



In re Estate of MKM (Deceased) (Succession Cause 91 of 2018 & 1612 of 2019 (Consolidated)) [2025] KEHC 10275 (KLR) (Family) (18 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10275 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 91 OF 2018 & 1612 OF 2019 (CONSOLIDATED)
PM NYAUNDI, J
JULY 18, 2025
IN THE MATTER OF THE ESTATE OF MKM (DECEASED)**

BETWEEN

FKM APPLICANT

AND

SNM 1ST RESPONDENT

EWM 2ND RESPONDENT

JUDGMENT

1. Before this Court is for summons dated 6th March 2023 in which the Applicant sought the following orders:
 - a. Spent.
 - b. The Letters of administration intestate issued on 12th March 2018 to SNM and EWM be revoked and or annulled.
 - c. Such other and or further reliefs be granted as this Honourable court may deem fit, just and expedient that will meet the ends of justice.
 - d. Costs of this application be in the cause.
2. The summons premised upon Section 76 of the *Law of Succession Act*, Rule 44 of the Probate & Administration Rules, Order 51 Rule 1 Civil Procedure Rules and all other enabling provisions of the law and was supported by the Affidavit of even date sworn by the Applicant. The Applicant filed a further affidavit sworn on 30th June 2023.



3. The Respondents opposed the summons through a Replying Affidavit sworn on 25th May 2023. At the request of the Applicant the matter was consolidated with Succession Cause No. 1612 of 2019.
4. The summons was canvassed by way of viva voce evidence.

Background

5. This succession cause relates to the Estate of MM (hereinafter the deceased) who died intestate on 4th October 2017. SNM and EWM in their capacity as widower and sister of the deceased respectively filed a petition for letters of administration intestate on 24th January 2018. The grant was issued to them on 7th June 2018. The grant has not been confirmed. The Applicants also lodged Petition for grant of probate in respect of the estate of the deceased but the same did not progress as there was already a subsisting succession cause with respect to the same estate.
6. The deceased is said to be survived by the following beneficiaries;
 - i. SNM..... widower
 - ii. JKM daughter.
 - iii. ESM son.
 - iv. VGW daughter.
 - v. MGW Son.
7. The deceased had the following assets;
 - a. Kajiado/Kaoutei-North/xxxxx/2.02 HA.
 - b. Kajiado/Olchoro-onyore/xxxxx/0.0469 HA.
 - c. Donyo Sabuk/Komarock Block 1/xxxxx/0.039 HA.
 - d. Donyo Sabuk/Komarock Block1/xxxxx/0.0427 HA.
 - e. GAKawa/Ithima Block 1/Burguret/xxx/1.37 HA.
 - f. Kajiado/Loodariak/xxxx/4.04 HA.
 - g. Kajiado/Olchoro-onyore/xxxxx/0.045 HA.
 - h. Kajiado/Olchoro-onyore/xxxxx/0.045 HA.
 - i. Motor Vehicle xxx 077E RAV 4 Toyota.
 - j. Maisonette No. 142 on LR No.xxx/12875 Phenom Estate Langata.
 - k. LR xxxxx/2518 ¼ Acre Mavoko Municipality.
 - l. Co-operative Bank Ltd Account Number .
 - m. Unaitas Account Number .
 - n. Family Bank Shares Account Number .
8. The applicant argues that she is the sister of the deceased. She averred that the deceased left a will dated 22nd October xxxx. That the grant issued on 12th March 2018 was obtained fraudulently by giving false information and or concealing important facts before the Honourable Court specifically that the



- deceased left a written will appointing her, JMB, LMM and JK as executors and trustees of the will. That the Respondents were aware that the deceased left a will. That there is a subsisting file, Succession Cause No. 1612 of 2019 where she and the other named executors have petitioned for letters of probate of written will. She argues that the 1st Respondent is not the biological father of JKM. Also, that the 2nd respondent indicated that she is the deceased's sister but she is the sister in law of the deceased.
9. In her Further Affidavit sworn on 30th June 2023, the applicant argues that the deceased executed her will two years before the birth of ESM, VGW and MGW who are triplets born on 31st October 2017. That the legal custody of the three children was granted to her on 5th May 2023 in Nairobi Children Case No. 1290 of 2017. That she undertakes to see that the three minors get a share from the estate of their late mother. She argued that the will was prepared by an advocate by the name Kuria Thomas Mbaria who is willing to testify. The will was witnessed by two independent witnesses who are also willing to testify.
 10. The Respondent avers that he had a good relationship with the deceased who was his wife. His case was that the deceased died intestate and did not leave a will. That the will presented by the applicant is a ploy to disinherit him as the widower of the deceased. He avers that he has challenged the authenticity of the will in Succession Cause No. 1612 of 2019 which was filed by the applicant and her siblings. He averred that the alleged will was made in xxxx before the birth of their children and is incapable of being enforced because it has left out the real beneficiaries of the deceased's estate. He averred that this succession cause should not be interfered with until the issues in Succession Cause No. 1612 of 2019 have been determined or until the two files have been consolidated and heard.
 11. The summons was canvassed by way of viva voce evidence.

Evidence

12. OW1, Thomas Mbaria testified on 29th January 2025. He stated that he is an advocate of the High Court of Kenya practicing in the firm of TM Kuria & Company Advocates. He adopted his witness statement dated 5th July 2023 as his evidence in chief. His evidence was that the deceased was his client from xxxx. She asked him to prepare a will in October xxxx. The deceased was accompanied by Claire J Mwendwa who is one of the witnesses. He explained to her the import and preparation of the will. She was of sound mind. He prepared the will as per her instructions, signed and stamped it. She confirmed that the will was drawn as per her instructions. She named one child, JKM and four other beneficiaries in her will. The bulk of her estate was to go to her child. The deceased did not go back to him to revoke the will. He produced the will as Exh.1.
13. During cross- examination, he stated that he was informed of the deceased's death by her sister. He learnt that the deceased got other children.
14. OW2, FKM, stated that she is the deceased's sister. She adopted her witness statement dated 30th July 2023 as her evidence in chief and a list of documents marked as Exh. 1-10 be admitted as exhibits. She told the court that she learnt the respondents filed a petition in 2019 which prompted her to file the current application for revocation of grant. Her evidence is that the 1st Respondent is the deceased's spouse. The 2nd Respondent is the wife to the 1st Respondent's brother. The deceased prepared a will on 22nd October xxxx and she was appointed as one of the executors. The deceased had one child in xxxx who is provided for in the will. As at the time of her death, she had four children. She gave birth to triplets on 4th October 2017 and died during birth. The triplets are not provided for in the will. She was given custody of the minors in May 2023. She asked the court to revoke the grant issued to the Respondents and that the will makes provisions for the minors.



15. During cross-examination, she stated that the 1st Respondent fraudulently included his name in the birth certificate of JK. She was not present when the will was read. She has not interfered with the estate.
16. PW 1, SN told the court that the deceased was his wife. He asked the court to adopt his replying affidavit sworn on 25th May 2023 as his evidence in chief and the annexures be admitted as his exhibits. He started cohabiting with the deceased in 2009 and formalized their marriage in 2013. His evidence was that he adopted J as his daughter. The deceased gave birth to their triplets on 23rd October 2017 and later died because of excessive bleeding. He learnt of the existence of the will after he had filed succession proceedings. He was not invited to the reading of the will. He was evicted from their matrimonial home after the deceased's death. He has not had access to the children. He asked the court to appoint him as an administrator of the deceased's estate.
17. During cross-examination, he stated that the 2nd respondent who is also an administrator of the deceased's estate is his sister in law. He has not subjected the will to forensic investigation. According to him, the will is a forgery; the DCI investigated it. That the properties listed in the petition for letters of administration belong to the deceased. He is listed as a beneficiary in the will but was not adequately provided for. He participated in the custody case concerning the children and he has appealed against the decision of the court. He argued that he is best placed to safeguard the deceased's properties for the benefit of the children. It is in the best interest of the minors that he should be appointed as an administrator.
18. In re-examination, he stated that he does not have an inventory of the assets of the deceased.

Applicant's Submissions.

