



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Gatheru s/o Kanyonyo (Deceased) (Probate & Administration
1032 of 2012) [2025] KEHC 4628 (KLR) (10 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4628 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
PROBATE & ADMINISTRATION 1032 OF 2012**

MA ODERO, J

APRIL 10, 2025

**IN THE MATTER OF THE ESTATE OF GATHERU S/O
KANYONYO (DECEASED)**

JUDGMENT

1. The Objector/Applicant herein Josphat Karienyee Gatheru filed in this Court the Summons for revocation or Annulment of Grant dated 30th March 2016. The Summons which was premised upon Section 76 of the *Law of Succession Act*, Cap 160 Laws of Kenya and Rule 44 of the Probate and Administration Rules was supported by the affidavit of even date sworn by the Objector.
2. Despite having been properly served with notice of the Summons the Respondents Margaret Wamaitha Gatheru and David Waweru Wanjau did not enter appearance nor did they file any reply to the Summons.
3. The matter was set down for hearing on 5th November 2024 by way of oral evidence. Once again the 2nd Respondents (the 1st Respondent having passed away) was properly served with notice of the hearing date. The Affidavit of Service dated 29th October 2024 sworn by one Theobald Maina Kihia a licensed Court Process Server is proof that service was properly effected. The Respondent failed to appear in court on the hearing date thus the matter proceeded in their absence.

Background** ___

4. This succession cause relates to the estate of the late Gatheru S/O Kanyonyo alias Gatheru Kanyoi (hereinafter referred to as ‘the Deceased’) who was said to have died intestate on 30th December 1962.
5. Following the demise of the Deceased the 1st and 2nd Respondents presenting themselves as the Daughter and Grandson of the Deceased sought and obtained letters of Administration Intestate which Grant was issued to the two on 25th September 2013.
6. Thereafter the Respondents filed a Summons for confirmation of Grant dated 2nd April 2014. The Certificate of Confirmed Grant was issued to the two on 6th June 2014. Following issuance of the



confirmed grant the Respondents proceeded to sell and transfer the property known as L.R No. Kirimukuyu/Mbogoini/409 to a third party one John Nderitu Mwangi.

7. The Objector who avers that he is a son of the Deceased now seeks to have the Grant issued to the Respondents revoked. He alleges that contrary to the claim by the Respondents that the Deceased passed away on 30th December 1962, the fact of the matter is that the Deceased actually died on 29th October 1995.
8. The Objector further avers that the Deceased was a polygamous man who had two wives namely Mary Njoki (the 1st wife (who pre-deceased the Deceased and Hannah Njeri (the 2nd wife) who survived the Deceased. That the Deceased was also survived by several children including the Objector.
9. Finally the Objector avers that the Respondents failed to list all the properties left behind by the Deceased. On the basis of these untrue allegations material concealment and serious defects in substance the Objector prays that the Grant issued to the Respondent be revoked and that the title to LR No. Kirimukuyu/Mbogoini/409 be cancelled and the property revert back to the name of the Deceased.
10. As stated earlier despite being served with all relevant notices, the Respondents failed to enter appearance, failed to attend the hearing of the Summons and failed/declined to participate in this matter at all. The court was informed that the 1st Respondent Margaret Wamaitha Gatheru has passed on, however no evidence of her demise i.e a Death Certificate was filed in court.

Analysis And Determination

11. I have carefully considered the summons before this court, the evidence adduced by the Objector as well as the written submissions on record. The only issue for determination is whether the Grant issued to the Respondents ought to be revoked.
12. The Grounds upon which a Grant may be revoked are clearly set out in Section 76 of the *Law of Succession Act* Cap 160 Laws of Kenya as follows:-

“A grant of representation whether or not confirmed may at time be revoked or annulled if the court decides either on application by any interested party or its own motion.

- i. that the proceedings to obtain the grant were defective in substance;
- ii. 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;
- iii. that the grant was obtained by means of an untrue allegation of a fact essential in point in law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
- iv. that the person to whom the grant was made has failed, after due notice and without reasonable cause either –
- v. to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order allow; or
- vi. to proceed diligently with the administration of the estate; or
- vii. 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

viii. that the grant has become useless and inoperative through subsequent circumstances.

13. In the case of *Jamleck Maina Njoroge v Mary Wanjiru Mwangi* (2015) eKLR the court observed as follows:-

“ 11. The circumstances that can lead to the revocation of grant have been set out in Section 76 Law of Succession. 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.”

14. Likewise in the case of *Albert Imbuga Kisigwa v Recho Kawai Kisigwa*, Succession Cause No. 158 of 2000, the Court stated as follows:

“(13) Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the court to invoke section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased’s estate and ensure that the action taken will be for the interest of justice.” [Own emphasis]

15. The first issue which the objector takes issue with is the date when the Deceased is said to have passed away. In obtaining the Grant the Respondents claimed that the Deceased died on 30th December 1962.

16. The 1st Respondent in support of the Petition for Grant of Letters of Administration swore an affidavit dated 4th July 2012 in which she averred that the death of the Deceased was not registered, thus the Respondents were unable to avail a death certificate as proof of his death. The Respondents annexed a letter dated 2nd February 2011 written by the chief of Kirimukuyu Location confirming that during the year 1962 registration of deaths was not compulsory.

17. As it transpired the above averments were not factual. The objector has Annexed to this Supporting Affidavit dated 30th March 2016 (Annexure ‘JKG – 2’) a copy of the Death Certificate Serial No. 0211974 issued in respect of one Gatheru Kanyoi. The Death Certificate indicates that the Deceased died on 29th October 1995 aged 74 years old. This document clearly controverts the averment by the Respondents that the Deceased died on December 1962.

18. Therefore the claim by the Respondents regarding the date of death of the Deceased has been shown to be false. This is one of the untrue allegations by which the Respondent obtained the Grant in question.

19. In obtaining the Grant the Respondents indicated that the Deceased was survived by Margaret Wamaitha Gatheru – Daughter and David Waweru Wanjau Grandson ONLY.

20. However the Objector who says he is a son to the Deceased avers that the Deceased was a polygamous man who had two (2) wives and several children. That the 1st wife Mary Njoki predeceased the Deceased



whilst the 2nd wife Hannah Njeri survived the Deceased. The Objector names the children of the Deceased as:-

- i. Joseph Karienyee - Son
- ii. Margaret Wamaitha - Daughter
- iii. Evans Mwangi - Son
- iv. Nancy Wamaitha - Daughter
- v. Patrick Waweru - Son
- vi. Solom Ngatia - Son
- vii. Charles Irungu - Son

21. In support of this averment the Objector has annexed to his Supporting affidavit a chief's letter dated 27th October 2015 confirming that the Deceased had two wives and naming the children of the Deceased.
22. By naming themselves as the sole survivors of the estate and by failing to name the other wives and children of the Deceased the Respondents obtained the Grant by way of material non-disclosure.
23. Rule 26 of the Probate and Administration Rules provide as follows:-

- “(1) Letters of Administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the Applicant.
- (2) An application for a grant where the Applicant is entitled in a degree equal to or lower than that of any other person shall in default of renunciation or written consent in form 38 or 39 by all persons entitled in equality or priority be supported by an affidavit of the applicant and such other evidence as the court may require.” [Own emphasis]

24. The 1st Respondent is stated to be a daughter of the Deceased whilst the 2nd Respondent is a son to the 1st Respondent and therefore is a ‘grandson’ to the Deceased.
25. The obvious question that arises is who has the right in priority to apply to administer the estate of a Deceased Person. Section 66 of the [Law of Succession Act](#) sets out the Order of priority to be applied in issuing letters of Administration to an estate as follows:-

“When a deceased has died intestate the court shall serve as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall in the best interest of all concerned be made but shall, without prejudice to that discretion, accept as a general guide, the following order of preference:-

- a. Surviving spouse or spouses, with or without association of other beneficiaries.
- b. Other beneficiaries entitled on intestacy with priority according to their respective beneficial interests as provided by Part V.
- c. The Public Trustee; and
- d. Creditors.



Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executors who prove the will.”

26. From a clear reading Section 66 provides that in cases where a Deceased dies intestate, priority in granting letters of Administration will go to the surviving spouse or spouses and the children of the Deceased. The 2nd Respondent being a ‘grandson’ to the Deceased does not rank in priority over the wives and biological children of the Deceased
27. In the case of *Cleopa Amutala Namayi v Judith Were Succession Cause 457 of 2005 [2015] eKLR* Hon. Mrima J. observed that;

“Be that as it may, under Part V of the Act grandchildren have no automatic right to inherit their grandparents....

The argument behind this position is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit from their grandparents indirectly through their own parents..... The children to the grandparents inherit first and thereafter the grandchildren inherit from their parents. The only time where the grandchildren inherit directly from their grandparents is when the grandchildren’s own parents are dead..... [own emphasis]
28. I therefore find that he 2nd Respondent herein cannot claim a right in priority to administer the estate of the Deceased for as long as the biological children of the Deceased are still alive. The 2nd Respondent may only be named as a ‘beneficiary’ of the estate of the Deceased to replace his late mother who is a genuine beneficiary. However at the time the Respondents applied for and obtained the Grant the 2nd Respondents mother was still alive. By failing to disclose the existence the names, the names and identities of the other beneficiaries the Respondents circumvented Rule 26 (1) and as such obtained the Grant by way of material non-disclosure.
29. Rule 40(3) of the same Rules provides that before a Grant can be confirmed all the particulars of all the dependants must be disclosed to the Court. It is further required that a ‘Consent’ signed by all the beneficiaries should accompany the summons for confirmation of Grant. Additionally said dependants are required to attend court during the hearing of the Summons for confirmation of grant to confirm their consent to both the summons for confirmation of Grant as well as their consent to the mode of distribution of the estate.
30. In this case Rule 40(3) was not complied with. The consent annexed to the Summons for confirmation of Grant dated 2nd April 2014 included only the names of the 1st and 2nd Respondents. The names of the wives and other children of the Deceased were omitted enabling the Respondents to circumvent the law to their own benefit and to the detriment of the other beneficiaries of the estate.
31. It is quite obvious to the court that these actions of the Respondents was a deliberate and malicious enterprise to ensure that they kept the other genuine beneficiaries in the dark as they proceeded to court to obtain the Grant in their own favour.
32. The objector has claimed that the Respondents failed to include all the assets left behind by the Deceased. In their Petition the Respondents listed only one asset being LR No. Kirimukuyu/Mbogoini/409. The Objector claims that the Deceased left another proeprty being Ker/Sorget/Sorget Block 1/90.



33. However the Objector has not annexed the Title documents for this Sorget Property to prove that the same was infact registered in the name of the Deceased. In the circumstances this allegation that the Respondents failed to list all the properties left behind by the Deceased remains unproven.
34. Once they had secured a Certificate of confirmed Grant the property known as Karimukuyu Mbogoini/409 was transferred into the name of the 2nd Respondent who then proceeded to sell and transfer the estate property to a third party. Annexed to the objectors supporting Affidavit is a Certificate of Official Search dated 3rd March 2016 (Annexure 'JKG-5(b) showing that this property is now registered in the name of one John Nderitu Mwangi. I have no doubt that the Respondent kept the proceeds of that Sale to themselves.
35. The copy of the Green card (Annexure 'JKG -5a') shows that this property was on 23rd April 1959 registered in the name of the Deceased Gatheru S/O Kanyonyo. Thereafter on 15th April 2015 the property was transferred to the 2nd Respondent David Waweru Wanjau and on 17th September 2015 the property was transferred to the third party John Nderitu Mwangi.
36. As stated earlier the Respondents colluded to unlawfully and un-procedurally apply for and obtain letters of Administration to the estate of the Deceased. They were clearly targeting the property known as Kirimukuyu/Mbogoini/409 which they listed as the only property left behind by the Deceased.
37. The Respondents maliciously and deliberately concealed the existence and identities of the other genuine beneficiaries to the estate. They deliberately excluded the other beneficiaries from this succession cause and in so doing secretly obtained the Grant in favour of themselves.
38. In the case of *Matheka and Another vs Matheka* (2005) eKLR the Court of Appeal laid down the following guiding principles in revocation of a grant;
 - (i) A grant may be revoked either by application by an interested party or by the court on its own motion.
 - (ii) Even when revocation is by the court upon its 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 the making of a false statement or by concealment of something material to the case or that the grant was obtained by means of untrue allegation of facts essential in point of law or that the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the estate.”
39. It is quite obvious that this Grant was obtained fraudulently by material non-disclosure, of material facts, by making of false statements and by way of untrue allegations. The grant so issued to the Respondents was defective in substance and is clearly for revoking. I therefore revoke the Grant issued to the Respondents on 25th September 2013 and confirmed on 6th June 2014.
40. Given that using of this illegally obtained Grant the 2nd Respondent illegally sold and transferred the property known as LR No. Kirimukuyu/Mbogoini/409 to a third party I direct that the title issued to John Nderitu Mwangi on 17th September 2015 be cancelled and title revert to the name of the Deceased.
41. Finally and in conclusion this Court makes the following orders;-
 - (1) The Summons for revocation of Grant dated 30th March 2016 is hereby allowed.
 - (2) The Grant issued on 25th September, 2013 in the names of Margaret Wamaitha Gatheru and David Waweru Wanjau be and is hereby revoked.



- (3) The certificate of confirmation of Grant dated 6th June 2014 issued to Margaret Wamaitha Gatheru and David Waweru Wanjau be and is hereby revoked.
- (4) The Surviving beneficiaries of the Deceased herein to forward to the court within twenty (20) days the name(s) of the person(s) they propose to be appointed as Administrators of the estate of the Deceased.
- (5) Costs of this Summons will be met by the Respondents.

DATED IN NYERI THIS 10TH DAY OF APRIL, 2025

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MAUREEN A. ODERO

JUDGE

