



REPUBLIC OF KENYA



KENYA LAW
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**Mathenge v Mathenge & another (Succession Cause 578 of 2011)
[2024] KEHC 223 (KLR) (18 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 223 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION CAUSE 578 OF 2011**

**M MUYA, J
JANUARY 18, 2024**

BETWEEN

NANCY WAMBUI MATHENGE APPLICANT

AND

NYAKIERE MATHENGE 1ST RESPONDENT

EVANS MWARIRI 2ND RESPONDENT

RULING

1. The summons for revocation of grant dated 13th June 2011 seeks for an order that the grant of letters of administration to Nyakiere Mathenge alias Serah Nyakieri Mathenge and Evans Mwariri Mathenge made on 25th June 2010 and confirmed on 23rd February 2011 be revoked (or annulled) on the following grounds:-
 - a. That the grant was obtained fraudulently by making of a false statement or by the concealment from the court of something material to the case.
 - b. That the grant was obtained by means of untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance and or inadvertently.
 - c. That the person to whom the grant was made has failed to proceed diligently with the administration of estate.
2. In her supporting affidavit the applicant deposes that the Deceased was her mother and that the 2nd Respondent is her brother. That the 1st Respondent is a stranger to the estate of the deceased as she was never a dependant.

That the deceased was survived by



Esther Wanjiru Mathenge - daughter.

Evans Mwariri - Son

Nancy Wambui Mathenge - daughter and

Pauline Njoki Mundia - Daughter.

3. Further that no consent or citation was served as per rules 26, 21 and 40 of the probate and administration Rules on the aforementioned beneficiaries.
4. That the 1st Respondent is not a beneficiary but a licensee whose interest was extinguished at the time of the demise of the deceased.
5. That the grant was confirmed on 23rd February 2011 but the Estate is yet to be transmitted.
6. That the beneficiaries, have been denied the right to inherit the Estate of their mother.
7. The Respondent in his replying affidavit dated 25th November 2021 deposes that:-

The proceedings in Karatina Senior Resident Magistrate Succession Cause number 24 of 2005 were illegal as they purported to distribute land parcels that had been distributed vide Nyeri Senior Resident Magistrate Court Civil appeal number 19 of 1975 through which he was registered as the proprietor of Land Parcels Iraini/gatundu/299 and Iraini/Kiaguthi/291.
8. Pursuant to the Court order Nyakiere Mathenge and his late mother Mary Wambiri Mathenge life interest was noted in the Register for the two Parcels of land.
9. That when the 1st Respondent filed Karatina Senior Resident Magistrate Succession Cause Number 24 of 2005 he objected to the same and notified the court on the illegality of the proceedings as the properties sought to be distributed had already been done so vide Nyeri Senior Resident Magistrates Court Civil appeal number 19 of 1975.
10. That the proceedings were heard without him being served and the 1st Respondent was issued with a grant which was subsequently confirmed for administration of land parcels already registered in his name.
11. Further he deposes that the grant issued to the 1st Respondent was a nullity and the proceedings thereon ought to be struck out.
12. That all the dealings effected on the said properties pursuant to the impugned grant be reversed and the relevant parcels of land be reverted back to their original status in line with the order issued in Nyeri Senior Resident Magistrate Civil appeal number 19 of 1975.
13. That the summons for revocation be allowed to the extent that the proceedings are a nullity and ought to be vacated.



Analysis and Determination

Issues -

Whether the grant was obtained fraudulently by making a false statement or by concealment from the court of something material to the case?

14. It is not in dispute that the grant was issued on 23rd June 2010 to the 2nd Respondent and it was subsequently confirmed on 23rd February 2021 vide Succession Cause number 25 of 2005. Parties present were shown as Serah Nyakicore Mathenge and her surety one Jane Mundia. In the citation to accept or refuse letters of administration dated 10th May 2005 shows the beneficiaries as Evans Mwariri Mathenge Esther Wanjiru Nancy Wambui Njoki Mundia
15. The probate and administration rule 26 (1) and (2) provide thus:-
 1. Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as 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 33 or 39 by all persons entitled in equality or priority be supported by an affidavit of the applicant and such other evidence as the court may require.
16. A perusal of Succession Cause number 24 of 2005 does not show a list of all the beneficiaries of the Estate and hence it does not conform to Section 26 of the probate and administration rules which provides that:-

"Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree, or in priority to the applicant."
17. In the case of the Estate of Muriranja Mboro Njiru Nairobi High Court Succession Cause Number 890 of 2003 it was held: - "I am satisfied that the grant obtained in Nakuru Court was not made in accordance with the laid down statutory requirement. The consent of Milka Njeru Muriranja widow of the deceased was not obtained. She never participated in the proceedings in that she never executed any of the mandatory forms to support the application. Under Rule 26 of the probate and Administration rules, consent of heir in equal degree is mandatory. The consent was never obtained from Milka. Citations were never obtained and Milka never signed any of the application forms although her name was disclosed..... in the circumstances mentioned above and upon its own motion, this court hereby revokes the grant issued under the Nakuru High Court Succession Cause number 108 of 2001, to Mary Nyambura Muriranja and Milka Njeri Muriranja on the grounds that the proceedings to obtain the grant were defective in substance."
18. Similarly in the matter of the *Estate of Isaac Kirery Njuguna (Deceased)* Nairobi High Court Succession Cause Number 1064 of 1994 it was held:- "A grant is liable for revocation where all the heirs have not consented to the mode of distribution and all the properties which make up the Estate are not taken into account or distributed."
19. The petition for letters of administration shows that the 1st and 2nd Respondent were the only heirs (beneficiaries) indicated as survivors of the estate of the Deceased herein one Mary Wambiri.
20. The certificate of confirmation of grant indicates distribution in the following mode:- Parcel Iriani/ Kiaguthy/29 to 1st Respondent as the sole proprietor.



21. Iriani/Gatundu/299 to 2nd Respondent as Sole Proprietor.
22. There was no attempt to include, the applicant herein and her sisters in the distribution of the estate.
23. Section 38 of the Law of Succession provides:- “Where an intestate has left a Surviving child or children but no spouse the net intestate shall, subject to the Provisions of Section 41 and 42, devolve upon the Surviving child, if there be only one, or shall be divided equally among the Surviving children.”
24. A clear reading and meaning of the above is that there ought to be no discrimination in terms of gender or in any other form.
25. This is buttressed by the United Nations convention on the elimination of discrimination against women (1979).
26. Article 2 of sub article 5 of *the constitution* provides:-
27. The general rules of international law shall form part of the law of Kenya.” Thus effectively domesticating the convention as part of our laws.
28. This court is satisfied that there was fraud and concealment of material facts in the process of obtaining the grant and its confirmation.
29. The court is clothed with jurisdiction by dint of Section 47 of the *law of Succession Act* which provides:- “The High Court shall have Jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decree and make such orders therein as may be expedient.....”
30. I find in the interests of Justice that the Court ought to revoke and annul the grant issued. I accordingly allow the application for revocation of the grant as prayed including the Subsequent title deeds issued from the original LR No. Iriani/Gatundu/299.
31. This being a family matter each party to bear its own costs.

RULING READ AND DELIVERED THIS 18TH JANUARY 2024

HON. JUSTICE M. MUYA

JUDGE

In the presence of:-

Miss Wanjiru holding brief for Muchiri

Applicant - Present in person

Court Assistant: Munene

30 days R/A.

HON. JUSTICE M. MUYA

JUDGE