19. She framed the following as issues for determination;
 - i. Whether the Letters of Administration Intestate issued on 12th March 2018 to SNM and EWM should be revoked.
 - ii. Whether the will dated 22nd October xxxx is valid and ought to be enforced.
 - iii. Whether the court can vary the will to include the triplet minors as beneficiaries.
20. On the first issue, the applicant relied on Section 76 of the [Law of Succession Act](#) and the decision of In re Estate Prisca Ong'ayo Nande (Deceased) [2020] KEHC 6553 (KLR) which states the grounds for revocation of a grant. the applicant submitted that the Respondent did not disclose to this court that the deceased left a valid will when he was applying for letters of administration intestate. Secondly, the applicant submitted that the 2nd respondent misrepresented herself as the deceased's sister while in fact she is the sister of the 1st Respondent. That the grant should be revoked on the following two grounds and the triplets should be considered as beneficiaries of the estate.
21. On the second issue, the applicant submitted that the deceased had the mental and legal capacity to make the will. There was no evidence of fraud, undue influence or coercion. That the 1st Respondent alleges fraud but has not proved the same. In the absence of any evidence, the will is therefore valid. She relied on the decision of In re Estate of James Mwangi Gakure (Deceased) [2019] eKLR. She argued that the will should be enforced and provision be made for the triplets under Section 26 of the [Law of Succession Act](#).
22. On the third issue, the applicant submitted that the minors are dependants of the deceased and are recognized as such under Section 29 of the [Law of Succession Act](#). That a variation should be made



under Section 26 of the [Law of Succession Act](#) and a provision be made for them. She sought to rely on the decision in re Estate of Lusila Wairu Waweru (Deceased) [2020] eKLR.

Respondent's Submissions.

23. The 1st Respondent framed the following as issues for determination;
- i. Whether the Grant of Letters of Administration Intestate issued on 12th March 2018 were obtained fraudulently and be revoked?
 - ii. Whether the Will produced by the Applicant dated 22nd October, xxxx is valid and if the same should be revoked?
 - iii. Whether the Deceased died Testate or Intestate?
24. The Respondent submitted that the order of preference on who applies for letters of administration is provided for under Section 66 of the [Law of Succession Act](#). That as a surviving spouse of the deceased, he followed due process when he petitioned for letters of administration and no one raised an issue. He argued that the 2nd respondent was not misrepresented as the deceased's sister. He stated that the fact the deceased was married to him, makes the 2nd respondent the deceased's sister.
25. On the second issue, the 1st Respondent submitted that he was not aware the deceased left a written will. Relying on the decision of Elizabeth Kamene Ndolo vs. George Matata Ndolo [1996] eKLR, the Respondent submitted that the failure to call Claire J Mwendwa Muthee who was one of the witnesses was an attempt to conceal material facts from this court. He argued that she was not an independent witness because she was the deceased's sister in law and her son was a beneficiary in the deceased's estate.
26. On the third issue, the 1st respondent submitted that the applicant had failed to demonstrate any of the grounds for revocation stipulated in Section 76 of the [Law of Succession Act](#). He argued that the will presented before court is void and defective and the same should not be enforced. He asked the court to hold that the deceased died intestate.

Analysis and Determination

27. I have considered the summons, the affidavit in support and in opposition to, the oral evidence and the written submissions by counsels. The key issue for the Court's determination are;
- i. Whether this application meets the threshold for revocation or annulment of grant under Section 76 of the [Law of Succession Act](#).
 - ii. Whether the deceased died testate or intestate
 - iii. What are the consequential orders the Court should make
 - iv. Who should bear costs

i. Whether this application meets the threshold for revocation or annulment of grant under Section 76 of the [Law of Succession Act](#).

28. Section 76 of the [Law of Succession Act](#) gives the court the powers to revoke a grant provided the conditions stipulated therein have been met. It states 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 has ordered or allowed; 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
 - iv. The grant has become useless and inoperative through subsequent circumstances.

29. The circumstances in which a grant can be revoked were discussed in the case of *In the Matter of the Estate of L.A.K. (Deceased)* [2014] eKLR :-

“Revocation of grants is governed by Section 76 of the *Law of Succession Act*. The relevant portions of Section 76 are paragraphs (a), (b) and (c) since the issues raised relate to the process of the making of a grant. A grant may be revoked where the proceedings leading up to its making were defective, or were attended by fraud and concealment of important matter, or was obtained by an untrue allegation of a fact essential to the point.”

30. Notably, the power to revoke or uphold a grant is a discretionary one. This principle was enunciated in the persuasive decision in *Albert Imbuga Kisigwa vs Recho Kawai Kisigwa Succession Cause No. 158 of 2000* where Mwita J stated: -

“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.”

31. The applicant argued that the grant should be revoked on the ground that the 1st Respondent gave false information when petitioning for the grant that the 2nd Respondent is the deceased’s sister. The 1st respondent during hearing confirmed that the 2nd respondent is his sister and therefore, the sister in law of the deceased. He sought to equate a sister and a sister in law. By virtue of Section 66 and Part V of the *Law of Succession Act* it is quite clear that priority is given to those who are related to the deceased by consanguinity. The reference to EWM as a sister to the deceased was therefore misleading and therefore in light of the provisions of Section 76 (b) will lead to revocation of the grant.



ii. Whether the deceased died testate or intestate.

32. The Applicant asserts that the deceased died testate. The 1st Respondent on the other hand argues that the deceased died intestate. A copy of the will dated 22nd October xxxx has been presented to this court.
33. The applicant argues that the estate of the deceased should be distributed according to the will and a provision be made for the three minors. The 1st respondent on the other hand argues that the deceased's estate should be distributed under the law of intestacy so as to include all the beneficiaries that were left out in the alleged will.
34. Section 107 of the Evidence Act, Cap 80 Laws of Kenya provides as follows:- "Burden of Proof
- (1) Whoever desires any court to give judgement as to any legal 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 facts it is said that the burden of proof lies on that person."
35. Section 11 of the Law of Succession Act Cap 160 Laws of Kenya provides as follows:-
- No written will shall be valid unless: -
- a. the testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;
 - b. the signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a Will;
 - c. the will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form to attestation shall be necessary.
36. I have carefully looked at the document that has been placed on record as the deceased's will. On the face of it, there is compliance with Section 11 of the Law of Succession Act. The same was duly executed and witnessed.
37. Thomas Mbaria Kuria the advocate who drew the will testified that the deceased visited his office and instructed him to draw a will. He prepared the will and read it to the deceased who confirmed the details of the will.
38. The Respondent contends that the 2nd witness to the will was not an independent witness, Section 3 of cap 160, defines independent witness as:-
- Means a witness who is not a beneficiary under a Will or the spouse of any such beneficiary.
39. Claire J Mwendwa Muthee is not a beneficiary in the will and therefore, she is an independent witness, therefore the challenge against her will not stand.



40. The respondent alleges that the will was fraudulently obtained but did not specify or prove the particulars of fraud. Although the 1st Respondent stated that the will is a forgery, no evidence was placed before this court to prove that the will is a forgery.
41. The 1st Respondent stated that the will did not make provision for the three minors who were born after the will had been written. The provisions for beneficiaries who have either been excluded or who have been inadequately provided for is anchored on Section 26 and 28 of the [Law of Succession Act](#). A testator has power to dispose of her property as she pleases and the court is bound to respect those wishes as long they are not repugnant to the Law and she does not leave out some dependants and beneficiaries.
42. Failure to make provision for a dependant by a deceased person in her will does not invalidate the Will as the Court is empowered under Section 26 of the [Law of Succession Act](#) to make reasonable provision for the dependant. Section 28 sets out the parameters that this Court should consider when making such provisions. See in re Estate of Lusila Wairu Waweru (Deceased) [2020] eKLR.
43. All in all, I find that the will dated 22nd October xxxx complies with the provisions of section 11 of the [Law of Succession Act](#). As such I find the deceased died testate and her estate will be distributed in accordance with her will noting that provision must be made for the children born after the will.

iii. What then are the Consequential orders?

44. In the end, I make the following orders;
 1. The Grant issued herein on 7th June 2018 is revoked
 2. Fresh Grant of Probate of Letters of Administration to issue to FKM, JMB, LMM and JKM as Co Executors of the Will of the Deceased dated 22nd October xxxx.
 3. The Executors to file summons for confirmation compliant with paragraph 43 above within 45 days. The same to be served on all the beneficiaries and dependants of the deceased.
 4. Any beneficiary or dependant opposed to the proposed mode of distribution to file affidavit of protest within 14 days of service. The Executors granted leave to file further affidavit if necessary within 7 days of service. Mention on 15th October 2025 to confirm compliance and take further directions.
 5. Each party will bear their own costs
45. Leave to appeal is granted. Any party exercising their right of appeal to file appeal within 30 days
It is so ordered

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 18TH DAY OF JULY 2025.

M NYAUNDI

JUDGE

In the Presence of

Ms. Irungu holding brief for Kamau for the Respondent

Ms. Musa for Petitioner

Fardosa Court Assistant

