



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**SUCCESSION CAUSE NO. 120 OF 2009**

***In the matter of the Estate of JACOB NJIRU MBARIRE (Deceased)***

**JOHN NJIRU MBARIRE.....APPLICANT**

**VERSUS**

**NICHOLAS IRERI.....RESPONDENT**

**RULING**

This is the application dated 26/5/15 seeking that the grant of probate issued to Nicholas Ileri on 4/6/2009 be revoked on grounds that

- i. The administrator has failed to proceed diligently with the administration of the estate.*
- ii. The administrator has failed to produce to court within the time prescribed an inventory of administration as required.*
- iii. The administrator has failed to take out proceedings for confirmation of grant or proceed to take necessary steps to conclude the process more than 6 years after the case was filed.*
- iv. This honourable court do issue new letters of administration to John Miriti Mbarire.*

The application is based on the affidavit of John Miriti Mbarire. In the affidavit the applicant stated that the deceased died on 16/3/1998 and a grant of probate was issued to Nicholas Ileri on 4/6/2009. The grant was never taken out for confirmation and the petitioner/respondent has failed to proceed or take the necessary steps to conclude the process more than 6 years of the cause being filed. The respondent has failed to proceed diligently with the administration of the estate. When he attempted, he allocated land to himself without consent of other family members. The respondent has failed to produce such account of administration to the court. The grant has not been confirmed within 6 years. The applicant is a son of the deceased.

The respondent in his reply stated that it was not true that he failed to file the summons for confirmation of grant. The record will prove that on 10/11/2011 he filed summons for confirmation of grant. On 18/6/2012 the applicant filed an affidavit of protest dated 18/6/2012 disputing that their late brother Stephen Mbae had a son by the name Hanny Munene. The administrator provided documentary evidence of the said son. The court directed that the evidence would be by way of *viva voce* evidence and that the respondent would be cross examined. In 1995, their late brother introduced his son and the mother to the family in the presence of the respondent. The son is named after their deceased father. He denies that he allocated himself land and demands proof. The respondent states that the applicant is a vexatious litigant and a person imbued by malice and lacks integrity. The applicant maliciously demolished 20 rental

houses and alienated their late brother's portion for his personal use.

Before their father died, the family members agreed on how the property would be shared in the event of their father's death. Their deceased father mandated him with the power to handle property issues. Their parents divorced in 1972 and each of them owned separate estates. The respondent argues that the application is an abuse of court process and ought to be dismissed.

Catherine Gicuku and and Rose Njeri both swore affidavits on 30/9/2015. They claim they are daughters of the deceased/beneficiaries and that they were in support of this application by John Miriti Mbarire.

The applicant in his submissions states that the respondent started allocating land belonging to the estate to himself without consent of family members. The demolition of temporary structures was approved by the family committee which was left by the deceased to oversee distribution. The respondent collected rent of Kshs.15,000-20,000 per month for 14 years and never gave the beneficiaries a cent. Rose Njeri stated that the respondent was not a faithful administrator.

The respondent denied allocating himself land. He stated that the applicant is the one who had allocated himself L.R. T.246 Gikuuri. On L.R. Kagaari/Kigaa/4500 which is in the name of the deceased, the applicant demolished the deceased's houses and gave the plot to their cousin.

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.*

This was illustrated in the case of **JOYCE NGIMA NJERU & ANOTHER VS ANN WAMBETI NJUE [2012] eKLR**

***i. The administrator has failed to proceed diligently with the administration of the estate***

The applicant alleges that the respondent has failed to diligently administer the estate. The applicant however does not give details of how the respondent has failed in the administration of the estate. In absence of this demonstration, this ground cannot stand.

***ii. The administrator has failed to produce to court within the time prescribed an inventory of administration as required.***

The applicant has not provided any proof that he has requested for an inventory/accounts of the estate. There is no evidence that the respondent has refused to provide such information on request.

***iii. The administrator has failed to take out proceedings for confirmation of grant or proceed to take necessary steps to conclude the process more than 6 years after the case was filed.***

The applicant alleges that the respondent has failed to conclude the process within 6 years. The respondent on the other hand alleges that his efforts to have the grant confirmed have been thwarted by the applicant himself who filed an affidavit of protest. A perusal of the court record confirms that the applicant filed an affidavit of protest against confirmation of grant on 10/5/2012. There is also a further affidavit of protest sworn by the applicant on 18/6/2012 against confirmation of grant filed by the respondent.

The two daughters of the deceased Rose Njeri Ayanga and Catherine Gichuku also filed affidavits of protest against the confirmation of grant filed by the respondent. There is also a protest by Kwa Mugo Tea Buying Centre through Peter Kinyua Rutere filed on 18/11/2013 claiming 0.07 ha allegedly sold by the deceased in 1984.

The court on 30/7/2012 ordered that the hearing of the protest proceeds by way of *viva voce* evidence.

In view of the above, the applicant and the two daughters of the deceased cannot accuse the respondent of delaying the confirmation of grant when they themselves filed affidavits of protest against the confirmation of grant filed by the respondent. They are equally guilty of causing delay in the conclusion of the matter. The parties having taken directions should have proceeded to fix a hearing for the protest.

I therefore decline to grant the orders sought in this application. The application is unmerited in my opinion as none of the ground of revocation of grant under Section 76 of the Laws of Succession Act has been proved.

From the facts of this application, it is not in doubt that the petitioner/respondent and his siblings cannot work together for the smooth and effective implementation of the grant. The applicant and his two sisters Rose Njeri Ayanga and Catherine Gichuku are on one side opposing the respondent's administration of the estate while the petitioner is on his own.

In the interests of justice I find that the applicant and his siblings would be represented if one of them joins the petitioner in the administration of the estate.

The applicant John Miriti Mbarire is therefore appointed as a co-administrator in the estate.

An amended letter of administration to issue in the joint names of the petitioner Nicholas Ireri and the applicant John Miriti Mbarire. The co-administrators to fast-track the execution of the grant. If they are not in agreement, the matter to be fixed for hearing within 30 days.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 27TH DAY OF OCTOBER, 2015.**

**F. MUCHEMI**

**J U D G E**

**In the presence of:-**

**The applicant**

## **The Respondent/petitioner**