



**In re Estate of Ngai Murunga (Deceased) (Civil Appeal E044 of 2023)
[2024] KEHC 3649 (KLR) (17 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3649 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E044 OF 2023
LM NJUGUNA, J
APRIL 17, 2024**

BETWEEN

ALICE GATURI APPELLANT

AND

JENIFFER NJOKI NJUE RESPONDENT

*(An appeal from the Ruling of Hon. Lucy Ambasi, CM in Embu
CM Succession Cause No. 40 of 2019 delivered on 27th July 2023.)*

JUDGMENT

1. The appellant filed a memorandum of appeal dated 15th August 2023, seeking orders that the appeal be allowed, the impugned ruling be quashed and set aside and the costs of the appeal be awarded to the appellant. The appeal is premised on the grounds that the learned Chief Magistrate erred in both facts and law:
 1. By misreading the respondent’s summons dated 16th November 2022 whose prayer 1 was for a specific order that ‘the confirmed grant dated 01st February 2021 be revoked’ and not the grant as indicated in the Ruling dated 27th July 2023
 2. By failing to appreciate that what the respondent was applying for in her Summons dated 16th November 2022 is for revocation of the certificate of confirmation of grant issued by the court on 01st February 2021 and not the grant of letters of administration and this is very clear in her summons, the supporting affidavits and the annexures;
 3. When she misapprehended the law and found that the purpose of section 76 of the *Law of Succession Act* is to ‘give recourse of beneficiaries such as the applicant in the instant cause who have been disinherited by the unlawful conduct of the petitioner’;



4. By misapprehending the law and applying section 38 of the *Law of Succession Act* in this matter when the deceased in this matter had left a spouse by the name of Alice Gatari, the appellant herein;
 5. By finding that the authority cited in support of the preliminary objection dated 14th March 2023 by Musyoka J. in the case of *Re Juma Shitseswa Linani (2021) eKLR* had no application in the facts of this cause;
 6. By ignoring and failing to consider that the respondent had deposed in paragraph 6 of the affidavit in support of her summons that she was present in court and gave her consent when the grant was confirmed but was misled by an unnamed person and dismissed the appellant's submission that her remedy lay only in the appeal against the said confirmation or review of the confirmed grant and mode of distribution and not apply for revocation of the confirmed grant;
 7. By failing to consider that the certificate of confirmation of grant had been fully effected and title deeds issued to the beneficiaries;
 8. By failing to consider that the appellant as the administrator of the estate had started the process of subdividing her 0.40Ha share of the deceased's land to give 0.119Ha to her daughter, the respondent herein, and therefore erred in finding that the respondent had been disinherited;
 9. By dismissing the preliminary objection dated 14th March 2021 without giving due consideration to the law applicable vis-à-vis the summons before the court and the prayers thereof; and
 10. By setting aside and revoking the orders of 01st February 2021 which confirmed and distributed the estate of the deceased and redistributing the estate of the deceased in equal shares to all the deceased's beneficiaries, which orders were against the law.
2. A brief background of the case is that a grant of letters of administration in the estate of the deceased was issued to the appellant herein on 28th August 2019. The appellant filed summons dated 24th August 2020 for confirmation of the said grant. Consequently, a certificate of confirmation of grant was issued on 01st February 2021 with a schedule distributing the estate of the deceased being property number Ngandori/Kirigi/1212 amongst 6 beneficiaries. The beneficiaries are the appellant, Joseph Mugo, David Mwaniki, Elias Muriithi Ngai, Timothy Kariuki Ngai and James Njeru Ngai.
 3. The respondent herein filed summons dated 16th November 2021 seeking for revocation of the confirmed grant. In response, the appellant herein filed a preliminary objection dated 15th March 2023 on the grounds that there is no law supporting revocation of a certificate of confirmation of grant as prayed. The trial magistrate determined the preliminary objection through a ruling dated 27th July 2023 dismissing the preliminary objection, revoked the order of the court distributing the estate and then redistributed the estate into equal shares to all the beneficiaries. This is the impugned ruling on appeal before this court.
 4. In this appeal, the court directed the parties to file their written submissions but only the appellant complied.
 5. The appellant submitted that when the grant was being confirmed, all the beneficiaries of the estate of the deceased were present in court and the respondent was also present. That it was agreed in court that a portion of land measuring 0.40Ha was to be given to the appellant to hold in trust for the daughters of the deceased but the respondent did not object to this position. That the respondent's summons for revocation of confirmed grant should not have been granted by the trial court as the prayer has no basis



in law. That under section 76 of the [Law of Succession Act](#), revocation of a certificate of confirmation of grant is not provided for and in any event, the grant was confirmed in the presence of the respondent but she did not raise any objection. Reliance was placed on the case of *Odaria Wanja v Charles Kinyua Njoka* (2021) eKLR where this court held that the certificate of confirmation of grant was an order of the court which cannot be revoked but can only be set aside. She urged the court to find that the preliminary objection had merit and set aside the orders of the trial magistrate.

