



**In re Estate of Nabie Wamamili (Deceased) (Probate & Administration  
94 of 1997) [2024] KEHC 5310 (KLR) (17 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5310 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
PROBATE & ADMINISTRATION 94 OF 1997**

**DK KEMEL, J**

**MAY 17, 2024**

**IN THE MATTER OF THE ESTATE OF THE LATE NABIE  
WAMAMILI (DECEASED)**

**BETWEEN**

**IN THE MATTER OF MOSES WEKESA (DECEASED) SUBSTITUTED BY  
STEPHEN MASIKA SHIUNDU ..... PETITIONER**

**AND**

**FRIDAH NAKHAYO WAMELA (DECEASED) SUBSTITUTED BY ELIUD  
WAMELA ..... OBJECTOR**

**JUDGMENT**

1. The record indicates that the Petitioner herein, the late Moses Wekesa, in 1992 petitioned this Court following the demise of his father the late Nabie Wamamili, in 1970. On 20<sup>th</sup> January 1993, Joseph Wamalwa Nabie alias Wamela Nabiye filed an objection to the making of a grant. On 17<sup>th</sup> August 1993, he filed a Petition by way of cross-application for a grant and on 24<sup>th</sup> September 1998 a joint grant was issued to the late Moses Wekesa Nabie and the late Fridah Nakhayo Wamela. The Objector herein the, late Fridah Nakhayo Wamela, was the widow of the late Joseph Wamalwa Nabie. Upon the demise of Joseph Wamalwa Nabie there was need for substitution by a person holding a grant in respect of his estate.
2. The late Fridah Nakhayo Wamela, formally came into the mater on 4<sup>th</sup> June 2004 when she filed a caveat and an application seeking revocation of the grant that had been confirmed to the Respondent. The Objector, late Fridah Nakhayo Wamela, was the Petitioner's (the late Moses Wekesa Nabie's), sister-in-law.



3. Upon the demise of both the Petitioner and the Objector, they were substituted with the present Petitioner and present Objector herein to proceed prosecuting and/or defending the suit for and on behalf of the respective estates of the deceased.
4. By a summons for revocation or annulment of grant dated 14<sup>th</sup> October 2010, the Objector herein sought the following reliefs:
  - a. That the proceedings to obtain the grant and certificate of confirmation were defective in substance.
  - b. That the grant was obtained fraudulently by the making a false statement or by the concealment from the Court of something material to the case.
  - c. The Petitioner to whom the grant was made has failed after due notice and without reasonable cause failed to proceed diligently with the administration of the estate.
5. According to the Objector, his mother had petitioned for the late letters of Administration Intestate of the estate of the deceased, Nabie Wamamili, who died on 24<sup>th</sup> May 1970. He averred that, the late Fridah Nakhayo Wamela, was a daughter-in-law to the deceased herein as her husband, the son of the deceased, was presumed dead since vanishing from home in 1974. Her presumed deceased husband re-appeared and applied to be enjoined to the proceedings and she left him to sort out the same. Her husband died in 1998 while the matter herein was still pending in Court. She later realized vide Justice Mbitio's orders that the grant of letters of administration intestate be made in the names of both the late Petitioner and Objector herein. He averred that the late Fridah Nakhayo Wamela was not aware that she had been made a joint administrator of the estate of the deceased, Nabie Wamamili's. He averred that it was believed that no grant of letters of administration intestate was ever issued and signed in the prescribed form to enable the late Petitioner administer the estate of the late Nabie Wamamili. He further averred that the certificate of confirmation of grant made on 30<sup>th</sup> June 1999 purporting to distribute the estate of the deceased's estate to the beneficiaries did not contain the name of the co-administratrix, the late Fridah Nakhayo, as per the order dated 24<sup>th</sup> September 1998. He also averred that the said certificate of confirmation of grant does not make any provision for her and her family of six children as only one of his sons, Wafula Wamela, was granted 2.5 acres. He averred that the late Moses Wekesa acted fraudulently in deliberately omitting her name as the co-administrator of the late Nabie Wamamili's estate in order to deny the beneficiaries their rightful equitable shares.
6. Opposing the summons, the Petitioner filed his statement dated 10<sup>th</sup> December 2018 filed on 5<sup>th</sup> February 2019. He averred that the application is frivolous, vexatious and absolutely without merit. According to him, the grant was made to both the late Moses Wekesa and late Fridah Nakhayo Wamela by this Court on 24<sup>th</sup> September 1998. The Petitioner proceeded to have the Objector make a joint application for confirmation of the grant but he refused and as a result, on 24<sup>th</sup> May 1999, he filed an application for confirmation of grant which was confirmed on 30<sup>th</sup> June 1999. He averred that the deceased had son sons: Japheth Siundu, Ndimu Nabie, Wamela Nabie and Moses Wekesa Nabie. He averred that prior to his death, the late Nabie Wamamili made provisions for his sons. He further averred that the Objector was aware of the confirmation process as the application was served upon his Counsel and that no affidavit of protest was filed. He urged this Court to dismiss the application.
7. Parties took directions to the effect that the Objector's application for revocation of grant dated 14<sup>th</sup> October 2010, be heard by way of viva voce evidence and that parties were to file and exchange witness statements and documents. The matter was thus set down for hearing on 6<sup>th</sup> March 2019 but which was subsequently adjourned to 3<sup>rd</sup> July 2019, 1<sup>st</sup> October 2019 and then to 7<sup>th</sup> November 2019 when the same was heard by Riechi J.



8. OB-PW1 was Eliud Barasa Wamela, who testified that the deceased herein was his grandfather as his father was the late Joseph Wamalwa. He knew the late Moses Wekesa as he was his father's brother and that the late Frida Nakhayo was his mother. He proceeded to adopt his recorded witness statement as his evidence-in-chief. According to him, land parcel number E. Bukusu/Nalondo/357 belonged to his late father and was not part of the estate of the deceased and that he produced a copy of the green card as an Exhibit. He testified that the family of the late Joseph Wamalwa ought to get a share from E. Bukusu/Nalondo/350.

On cross-examination, he told the Court that E. Bukusu/Nalondo/357 was purchased by his late father from one Raphael Nalianya Juma in 1967 or thereabout but that he did not have an agreement to prove the same. He demanded nine acres from E. Bukusu/Nalondo/350 as his late father had two sons. He testified that the deceased herein had four sons. That the parcel of the land on the ground is 7 acres.

9. The Court proceeded to direct that the Objector to engage the services of a surveyor to ascertain the size of the deceased's land parcel E. Bukusu/Nalondo/350 and a report be shared to all parties.
10. On 15.5.2023, the Objector closed his case and that the Petitioner's case started in earnest. PET-PW1 was Stephen Masika Shiundu, who adopted his statement dated 17<sup>th</sup> April 2023 as his evidence in chief and relied on his response sworn on 5<sup>th</sup> April 2016 by the late Moses Wekesa as his evidence in chief. He testified that his father was the late Japheth Shiundu and that he was not a biological son to the late Moses Wekesa. He told the Court that his father was allocated land in Chwele by his late grandfather and that his father sold off the same and moved to Uganda prior to his settlement in Kimaeti. He told the Court that his father was duly settled by the deceased herein and that his late grandfather had four sons. He testified that his grandfather's asset was LR East Bukusu/Nalondo/350 and that they are supposed to get a third of the share. He testified that the total acreage was 10.8 Ha and that LR East Bukusu/Nalondo/357 belonged to their late grandfather.

On cross-examination, he told the Court that his father was duly settled by the deceased herein and that his late grandfather had four sons. He testified that his grandfather's asset was LR East Bukusu/Nalondo/350 and that they are supposed to get a third of the share. He testified that the total acreage was 10.8 Ha and that LR East Bukusu/Nalondo/357 belonged to their late grandfather but the family is currently utilizing parcel 350. He told the Court that his late grandfather shared out land to his sons and that he proposed a schedule of distribution that failed to capture the sons of the late Moses Wekesa since one is deceased while the other one cannot be found.

On re-examination, he told the Court the Court that the late Moses Wekesa was the last born while his father was the eldest.

11. PET-PW2 was Isaac Wanyama Shiundu, who adopted his witness statement dated 17<sup>th</sup> April 2023 as his evidence-in-chief. According to him, the late Moses Wekesa was his uncle and that his father Japhet Shiundu got land in Chwele. He testified that their grandfather allocated them land in LR East Bukusu/North Nalondo/350 but lacked evidence on the same.

On cross-examination, he told the Court that the family members met and distributed the land and that the title deed only reflects the size as seven acres. He told the Court that he had a right to inherit his grandfather's land through his father.

On re-examination, he told the Court that they have given the Objector 1.5 acres.

12. Upon closure of the Petitioner's case, parties were directed to file their respective written submissions. However, it is only the Objector who complied.



13. I have considered the rival evidence and the affidavits as well as the submissions presented. I find the only issues for determination is whether the Objector has made a case for the revocation of grant issued to the Petitioner.

14. It is noted that the objection is predicated on section 76 of the Law of Succession Act, Cap 160, Laws of Kenya, which provides that:

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“76. Revocation or annulment of grant

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

15. Under section 76, a court may revoke a grant based on the grounds listed above. The revocation may be on court’s own motion or on the application of a party. Generally, there are three grounds upon which a grant may be revoked:

- a. 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 or she is a survivor when he/she is not, among other reasons. The above ground has been used by courts to revoke grant in a litany of cases including *Mwathi v Mwathi & Another* 1 EA 229, *In the Matter of the Estate of Mwaura Mutungu alias Mwaura Gichingo Mbura alias Mwaura Mbura* Nairobi High Court Succession Cause Number 935 of 2003 and *Musa v Musa*, 2002 1 EA 182.



- b. Where the grant was obtained procedurally, but the administrator, thereafter, got into problems with the exercise of administration, such as where he or she fails to apply for confirmation of grant within the time allowed, or he or she fails to proceed diligently with administration, or fails to render accounts as and when required. For example, In the Matter of the Estate of Mohamed Musa, Mombasa High Court Succession Cause No.9 of 1997, the Court revoked the grant because the administrators had not kept any records of account of their administration.
  - c. 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 or her duties as administrator, or the sole administrator is adjudged bankrupt and, therefore, becomes unqualified to hold any office of trust.
16. A Court therefore faced with an application for revocation of grant may make such orders as it deems fit and just, given the circumstances of the case. In the Matter of the Estate of Esther Wanjiru Mucheru (deceased), Nairobi High Court Succession Cause No.1996 of 1999, the Court noted that section 76 of the [Law of Succession Act](#) is discretionary in that it gives the Court discretion whether to revoke or annul a grant.
  17. Moreover, it is the duty of the applicant to prove that any of the grounds set out under section 76 has been committed before the Court can revoke a grant already issued. This position was adopted by the Court in *Kennedy Opiche Olela v William Ogida Ochuodho & another* [2014] eKLR.
  18. 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.”
  19. In the instant case, the application for revocation is predicated on the ground that the Petitioner acted fraudulently in deliberately omitting the name of the co-administrator of the deceased’s estate and that the late Moses Wekesa apportioned himself a huge chunk of the estate. It is imperative to note that both the administrators in the grant issued on 24<sup>th</sup> September 1998 are deceased.
  20. In re Estate of Laban Njenga Mundia (Deceased) eKLR, the administrator, named Josephine Nduta, filed summons for confirmation of grant. Alvin Kamande Njenga (the “Objector”) filed a replying affidavit which was effectively an affidavit of protest. By way of background, a grant was initially issued to the widow of the deceased, named Esther Njeri Njenga (“Esther”) and confirmed. The Objector filed an application seeking to revoke the grant in favour of Esther, who was also his mother. During the course of the hearing of the application, Esther passed away. Following her demise, Josephine was appointed as the administrator. Josephine claimed that her appointment represented a fresh grant issued to her and she therefore had the authority to apply for confirmation of grant. The Objector however claimed that the Court had no powers to appoint a substantive administrator. The grant had become useless and inoperative upon his mother’s death; therefore, Josephine was only appointed as



administrator for purposes of prosecuting the summons for revocation of grant he had filed. The Court agreed with the Objector and held that Josephine had been appointed by Court as administrator only for purposes of proceeding with the summons seeking revocation of grant. It further held that the legal position is that where a sole administrator passes away, the grant becomes useless and inoperative. The person seeking to replace the deceased administrator must first apply to have the initial grant revoked and include a prayer that a fresh grant be issued to himself with a further prayer for confirmation, if relevant. The Court therefore held that the grant issued to Esther had become useless and inoperative on account of her demise and that Josephine had no capacity to file a summons for confirmation of grant. Acting on its own motion, the Court revoked the certificate of confirmation of grant issued to Esther and directed the family to agree on an administrator to whom a fresh grant may be issued.

21. My Learned colleague Angawa J in the matter of the estate of Peris Wanjiku Nduati (deceased) Nairobi High Court Succession Cause No. 2349/2001 in which she held that:

“where an administrator dies before completion of administration, the right course of action should be to seek his replacement through an application for grant of administration de bonis non”. Also see *Maamun bin Rashid bin Salim EL-Rumhy vs Haider Mohammed Bin Rashid El-Basamy* (1963) (EA.438).

22. In this case, both the administrators are deceased and which automatically renders the grant issued on 24<sup>th</sup> September 1998 useless and inoperative. This scenario invites this court to revoke the grant that was issued as it is clear that the administration process was not concluded as the estate was not distributed to the satisfaction of the beneficiaries and as long as the beneficiaries have an issue this Court is warranted to get involved and ensure proper administration and distribution of the estate of the deceased.

23. At this juncture, this Court proceeds on its own motion to revoke the grant issued on 24<sup>th</sup> September 1998 and advises the parties herein to seek issuance of a fresh grant of letters of administration de bonis non and subsequent confirmation of the grant.

24. In view of the foregoing observations, it is my finding that the Objector’s application dated 14.10.2010 has merit. The same is allowed. The family of the deceased are now directed to urgently proceed to seek for fresh grant of letters of administration de bonis non and thereafter seek for confirmation of grant. Each party to meet their own costs.

It is hereby so ordered.

**DATED AND DELIVERED AT BUNGOMA THIS 17<sup>TH</sup> DAY OF MAY 2024.**

**D. KEMEI**

**JUDGE**

In the presence of:

Miss Wakoli for Objector

Alofi for Khalunda for Petitioner

Kizito Court Assistant

