



REPUBLIC OF KENYA



**In re Estate of Celipha Wambui (Deceased) (Succession Cause  
671 of 2008) [2024] KEHC 7032 (KLR) (17 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 7032 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
SUCCESSION CAUSE 671 OF 2008  
SM MOHOCHI, J  
MAY 17, 2024**

**BETWEEN**

**ISAAC MUNDUI KAMBURU ..... APPLICANT**

**AND**

**SAMUEL KAMAU KARANJA ..... 1<sup>ST</sup> RESPONDENT**

**ISAAC KIGOTHO MAINA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The deceased herein, Celipha Wambui Kamburudied on the 5<sup>th</sup> October 2006 at the prime age of 82 years and was survived by two children, Isaac Mundui Kaburu (the Applicant herein and Nancy Wangui Kaburu (now deceased).
2. Upon the death of the deceased, Nancy Wangui Kaburu (deceased) petitioned for grant of Probate of the deceased's estate with will annexed, based on the deceased written Will dated the 18<sup>th</sup> June 1986 and pursuant thereto, the Court issued a grant of probate of a written will, on the 23<sup>rd</sup> April 2009 which was Confirmed on the 11<sup>th</sup> May 2010.
3. The estate was distributed and the Properties distributed as per the last wishes of the deceased as was contained on the Certificate of Confirmation of Grant.
4. The Respondents were never parties of the succession proceedings herein, neither were they executors of the will of the deceased and were not beneficiaries of the estate of the deceased.
5. The Respondents have been enjoined to these proceedings by virtue of being children and administrators of the estate of Nancy Wangui Kaburu (deceased) who was the Executor of the estate of the deceased herein.



6. The Grant of probate with a written will annexed was confirmed on the 11<sup>th</sup> May 2010 and Nancy Wangui Kaburu (deceased) died on the 20<sup>th</sup> day of September, 2013 long after executing and distributing the estate and concluding the probate.
7. Before this court is a Summons for Revocation or Annulment of Grant dated the 28<sup>th</sup> October 2020, the Applicant herein moved this Court seeking for an order that, the Grant of Probate of Written Will issued to Nancy Wangui on the 23rd April 2009 be revoked and/or annulled on the following grounds:
  - a. That the proceedings to obtain the grant were defective in substance
  - b. That the Grant was obtained fraudulently by making a false statement and/or by the concealment from Court of material information
  - c. That the Grant was obtained by means of an untrue allegation of a fact
  - d. That the Grant has become useless an inoperative.

### **The Applicant's Case**

8. The Applicant regurgitated the averments of his supporting affidavit in submissions and refined the issues for consideration to be;
  - i. Whether the proceedings to obtain the Grant were defective?
  - ii. whether the Grant was obtained fraudulently by making false statements and concealment of facts, untrue allegations of facts.
  - iii. Whether the same has become useless and inoperative.
  - iv. Whether the summons for revocation of grant have met the threshold for revocation.
  - v. Who should bear the costs of this application.
9. The Applicant submits that, he was not granted an opportunity to contest the will and his consent as to the mode of distribution was not obtained and confirmed by the Court. The Petitioner misled this Honourable Court by presenting an invalid will. That this whole succession cause is tainted with irregularities. The purported will has included properties that do not form part of the estate of the deceased. It is unclear why the Honourable Court did not insist on the attendance of all the beneficiaries of the deceased despite being named in the Chief's letter.
10. That, the Applicant testified and produced evidence that he had lodged a caution against LR. Laikipia/Lariak/I09 but the same was removed through an order issued in Nyeri Succession Cause 215 Of 2019- In The Matter of the Estate of Nancy Wangui Kaburu. The Applicant was not served with a notice or summons to Contest the said removal of caution. We note that the properties distributed in the present succession cause have already been transferred to Nancy Wangui Kaburu and distributed in the Nyeri succession cause.
11. That Revocation of Grant is provided for under Section 76 of the *Law of Succession Act*. The grounds upon which the grant may be revoked are well provided therein. The said section provides that revocation can either be at the instance of an applicant or can be by the court *suo moto*. However, it is a prerequisite that the conditions for revocation as set out under Section 76 must be proved. Reliance



is placed on the case of *Jamleck Maina Njoroge v Mary Wanjiru Mwangi* [2015] eKLR the court discussed circumstances when a grant can be revoked. The court observed:

“The circumstances that can lead to the revocation of grant have been set out in Section 76 Law of Succession. For a grant to be revoked either on the Application of an interested party or on the court’s own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the Grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.”

