



REPUBLIC OF KENYA



In re Estate of Kitela Kioko Kithuma (Deceased) (Succession Cause 298 of 2009) [2025] KEHC 1979 (KLR) (17 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1979 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE 298 OF 2009**

MW MUIGAI, J

FEBRUARY 17, 2025

**IN THE MATTER OF THE MATTER OF THE
ESTATE OF KITELA KIOKO KITHUMA (DECEASED)**

BETWEEN

ISAAC MANZA KITELA 1ST ADMINISTRATOR

FESTUS JACKSON MUSYOKA 2ND ADMINISTRATOR

AND

BERNARD KITELA PROTESTOR

RULING

Summons for Revocation / Annulment of a Certificate for Confirmation of a Grant Dated June 10, 2024

1. The Summons have been brought under section 76 (c) of the *Law of Succession Act* and Rules 44 and 73 of the Probate and Administration rules wherein the Protestor seeks the following orders;
 - a. Spent
 - b. Spent
 - c. The Certificate of Confirmation of Grant issued herein pursuant to the judgment of the Court dated January 18, 2024 be revoked or annulled to pave way for a fresh distribution of the estate.
 - d. The judgment of the court issued herein on January 18, 2024 be reviewed and/or set aside
 - e. The costs of this application be borne by the Respondent.
2. The Summons are supported by the affidavit of Benard Kitela deposed on an even date wherein he contends that he is beneficiary of the estate and his late mother, one Beatrice Mutio Kitela (deceased)



who died on 10.01.2015 willingly transferred all her shares as member number 1144 to Festus Jackson M. Kitela, the 2nd Administrator through a letter dated 8.06.2009 and the application form was filled, executed and approved by the Chairman of Konza Ranching & Farming Co-operative Society Limited on 26.06.2009 and subsequently updated their register indicating the 2nd Administrator as the proprietor of the suit property

3. He deposed that Konza South/Konza South Block 5/1326 was distributed to Agnes Mbula Maundu, Rachel Syowai Muema, Mary Nzisa Mutavi, David Luilu Kitela and Bernard Mutuku Kitela yet according to a search he did, the property is registered in the name of the 2nd Administrator thus not available for distribution. According to him, the proceedings to obtain the grant was fraudulent and defective and was obtained by untrue allegations of a fact which was essential in point of law. He indicated that he stands to suffer because the land is supposed to be part of his distribution and it does not belong to the estate.

Replying Affidavit Dated 30.09.2024

4. The 1st Administrator denied that their mother ever transferred nor wrote a letter as alleged and he stated that the letter was a forgery. He and his family were not involved nor informed of the transfer. He stated that the grant was applied for and confirmed with full knowledge and in the presence of the Applicant.
5. It was contended that the Applicant has benefited more and if the judgment is not reviewed in a manner to remove the Applicant's share in Konza South/Konza South Block 5/1326 then he and other beneficiaries will suffer and be prejudiced and deprived of their share.
6. That Benard Mutuku Kitela should not have been included as he obtained more portions than others namely; Konza North Block 1/605 measuring 4.0 ha, Block 1/606 measuring 4.0ha, Kalama/Muumandu/118 measuring 8.5 ha and thus should not share with four others the property in dispute.

Notice of Preliminary Objection Dated 19.11.2024

7. The Protestor raised preliminary objection to the 1st Administrator's response for the reason that the pleadings are incurably defective in form, not even Article 159 (2) (d) of *the Constitution* of Kenya can cure it.

Protestor's Replying Affidavit Dated 20.09.2024

8. The Protestor contended that the application for review by the 1st Administrator is incurably defective in form as it violated the provisions of Rule 49 and 63 (1) of the Probate and Administration rules. He stated that the court distributed the property among 3 daughters and 2 sons and not solely to Benard Mutuku Kitela as purported by the 1st Administrator.
9. He deposed that there was no determination made in Makueni ELC Cause No E038 of 2021 that declared the 1st Administrator as the owner of the suit property as alleged but rather the suit was dismissed for want of prosecution as a result of a mistake by the advocate and was aware that he is in the process of reinstating the suit.

Supplementary Affidavit Dated 20.09.2024

10. The Protestor deposed that the 1st Administrator has not brought evidence to prove that he is a beneficial owner or in occupation of the suit property nor that the 2nd Administrator acquired the



property fraudulently or through corruption as alleged. He stated that he was a witness as the transfer was done in his presence.

11. The Protestor also filed a Further Affidavit wherein he reiterated that the 2nd Administrator is the registered owner of Land Parcel Konza South Block 5 1326.
12. The Summons and Preliminary objection were canvassed by way of written submissions.

