



REPUBLIC OF KENYA



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**Kamwara v Mutea (Criminal Appeal E003 of 2023)  
[2025] KEHC 4650 (KLR) (3 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4650 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL APPEAL E003 OF 2023**

**LW GITARI, J**

**APRIL 3, 2025**

**BETWEEN**

**CATHERINE GATIRI KAMWARA ..... APPELLANT**

**AND**

**NICHOLAS KOOME MUTEA ..... RESPONDENT**

**JUDGMENT**

**Background**

1. This appeal arises from a ruling delivered in the Senior Resident Magistrate court at Githongo Succession Cause No. 71/2018 in the matter of the Estate of Issac Mutea Muguna (Deceased). The said deceased Isaac Mutea Muguna died on 15/09/2017 and a grant of letters of Administration of his estate was issued to Catherine Gatiri Kamwara and Nicholas Koome Mutea on 27/05/2019. However, vide a ruling delivered by the learned Magistrate on 14<sup>th</sup> December 2022 the grant issued to the appellant was revoked and he learned Magistrate replaced her with her son Lawi Muchai Mutea. The appellant was also removed from being a signatory to a bank account No. 12xxxxxxx at KCB bank Meru and replaced with the said son Lawi Muchai Mutea who is her stepson.
2. The appellant was aggrieved by the said and filed this appeal based on the following grounds:
  1. The learned Magistrate erred in law and in facts by removing the appellant as the co-administrator of the deceased estate and replacing her with Lawi Muchai Mutea who is the appellant's son.
  2. The learned Magistrate erred in law and in facts by failing to find that Lawi Muchai Mutea did not consent to replace the appellant as the co-administrator of the deceased's estate.



3. The learned Magistrate erred in law and in facts by failing to find that the other deceased's children did not consent to the removal of the appellant as the co-administrator of the deceased's estate.
  4. The learned Magistrate erred in law and in facts by failing to find that the appellant being the deceased's wife lies first in the degree of administering the deceased's estate before the children.
  5. The learned Magistrate erred in law and in facts by failing to find that the costs of administering the deceased's estate are paid from the estate and the appellant cannot be admonished for asking money from the estate to pay lawyers who acted for the estate.
  6. The learned Magistrate erred in law and in fact by not finding that the appellant has diligently performed her duties as a co-administrator and the respondent who is the elder stepson of the appellant only wants to control the estate by having his younger step brother as a co-administrator.
3. The appellant prays that this appeal be allowed, the respondent's application dated 31/08/2022 be dismissed and she be reinstated as a co-administrator of the deceased estate. The appeal was opposed by the respondent and the court directed that the respondent and the court directed that it be canvased by way of written submission.

### **Appellants Submissions**

4. The appellant argued grounds 1, 2, & 3 together and submits that the appellant did not consent to be substituted as an administrator of the estate of the deceased nor did the other beneficiaries including Lawi Muchai Mutea consent to her removal as an administrator of the estate of the deceased. The appellant relies on the case of *In Estate of Joseph Otieno Oonga (deceased)* (2019) eKLR where the court held that Section 76 of the [Law of Succession Act](#) and Rule 44 of the [Probate and Administration Rules](#) provides for the revocation of the grant of letters of administration and such an application can only be heard after all the beneficiaries have been served and given an opportunity to respond thereto. That the appointment of any other person as an administrator must also be with the consent of all other beneficiaries. The appellant submits that failure to seek the consent of the either beneficiaries and to serve them with summons for revocation of grant was fatal and a ground for this court to allow the appeal.
5. On ground No. 4, it is submitted that the applicant being the widow of the deceased had priority in administering the estate of the deceased. He relies on Section 35(1) of the [Law of Succession Act](#) which provides as follows:
  - “(1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—
    - (a) the personal and household effects of the deceased absolutely; and
    - (b) a life interest in the whole residue of the net intestate estate:
 

Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.”
6. He relies on the case of *Tau Katungi v Margrethe Thorning Katungi & Another* (2014) eKLR where the court while relying on Section 35(1) of the [Law of Succession Act](#) stated that children of the deceased



are not entitled to access the net intestate estate so long as there is a surviving spouse. The children's right to the estate crystallizes upon determination of the life interest holder or her remarriage.

7. On ground No. 5 it is submitted that the legal fees payable to her lawyers were to be borne by the estate and it was therefore wrong for the appellant to be denied access to funds to pay the lawyers. She relies on Section 83(c) of the *Law of Succession Act* which provides as follows:

“Personal representatives shall have the following duties:

- a. ...
- b. ...
- c. To pay out of the estate of the deceased all expenses of obtaining their grant of representation and all other reasonable expenses of administration including to estate duty if any.”

