In re Estate of Thomas Wamunyu Ndegwa alias Wamunyu Ndegwa (Deceased) (Probate & Administration 2 of 2024) [2025] KEHC 9889 (KLR) (10 July 2025) (Ruling)

Neutral citation: [2025] KEHC 9889 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

PROBATE & ADMINISTRATION 2 OF 2024

TW OUYA, J

JULY 10, 2025

IN THE MATTER OF THE ESTATE OF THOMAS WAMUNYU NDEGWA ALIAS WAMUNYU NDEGWA (DECEASED)

BETWEEN

JAMES WAMBURU WAMUNYU ..... APPLICANT

AND

MARTHA WAMBUI WAMBURU ..... 1ST RESPONDENT

JOHN MWAURA WAMUNYU ..... 2ND RESPONDENT

JOSEPH NDEGWA WAMUNYU ..... 3RD RESPONDENT

RULING

1. This ruling is in respect of the applicant's summons for revocation of grant dated 13th September, 2023. Prayers I and II are now spent, and what is now pending this court's determination are the following prayers:

    i. That the honourable court be pleased to revoke/annul the grant issued and amended on 22nd November 2021, and confirmed grant issued and amended on 22nd November 2021;

    ii. That the honourable court be pleased to review the orders for granting administration to the respondents and direct that the same be issued in the names of the applicant;

    iii. That the honourable court be pleased to review the orders confirming the grant and revoke the same;

    iv. A declaration that the proceedings are defective and the same be nullified and parties directed to file testate proceedings; and

    v. That costs be in the cause.

2. The application is anchored on the grounds stated on the face of the motion and in the deposition made in the supporting affidavit sworn by the applicant on 13th September, 2023. In brief, the applicant alleged that the deceased herein died testate having left a valid will on the distribution of his estate; that the administrators of his estate failed to inform the court that the deceased had died testate and that he was appointed as the executor of the deceased in the will.

3. He contended that the administrators had knowledge of the existence of the will and ought to have filed a testate proceeding, as such, the grant and these proceedings are defective and ought to be revoked and fresh proceedings be undertaken as testate.

4. The applicant further contended that he had filed an affidavit of protest, indicating that there was concealment of material facts as the citation was never served upon some beneficiaries. however, the protest was never heard nor determined. That the confirmation of grant was done during the pandemic and he was never served with the date for availing himself. He stated that had he been served with the date for confirmation, he would have raised an objection and informed the court of the will and the defectiveness of the proceedings.

5. The applicant alleged that the administrators knew of the existence of the will and that is the reason why they never served him, so that he does not raise an objection. He stated that the administrators are running the estate of the deceased without consultation of the beneficiaries, and that out of their ignorance of the affairs of the estate, they have included property that had been sold to 3rd parties and distributed the same to beneficiaries instead of purchasers who should be treated as liabilities of the estate of the deceased.

6. He alleged that the deceased failed to include the properties sold to third parties in his will, as he had sold them, implying that they should not form part of his estate. The applicant contended that the court erred in distributing the estate of the deceased, as it did not consider the subdivision provided in the deceased will dated 7th January, 1989.

7. The application is opposed vide a replying affidavit sworn by Martha Wambui Wamburu, John Mwaura Wamunyu and Joseph Ndegwa Wamunyu, the 1st, 2nd and 3rd respondents respectively. In the affidavit, the respondents alleged that after the death of the deceased, the applicant petitioned for a grant of probate in respect to the estate of the deceased at the Senior Resident Magistrate's court in Thika, which grant was confirmed by the said court on 18th January, 1990.

8. That on 29th October, 2004, the said grant of probate was annulled by the High Court on grounds that the suit was filed in a court that did not have the jurisdiction to hear the matter and also because the suit was filed without the knowledge of the other beneficiaries.

9. The respondents contended that the High Court, in its ruling annulling the confirmed grant of probate issued to the applicant, granted the parties the liberty to file for a fresh grant at the High Court, and on 2nd November, 2004, they wrote a letter to the applicant's then advocate advising the applicant to move to court if he wished to prove the will, failure to which they would proceed to make an application intestate.

10. The respondents alleged that after the applicant failed to petition the court for a grant of probate, they proceeded to petition the High Court for grant of letters of administration intestate, which was issued on 25th September, 2006. That on 21st of April, 2008, they made an application to court for a confirmation of the said grant seeking that the estate of the deceased be distributed equally amongst his five (5) houses.

11. That the applicant then filed an affidavit of protest against the summons for confirmation of grant, which he failed to prosecute despite numerous court hearing dates which they were aware of. That on 24th June, 2020, the applicant's protest was dismissed and the grant confirmed. They then wrote a letter to the applicant's then advocate informing them of the outcome of the protest.

12. The respondent's contended that the applicant and his lawyers have always been aware of the court proceedings, as dates were always taken by consent, and where they were not present, they were always served with hearing notices and affidavits of service filed. The respondents averred that the applicant had an opportunity to file for fresh grant of probate from 2004 when the initial grant of probate was annulled, but he failed to do so.

13. They further averred that the alleged will of the deceased has always been disputed and that it would not be in the interest of justice if the instant application is allowed as this will amount to the court allowing the applicant to waste judicial time.

14. In response, the applicant swore a further affidavit on 25th April, 2024, wherein he alleged that the order by the High Court annulled the probate and not the will. That miscellaneous application no. 258 of 1989, was withdrawn on 8th June 1992 by consent, hence no conclusive orders as regards validity of the will were issued. He averred that the will was valid and the matter ought to have proceeded as testate, considering that the court did not grant liberty to disregard the will and the same should be considered.

15. He stated that the letter written to his learned counsel cannot be a reason to disregard the will and averred that at the point of filing this succession cause, the respondents were aware of the existence of the will but decided to ignore it. That he filed a protest dated 3rd November, 2023, for revocation and brought to the attention of the court. the existence of the will of the deceased.

16. He stated that the respondents have not provided evidence of the validity of the will or why the court should not consider it, and that without evidence of the invalidity of the will, the intestate proceedings should be null and void. The applicant urged this court to revoke the grant of letters of administration, and the parties be directed to file testate proceedings.

17. By consent of the parties, this court on 29th May, 2024, directed that the application be prosecuted by way of written submissions. The applicant's written submissions dated 24th June, 2024, was filed on his behalf by his learned counsel Waweru Nyambura & Co. Advocates; whereas those by the respondent dated 20th November, 2024, were filed on their behalf by their learned counsel Etole & Company Advocates.

18. The applicant in his written submissions contended that the confirmed grant of letters of administration issued to the respondents should be revoked as the same was obtained illegally and irregularly. He submitted that disregarding the valid will of the deceased which contained his wishes regarding the distribution of his estate, amounted to misrepresentation and concealment of material facts. As such the confirmed grant of letters of administration issued to the respondents should be revoked to allow the wishes of the deceased to be honoured.

19. The applicant submitted that the respondents did not move the court to nullify the will of the deceased, but they simply disregarded the wishes of the deceased and petitioned for grant of letters of administration. He further submitted that given the respondents had alleged that the deceased was not of sound mind at the time of making the will, the onus was on them to prove that the will was invalid before proceeding to petition for grant of letters of administration.

20. The respondents on the other hand submitted that the applicant and his learned counsel whom it is alleged drafted the will, have been active participants in the succession cause before the court and they have failed to prove that there was a valid will left behind by the deceased.

21. They contended that whereas the applicant alleges that the process to obtain the grant was defective in substance, he was present during all court proceedings and no court sessions proceeded without his knowledge; he was therefore duly aware of the due process in the matter. They further contended that whereas the applicant alleged that the confirmed grant was obtained fraudulently, he did not specifically plead and set out the particulars of the alleged fraud as is required by law.

22. It was the respondents' submission that the applicant has failed to adduce evidence that they made false statements, and that the applicant who was a party to the proceedings and ably represented, ought to have raised an alarm had there been any representation made to the court.

23. The respondents submitted that the applicant has solely dealt with the properties of the deceased and sold most of the said properties off, thus denying all the other beneficiaries of the estate usage of the properties. They submitted that it would not be in the interest of justice if the grant is revoked, as it will further disinherit all the other beneficiaries of the estate.

24. The respondents contended that whereas the deceased had more than 45 children, it is only the applicant who claims that there is a valid will as none of the wives of the deceased or his other children knew of the existence of the will. They further contended that a glance of the will reveals that it is only the applicant that stands to benefit from the will at the expense of all the other beneficiaries.

25. The respondents submitted that the alleged will is fake, and that is the reason why the applicant has not been able to file for probate since the year 2004, when the initial probate was revoked by the court.

26. It was the respondents' submissions that the Applicant was given numerous opportunities by the High Court in Kiambu to prosecute his protest but failed to do so and he now wants the court to revoke the grant that has been issued.

27. They contended that the issue of the will has been litigated before and for the Applicant to seek for revocation of grant, shows that he wants the court to re-visits issues which have been dealt with conclusively by other courts, yet this court is not sitting in its Appellant capacity.

28. I have duly considered the application, the affidavits in response as well as the rival submissions by the parties. Having done so, I find that the main issue for determination in this application, is whether the confirmed grant of letters of administration in respect of the estate of the deceased, should be revoked; given that this will determine whether the other prayers made by the applicant will be considered by this court.

29. The law governing revocation or annulment of grants in Kenya is encompassed in the *Law of Succession Act*, more specifically Section 76. The said provision of law stipulates 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

(iv) that the grant has become useless and inoperative through subsequent circumstances."

30. The Court of Appeal, in Joyce Ngima Njeru & another versus Ann Wambeti Njue (2012) eKLR; expressed itself as follows regarding the issue of revocation of grants: ".....the central core of the ingredients required to be established under section 76 of the L.S.A. is that it is meant to be used as a vehicle to attack and fault the process of either obtaining the Grant or in active use of the Grant after being lawfully obtained in circumstances where it has become useless. It is not meant to fault the decision on the merits."

31. Additionally, Musyoka, J, in re Estate of Prisca Ong'ayo Nande (Deceased) [2020] KEHC 6553 (KLR); while interpreting Section 76 of the *Law of Succession Act*, stated as follows: "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."

32. In this case, the applicant's main grounds for seeking revocation of the grant issued to the respondents on 22nd November,2021, is that the proceedings to obtain the grant was defective in substance as the

administrators who knew that the deceased had left behind a valid will ought to have filed testate proceedings instead of intestate proceedings.

33. To this I would like to state that, as the applicant, out of all the other beneficiaries of the estate of the deceased, was the one convinced that the deceased had left behind a valid will dated 7th January, 1989, and considering also that he had alleged that the deceased had, in the said will, appointed him an executor of his estate, the onus was upon him as the appointed executor to file for grant of probate if indeed he felt that the deceased had left behind a valid will. It was not the responsibility of the respondents to file for a grant of probate.

34. I say so because, under Section 62 of the *Law of Succession Act*, the court can only grant letters of administration in respect of a testate estate to no one other than the executor of a will, unless the said executor has renounced executorship, or has been cited to either renounce his executorship or take up a grant of probate but failed to do so.

35. Section 62 of the *Law of Succession Act* stipulates as follows: "When a person who has been appointed by a will as an executor thereof has not renounced the executorship, letters of administration shall not be granted to any other person until a citation has been issued, calling upon the executor to renounce his executorship or apply for a grant of probate of the will."

36. In re the estate of Riyaz Tadjin Rahemtulla Dhanji (Deceased) [2017] eKLR; Justice Musyoka, while interpreting Section 62 of the *Law of Succession Act* stated as follows: "Under section 62, the court should not rush to make a grant of letters before citations have been issued on the executors named in the will. For avoidance of doubt the said provision states as follow: 'When a person who has been appointed by a will as an executor thereof has not renounced executorship, letters of administration shall not be granted to any other person until a citation has been issued, calling upon the executor to renounce his executorship or apply for a grant of probate of the will.' The effect of the provision is that the court ought not to grant letters of administration in respect of a testate estate to anyone other than an executor unless the executor has renounced executorship or had been cited to either renounce executorship or take up the grant of probate and he fails to do either."

37. From the above provision of the *Law of Succession Act*, it is clear that the applicant as the alleged appointed executor was the one who ought to have filed for a grant of probate in the estate of the deceased, if he believed that the deceased had left behind a valid will, considering that he had not renounced his alleged executorship. It was not the responsibility of the respondents to file for a grant of probate as the applicant had not renounced his executorship. It is also pertinent that the respondents did not recognise the will that had allegedly been left behind by the deceased.

38. Furthermore, from the evidence on record, after the High Court on the 1st of October, 2004, annulled the confirmed grant of probate that had been issued to the applicant by the Senior Resident Magistrate court at Thika, Njiru Boniface & Co. Advocates, wrote a letter dated 2nd November, 2004, to the applicant, informing him that his clients, who were also beneficiaries of the estate of the deceased did not recognise the alleged will of the deceased dated 7th January, 1989, as they regarded the said will as being a forgery.

39. In the said letter, it was suggested that the succession of the estate of the deceased should proceed intestate. However, the applicant was given seven (7) days to move the court under the *Law of Succession Act*, in the event that he wanted to prove the validity of the will.

40. From the records, the applicant did not file testate proceedings, and this prompted the respondents to file intestate proceedings and obtained a confirmed grant of letters of administration, as they believed that the deceased did not leave behind a valid will.

41. I am therefore of the considered view that nothing turns on this ground, as it was the responsibility of the applicant to file testate proceedings as the alleged appointed executor of the deceased, that is, if he indeed believed that the deceased had left behind a valid will. It was not the responsibility of the respondents to file or initiate testate proceedings as they did not believe the deceased had left behind a valid will. The respondents were therefore within their rights to file intestate proceedings in regards to the estate of the deceased.

42. The other ground advanced by the applicant for seeking the revocation of the confirmed grant of letters of administration, is that the respondents totally disregarded the will left behind by the deceased. That this amounted to misrepresentation and concealment of material facts, and as such, the confirmed grant of letters of administration should be revoked so as to honour the wishes of the deceased.

43. As stated herein above, the respondents did not disregard the will allegedly left behind by the deceased as the applicant would like this court to believe. I say so because, it is evident from the records of this court, that the respondents had disputed the fact that the deceased had left behind a valid will, as such, they proceeded to file for grant of letters of administration intestate in respect to the estate of the deceased, as they did not believe that the deceased had died testate. In any case, the respondents had by a letter dated 2nd November, 2004, given the applicant 7 days to move the court under the law of succession if he felt that the will left behind by the deceased was valid, which he failed to do.

44. Furthermore, I have noted from the records of this court that the applicant had on 3rd November, 2008, filed an affidavit of protest, against the confirmation of grant that had been issued to the respondent. Part of the reasons that the applicant had advanced in his affidavit of protest was that the respondents had not obtained the consent of all the beneficiaries of the deceased when applying for the grant of letters of administration and also that the respondents had concealed from the court the fact that the deceased had left behind a valid will.

45. Whereas the applicant had an opportunity to canvass on the issue of the validity of the alleged will before this court at the hearing of the application for confirmation of grant, the applicant failed to prosecute his protest despite numerous opportunities being granted by the court, and as a result, on the 24th of June, 2020, his protest was dismissed by the court and the grant of letters of administration intestate was confirmed.

46. From the proceedings, the date of hearing the applicant's protest was taken by consent on the 25th of February, 2020, and he cannot therefore claim that he was not made aware of the hearing of the same. This gives me reason to believe that the respondents did not conceal from the court the fact that the deceased had left behind a valid will, considering that from the onset they did not believe that the deceased had died testate.

47. The applicant who had believed that the deceased had left behind a valid will was granted an opportunity, at the hearing of the application for confirmation of grant, to convince the court that indeed the deceased had left behind a valid will, which he failed to do thereby sleeping on his rights.

48. Given the foregoing, I am of the view that the applicant's summons for revocation of grant lacks in merit, and the same should be dismissed with costs to the respondents.

49. The appeal is hereby dismissed with costs to the respondents. Thirty days stay of execution granted.

DATED, SIGNED AND DELIVERED ELECTRONICALLY THIS 10TH JULY, 2025.

HON. T. W. OUYA

JUDGE