6. The issue for determination herein is whether or not the trial magistrate erred in dismissing the preliminary objection dated 14th March 2023.
7. To begin with, I shall re-examine the evidence and the arguments made at the trial, as is expected of a first appellate court. (see the case of *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123). The summons for revocation dated 16th November 2022 was filed pursuant to section 76(e) of the [Law of Succession Act](#) seeking the following orders (quoted verbatim):
 1. “That the confirmed grant dated 1st of Feb. 2021 be revoked.
 2. That a fresh confirmed grant be issued including Jeniffer Njoki Njue as a beneficiary of the estate and allocated a share of land parcel no. Ngandori/Kirigi/1212.
 3. The cost be in the cause”
8. The appellant filed preliminary objection dated 14th March 2023 in opposition of the summons for revocation on the grounds that:
 1. “There is no law under the [Law of Succession Act](#) or any other law in Kenya to revoke a certificate of confirmation of grant as prayed by the applicant.
 2. The summons dated 16th November 2022 is therefore incompetent and should be struck out with costs to the respondent.”
9. The trial magistrate, in her ruling, found that the case of *In re Estate of Juma Shitseswa Linani (Deceased)* [2021] eKLR is not a good authority for the present case as the court had become functus officio and on the issue of confirmation of the grant, the beneficiary was referred to appeal. She relied on the case of *The Estate of Seth Namiba Ashuma (deceased)* (2020) eKLR where the court frowned upon disinheritance of women in light of international law provisions on the issue. She went on to find that the preliminary objection does not meet the tests in the case of *Mukisa Biscuits Manufacturing Company Limited vs. West End Distributors Limited* (1969) EA 696 for it to be entertained, therefore dismissed it and redistributed the estate according to section 38 of the [Law of Succession Act](#).
10. Firstly, Order 51 Rule 14(1) of the Civil Procedure Rules 2010 provides for preliminary objection as a way of opposing an application. In the case of *Mukisa Biscuits Manufacturing Company Limited vs. West End Distributors Limited* (1969) EA 696 (ibid) the Court of Appeal held thus:

“...So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises out of clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit....A preliminary objection is in the nature of a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct.”
11. From a reading of the grounds of the preliminary objection, the appellant was challenging the provision of law cited by the respondent in the summons for revocation stating that there is no law supporting the prayers sought. A perusal of the prayers in the summons for revocation depicts that the respondent



was simply aggrieved with the distribution of the estate of the deceased. I understand it this way because she does not plead dissatisfaction with the process of appointing the appellant as an administrator of the estate. The respondent filed the summons for revocation of grant pursuant to section 76(e) of the *Law of Succession Act* which provides thus:

“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-

(e) that the grant has become useless and inoperative through subsequent circumstances.”

12. In my view, and in light of the sentiments of the superior court in the above cited case of *Mukisa Biscuits Manufacturing Company Limited vs. West End Distributors Limited* (1969) EA 696 (ibid), the preliminary objection raised a valid point of law. Between the parties, the facts of the case were settled and the preliminary objection raised a point of law that needed to be determined by the trial court. The parties made their arguments before the trial magistrate and the appellant placed reliance on the case of *In re Estate of Juma Shitseswa Linani (Deceased)* [2021] eKLR, which was adjudged as unauthoritative in the present case.

13. I have perused this case and there was a myriad of issues before the Honourable Judge therein, raised through an application which was opposed by way of a preliminary objection. The Honourable judge dismissed the preliminary objection stating that the same did not meet the requirements laid down in the case of *Mukisa Biscuits Manufacturing Company Limited vs. West End Distributors Limited* (1969) EA 696 (supra). He proceeded to determine the rest of the issues before him. One of them was that the application sought orders for revocation of the certificate of confirmation of grant, but the affidavit in support of the application challenges the process of obtaining the grant of representation.

