In re Estate of Fitzval Remedios Santana De Souza (Deceased) (Succession Cause E094 of 2023) [2025] KEHC 6836 (KLR) (16 May 2025) (Ruling)

Neutral citation: [2025] KEHC 6836 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

SUCCESSION CAUSE E094 OF 2023

G MUTAI, J

MAY 16, 2025

BETWEEN

ROMOLA AMELIA DE SOUZA ..... 1ST APPLICANT

MAYA HELLEN DE SOUZA ..... 2ND APPLICANT

AND

VEENA CARMEN DE SOUZA ..... 1ST RESPONDENT

MARK VIREN DE SOUZA ..... 2ND RESPONDENT

AND

ROY DE SOUZA ..... INTERESTED PARTY

RULING

1. In his last will and testament, dated 6th May 2013, the deceased appointed Romola Amelia de Souza, Veena Carmen de Souza, and Maya Hellen de Souza as the executors and trustees of his will. At paragraph 4 of the said will, he stated, "I hereby authorize and instruct Romola Amelia de Souza, Veena Carmen de Souza, and Maya Hellen de Souza to manage all my assets and to pay all my debts, including funeral and testamentary expenses."

2. Further, at paragraph 24 of the said document, he added that:-

> "I hereby instruct and direct my executors/trustees that if any one of my children or any other person challenges my will or me personally, for any reason whatsoever, I instruct my Executors/Trustees to disregard any instructions or provisions giving that person any right to my property, movable or immovable. And if any of my Executors/Trustees refuses to follow my directions or instructions, then she should resign or be removed as my Executor/ Trustee and should be replaced by my other son, Mark Viren de Souza. Should he decline,

then the remaining two shall remain as Executors/Trustees. I have tried my very best to be as equal and fair as I can be. It is known that any two people can disagree on the exact value of any two plots in any property."

3. The 1st & 2nd Petitioners/Respondents filed the Petition for Grant of Probate in respect of this matter. Although the 2nd Petitioner/Respondent was not named as an original executor, and was only to become one if any of the three renounced executorship, it was stated based on the correspondence between the parties that the 1st and 2nd Applicants had, in effect, refused to follow the directions of the deceased testator and were thus deemed to have resigned or been removed.

4. This Court issued a Grant of Probate of the deceased's written will on 1st February 2024. It is this action on the part of the Court that appears to have triggered the application now before the Court.

5. The application is dated 16th January 2025. The same seeks two orders, to wit:-

    1. That the Grant of Probate of the Written Will issued on 1st February 2024 and all other consequential proceedings thereto be set aside and the suit be struck out;

    2. That the costs of this application be provided for.

6. The ground upon which the application is based, as disclosed in the body of the Notice of Motion is that the 1st and 2nd Applicants as well as the 1st Petitioner/Respondent were named as the executors of the written will of the deceased dated 6th May 2025 and that they were ready to take their rightful roles as executors. They denied that they had renounced their executorship and stated that no citation was issued calling on them to renounce their executorship or to apply for the grant of probate of the will. The failure to take out a citation was a procedural defect in the grant's issuance, which rendered the resultant Grant of Probate defective in substance. They averred that the 2nd Petitioner/Respondent ought therefore not to have been granted probate of the will of the deceased with the 1st Petitioner/Respondent.

7. The application is opposed. The 1st Petitioner/Respondent deposed to an affidavit sworn on 5th February 2025, in which she stated that it was not necessary for them to take out citation, as both she and Mark Viren de Souza were named as executors in the will dated 6th May 2013, and that Mark was named as an "alternative executor" should any of the executors refuse to follow the instructions of the testator and take up responsibilities as executors. She deposed that the mother and the sister didn't need to renounce the executorship since the will provided for "removal and replacement if they refused to follow my father's instructions, which they plainly did."

8. The deponent stated that it was clear from the correspondence between the parties and their representatives that the Applicants were not willing to take up their role as executors and had, in essence, renounced or refused to take up executorship. She averred that Maya refused to sign the petition for the grant of probate. Their mother, when issued with a notice, was initially silent but subsequently refused through communication sent via her lawyer, Mr Rebelo.

9. She stated that it was incredible that while the Applicants had stated that they were ready and willing to take their roles as executors, they were applying for the entire proceedings to be struck out. Veera Carmen de Souza urged that such a cause of action would greatly prejudice the estate. Consequently, she prayed that the application be dismissed.

10. Maya Helen de Souza deposed to a Supplementary affidavit on 21st February 2025, in which she denied the contents of the Replying Affidavit and urged that the fact that no citation was taken out was not a minor misstep but was an intentional attempt to exclude the two applicants from the management of the estate.

11. The application was canvassed through written submissions. Both parties filed written submissions, a precis of which I shall state below.

12. The submissions of the Applicants are dated 21st February 2025.

13. In the said submissions, reliance was placed on the provisions of section 62 of the *Law of Succession Act*. Counsels for the Applicants, Archer & Wilcox, urged that the grant shouldn't have been issued to any person until all the executors named in the will had been issued with citation or had renounced the executorship to apply for a grant of probate of the will. Renunciation of the executorship could be either oral, in court, or writing. If the latter, it must be in one of the Forms 98 to 102 of the P&A Forms, as appropriate.