8. The appellant contends that the law stipulates that expenses for obtaining the grant of representation are paid from the deceased's estate and to deny the appellant the right to access the funds to pay the lawyers is against the law. That the general principle is that the estate has to bear the expenses incidental to the proper performance of the duties of the personal representatives.
9. Ground 6 – It is submitted that the appellant diligently performed her duties as an administrator. That the respondent who is her step-son acted with malice in removing her as an administrator with the aim of controlling the estate to her exclusion. That she has not failed to sign withdrawal forms and has indeed signed several of them on various dates and has therefore been performing her duties as the administrator of the estate. It is submitted that there was no proof that the appellant was ineffective as an administrator and her appeal should be allowed.

### **Respondent's Submissions**

10. The respondent submits that on whether the learned Magistrate erred by removing the appellant as the co-administrator of the estate of the deceased, it is submitted that she had refused to co-operate in the administration of the estate. It is submitted that the appellant has not included the main body of the application which shows the prayers the respondent was seeking, that is to be compelled to sign the documents to open a joint account so that it could receive all monies due to the estate for distribution to the beneficiaries as per the Judgment of the learned Magistrate. That the respondent sought the revocation of the grant so that she could conveniently administer the estate with ease.
11. Secondly, the respondent submits that he was seeking revocation of grant in the application dated 31/08/2022 as the appellant had refused to sign the withdrawal forms to withdraw school fees for the beneficiaries. That the learned Magistrate acted within the law in removing the appellant upon application being made before the learned Magistrate for failing to diligently administer the estate.
12. The respondent submits that the second issue is whether the learned Magistrate requires the consent of Lawi Muchai Mutea on the consent of all the beneficiaries to remove the administrator. The respondent relies on Article 159 of the *Constitution* and Rule 73 of the *Probate and Administration Rules* and submits that the learned Magistrate had inherent power to make such orders for the ends



of justice to be met. He further relies on the case of *Re Estate Annah Nenbungai Koikai (deceased)* (2021) eKLR where the court held that:

“The applicants have made out a good case for the removal of the administrator on account of failure to diligently carry out and complete administration of the estate of the deceased in accordance with the grant as confirmed by the court.”

13. He submits that the respondent presented compelling evidence for the court to use its inherent power in order to save proper administration of the estate of the deceased and the want of consent from other beneficiaries could not deter the learned Magistrate to properly apply the law as she and on the failure by the learned Magistrate to find that the appellant had priority in administering the deceased's estate, the respondent relies on the *Re-Estate of George Ragui Karanja (Deceased)* 2016 eKLR where the court held that the court has the final discretion to determine the person or persons to whom the grant of letters of administration shall, in the best interests of those concerned be made and the order of precedence under Section 66 of the *Law of Succession Act* is not binding to the court. It is discretionary and refers to general rule. The respondent submits that he application has not satisfied the criteria set out by the Court of Appeal for interfering in the exercise of discretion by trial court as held in *Said Ahmed v Manasseh Denga & Another* 2019 eKLR, Court of Appeal. He submits that the discretion was exercised fairly as the applicant had become a stumbling block in the administration of the estate of the deceased.
14. On whether the learned Magistrate erred in holding that there were no orders as to costs. It is submitted that the succession was successfully concluded and the beneficiaries were fairly provided for and there is no appeal by any of the beneficiaries on the mode of distribution. That the only bundle on the distribution of the estate is the Pension and Gratuity Account set aside for the 3 dependants in school in which he appellant had an interest and was not willing to let go. That the estate had no lawyers and were not included in the grant and neither were proposed in the mode of distribution. The respondent prays that the appeal be dismissed.

### **Analysis and Determination**

15. I have a considered the impugned ruling. The grounds of the appeal and the submissions. The issues which arises for determination are:
  1. Whether the learned Magistrate erred by removing the appellant as a co-administrator of the estate of the deceased.

This is a first appellate court and is mandated to re-evaluate the evidence which was before the trial court and arrive at its own independent finding but to bear in mind that it had no opportunity to see the witnesses when they testified and leave room for that, see *Selle & Another v Associated, Motor Boat Company Limited & Others* (1968) E.A The impugned ruling shows that the 2<sup>nd</sup> Petitioner who is the respondent had filed a summons under Section 49, 76(d), (ii) of the *Law of Succession Act* seeking an order that the grant be revoked and the court to issue a fresh grant to Nicholas Koome Mutea and Lawi Muchai Mutea.
16. The second prayer was that an order be issued removing Catherine Kamwara as a signatory to Account No. 12XXXXXXXXXX at KCB Meru Branch. The first of the application ws that the appellant had paralyzed and frustrated the implementation of the Judgment of the court. The 2<sup>nd</sup> Petitioner filed and application dated 14/12/2021 and the 1<sup>st</sup> Petitioner was forced to open a bank account to receive monies from Public Trustee Embu which culminated into opening account No. 12XXXXXXXXXX KCB Bank Meru Branch. On 29/8/2022 the appellant refused to sign forms for withdrawal of fees and



subsistence of the respondents (2<sup>nd</sup> petitioner's) siblings having gone to the bank as she was demanding Kshs. 62,000/= to settle her lawyers' fees and Kshs. 10,000/= which they refused. The appellant left the children of deceased stranded. That she had also demanded that they pay a Sacco loan of Kshs. 597,965.74 which they also refused. This is what prompted the filing of the application which gave rise to the impugned ruling.

17. The learned Magistrate held that the appellant had failed to exercise her duty of ensuring that the deceased's estate is administered appropriately and had become a stumbling block to the management of the estate. She revoked the grant and ordered a fresh grant to be issued to Nicholas Koome Mutea and Lawi Muchai Mutea, removed the appellant as a signatory to the account at KCB Bank Meru and appointed Lawi Muchai Mutea to be a co-signatory to the said Account. The law on revocation of grants is anchored at Section 76 of the Law of Succession Act which provides as follows:

“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.”

18. A grant of letters of Administration may be revoked where the grounds listed under Section 76 either on application by a party or the court on its motion. The grounds are the process of obtaining the grant as defective by reason of failure to comply with the procedure or obtaining the grant. It may also be revoked by reason of fraud or misrepresentation or concealment of material facts which are relevant to the case. The grant may also be revoked where the administrator fails to apply for confirmation of grant or fails to proceed diligently with the administration and fails to render accounts of the estate when required. The grant may also be revoked where it has become useless and in operative due to some circumstance like where the sole administrator dies or is unable to carry on with the exercise of his duties as the administrator of the estate. In this case the respondent had moved the court by stating



that the appellant had failed to proceed diligently with the administration of the estate and urged the court to revoke the grant.

19. I have perused the proceedings before the trial court and noted that the learned Magistrate entered Judgment on 28/4/2021 and distributed the estate to all the rightful beneficiaries. It is important to note that the appellant has not challenged the mode of distribution of the estate of the deceased as contained in the said Judgment. As such the appellant has no problem with the mode of the distribution of the estate.
20. I have looked at the replying affidavit of the appellant in response to the affidavit the appellant denied that she has frustrated the distribution of the estate of the deceased or that she has refused to cooperate with her co-administrator. She further depones that the 2<sup>nd</sup> petitioner is an adult and not a minor for he has attained the age of majority and hence should open his account in his name and she should not be compelled to open up a joint account with the 2<sup>nd</sup> petitioner to enable the public trustee deposit the estate funds for the distribution to the beneficiaries. The respondent had deponed that the appellant had failed to sign account opening document and to present herself before the public to sign the relevant documents for the release of the estate money into a joint account.
21. The appellant's averments were a general denial and the fact that she clearly stated that the respondent could open the account in his own name as he is an adult is a clear indication that she had failed to act diligently by refusing to sign the account opening documents. It is trite that where there are two administrators of the estate of a deceased person, they are supposed to execute the documents to facilitate the implementation of the grant. In the impugned ruling the trial Magistrate held that the appellant had to be forced by the court to open the bank account to receive funds from the public trustee and thereafter she refused to sign forms for the withdrawal of fees and subsistence of the 2<sup>nd</sup> petitioner siblings and demands Kshs. 62,000/= to settle lawyers fees and Kshs. 10,000/=. That she had also demanded that they pay her Sacco loan.
22. I find that the conclusion by the learned Magistrate that the appellant had failed to exercise her duty as stipulated by the statute was well founded. She indeed had become a stumbling block to the management of the estate and resultantly the court was made to police each and every step of the administration. She relied on the High Court decision *in re Estate of Chiringu Kangerue (Deceased)* (2021) eKLR where the High Court had to invoke its powers and revoke a grant to ensure that Justice is done to the beneficiaries. In the persuasive decision cited by the respondent, that is *in Re Estate of Annah Nenchungei Koikai (Deceased)* (2021) eKLR the court stated that where there are two or more administrators and one or two of them are recalcitrant or an impediment to the administration the proper cause to take is to remove such an administrator. The court held that:

“The applicants had made a good case for removal of the administrator on account of failure to diligently carry out and complete the administration of the estate of the deceased in accordance with the grant as conformed by the court.”
23. It is clear from the Ruling of the learned Magistrate that the applicant had refused to act diligently by failing to sign documents to facilitate the opening of the bank account and documents required by the public trustee to transfer money to the account. Section 76 (d) (II) is one of the grounds for the revocation of grant where an administrator had failed to act diligently. The learned Magistrate exercised her discretion fairly and this court has no reason to interfere with the exercise of the discretion.



24. The second consideration is whether the learned Magistrate erred in appointing an administrator without the consent of either beneficiaries and without the consent of the administrator so appointed. Section 66 of the [Law of Succession Act](#) provides as follows:

“When a deceased has died intestate, the court shall, save 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 interests 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 executor or executors who prove the will.”

25. The Section give the court the sole discretion to determine the person or persons to whom the grant of letters of administration shall be made. The order of precedence of the person to be considered in the exercise of that discretion is a general guide and is therefore not mandatory. The court is given unfettered discretion to determine as to whom the grant should be issued. The appellate court will not normally interfere with the exercise of that discretion unless it is shown that the discretion was not exercised judiciously or fairly.

26. In [Said Ahmed v Manasseh Denga & Another](#) (2019) eKLR

“It is common ground that such discretion cannot be interfered with lightly by an appellate court unless it is shown that the discretion was clearly wrong because the Judge misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. Those principles were stated in the ageless case of *Mbogo & Another v Shab* [1968] E.A 93. In the subsequent case of *United India Insurance Co. Ltd & 2 Others v East African Underwriters (Kenya) Ltd* [1985] KLR 898 Madan, JA stated thus:

“The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

27. The learned Magistrate had jurisdiction to issue such orders as may be necessary to determine any dispute under the [Act](#). Section 48(1) of the [Law of Succession Act](#) provides as follows:

“(1) Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49 of this [Act](#), a Resident Magistrate shall have jurisdiction to entertain any application other than an application under section 76 of this [Act](#) and to determine any dispute under this Act and



pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed one hundred thousand shillings:

Provided that for the purpose of this section in any place where both the High Court and a Resident Magistrate's Court are available, the High Court shall have exclusive jurisdiction to make all grants of representation and determine all disputes under this Act."

28. This further buttressed by Rule 73 of the Probate and Administration Rules which provides that:

"Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process."

29. The learned Magistrate in the exercise of the discretion did not require the consent of the beneficiaries or the person to be appointed. The appellant has not availed any evidence to show that the person appointed to replace her the administrator had not consented. The appellant has also not shown that the other beneficiaries were not served. She has not discharged that burden. Section 107 of the Evidence Act provides that:

"(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

30. The appellant has not appealed against the mode of distribution. The Judgement of the learned Magistrate still stands as there is no appeal. The appellant had no reason not to sign the documents to effect the grant and yet she was satisfied with the Judgment. The learned Magistrate acted within the Law by removing her as an administrator of the estate of the deceased and appointing Lawi Muchai Mutea as an administrator in her place. It is my view that the appeal lacks merits.

31. On the issue costs, it is trite law that they follow the event and are at the discretion of the court. An appellate court will not normally interfere with the exercise of discretion by the trial court unless it is shown that the exercise of discretion was clearly wrong, that the Judge misdirected himself or acted on matters which it should have taken into consideration and in so doing arrived at a wrong conclusion. See Said Abamed v Manasseh Denga & Another (2019) eKLR (*supra*). This is a matter that involved beneficiaries of the estate of the deceased. The learned Magistrate distributed the estate and the beneficiaries including the appellant were satisfied as there is no appeal on the mode of distribution.

32. In this matter the lower court did not order that the advocates fees be paid. Furthermore, no advocate/client bill of costs had been taxed. The Pension and Gratuity Account was set part for education purposes of three dependants who were in school. It was contrary to the Judgment of the court for the appellant to demand advocates fees from the said account. The Judgment is binding on the appellant. The distribution of the estate was concluded by the learned Magistrate. It was therefore fair for the learned Magistrate to order that each party to bear its own costs. The learned Magistrate exercised her discretion fairly in the circumstances and I have no reasons to interfere with her decision.



**Conclusion**

33. This appeal is without merits. I order that:

1. The appeal is dismissed.
2. Each party to bear its own costs.

**DATED, SIGNED AND DELIVERED AT MERU THIS 3<sup>RD</sup> DAY OF APRIL 2025**

**HON. LADY JUSTICE L. GITARI**

**JUDGE**

