to not prosecute the summons to show cause why it should not be struck out. The Petitioning Applicants would rather not give the Respondent that opportunity.

5. The Court must therefore consider the content of the Summons for Revocation. The Objector there claims to be the Mother of the Deceased. That is admitted by the Petitioners when they refer to her as their "Mother in law". To that extent she has locus to bring the Summons for Revocation. From the list of dependants/beneficiaries both from the Assistant Chief and also incorporated in the Petition it is clear that she was not included. Further she is not included in the list of persons who may have equal or lesser right to petition. As a parent she has that right. In the circumstances her consent was not obtained. The Mother of the Deceased complains that the Petitioners and alleged Dependants are neither the wives nor the Children of the Deceased. The Objector also states that there is in fact a different widow. That raises triable issues. The Objector appended her thumb print to her Affidavit in Support suggesting that she is illiterate.

6. The Petitioners have responded to the Summons for Revocation in their Supporting Affidavit. From paragraph 5 onwards it states:

*"5. THAT we are the widows of the deceased and the dependants are our children. Annexed and marked PWHG 6 is a copy of the chief's letter.*

*6. THAT we followed due process of the law when we filed the petition and all the dependants who had reached the age of majority gave consent. Annexed and Marked PWHG 6 is a copy of the consent.*

*7. THAT before the grant was confirmed it had been gazetted and the applicant had all the time to object but she voluntarily chose not to. Annexed and marked PWGH [8] is a copy of the Kenya*

*gazette.*

*8. THAT the dependants listed in the applicants supporting affidavit are not known to us neither to the chief.*

*9. THAT the applicant is our mother in law obsessed with malice and cantankerous hatred toward us as the widows.*

*10. THAT the applicant inherited large piece of land from her late husband which she subdivided to her children and instead of allocating the piece belonging to Elias Njoroge Ndungu to his widows, she further subdivided the piece of land into plots and sold them for her own parochial interests.*

*11. THAT the applicant has Six more children who support her and she is determined to deprive us the only benefits the deceased would get from his place of work prior to his death....”.*

7. Although the Petitioners criticise the Objector for delay when they complain of school fees and also at paragraph 13 of the Supporting Affidavit which states “THAT the application herein had not been executed for the last five (5) years thus wrecking our process of demanding our late husband’s benefits, they do not address their own conduct. The Petitioners are the Administrators of a Certificate of Confirmed Grant since at least 23<sup>rd</sup> December 2008 and at the latest 7<sup>th</sup> May 2009. It is unclear what effect the Letter from B.G. Wainaina & Co has had on that process. There is nothing to show that the Certificate was revoked or stopped as a consequence of the Summons for Revocation. In the circumstances, the Petitioners cannot argue that there is a delay in distribution due to that Summons and not their own conduct. What is said in the Written Submissions, rather than the Supporting Affidavit, is that The Administratrices were prevented from collecting a copy of the Certificate of Confirmed Grant due to the Letter of 11<sup>th</sup> May 2009. However, they have Exhibited a copy of the document they allege they could not collect to the Supporting Affidavit. The Submissions also say that the Letter was also sent to WE TIFEY Ltd who withheld the benefits. Again there is no evidence of that in the Supporting Affidavit. What is said in that document is that the Objector is intent on depriving the Petitioners of everything. Also that the Application has not been executed thus wrecking our process of demanding our late husband’s benefit. Paragraph 14 says “we have children who are in school and in urgent need of money”. In deciding how plausible that argument is, it is noted that the youngest child was aged 8 years in 2007, therefore the allegation is implausible without further explanation. The Affidavit argues that “the suit is an abuse of the court process and a sham”.

8. The Advocates acting for the Objector were served with a Notice of Hearing for 30<sup>th</sup> May 2017. They did not attend and have not participated. There is nothing on the file to show that either the Objector or her Advocates were served with the Summons itself.

9. The Application seeks to strike out the Summons for failure to prosecute. The Application does not encompass an opportunity to the Objector to respond by asking for an ex-parte hearing. The Applicants are represented by different Advocates in each venue. The Application and Supporting Affidavit purports to wish matters to be concluded but in fact raises more questions and concerns than it answers. In particular, whether the dependants and/or the potential beneficiaries of the Deceased were correctly identified. Secondly, if there was incorrect and/or incomplete identification, was that done deliberately with the intention of misleading the Court and disinheriting some or all of the beneficiaries and/or dependants?

10. The Application and its contents also raises questions in relation to the Schedule of Assets. Is the property listed genuinely property and/or entitlements due to the Deceased. If the Property known as Kijabe/Kijabe/Block/1/4565 had not vested in the Deceased from his Father’s Estate, it cannot form part of his own Estate. That has the effect of making that part of the process unreliable. The Petitioners argue that the gazette notice provides adequate notice, however, the Objector is illiterate. Secondly, the timing of the gazette notice and the lapse between the date of the notice and its publication raises questions of its own

11. The effect of dismissal of the Summons for Revocation is that the Petitioners will be free to continue administering the Estate and to take possession and distribute such of it as they collect in. Both Applications raise issues as to whether, in fact, they are the proper people to do so. The Letter from the Assistant Chief provides a rebuttable presumption. That presumption has been rebutted by the Summons for Revocation. The Assistant Chief has not attended Court to give evidence and therefore the Court has not made any findings. It is in the interests of justice that such findings are made before any administration continues or is revoked.

12. **Section 71 of the Law of Succession Act** sets out the conditions necessary before the grant of letters of administration can be confirmed, that is,

*(1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.*

*(2) Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may—*

*(a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or*

*(b) if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 of this Act, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be unadministered; or*

*(c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control; or*

*(d) postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case:*

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

*(2A) Where a continuing trust arises and there is only one surviving administrator, if the court confirms the grant, it shall, subject to section 66, appoint administrators jointly with the surviving administrator not less than one or more than three persons as proposed by the surviving administrator which failing as chosen by the court of its own motion.*

*(3) The court may, on the application of the holder of a grant of representation, direct that such grant be confirmed before the expiration of six months from the date of the grant if it is satisfied—*

*(a) that there is no dependant, as defined by section 29, of the deceased or that the only dependants are of full age and consent to the application;*

*(b) that it would be expedient in all circumstances of the case so to direct.*

*(4) Notwithstanding the provisions of this section and sections 72 and 73, where an applicant files, at the same time as the petition, summons for the immediate issue of a confirmed grant of representation the court may, if it is satisfied that—*

*(a) there is no dependant, as defined by section 29, of the deceased other than the petitioner;*

Section 72 provides:

## **72. Grants not to be confirmed in certain circumstances**

*No grant of representation shall be confirmed until the court—*

*(a) is satisfied that no application under Part III of this Act is pending; and*

*(b) has received a certificate from the Estate Duty Commissioner that he is satisfied that all estate duty payable in respect of the estate concerned has been or will be paid, or that no estate duty is payable in respect thereof; or*

*(c) is itself satisfied that no estate duty is payable in respect of the estate concerned.*

Section 76 of the Law of Succession Act provides:

*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;....”*

12. In the circumstances, the Court has before it a number of issues that must be resolved before the grant could have been confirmed, or could continue to subsist. Further, the Petitioners are now praying in aid the rights of their children. Even if their children were entitled to inherit from the deceased, they took no steps to protect their interests when they were seeking confirmation of the letters of administration. **Section 41** of the **Act** provides;

*“Where reference is made in this Act to the "net intestate estate", or the residue thereof, devolving upon a child or children, the property comprised therein shall be held in trust, in equal shares in the case of more than one child, for all or any of the children of the intestate who attain the age of eighteen years or who, being female, marry under that age, and for all or any of the issue of any child of the intestate who predecease him and who attain that age or so marry, in which case the issue shall take through degrees, in equal shares, the share which their parent would have taken had he not predeceased the intestate.”*

14. For the reasons set out above, it is in the interests of justice that the Summons of revocation be heard and dispensed with to ascertain the true entitlement to the Estate of the Deceased. As a consequence the Application dated and filed on 17<sup>th</sup> March 2016 is dismissed with costs.

15. It is further Ordered and Directed **THAT**:

(1) File **LIMURU SPMCC SUCCESSION CAUSE No. 59 OF 2007** be called for and placed together with this file

(2) Both Matters be listed for further directions, including the issues of consolidation and transfer to the High Court at Naivasha within 28 days

(3) Parties to file and serve such evidence as they seek to rely upon to support their respective claims including birth certificates and marriage certificates within 21 days.

(4) Matter to proceed with viva voce evidence and the author of the “Chief’s Letter” shall attend to

give evidence.

(5) Henceforth the Objector shall be served by personal service.

**Order accordingly,**

**FARAH S. M. AMIN**

JUDGE

**Delivered, signed and dated this 30th day of October 2107**

In the Presence of:

Patrick – Court Clerk

Counsel for the Objector: Messrs B.G. Wanaina on Record, not present

Counsel for Petitioner/Applicants: Mr Omolo HB Mr Macharia