14. Counsel for the Applicants identified the issues as being:-

    1. Whether it was necessary for a citation to be issued, and

    2. Whether the Court has the power to strike out the suit.

15. In respect of the first issue, it was urged that there was no provision for the removal of executors in the Rules. Relying on the case of re Estate of Himatlal Jevatlal Mehta (Deceased) [2020] KEHC 3618 (KLR), it was contended that the *Law of Succession Act* and its rules do not provide for the removal of an executor.

16. Ms JanMohamed, SC, learned counsel for the Applicants, submitted that, since under Kenyan law an executor could not be removed and there having been no renunciation, the conditions under which Mark Viren de Souza could be an executor had not crystallized. His appointment as an executor was therefore fallacious; counsel urged that the testator, in any event, had not contemplated a situation where two executors would have refused to take up the executorships.

17. On the second issue, it was urged that pursuant to section 76 of the *Law of Succession Act*, the Court could strike out proceedings commenced in abuse of its process. Ms JanMohamed relied on the case of re The Matter of The Estate of George M'Mboroki (Deceased) [2008] KEHC 3646 (KLR). Reliance was also placed on the provisions of section 47 of the *Law of Succession Act* and Rule 73 of the Probate and Administration Rules.

18. The submissions of the Petitioners/Respondents are dated 28th February 2025. Counsels for the Petitioners/Respondents, Anjarwalla & Khanna, stated that in the Supplementary Affidavit, the Applicants had attempted to introduce new issues, to wit, that the deceased had declining mental capacity at the time he executed the Will. It was urged that new issues could not be introduced at such a stage. Counsels for the Executors/Respondents relied on the case of Astute Africa Investments & Holdings Ltd vs Spire Bank Kenya Ltd & another [2018] KEHC 3360 (KLR) and Bernard Kibor Kitur vs Alfred Kiptoo Keter [2018]eKLR.

19. Mr Esmail and Ms Onesmus, the learned counsels for the Petitioners/Respondents, in their written submissions, urged that their clients were not under an obligation to notify the executors of the filing of the petition and that the statutory notice was published in the Kenya Gazette.

20. Regarding the two issues pointed/out by the Applicants, the Executors/Respondents urged that there was no need for consent, or in the alternative, renunciation by the recalcitrant executors. Reliance was

placed on the decision of W. Musyoka, J, re Estate Of Margaret Wairimu Gichuhi (Deceased) [2017] KEHC 8207 (KLR), where the Court stated as follows:-

> "7. There is nothing in the relevant legislation that requires a co-executor to inform or consult his co-executor before applying for representation as per the will. Neither is he required to get the consent or renunciation of the co-executor. These are required by section 62 of the Act and Rule 7 of the Rules for those seeking grants of letters of administration."

21. Counsels for the Executors/Respondents urged that Section 62 of the *Law of Succession Act* ought to be read together with Rule 7(6) of the P&A Rules.

22. It was urged that by their conduct, the Applicants had refused to take out letters of administration. The said counsels submitted that striking out the petition would leave the estate without personal representatives, causing unnecessary delay to the probate proceedings without a justifiable cause.

23. They argued that Rule 18(2) of the Probate and Administration Rules, which applies to renunciation, did not apply to this case, and that Section 62 of the *Law of Succession Act* is also inapplicable.

24. It was submitted that there was no requirement for all the executors to apply for a grant at the same time. Reference was made to Rule 19(1) of the Probate & Administration Rules.

25. Counsel stated that the grounds upon which the grant may be revoked are set out in Section 76 of the Act. The said ground had not been met in this case. It was submitted that the decision to file a petition for the grant of probate was made in accordance with the testator's instructions in the will.

26. For the foregoing reasons, it was urged that the application be dismissed with costs.

27. I have reviewed the Notice of Motion application dated 16th January 2025, the supporting affidavit of Maya Helen de Souza sworn on 16th January 2025, the replying affidavit of Veena Carmen de Souza sworn on 5th February 2025, and the Supplementary affidavit of Maya Helen de Souza, sworn on 21st February 2025, as well as the Written Submissions of the parties. Has a case been made for the grant of the orders sought?

28. I agree with the parties' counsels that the issues that this Court is called upon to determine are the following: -

    1. Whether it is necessary to issue a citation; and

    2. Whether this Court may strike out a suit.

29. The Court notes that Veena Carmen de Souza is an executor of the will of the deceased, as are Romola Amelia de Souza and Maya Helen de Souza. Mark Viren de Souza is what may be called an alternate executor; he would only be an executor if an executor named in the will resigned (i.e., renounced the executorship) or was otherwise removed. His executorship is therefore conditional.

30. It is a common ground that there hasn't been a formal renunciation by Romola and Maya of their executorship of the will. There has, however, been reluctance, expressed in writing, through own or counsel's letters, to petition for the grant of representation due to the feeling they have that the division of the estate as proposed in the will was not fair to all the beneficiaries. Does the reluctance amount to renunciation?