14. The Judge discussed circumstances under which a grant may be revoked as provided under section 76 of the *Law of Succession Act* and stated thus:

“The third general ground is represented by section 76(e), and it is about the grant becoming useless or inoperative due to subsequent circumstances or events. It is presupposed that the grant was obtained in a proper and procedural manner, but then an event happens which renders the grant useless or inoperative, such as where the sole holder of the grant dies leaving the estate without an administrator, or the sole administrator is adjudged bankrupt thereby losing the legal competence to administer an estate.

15. For situations where a party is aggrieved with distribution of the estate, it was his view that the party has the option of review or appeal, seeing as the court that issued the certificate of confirmation of grant has at this point become functus officio. He stated:

“Section 76 makes no mention of revocation of certificates of confirmation of grants. The only reference to confirmation of a grant is in section 76(d)(i), and it is about the failure to apply for confirmation of the grant within the time allowed in law. That means that a grant-holder who fails to apply for confirmation of his grant in accordance with sections 71 and 73 of the *Law of Succession Act* exposes their grant to revocation. There is nothing in section 76 about a certificate of confirmation of grant being revoked because there were problems with the process of the confirmation of grant. Neither does section 76 permit the making of orders on a summons for revocation of grant founded on grounds to do with a party being unhappy with the confirmation provision, and the process gives the court no discretion to cancel certificates of confirmation of grant. The ideal situation, where a person is unhappy



with the process of confirmation of grant, for it would appear that that is what the applicant herein is aggrieved about, is not to move the court under section 76 for revocation of grant, for the reasons that I have discussed in the foregoing paragraphs. What such a person should do instead, is to file an appeal against the orders made by the court on distribution. The court confirming a grant largely becomes functus officio so far as confirmation of the grant is concerned, and cannot revisit the matter unless upon review.”

16. I do not need to go further into the findings of the Honourable Judge in that case, noting that he has sufficiently guided on the issues relevant to the case before me. In my view, the case of *In re Estate of Juma Shitseswa Linani (Deceased)* [2021] eKLR, is a persuasive authority to the issues raised herein. As I have stated earlier, the summons for revocation as crafted by the respondent, challenge the distribution of the estate and not the process of issuing the grant of representation itself. At the same time, the preliminary objection is raising an issue of law which should have been determined according to the law. The grounds for revocation of a grant are set out under section 76 of the [Law of Succession Act](#). According to the respondent’s affidavit in support of summons for revocation of the grant, the main issue is that she has not been expressly stated as a beneficiary of the estate of the deceased in the certificate of confirmation of grant.
17. I am also guided by the case of *In re Estate of Prisca Ong’ayo Nande (Deceased)* (2020) eKLR, the court found that:

“I have very closely perused through the provisions of the [Law of Succession Act](#), and I have not come across any provision that provides a remedy to a person who is aggrieved by confirmation orders. Sections 71, 72 and 73 of the [Law of Succession Act](#), which deal with confirmation of grants, do not address the question of redress for parties who are unhappy with the confirmation process, nor do they deal generally with flaws in the confirmation process. As stated above, section 76 has nothing to do with the confirmation process, and provides no relief at all to any person unhappy with the confirmation process. In the absence of any provision in the [Law of Succession Act](#), for relief or redress for persons aggrieved by such orders, the aggrieved parties have only two recourses under general civil law, that is to say appeal and review, to the extent that the same is permissible under the [Law of Succession Act](#). I would believe that one can also apply for the setting aside or vacating of confirmation orders, where the same are obtained through abuse of procedure.”
18. A certificate of confirmation of grant is an order of the court emanating from the substantive grant of representation, in this case a grant of letters of administration, which is what may be revoked on the grounds set under section 76 of the [Law of Succession Act](#). The certificate of confirmation of grant (which I presume is what the respondent has termed as ‘confirmed grant’) cannot be revoked but rather, set aside. Being an order of the court, it may be the subject of a review or an appeal for purposes of redistribution of the estate only and not removal or appointment of an administrator.
19. Therefore, the appeal herein is meritorious and is hereby allowed. The following orders shall issue:
 1. The ruling and orders of the trial magistrate in Embu CM Succession Cause No. 40 of 2019 delivered on 27th July 2023 are hereby set aside;
 2. The preliminary objection dated 14th March 2023 has merit and is hereby allowed;
 3. The summons dated 16th November 2022 for revocation of grant is hereby struck out; and
 4. Each party to bear their own costs since they are members of the same family.



20. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 17TH DAY OF APRIL, 2024.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent

