



REPUBLIC OF KENYA



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**Asvalu v Ashiundu & another (Succession Appeal E016 of 2023)  
[2025] KEHC 8191 (KLR) (13 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8191 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
SUCCESSION APPEAL E016 OF 2023**

**AC BETT, J  
JUNE 13, 2025**

**BETWEEN**

**MARIA MUSAVI ASVALU ..... APPELLANT**

**AND**

**SILVESTER IKHONI ASHIUNDU ..... 1<sup>ST</sup> RESPONDENT**

**EDWIN MILIMU ASHIUNDU ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal against the ruling of V.O. Amboko (SRM) delivered on 6th  
September 2023 in Kakamega CMC. Succession Cause No. 1293 of 2018)*

**JUDGMENT**

1. On 3.6.2016, Grant of Letters of Administration intestate were issued to the Respondents herein and the said Grant was confirmed on 19.3.2019. By virtue of the Certificate of Confirmation of Grant, the Respondents were to each get 1.9 hectares from LR No. Kakamega/Shitochi/1038.
2. It appears that the Respondents subsequently disagreed, for the 2<sup>nd</sup> Respondent filed an application dated 24.5.2019 seeking orders that the Executive Officer of the court be empowered to sign transfer and other related forms concerning the subject property so as to effect the transfer of the 1.9 hectares to the 2<sup>nd</sup> Respondent.
3. In turn, the 1<sup>st</sup> Respondent filed summons for revocation and annulment of grant.
4. The disputing parties were referred to mediation and on 28.10.2019, the court adopted a mediation agreement, in which they agreed to inter alia, go back to court for determination of the portions of the subject land to which each one of them was entitled.
5. On 6.2.2020, the Appellant who was in person filed summons for revocation and annulment of grant alongside one Imereta Mutuka Shisumu. The said application was dismissed on 19.6.2020. The ruling



- dismissing the Appellant's application was delivered in absence of the parties by way of electronic means due to the Covid-19 pandemic.
6. By another application dated 12.2.2021 filed on 15.2.2021, the Appellant through the firm of M/s. Momanyi, Manyoni & Co. Advocates filed a fresh Summons for Revocation of Grant on the grounds that being the sole surviving child of the deceased, she ranked higher in priority to apply for letters of administration a fact which was not disclosed by the 1<sup>st</sup> Respondent who is a grandson. She attributed the grant obtained by the Respondents to fraud and misrepresentation and averred that the Respondents had left out other unnamed beneficiaries to the estate of the deceased.
  7. From my perusal of the records, I have established that by an application dated 10.2.2022, the Applicant who was acting in person sought the confirmation of grant of letters of administration issued to her on 14.1.2022 although there was no such grant issued to her on the stated date or any other date.
  8. By another application dated 7.3.2022, the Appellant sought the confirmation of the grant purportedly issued on 14.1.2022. the application was once more filed in person although no notice to act in person had been filed by the Appellant. Alongside the application, the Appellant filed a mutation form. She later filed a further affidavit on 28.4. 2022 in which she attached copies of minutes of a meeting in which the beneficiaries the estate of the deceased agreed to her proposed mode of distribution. She also deponed that the 2<sup>nd</sup> Respondent was the only beneficiary who failed to attend the said meeting. There were no responses filed by the Respondents to the said two applications.
  9. On 26.2.2021, Mr Manyoni appeared in court and urged the court to appoint the Appellant Co-Administrator with the 1<sup>st</sup> Respondent since the Respondents were not opposed to the application having been duly served. The court did not grant the orders sought but fixed the matter for mention where it appears that the court was expecting the parties to have a fresh grant issued by consent.
  10. It appears that the parties failed to agree and on 8.3.2023 the trial court sought to know from one of the Administrators how many children the deceased had to which the Administrator responded that the deceased had 1 son and 5 daughters 4 of whom died at a young age leaving only 1 daughter. It was his testimony that the son was survived by a wife and children, 3 of whom had passed on. It was his further testimony that 3 beneficiaries were alive namely Silvester Ikhoni & Imelda Ashiundu being children of the deceased's son and Edwin Milimu being a great grandson.
  11. From the proceedings, it is apparent that the trial court was not satisfied with the proposed mode of distribution and the court then fixed the matter for further mention on 3.5.2023 for confirmation of Grant. On 3.5.2023 the trial court fixed the matter for further mention on 23.8.2023.
  12. At that point, Counsel for the Respondent submitted that the proceedings of 26.2.2021, where the court had been informed that there was no opposition to the summons for revocation of grant was not a true reflection as the Objector was not served. She contended that the Summons for Confirmation dated 7.2.2022 should not be allowed as the court was functus officio.
  13. On 6.9.2023, the trial court delivered a ruling in which it noted that the grant had been confirmed on 19.3.2014 and a mediation agreement adopted by the court. The court further noted that no appeal had been filed against the order of distribution made by court when it confirmed the grant.
  14. In its impugned ruling, the trial court dismissed the Appellant's application on the ground that the court was functus officio having made its determination vide issuance of confirmation of Grant on 19.3.2019. The court was of the opinion that the Appellant ought to have applied for review of the said orders or appealed against the same.



15. Being aggrieved against the decision of the trial court, the Appellant filed a memorandum of appeal in which she set out her grounds of appeal which are summarized as follows:-
  - a. That the trial court erred in holding that it was functus officio when it was participated in the proceedings when the grant was confirmed.
  - b. That the trial court erred in holding that the confirmation of the Grant on 19.3.2019 concluded the matter when the Appellant and other beneficiaries did not participate in the proceedings during the confirmation of Grant
  - c. That the court erred both in law and in fact.
16. The court directed that the appeal be canvassed by way of written submissions.
17. The Appellant submitted that since the Appellant's application in the lower court was brought under section 76 of the *Law of Succession Act*, the court ought to have allowed the application. Reliance was placed on the case of *In re Estate of Prisca Ongayo Nande (deceased)* [2020] eKLR and in *Re Estate of the late Epharus Nyambura Nduati (deceased)* [2021] eKLR. It was submitted that the court has inherent powers under Section 76 of the *Law of Succession Act* and Article 159 of *the Constitution* and erred both in law and in fact in holding that it was functus officio in dealing with the Appellant's application.
18. On the second ground, the Appellant submitted that the Appellant and other beneficiaries of the estate of deceased should have been informed and their consent obtained before the certificate of confirmation of Grant could issue. The Appellant cited the case of *In Re Estate of Lesinko Sekorte Kivaryio (deceased)* [2017] eKLR and contended that the process of confirmation was flawed.
19. Further, the Appellant submitted that the trial court ought to have considered all the evidence adduced by the Appellant while making its decision. The Appellant urged the court to allow the appeal and make an order revoking the grant of letters of administration issued to the Respondents and confirmed on 19.3.2019.
20. On his part, the 2<sup>nd</sup> Respondent submitted that the trial court had no jurisdiction to hear the summons dated 12.2.2021 having delivered a ruling on similar summons filed by the Appellant on 19.6.2020 and therefore the court was functus officio. He relied on the case of *Jemsey Evening Port Limited v A. Thani* [2002] JLR 542 and the *Owners of the Motor Vessel "Lillian s" v Caltex Oil (Kenya) ltd* [1989] eKLR and stated that the court did not have the latitude to entertain another application on similar issues.

### **Analysis and Determination**

21. This being a first appeal, the duty of the court is to review the evidence a fresh so as to reach an independent decision as to whether to uphold the decision of the trial court. See *Selle v Associated Motor Boat co* [1968] EA 123.
22. There are two issues for determination that are raised herein:-
  - a. Whether the court becomes functus officio upon confirmation of grant.
  - b. Whether the application is merited
23. It is trite that the court largely becomes functus officio once it has issued a certificate of confirmation of letters of administration. However, section 76 of the *Law of Succession Act* provides for instances



where the court can be allowed to revoke or annul the Grant notwithstanding the fact that it has been confirmed and provides that:-

“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.”

24. By virtue of section 76 of the *Law of Succession Act*, the court had discretion to entertain an application for revocation or annulment of grant and in *Re Estate of Epharus Nyambura Nduati (deceased) [2021]* eKLR the court held as follows:-

“In light of the above, I invoke the inherent powers of this court granted under Article 159 of *the Constitution* and Section 76 of the *Law of Succession Act* and make the order to revoke the letters of grant of administration issued to the Petitioner and subsequent confirmation as it was obtained fraudulently by the making of false statement or by the concealment from court of something material to the case particularly in relation to the sale of the 2 acre portion of Nyandarua/Oljoro Orok Salient/1881 belonging to the Applicant’s husband.”

25. I now turn to the present appeal, which I dare say the Appellant did not handle diligently. She filed a number of similar applications after her application for revocation of grant was dismissed by the trial court vide its ruling dated 19.6.2020 which was delivered in her absence. However, one would have expected the Appellant to first establish the outcome of her application dated 5.2.2020 before taking the next step.

26. The Appellant did not file an application against the decision of the trial court dated 19.6.2020 but instead proceeded to file two similar applications which were never prosecuted and then two misconceived summons for confirmation of grant. The Appellant prayed for confirmation of grant that was purportedly issued to her on 14.1.2022. The said summons for confirmation of grant was



fixed for 22.3.2022. This application brought much confusion in the file as the court proceeded on the premise that the cause was coming up for confirmation of grant yet there was never any grant issued to the Appellant in the proceedings in the first place. In any event the grant that had been confirmed by the court on 19.6.2020 was still valid.

27. On reviewing the proceedings, it is apparent that the Appellant indeed may have had a good case as the Respondents never involved her in the succession proceedings despite the fact that she is the sole surviving daughter of the deceased. By virtue of that dependency as a daughter of the deceased, she ought to have been listed as a beneficiary of his estate for she ranked in priority to the Respondents when it came to seeking representation of the estate of the deceased. I have perused the affidavit in support of the petition for letters of administration. The Respondents listed only themselves as the sole dependants of the deceased yet when they appeared before the trial court on 8.3.2023, they indicated that there were three beneficiaries. All in all, I find that despite the confusion in the file, it is evident that the proceedings to obtain the grant were defective as the Respondents had failed to disclose to the court that the Appellant was one of the dependants of the deceased. Whether the omission was intentional or inadvertent, it led to dissatisfaction on the part of Appellant who then tried to seek redress albeit with no success, principally due to the fact her misconceived applications.
28. The Respondents caused the estate of the deceased to devolve equally to the two of them. I have perused an affidavit sworn by the Appellant on 7.3.2023 and it appears that there are other beneficiaries of the estate of the deceased who were indeed left out, aside from the Appellant. While seeking confirmation of the grant, the Respondents did not seek the consent of these co-beneficiaries and this was contrary to Rule 26 of the Probate and Administration Rules which provides:-

“

- “(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 so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.”

Nevertheless, their application was allowed and the grant confirmed.

29. It is my finding that the trial court was right in declaring that it was functus officio in that it had issued a certificate of confirmation of grant and subsequently dismissed summons for revocation of grant that was filed by the Appellant. However, having adopted the partial mediation settlement agreement dated 17.10.2019 which paved way for the court to revisit the issue of distribution and having reached the conclusion on 8.3.2023 that it seemed that all the beneficiaries did not sit and agree on the mode of distribution, the court ought to have invoked its inherent powers to ensure that the ends of justice were met.
30. Be that as it may, having perused the Appellant’s application which the court declined to hear, I find that the court was not wrong in its decision not to hear the application as the orders sought could not have been granted in any event as the same was res judicata.
31. In regard to the prayer of the Appellant that the Grant of Letters of Administration issued to the Respondent on 19.3.2019 be revoked in its entirety, it is my view that the Appellant ought to have filed



an appeal against the ruling of the trial court dated 19.6.2020. At this point, the court cannot be invited to make a decision concerning the issue, which was not the subject matter of the appeal as the court derives its jurisdiction from the pleadings. The appeal therefore lacks merit and is hereby dismissed.

32. Having said that, the court cannot turn a blind eye to the underlying issues in this cause. Aside from the Appellant, there are other beneficiaries of the estate who were not privy to the succession proceedings. These are the orphaned grandchildren of the deceased. Article 159 of *the Constitution* enjoins the courts to protect and promote the principles of *the constitution*. Article 50(1) of *the Constitution* states:-

“(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

33. Despite her appeal being dismissed, the Appellant and by extension her co-beneficiaries are clearly aggrieved and should not be left without any further recourse. The courts exist to deliver justice in the spirit of *the Constitution*. In *Kamlesh Mansukhlal Danki Patni v Director of Public Prosecution & 3 others* [2015] eKLR, the Court of Appeal held that:-

“It must be realized that courts exist for the purpose of dispensing justice. Judicial Officers derive their judicial power from the people or, as we are wont to say in Kenya, from Wanjiku, by dint of Article 159 (1) of *the Constitution* which succinctly states that “judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under this Constitution.” Judicial Officers are also State officers, and consequently are enjoined by Article 10 of *the Constitution* to adhere to national values and principles of governance which require them whenever applying or interpreting *the Constitution* or interpreting the law to ensure, inter alia, that the rule of law, human dignity and human rights and equity are upheld. For these reasons, decisions of the Courts must be redolent of fairness and reflect the best interest of the people whom the law is intended to serve. Such decisions may involve only the rights and obligations of the parties to the litigation inter se (and hence only the parties’ interests) and while others may transcend the interest of the litigants and encompass public interest. In all these decisions, it is incumbent upon the Court in exercising its judicial authority to ensure dispensation of justice as this is what lives up to the constitutional expectation and enhances public confidence in the system of justice.”

34. It is evident that the Appellant and the other beneficiaries of the deceased have never been heard and their case determined to its conclusion on merit. They should not be locked out by a technicality.
35. In the spirit of *the Constitution*, I am obliged to ensure that the Appellant and other dependants of the deceased herein are granted a fair hearing. I therefore invoke Article 159 of *the Constitution* and Rule 73 of the Probate and Administration Rules and hereby extend time within which the Appellant should file an appeal against the ruling of the court dated 19.6.2020 by twenty one (21) days.
36. This being a family matter, there shall be no order as to costs.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 13<sup>TH</sup> DAY OF JUNE 2025.**

**A. C. BETT**

**JUDGE.**

In the presence of:



Mr. Orute holding brief for Mr. Momanyi for the Appellant

No appearance for Ms. Khadenyi for the Respondents

Appellant present

1<sup>st</sup> Respondent present

Court Assistant: Polycap