Protestor's Submissions

13. Whilst relying on the case of Mukisa Biscuit Manufacturing Company Limited vs West End Distributors Limited (969) It was submitted that the response to the summons was incurably defective as it is titled 'appeal of the affidavit for protestor/applicant' and a document titles 'Review of the petitioner Isaac Manza Kitela' which according to him does not qualify as a pleading as it contravenes Rule 49 and 63(1) of the Probate & Administration Rules. In addition, that the undated application for review has not been brought by way of Summons.
14. Secondly, it was submitted that the judgment of 18.01.2024 should be reviewed and/set aside as the protestor had demonstrated and adduced evidence that the suit property did not belong to the estate.
15. Reliance was placed on the cases of Tokesi Mambili & others vs Simion Litsanga Sabwa , Civil Appeal 90 of 2001, Civil Appeal 2111 of 1996, National Bank of Kenya vs Ndungu Njau (1997) e KLR, Trust Bank Limited vs Parmount Universal Bank Limited & 2 others (2009) e KLR, Nyamongo & Nyamongi vs Kogo (2001) EA 170.
16. Third, it was submitted that there was concealment of the fact that Land Parcel Number Konza South Block 5 (Konza)/1326 did not form part of the estate of the deceased resulting in distribution of the same thus warranted revocation or annulment of the grant. The protestor relied on the cases of Jamleck Maina Njoroge vs Mary Wanjiru Mwangi (2015) and Re estate of Moses Wachira Komotho (deceased) (2009)

1st Administrator's Submissions

17. The 1st administrator reiterated the contents of his affidavit and submitted that Makueni ELC Case No E038 of 2021 was dismissed for want of prosecution with costs to the Defendant and the protestor has no ground on this case. He stated that they lived on the said piece of land for 7 years with their mother and Festus Musyoka and Benard Mutuku never asked about anything on the piece of land. He submitted that it was their only remaining hope as Festus Jackson Musyoka Kitela and Benard Mutuku Kitela had sold 34 acres and they remained poor.

Determination

18. I have considered the Summons, the Notice of Preliminary objection, the rival affidavits as well as submission of the parties and find that the issues for determination are;
 - a. Whether the response to the Summons was incurably defective
 - b. Whether the grant should be revoked or annulled or reviewed



19. The Court of Appeal in the case of *Nitin Properties Ltd v Singh Kalsi & another* [1995] states as follows:-

“A preliminary objection raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

20. The Protestor contends that there is an undated Summons for review on record which should be dismissed because it is incurably defective. I have perused the file and note that there is a letter who reference is “Re: Review Of The Petitioner Isaac Maanza Kitela” It cannot be said that the same are summons but a letter informing the court about the conduct of the said Isaac Maanza Kitela. There is therefore no undated Summons before this court for it to address its mind to.

21. As regards whether the grant should be revoked or annulled. I am guided by Section 76 of the Succession Act that provides that 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.

22. It expressly states 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.”



23. This section was interpreted in the case of *In re Estate of Prisca Ong'ayo Nande (Deceased)* [2020] eKLR where it was stated that:

“Under section 76, a court may revoke a grant so long as the grounds listed above are disclosed, either on its own motion or on the application of a party. A grant of letters of administration may be revoked on three general grounds. The first is where the process of obtaining the grant was attended by problems. The first would be where the process was defective, either because some mandatory procedural step was omitted, or the persons applying for representation was not competent or suitable for appointment, or the deceased died testate having made a valid will and then a grant or letters of administration intestate was made instead of a grant of probate, or vice versa. It could also be that the process was marred by fraud and misrepresentation or concealment of matter, such as where some survivors are not disclosed or the Applicant lies that he is a survivor when he is not, among other reasons. The second general ground is where the grant was obtained procedurally, but the administrator, thereafter, got into problems with the exercise of administration, such as where he fails to apply for confirmation of grant within the time allowed, or he fails to proceed diligently with administration, or fails to render accounts as and when required. The third general ground is where the grant has become useless and inoperative following subsequent circumstances, such as where a sole administrator dies leaving behind no administrator to carry on the exercise, or where the sole administrator loses the soundness of his mind for whatever reason or even becomes physically infirm to an extent of being unable to carry out his duties as administrator, or the sole administrator is adjudged bankrupt and, therefore, becomes unqualified to hold any office of trust.”

24. The Protester in this case contends that he has a title deed in the name of the 2nd Administrator who did not participate in these proceedings and thus Konza South/Konza South Block 5/1326 is not part of this estate as it was “willingly” transferred to the 2nd Administrator by their mother during her life time.
25. In the court’s judgment of 18/1/2024, it was noted that Konza South/Konza South Block 5/1326 was the subject of a dispute between Festus and Isaack. That the property was in the name of Festus Jackson Kitela. The Court noted that no details of the case in Makueni High Court on its status or progress had been provided to the Court.
26. Now, the court has been provided with a copy of an order dated 6.03.2024 in Makueni ELC Case no E038 of 2021 Festus Jackson Musyoka Kitela vs Isaac Manza Kitela where the suit was dismissed for want of prosecution with costs to the defendant.
27. As stated earlier, the protester speaks from a third party perspective as the said Festus did not participate in these proceedings.
28. The deceased herein died on 30th December 2003, the Summons for confirmation of grant was filed on 20th January 2023 and the grant was confirmed on 18th February 2023 with 30 days for parties to inform the court of any new developments and may apply to Court.
29. The documents attached to the application on namely, a letter dated 8.06.2009, application for transfer form, membership card, shares register, land register for Konza Ranching and an official search indicate that transactions occurred on or about 2009. How could this transfer and registration have been done without a confirmed grant?
30. Section 82 (b) of the *Law of Succession Act* which provides that “no immovable property shall be sold before confirmation of the grant.”



31. In *Dan Abdirahani Hassan & 2 others v Registrar of Titles, Ministry of Lands & 2 others* [2013] eKLR where Angote J held that:

“Article 40 of the current Constitution, just like section 75 of the repealed Constitution protects the right to own property. This Article should however be read together with the provisions of Article 40(6) which excludes the protection of property which has been found to have been unlawfully acquired. This requirement recognizes the fact that *the Constitution* protects certain values such as human rights, social justice and integrity amongst others. These national values require that before one can be protected by *the Constitution*, he must show that he has followed the due process in acquiring that which he wants to be protected.”

32. The court in its judgment also stated as follows;

“38. 38. In the absence of proof of a valid written or oral will of the deceased and/or confirmed gift inter vivos, the Court under Law of Succession ought to facilitate administration and distribution.”

33. There is still no evidence of the same at this juncture. I therefore find that the grounds for revocation and/or annulment of grant under Section 76 of the *Law of Succession Act* have not been satisfied

34. On the issue of review, Order 45 Rules (1) and (2) of the Civil Procedure Rules and Rules 63 and 73 of the Probate & Administration Rules, provided the legal basis for the application.

35. Order 45 of the Civil Procedure Rules would apply herein by dint of Rule 63 (1) of the Probate & Administration Rules.

36. The court in the case of *John M. Njoroge & Others Vs. Cecilia M. Njoroge & Others* (2016) eKLR, held that:-

“As stated above, the only provisions of the Civil Procedure Rules imported to the *Law of Succession Act* are orders dealing with service of summons, interrogatories, discoveries, inspection, consolidation of suits, summoning and attending witnesses, affidavits, review and computation of time. Clearly, Order 45 relating to review is one of the Civil Procedure Rules imported into succession practice by Rule 63 of the Probate & Administration Rules. An application for review in succession proceedings can be brought by a party to the proceedings, a beneficiary to the estate or any interested party. However, the application must meet the substantive requirements of an application brought for review set out in order 45 of the Civil Procedure Rules.”

37. The requirements for review in summary are that;

- a. The discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant and could not be produced at the time when the decree was passed.
- b. An applicant must demonstrate that there has been some mistake or error apparent on the face of the record.
- c. For any other sufficient reason

38. The 1st Administrator contends that the



The court in its judgment of 18.01.2024 gave inter alia, the following orders with regards to distribution the property and in particular Konza South/Konza South Block 5/1326;

(b)to be distributed amongst daughters of the deceased and two sons equally/equitably, who will not have specific properties allocated to them;

- Agnes Mbula Maundu,

-Rachel Syowai Muema,

-Mary Nzisa Mutavi

-David Luilu Kitela

- Bernard Mutuku Kitela

(c)

(d)

The Court also provided at the end of the judgment as follows;

If any party is aggrieved or by agreement/consensus propose a more practical/distribution in light of new developments, a party may apply within 30 days to date. Thereafter, Certificate of Confirmation of Grant of distribution of the deceased's shall issue.

39. None of the parties aggrieved by the decision of the Court provided evidence of consulting by consensus of agreement a more practical distribution in light of new developments within the 30 days or to date.
40. The beneficiaries and/or Administrators have not sat and agreed on a better proposal on distribution of the estate fairly and equitably amongst ALL beneficiaries' and presented to Court a signed Proposal/Agreement with Beneficiaries full names ID number and written Consent and presented to Court for consideration and approval as provided by Section 71 LSA.
41. Of interest, the Administrators/Beneficiaries met and undertook Court Annexed Mediation that resulted in a Partial Mediation Settlement Agreement adopted by this Court. This Court only dealt with properties that parties did/could not agree upon.
42. Therefore, I find that there is no ground or reason that has been presented to this Court for review or to interfere with its judgment of January 18, 2024.

Disposition

In the premises, the Summons dated June 10, 2024 is dismissed.

**RULING DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS HIGH COURT
ON LINE ON 17/2/2025**

M.W.MUIGAI

JUDGE