12. That, the 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 for revocation or annulment of a grant. And when a court is called upon to exercise this discretion, it must consider interests of all beneficiaries entitled to the deceased’s estate and ensure that the action taken will be for the interest of justice.

13. That, in the circumstances of this case, the Applicant has satisfied the conditions to revoke the grant so that this succession can be started afresh. The Applicant is also seeking that the orders hereto do extend to Nyeri Succession Cause 215 of 2019 which distributed the estate of Nancy Wangui Kaburu derived from this estate.

14. That the *Law of Succession Act* Section 47 provides for jurisdiction of the High Court in respect of matters falling under the Act as follows: -

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce Such decrees and make such orders therein as may be expedient.”

15. That, Rule 41(3) of the *Probate and Administration Rules* provides that:

“Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or if any condition or qualifications attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the *Act*, by order appropriate and set aside the particular share or estate of the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule I of the *Civil Procedure Rules* and may thereupon, subject to the proviso to section 71(2) of the *Act*, proceed to confirm the grant.”

16. That on the issue of costs the general rule as to costs is provided for in Section 27 of the *Civil Procedure Act* which provides as follows:

“Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the Court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers :



Provided that, the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

17. That, the Respondents herein, while knowing that this estate is tainted with irregularities, have declined to surrender hence necessitating this lengthy trial and should be condemned to bear costs of this application.

### **The Respondent’s Case**

18. The Respondents replied to the aforesaid Summons for Revocation vide a Replying Affidavit dated the 13<sup>th</sup> May 2021 sworn by the 1<sup>st</sup> Respondent herein in which they maintain that the Grant was procedurally applied for and the estate distributed in accordance with the will of the deceased and prayed that the Application be dismissed.
19. The Respondents filed written submissions in support of their case and relied on their Replying Affidavit, evidence tendered during hearing, facts of the matter and the List and Bundle of Authorities filed.
20. The Respondents refined two issues that arise for determination in this matter: -
- i. Whether the deceased died testate leaving a valid will
  - ii. Whether the grant of Probate issued to Nancy Wangui Kaburu(now deceased) on the 23<sup>rd</sup> April, 2009 and confirmed on the 11<sup>th</sup> May 2010 should be revoked.
21. As to whether the Deceased died Testate having left a valid Will? The Respondent submit that, the deceased died testate having left a valid written will dated the 18<sup>th</sup> June 1986, and that the relevant provisions relating to its validity is Section 11 of the Law of Succession Act which 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 or the testato.r
  - 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 has 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 of attestation shall be necessary.
22. A cursory look at the will dated the 18<sup>th</sup> June 1986 shows that the same has validity test under Section 11 aforesaid. The will bears the signature of the deceased and is signed by two witnesses who have indicated that they were above the age of majority. It therefore follows that the deceased died leaving a valid will.
23. That in this instant case, the issue of testamentary capacity of the late Celipha Wambui Kaburu was not raised. It was not argued that the deceased did not have the requisite soundness of mind for the purpose of making the disputed will. The matter of the state of mind of the deceased at the time she allegedly made the impugned will in 1986 was, therefore, not relevant and as such the provisions of



Section 5 of the Law of Succession Act, which relate to soundness of mind, are not altogether relevant for the purpose of this suit. To the Applicant, the deceased's will was a forgery and has enumerated various reasons in support of the said allegation in paragraph 11 of the Applicant's Supporting Affidavit dated the 25<sup>th</sup> October 2020 which we shall submit on hereunder: -

“That the Applicant used to live with his mother at Kinamba but was not aware that she had made the Will and that the witnesses in the Will are not known to the Applicant or his family members.”

24. That, as per the provisions of Section 11 of the Law of Succession Act, disclosure of the will to beneficiaries is not one of the factors to be considered when determining the validity of a will. In so submitting the Respondents are guided by the holding of Honourable Learned Justice Musyoka in the case of In re Estate of Francis Andabwa Nabwangu (Deceased) [2021] eKLR where he held that:

“The law does not place an obligation on the testator to disclose to the family who the witnesses to his will were, neither is there a requirement in the law that they be known to the family”.

25. That in that case, the Honourable Court cited with approval various case law in support of the aforesaid holding and stated as follows at paragraph 21: -

“Related to the matter of forgeries, is the claim by the applicants that the attesting witnesses were unknown to the family and they were not disclosed. It is not too clear to me what the applicants meant by this. The will on record shows that the first witness was Hon. Masinde Muliro, who affixed his signature, and the other was R. Shihemi who wrote down his name as his signature. The writing of these names is quite clear. Anyone who wished to establish their whereabouts could make enquiries, I note that Hon, Masinde Muliro is a notable public figure of historical significance and a national hero, a fact that this court can take judicial notice of. In any event, it has not been claimed that the deceased did not know or was not acquainted with these alleged witnesses. Section 11 only requires presence of two or more competent witnesses, "Competent witness" is defined in section 3(1) of the Law of Succession Act to mean a person of sound mind and full age. The law does not place an obligation on the testator to disclose to the family who the witnesses to his will were, neither is there a requirement in the law that they be known to the family. It was said, in In Re Estate of GKK (Deceased) [2013] eKLR (Lenaola J), that the witnesses need not be the trusted friends of the deceased, they could be anyone, so long as they were capable of seeing the deceased sign the document and understood what they were doing.

In, in re Estate of Julius Mimano (Deceased) [2019] eKLR (Musyoka J), it was said that the fact that the attesting witnesses were unknown to members of the family of the deceased did not affect the attestation and the validity of the will, and that section 11 did not make it a requirement that the attesting witnesses be persons known to the family of the deceased.”

26. The Respondent fully associate themselves with the above holdings and submit that just because the Applicant did not know the existence of a will during the deceased's lifetime is not proof that the will was forged:

That the Applicant alleges that, the deceased had a strained relationship with the executor of the will Nancy Wangui and as such she would not have bequeathed to her as she did in the will.”



27. It is the Respondents submission that, the burden of proof of the aforesaid allegation rests with the Applicant. The Applicant did not lead any evidence to proof that his sister had a strained relationship with their mother. Without proof the said allegation should not hold water and we pray that you so find:

That the Applicant being the only son of the deceased was not provided for in the will.

28. It is the Respondents submission that, the aforesaid allegation is not true. Paragraph 5 of the will clearly makes a provision for the Applicant herein. Even in the unlikely event that the will did not provide for the Applicant, the same does not make the will invalid. In so submitting we are guided by the holding of the Court *In re Estate of Julius Mimano (Deceased)* [2019] eKLR where the Honourable Court stated as follows when dealing with a similar issue: -

“The applicant pointed at the fact that the will, did not provide for the children of the deceased, and especially himself, being the only son of the deceased.

According to him that was unusual, and raised suspicion. Section 5 of the *Law of Succession Act* gave the deceased freedom of testation, to dispose of his property as he pleased to whomsoever he pleased. It was within his freedom or discretion to determine who was to benefit from his bounty. The mere fact that a will leaves out children from benefit and benefits the spouse substantially should not be ground for invalidation of a will. A party aggrieved by such provision has a remedy in section 26 of the *Law of Succession Act*, but not in the nullification of the will.”

29. The Respondent fully associate themselves with the above holding and submit that the will provided for the Applicant and even if it did not the same is still not a valid ground for nullification of the will and that the deceased's will is valid for all intends and purpose.

30. As to whether the grant of (now deceased) on the should be revoked. probate issued to Nancy Wangui Kaburu on the 23<sup>rd</sup> April, 2009 and confirmed on the 11<sup>th</sup> May 2010

31. It is the Respondent's submission that, the Applicant's Application is brought under the provisions of Section 76 of the *Law of Succession Act*. The Applicant has relied on several grounds to support his Application. The said grounds can be found in his supporting Affidavit. In paragraph 8 of the Supporting Affidavit, one of the aforesaid grounds is that Nancy Wangui (deceased) instituted the succession proceedings secretly without informing the Applicant and/or seeking his consent or participation. It is the Respondents submission that, an Executor named in a will has no legal obligation to obtain the consent of anyone including a beneficiary of a will before commencing succession proceedings. The relevant law on Application for Grant is Section 51 and Rule 7 (1) of the *Law of Succession Act* which provides as follows: -

Application

for

grant:

1. Every application for a grant of representation shall be made in such form as may be prescribed, signed by the applicant and witnessed in the prescribed manner.
2. An Application shall include information as to -
  - i. the full names of the deceased;
  - ii. the date and place of his death;
  - iii. his last known place of residence;



- iv. the relationship (if any) of the applicant to the deceased;
- v. whether or not the deceased left a valid will;
- vi. the present addresses of any executors appointed by any such valid will;
- vii. in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;
- viii. a full inventory of all the assets and liabilities of the deceased; and
- ix. such other matters as may be prescribed.

1. Where it is alleged in an application that the deceased left a valid will -

- a) if it was written, the original will shall be annexed to the application, or if it is alleged to have been lost, or destroyed otherwise than by way of revocation, or if for any other reason the original cannot be produced, then either: -
  - i. an authenticated copy thereof shall be so annexed; or
  - ii. the names and addresses of all persons alleged to be able to prove its contents shall be stated in the application;

32. That, as per the aforesaid provision, there is nowhere where Nancy Wangui (deceased) was required by law to notify and/or seek the Applicant's consent before applying for the Grant. In so submitting we are guided by the holding of the Honourable Court in the case of *In re Estate of Abdulkarim Chatur Popat (Deceased)* [2019] eKLR where it was held as follows at paragraph 15: -

“ .... It is to be noted that where an executor of the will of a deceased person applies for a grant of probate, the consent of dependants of the deceased is not required as in the case of an application for a grant of letters of administration intestate. Rule 7(1)(g) of the *Rules* requires that the names and present addresses of the executors be indicated. The law does not strictly stipulate that the 1st-3rd Respondents were under an obligation to inform and notify the Applicant of the proceedings to obtain the Grant. As indicated above, the gazette notice in Form 60 is a notice to all persons concerned. The notice in the Kenya Gazette of 20.12.13, served to notify all persons concerned. This included the Applicant, as a person concerned with the application for a grant of representation in respect of the estate of the deceased. In the circumstances, I find that the 1st.-3rd Respondents met the statutory requirement of having the notice of their application for the Grant published in the Kenya Gazette of 20.12.13. The gazette notice constituted adequate notice to the Applicant. The case of re:Estate of Wahome Mwenje Ngorano Deceased [2016] ekKLR relied on by the Applicant is distinguished in that unlike in the present case, the deceased therein died intestate.”

33. The Respondents associate themselves with the above *Abdulkarim Chatur Popat (Deceased)* [2019] eKLR holding contending that, that Nancy Wangui (deceased) published a notice No. 2472 in the Kenya Gazette Volume CXI-No. 21 dated the 13<sup>th</sup> March 2009 which is a public document that can be accessed to date on the Kenya Law Reports under the following link:

<http://kenyalaw.org/kenyagazette/gazette/volume/NjE2/Vol%20CX1%20%20%20No.%2021%20/> which notice served to notify all persons concerned with the estate of the late Celipha



Wambui Kamburu. This included the Applicant, as a person concerned with the application for a grant of representation in respect of the estate of the deceased. It is thus our submission that the allegation that the Applicant was not notified and/or his consent sought cannot be a ground for revocation of grant and we pray that you so find.

34. The other ground can be found in paragraph 12 where the Applicant accuses the late Nancy Wangui of failure to disclose several issues. One that the Applicant was a beneficiary of the deceased.
35. That the aforesaid allegation is not true, since the Affidavit in support of summons for confirmation of grant clearly identifies the Applicant as one of the children of the deceased. Secondly is that there existed other wills and codicils executed Subsequent to the will presented by the late Nancy Wangui.
36. The aforesaid allegation also does not hold water since the Applicant did not bother to produce the alleged wills and/or codicils as proof of the allegation. During hearing, the Applicant confirmed that there were no other wills as alleged. Also the allegation that there was animosity between the deceased and the late Nancy Wangui has not been proved hence not a sufficient ground for revocation of grant.
37. In paragraph 13 of the Supporting Affidavit, the Applicant avers that he was not provided for under the will. The aforesaid allegation is not true since clause 5 of the will clearly names the Applicant as a beneficiary and provided for him Plot No. 327 Lariak Settlement Scheme. Even in the unlikely event that the Applicant was not provided for under the will, he ought to have moved the Court under Section 26 of the Law of Succession Act. However, under Section 30 of the Law of Succession Act, such an Application can only be made before confirmation of Grant. Considering that the Grant was already confirmed, such an Application has been overtaken by events. In so submitting we rely on the holding of the Court in *In re Estate of Julius Mimano (Deceased)* [2019] eKLR where it was stated as follows at paragraph 66: -

“In the circumstances there cannot be any foundation to mount an application under section 26 of the Law of Succession Act for lack of adequate provision. In any event, the applicant has to contend with section 30 of the Act, which provides that such an application can only be made before the grant was confirmed. The grant was confirmed in 2006, the prayers for reasonable provision were therefore overtaken by events. The applicant has not demonstrated that there is room for extension of the period for filing such an application after grant has been confirmed.”

38. In paragraph 14 of the Supporting Affidavit, the Applicant has alleged that LR No. Laikipia/Lariak/109 is a property of the deceased but was not included in the alleged will. In rejoinder thereto they submitted that the aforesaid Property Title No. Laikipia/Lariak-109 was within Plot No.323 Lariak Settlement Schemewhich was bequeathed to the late Nancy Wangui(deceased) in accordance with paragraph 4 (i) (a) the Will a fact that the late Nancy Wangui (deceased) duly disclosed in her Affidavit in support of the petition for grant of probate. Be that as it may, even in the event where a property has been erroneously included and/or left out of the will, the same does make the will invalid and/or can it be a ground for revocation of grant. In the circumstances, it as their submission that the aforesaid ground in paragraph 14 of the Supporting Affidavit cannot hold water.
39. That the late Celipha Wambui Kaburu died leaving behind a valid written will. The Applicant herein has challenged the validity of the said will more than ten years after the death of the said Celipha Wambui. It is important to note that the Respondents herein are not the Administrators of the estate of the late Celipha Wambui Kaburu. The Administrator of the said estate is also deceased. Even during her lifetime, the Applicant never moved the Court seeking to have the grant revoked. As demonstrated in these submissions, the Applicant has not discharged the burden of proving that the will was not



valid and neither has he proved that the Grant issued herein should be revoked. In the final limb of these submissions they humbly pray that the Applicants Application herein be dismissed with costs.

### **Analysis and Determination**

40. That Court notes with exception that the Respondents are wrongly enjoined warranting automatic striking out of the pleadings for misjoinder, the respondents had nothing to do with the succession save that their deceased mother was the executor in this succession. This cannot be a mere slip and the Applicant consciously enjoined non-parties to resuscitate a concluded succession.
41. Further the Court notes that the summons for revocation of grant has not attacked the validity and ethnicity of the will but rather that, the proceedings to obtain the grant were defective in substance, that the Grant was obtained fraudulently by making a false statement and/or by the concealment from Court of material information and that the Grant was obtained by means of an untrue allegation of a fact and that, the Grant has become useless an inoperative.
42. The Confirmed Grant was by law meant to have been executed and the estate distributed by January 2011 at the latest.
43. As to whether the Will was a forgery or not, that is water under the bridge as the probate and administration rules provide for two windows for contesting a will and objecting which was never done in this instance.
44. The Applicant alleges that, he became aware of these proceedings in May 2012 when the Executor of the deceased's estate was still alive, the Applicant did not file the instant Application and only filed it in October 2020 which is ten (10) years after confirmation of the grant and seven (7) years after the death of the Executor of the said estate.
45. This Court is of the view that whenever fraud is belatedly alleged to have been committed, long after distribution of the estate of the deceased then the ideal forum may be the Environment and Land Court to seek for nullification of such titles.
46. With regards to the Applicant contention that his consent was never sought, this court is of the humble view that a probate and administration interstate is participatory under the supervision of the court and consents of crucial parties are a necessary element. On the other hand, a probate and administration testate has minimal supervision of the court with the court being concerned with strict implementation of the last wish and testament of the deceased. The executor to a written will, does not require consent of anyone in discharging of her duties.
47. I am persuaded to find that the Summons for revocation of grant dated 28<sup>th</sup> October 2020 is without merit and the same is dismissed with costs to the respondents.
48. This court is inclined to award costs owing to the deliberate and insidious enjoyment of non-parties and posturing for costs upon the summons being allowed.
49. This Probate and Administration shall be marked as closed.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAKURU ON THIS 17TH DAY OF MAY, 2024.**

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**MOHOCHI S.M.**

**JUDGE**