31. Section 59 of the *Law of Succession Act* provides that:-

> " A person who has been appointed by a Will as an executor thereof may either by oral declaration before the Court or by writing under his hand, renounce executorship, and shall thereafter be finally precluded from applying for grant of probate of that will."

32. Rule 18(1) of the Probate and Administration Rules provides that renunciation of probate, whether of a written or oral will, or of the right to apply for administration, shall be in Forms 98 to 102, as appropriate.

33. I agree that there is no requirement that all executors must apply for the grant of probate together. It is for this reason that Section 60 of the Act provides that the grant of probate may be granted to all executors at once or at different times. The grant is made at different times to the executors by way of joinder by endorsement of the grant pursuant to Rule 19(1) of the Probate and Administration Rules.

34. In my view, therefore, there was no requirement for Veena to apply for a grant of Probate with Romola and Maya or for her to cite them. The two have the option of applying for a grant, and the Court would then join them by way of endorsement of the grant of probate.

35. The status of Mark Viren de Souza, however, is different. His executorship, and thus the grant of probate issued to him, has been questioned. Had the conditions under which he could be appointed crystallized? As already shown, he is an alternate executor. He could only become a substantive executor if an executor resigned or was removed. None of the executors had resigned. In my view, "removal" of an executor, if at all that is possible, could only be done through a legal process.

36. That being the case, it is my view that, before Mark Viren de Souza was appointed as an executor, it was necessary to issue citations to Maya and Romola, calling on them to either renounce the executorship or apply for a grant of probate. This was not done in this case. It is therefore my opinion that to the extent that no citation was issued to Romola and Maya, these proceedings, in particular the issuance of the grant of probate to Mark Viren de Souza, are defective.

37. Regarding the question of removing an executor, I agree with the decision of the Court in the case of re Estate of Himatlal Jevatlal Mehta (Deceased) [2020] KEHC 3618 (KLR) in which it was held that the *Law of Succession Act* makes no provision for removing an executor, as suggested by the Petitioners/ Respondents. Muguru Thande, J was quite emphatic in the said case, holding that:-

> " 11. The *Law of Succession Act* and its Rules make no provision for "removal" of an executor as sought by the Applicants herein. The only way a person to whom a grant of representation in respect of the estate of a deceased person has been issued, can cease to be a legal representative, is through an application for revocation of such grant. Section 76 of the Act and Rule 44 of the Rules make provision for revocation of a grant of representation."

38. She further held in the said case that:-

> " 14. I have looked at the cited case of Rupal Shah and Another v Ramesh Bhagwani Shah [2015] eKLR in which Ougo, J removed an executor who she found unsuitable and substituted 2 others for him. With profound respect, I find that the decision to remove and substitute the executor, is not anchored in law. Indeed, without the revocation of the grant, the unintended outcome of the

orders therein, is the existence of 2 grants in respect of that estate, which is a legal anomaly."

39. I am in full agreement with the said holding. In the circumstances, I am unable to remove Mark Viren de Souza from his court-appointed role.

40. Having found that there was a material omission in the procedure used in this matter and upon holding that the grantee of the probate of the will cannot be removed, what may this Court do in the interests of justice?

41. Section 76 of the *Law of Succession Act* provides that the grant of representation may be revoked. It states that:-

"

"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."

42. In re Estate of Prisca Ong'ayo Nande (Deceased) [2020] KEHC 6553 (KLR) the Court stated as follows:-

"8. 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." (emphasis added).

43. It is clear to me that in this case, a mandatory procedural step was omitted. It is also arguable that Mark Viren de Souza was not an executor, and therefore could not be issued with a grant of probate. In the circumstances, I find and hold that the grant was obtained in proceedings that were defective in substance.

44. I note that revocation of the grant is a drastic remedy. In Albert Imbuga Kisigwa vs Recho Kavai Kisigwa [2016]eKLR the Court stated that:-

> " 13. Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not a 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."

45. The Applicants in this case appear to have acted deliberately to delay, hinder, and probably defeat the probate process. The estate of the deceased, however, is vast and requires administration; if the Court were to strike out the probate proceedings, it would be wasted. This Court, in exercising its jurisdiction, must strike a balance by issuing orders that aid the administration of the estate, rather than throwing it into limbo or perpetuating conflict.

46. Based on the foregoing and in exercise of my jurisdiction and power under Section 47 of the Act and Rule 73 of the Probate and Administration Rules, I hereby revoke the grant of probate issued in these proceedings on 1st February 2024 forthwith. I issue a grant of probate to Veena Carmen de Souza, Romola Amelia de Souza, and Maya Helen de Souza, forthwith.

47. I order Veena Carmen de Souza, Romola Amelia de Souza, and Maya Helen de Souza to file a Summons for Confirmation of Grant of Probate within 60 days of the date hereof.

48. I make no orders as to costs, as this is a succession matter involving close family members.

It is so ordered.

DATED AND SIGNED AT MOMBASA THIS 16TH DAY OF MAY 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE