



REPUBLIC OF KENYA



**In re Estate of Susan Mwelu Mutia (Deceased) (Probate & Administration
36 of 2017) [2025] KEHC 2202 (KLR) (23 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 2202 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
PROBATE & ADMINISTRATION 36 OF 2017**

F GIKONYO, J

JANUARY 23, 2025

IN THE ESTATE OF SUSAN MWELU MUTIA (DECEASED)

BETWEEN

FRANSISCAH MWIKALI KIBISU 1ST APPLICANT

ISSAC LEMAIYAN SAITOTI 2ND APPLICANT

AND

MAUREEN SETH 1ST RESPONDENT

ROSEMARY KAWIN SETH 2ND RESPONDENT

JUDGMENT

Revocation of grant and creation of family trust

1. The two applicants have applied for revocation of grant under section 76 of the *Law of Succession Act*. The umbrella ground was that; a) the grant was obtained fraudulently; by non-disclosure and concealment of material facts.
2. The specific reasons were that; b) the 1st applicant was excluded from participating in the proceedings-her consent was not sought; c) the 1st applicant was disinherited of her mother's estate for she was married at the time her mother died; and d) the 2nd applicant has been denied the share of her late mother who is also a daughter of the deceased.
3. The 1st applicant has stated that she made frantic efforts to have her share from her siblings in vain.
4. She stated that, although her name was included in the initial petition as a beneficiary, she was not made aware of or consulted to consent to the issuance of the grant or distribution of the estate.
5. These reasons were augmented through written submissions filed by the applicants.



6. More specifically, that her exclusion from the estate on the basis that she was married offends article 27 of the *Constitution* which prohibits discrimination on such ground and reinforces the right to equality in enjoyment of rights, equality and protection before the law. According to her, this principle of equality is embodied in section 38 of the *Law of Succession Act* requiring intestate estate to be divided equally amongst the children of the deceased.
7. She emphasized that there was absolute non-disclosure of material facts as well as misrepresentation of material facts which makes the obtaining of the grant fraudulent; for which it should be revoked.
8. She stated that, as a daughter of the deceased, she was entitled under section 66 of the *Law of Succession Act*, to the grant in the same priority as the respondents. And, in the absence of renunciation of right, obtaining the grant without reference or notice to her or her consent violates rule 26 and 40 of the Probate and Administration Rules. She stated that the 1st respondent in her evidence admitted that they did not notify her of the obtaining and issuance of the grant. Her name was omitted in the form for consent for granting of letters of administration which is a clear evidence of her exclusion from participating in these proceedings.
9. On that basis she beseeched the court to revoke the grant.
10. She cited the following cases in support of her position:

In re the estate of Amos Kiteria Madeda-Deceased [2022] KEHC 12950 (KLR);

Respondents opposed application

11. The respondents opposed the application and reinforced their arguments through written submissions.
12. The respondents made the following major arguments;
13. That the mother of the 2nd applicant, Jane Tekla Adege, was included as a beneficiary of the estate subject of these proceedings. However, the 2nd applicant is yet to obtain letters of administration of the estate of his late mother so that he may claim the share of his mother. They took the view that a grandchild cannot take directly from the estate of the grandparent.
14. That 1ST applicant was aware of the filing of these proceedings. Thus, has not proved the grant was obtained through non-disclosure of facts.
15. They prayed for the application to be dismissed.

Analysis and Determination

Competence and legal standing issues

16. '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...' that any one or more of grounds set out in section 76 of the *Law of Succession Act* has been proved.
17. Under section 76 of the *Law of Succession Act*, 'any interested party' may apply for revocation or annulment of a grant. And, a grant may be revoked or annulled at any time as long as the applicant has proved one or more of the grounds in the section.



18. These propositions of the law settle two concerns that were argued by the respondents on; a) whether an application for revocation of grant may be made after 22 years; and b) whether the 2nd applicant can apply for revocation of grant.

Absence of consent

19. The applicants argued that they were excluded in the proceedings by the respondents, yet, they stand in equality with the respondents in applying for grant of representation. The 1st applicant is one of the daughters of the deceased. The 2nd applicant is the son of Jane Teekla Adega-now deceased-, who was also a daughter of the deceased. None is the lesser in applying for grant of letters of administration for the estate of the deceased. Especially the 1st applicant, the record as well as the evidence adduced in court show that she was not aware of and was totally excluded from participating in these proceedings. The reason given by the respondents for excluding her was, because she was married. Marriage neither works corruption of blood nor imposes an attainder to disinherit a daughter of the deceased.
20. The 1st applicant did not renounce her right. She did not give her consent to the making of the grant to the petitioners or to the distribution of the estate.
21. The respondents argued that the 2nd applicant should obtain letters of administration in order to claim the share of her mother. The court has perused the confirmed grant and the certificate thereto and does not see any share that was reserved or distributed to Jane Teekla Adega. Making their claim cynical.
22. Reacting to the claim by the 1st applicant of being totally disinherited, the respondents argued that the 1st applicant lives in one of the estate properties at Narok. But, again, there is absolutely no provision made for the 1st applicant in the confirmed grant. Again, making this argument a mockery.
23. According to the Certificate of Confirmation of Grant, 'all beneficiaries' means and refers to only; Rosemary Kawin Seth, Maureen Seth, Ann Ndunge Seth, Agnes Shida and Bernadette Seth. Fransiscah and Jane are not named as beneficiaries. Therefore, the claim by DW2 that all beneficiaries are benefiting from the estate does not pass the legal test, and is not in step with empirical test in the administration of the estate of the deceased.
24. The respondents attempted to ameliorate the bad situation through a consent filed in court on 19th March, 2024 by including the applicants and listing them as beneficiaries of the estate of the deceased.
25. The consent also includes other properties of the estate which had been left out. The schedule of assets was also amended and some of the properties are to be distributed equally amongst and transferred to the beneficiaries.
26. Except, some properties namely; Plot No. 179 Masikonde Estate, Narok, Narok Township 98, Narok Town 41, and Zone 52 Narok Town; were to be transferred to a company to be incorporated by the administrators. And, beneficiaries living in these properties will pay rent as per current rates to the company, and if unable to so pay, shall vacate the premises.
27. The element of setting up a company and eviction of beneficiaries who do not pay the current rent to the company was disputed by the beneficiaries. The court did not adopt the consent. It gave the parties more time to reconsider the utility of a family trust if the intention is to preserve the properties for posterity which is founded on the notion of sustainable development; bringing the court to say something about family trust vis limited liability company.



Proposal to appropriate intestate estate property to a company

28. Parties herein initially filed a consent appropriating the intestate estate property of the deceased to a yet-to-be registered limited liability company. The consent also provided that, the beneficiaries of the estate of the deceased shall hold equal shares in the said company once registered. But, strangely, the consent provided that the beneficiaries, after ceding their property to the company, will be paying rent at the market rates, of the houses they occupy; and in default, the company will evict them.
29. The court did not adopt the consent and gave its reasons.
30. Unless it is specifically provided in a will, appropriating the property of the estate of the deceased to a company- registered or not-is problematic in the succession law for a number of reasons.
31. Some of the reasons include; first, the probate court distributes the estate to the dependants or beneficiaries of the estate of the deceased. Second, the concept of corporate personality of a company(Salomon vs. Salomon) is not consistent with individual and personal ownership of property bequeathed by will or distributed by the court to the beneficiaries; the property of the company belongs to the company.

Family trust and its Purpose

32. A family trust provides a solution with guaranteed outcomes which secures the family property as well as the proprietary interest of the beneficiaries for posterity.
33. Family trust is more appropriate vehicle in succession cases as the trust form is not strange to the [law of succession Act](#). Family trust is also part of trust law having been introduced in 2021 through section 3D of the Trustee (Perpetual Succession) Act in 2021, providing for registration or incorporation of a Family Trust by any person or persons, whether jointly or as an individual, for the purposes of planning or managing their personal estate.
34. Family trust, is, therefore, the big and revolutionary idea serving as a vehicle for preservation or creation of wealth for generations; an element of, and premised upon the logic of sustainable development of using the family assets to meet ‘the needs of the present without compromising the ability of future generations to meet their own needs’¹. The thinking is intra-generational equity, which implies fairness to coming generations of the family members. This idea of family trust and sustainable development is not far removed from the African tradition that aimed at keeping families within and the clan together and preserving their wealth. But, the tradition and practice was affected by other developments such as individual ownership of land.
35. The beneficiaries of a family trust may be living or not; a provision which partly feeds the idea of sustainable development and incorporates the principle of representation in respect of the share of a deceased dependant or beneficiary by his or her dependants or children under the [Law of Succession Act](#). Section 38 and 41 of the [Law of Succession Act](#).
36. Be that the purport of family trust, perhaps it also helps to avoid fragmentation of family wealth into small units which may not be economically viable or which literally diminish or ‘dissipate’ economic opportunities that may become available to the family if the wealth remained a single mass.
37. A family trust may be set up by the testator in his lifetime or in a will or by the beneficiaries by having the administrator as a trustee for their respective shares as determined by the court forming the trust property.

¹ The 1987 report, Our Common Future, of the United Nations World Commission on Environment and Development (WCED)



38. In a family trust, the trustee may also be a beneficiary. Section 38 of the *Law of Succession Act* is a perfect example upon which a family trust may be anchored. The individual and beneficial ownership of the property by the beneficiaries of the estate as defined by the court is maintained in the trust.
39. This understanding, forms the functional foundation for how the court should assist parties to realize sustainable use, preservation and creation of family properties or wealth in succession causes.

Disposition

40. The applicants have proved that the grant herein was obtained fraudulently; by non-disclosure and concealment of material facts. The respondents excluded the 1st applicant from the proceedings and also disinherited her. They also disinherited the mother of the 2nd applicant. However, it is not in all cases the court revokes the grant. The court should fashion orders that fit the peculiar situation of each case. In this case, parties have signified the need to distribute the estate equally amongst all the children of the deceased in accordance with section 38 of the *Law of Succession Act* which provides that: -

Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.

41. Section 41 of the *Law of Succession Act* embodies the principle of representation and trust in which case the children of the child of the deceased take, in equal shares, the share which their parent would have taken were it not for his or her death.
42. In the circumstances of this case, it is prudent to add the 1st applicant as one of the administrators. Therefore, the grant will be issued in the names of three administrators. The properties left out shall be part of the estate of the deceased. The additional properties are: -
- a. Konza Mwa Mautio plot No. 404
 - b. Konza Commercial Plot No. 0893
 - c. Konza South/Konza South Block 7 (Kima)/169
 - d. Konza South/Konza South Block 7 (Konza)/1650
43. These properties be added to those appearing in the earlier grant.
44. And, all the assets shall be distributed equally to all the children of the deceased. The share of Jane Teekla Adegga shall devolve to her children in equal shares.
45. The Certificate of Confirmation of Grant be amended in accordance with these orders. An amended Certificate of Confirmation of Grant be issued accordingly.
46. However, as parties expressed an intention to, may create a family trust on one or more or all of the estate properties with beneficial ownership being in equal shares amongst the beneficiaries as has been ordered by the court. In such venture, the three administrators are the trustees of the family trust. This option may be explored but must be recorded in court with the consent of all the beneficiaries.
47. As these proceedings involve close family members, no orders as to costs.

DATED AND DELIVERED AT NAIROBI THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 23RD DAY OF JANUARY, 2025.

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F. GIKONYO M

JUDGE

In the presence of: -

1. Onduso for petitioners/respondents
2. Ms. Kyengo for applicants
3. Ekesa for Ojo for KCB
4. Kinyua C/A

