



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Ndwiga Nthanju (Deceased) (Civil Appeal
E028 of 2023) [2024] KEHC 5778 (KLR) (15 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5778 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E028 OF 2023
LM NJUGUNA, J
MAY 15, 2024
IN THE MATTER OF THE ESTATE OF NDWIGA NTHANJU (DECEASED)**

BETWEEN

JOSEPHINE MURANGI NYAGA APPELLANT

AND

JNN RESPONDENT

(Being an appeal arising from the decision of Hon. G. Mundia PM in Embu Chief Magistrate's Court Succession Cause No. 47 of 2018 delivered on 15th June 2023)

JUDGMENT

1. For determination is a memorandum of appeal dated 22nd June 2023 through which the appellant seeks the following orders:
 1. That the ruling of the trial court be set aside;
 2. That the appeal be allowed; and
 3. That costs of the appeal and trial court be awarded to the appellant.
2. The appeal is premised on grounds that the learned trial magistrate erred in law and fact:
 1. When he revoked the grant issued to the appellant on the basis that the respondent had not signed the consent to the confirmation of grant, whereas the court had directed that the respondent who had not signed the consent to confirmation of grant and to the distribution of the estate be served with a hearing notice to appear in court for confirmation of grant and which he did virtually on 06th April 2021 after he was served with a hearing notice;
 2. When he found that failure to sign the consent to confirmation of grant which was mandatory in law made the procedure for confirming the grant unprocedural and against the law



whereas the applicant could not force the respondent to sign the consent and reported to the honourable court of the respondent's failure to sign the consent;

3. By finding that the consent to confirmation of grant was not filed, which fact was false in that the consent to confirmation of grant was signed and filed by the applicant even though the respondent refused to sign it;
 4. By revoking the grant whereas the respondent had participated in the proceedings but had declined to signed the consent for confirmation of the grant, was served with a hearing notice and appeared before the court for confirmation and did not raise any protest against confirmation;
 5. By revoking the grant yet the respondent had signed the consent to making the grant on 28th February 2018; and
 6. By failing to find that the respondent did not prove any grounds under section 76 of the [*Law of succession act*](#) to warrant revocation of the grant.
3. A grant of letters of administration was issued in the estate of the deceased to the appellant herein on 06th September 2018. She filed summons for confirmation of grant which was accompanied by a consent form which was not signed by the respondent but had the signatures of all the other beneficiaries. The trial court determined a protest that was filed in the cause and then ordered that a certificate of confirmation be issued. The respondent herein filed summons for revocation of grant on grounds that he did not consent to the confirmation of the grant. He alleged that at the confirmation proceedings, he attended court virtually but he did not get to address the court. That the appellant had already benefitted from parcel number Ngandori/Kiriari/xxxx from the deceased but she concealed this information from the court. He challenged the mode of distribution, stating that it was unfair to him.
 4. In response, the appellant herein filed a replying affidavit stating that the grounds raised in the revocation application are in no way related to the grounds stipulated under section 76 of the [*Law of Succession Act*](#). That the respondent was not given parcel number Ngandori/Kiriari/xxxx, neither was she holding the same in trust for him. That the whole family agreed to dispose of parcel number Ngandori/Kiriari/4034 to Zackaria Njeru Nyaga in order to finance the succession proceedings and repay the debts of the deceased. That there was no agreement that the respondent would get a portion of Ngandori/Kiriari/1322 as compensation for giving up parcel number Ngandori/Kiriari/xxxx.
 5. The court took viva voce evidence where PW1, the respondent herein stated that the deceased, his grandfather, gave him parcel number Ngandori/Kiriari/xxxx while he was still a minor and that the appellant herein was meant to hold it in trust for him. That the appellant herein told him that he would get 2 acres from parcel number Ngandori/Kiriari/1322 but he got 0.36Ha. That the confirmation proceedings were done virtually and he did not get a chance to address the court on his grievance. That he did not sign the consent for confirmation of grant and so he wants the grant revoked.
 6. DW1, the appellant herein stated that the estate has already been distributed to the beneficiaries. She stated that parcel number Ngandori/Kiriari/xxxx was her husband's inheritance from the estate of the deceased and that it was never given to the respondent herein at any given point. That the respondent herein has since inherited a portion of parcel number Ngandori/Kiriari/1322 that is larger than parcel number Ngandori/Kiriari/xxxx. She stated that parcel number Ngandori/Kiriari/4034 was sold to cover the cost of succession proceedings.
 7. DW2 stated that parcel number Ngandori/Kiriari/4034 was sold to pay off the debts left behind by the deceased and to finance the succession proceedings. That at the confirmation proceedings, there



was no protest raised. The court, in its ruling, found that the absence of form 37 which is a consent to confirmation of grant under rule 40(8) of the Probate & Administration Rules caused the proceedings to become defective. He revoked the grant on this basis.

8. The appeal was canvassed by way of written submissions.
9. The appellant submitted that the trial magistrate erred in finding that the consent to confirmation of grant had not been filed yet the same was duly filed even though the respondent did not sign it. That if the respondent had a problem with distribution of the estate, he ought to have filed a protest but he did not do so. That the respondent admitted that he was duly served with the hearing notice for confirmation of the grant and he attended court but failed to raise any issues he had with the distribution. She argued that the grounds for revocation of the grant had not been proved as provided under section 76 of the Law of Succession Act. That the respondent's contention is the mode of distribution and not the grant itself. She relied on the cases of In Re Estate of Prisca Ong'ayo Nande (deceased) [2020] eKLR and Maria Irimba Njiru & Another v Caroro Njeru Njiru [2020] eKLR and urged the court to allow the appeal.
10. The respondent submitted that there is no contest as to whether the consent was filed. However, the same was not signed by all the beneficiaries according to Rule 40(8) of the Probate and Administration Rules. He relied on the case of Beatrice Mbeere Njiru v Alexander Nyaga Njiru [2022] eKLR and In the Estate of Ibrahim Likabo Mibeso (deceased) [2020] eKLR. He argued that sufficient grounds for revocation of the grant were proved. That the appellant herself stated that parcel number Ngandori/Kiriari/4034 was sold but the certificate of confirmation of grant shows that the land was given to Lilian Nyakio, whose sister is mentally challenged, a fact that was not disclosed to the court. That the respondent intended to raise a protest but he did not get a chance to do so in court.
11. The issue for determination is whether the trial court erred in revoking the grant.
12. Revocation and/or annulment of a grant is governed by section 76 of the Law of Succession act which provides as follows:

“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.”

13. According to the summons for revocation of the grant dated 08th April 2021, the respondent herein stated that the grant issued to the appellant should be revoked on the grounds that it was obtained fraudulently by making of a false statement of facts material to the cause, that the respondent did not sign the consent form for confirmation of the grant and that he had been given parcel number Ngandori/Kiriari/xxxx by the deceased. That the proceedings to obtain the grant were defective.
14. The trial magistrate relied on the case of *Beatrice Mbeere Njiru v Alexander Nyaga Njiru* [2022] eKLR and stated that the proceedings were flawed because the respondent herein did not sign the consent to confirmation of grant. He went on to revoke the grant on the basis that the said consent was absent. From a perusal of the court record, the consent was indeed filed but the signature of the respondent was not appended on it.
15. Further, when the matter went before the trial court for confirmation, the court record shows that the respondent was marked as present in court. The respondent argued that he was in court on the said date but his advocate did not address the court on his reservations to the proposed mode of distribution. Having verified the presence of all the beneficiaries, the court confirmed the grant and ordered distribution on the basis of the proposed mode in the affidavit in support of the summons for confirmation.
16. The contention arising in this appeal is purely on distribution of the estate. The respondent did not prove fraud at the point of issuance of the grant. I agree with the trial magistrate when he stated that fraud is indeed a serious offence and it must be strictly proved. Onus was on the respondent to prove that the grant was indeed obtained fraudulently but, in my view, nothing in the facts and arguments supports this position. Failure by a party to sign the consent to confirmation of a grant is not a ground for revocation of the grant. In any event, if a party does not sign the consent to confirmation of grant as a way of protesting the proposed mode of distribution, he should file a formal protest which will be heard and determined by the court before the estate is distributed. This is provided for under Rule 40 of the *Probate and Administration Rules*.
17. In this case, the respondent attended court and he did not give persuasive reasons why he did not file a protest to the confirmation. In my view, the grant should not have been revoked on the basis of the consent to confirmation form given the conduct of the respondent at the confirmation hearing.
18. Given the foregoing, I find that the appeal has merit and the same is hereby allowed. The ruling of the trial court in Embu Chief Magistrate’s Court Succession Cause No. 47 of 2018 delivered on 15th June 2023 is hereby set aside.
19. Each party to bear its costs of the appeal.



20. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 15TH DAY OF MAY, 2024.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent

