



REPUBLIC OF KENYA



In re Estate of Jonathan Kegohi Kasavuli Ndiwa (Deceased) (Succession Cause 27 of 2001) [2024] KEHC 8197 (KLR) (5 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8197 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
SUCCESSION CAUSE 27 OF 2001**

DK KEMEL, J

JULY 5, 2024

IN THE MATTER OF THE ESTATE OF JONATHAN KEGOHI KASAVULI NDIWA

BETWEEN

LEVIS ANYANDA KEGOHI OBJECTOR

AND

JACKTON MARK KEGOHI 1ST ADMINISTRATOR

BELICE KAYUNDI NDIWA 2ND ADMINISTRATOR

RULING

1. The application dated May 17, 2023 lodged by the Objector/Applicant is premised under the provisions of section 76 of the *Law of Succession Act*, Rule 44 of the Probate and Administration Rules and all enabling provisions of the law. The Objector/Applicant seeks an annulment and/or revocation of the grant of representation issued on 21st June 2001 to the Administrators/Respondents; that the Objector/Applicant herein be appointed as the Administrator of the estate of the deceased and that costs of the application be borne by the estate of the deceased. The grounds in support of the application are as follows:
 - a. The Administrators/Respondents have failed to execute their mandate with diligence and according to the law.
 - b. The Administrators/Respondents are intermeddling with the estate of the deceased by introducing strangers as beneficiaries.
 - c. The Administrators/Respondents have declared their intention to flout the law by implementing a mode of distribution unknown to law.
 - d. Buyers, if any, ought to wait for a refund of their monies and should not be allowed to interfere with the distribution of the estate.



- e. The grant has become inoperative and useless as there is no chance whatsoever that the Administrators as constituted can preserve or protect the assets of the estate deceased or at all.
 - f. The Administrators/Respondents have listed a strange property as an asset of the estate of the deceased and which is further evidence of their reluctance to administer the estate according to law.
 - g. The estate that is due for distribution is not the property of either of the Administrators/Respondents yet.
2. The application is supported by the grounds on the face of the application and by a supporting affidavit of the Objector/Applicant sworn on even date which is a reiteration of the grounds set out therein.
 3. Opposing the summons for revocation the administrators/Respondents through the 1st Administrator swore a replying affidavit on 19th June 2023 wherein he averred that they are entitled as beneficiaries of the estate of the deceased. He averred that he purchased parcel Ndivisi/Ndivisi/231 through the proceeds of sale of part of the estate of the deceased in his capacity as the administrator and that the said parcel forms part of the estate of the deceased. According to him, the sale of part of the estate of the deceased was consented to by all family members including the Objector/Applicant and that the same was necessitated by urgent medical bills of the 2nd Administrator. He averred that after consultation with other family members, the Objector/Applicant was to identify a parcel of land measuring five acres in any part of Bungoma County whose value was equivalent to the value of land in Tabani Settlement Scheme where they would settle the Objector/Applicant's household. He identified two acres of land within Misikhu area, being the preferred place of settlement by the Objector/Applicant, which he proceeded to purchase for him. That on 28th August 2021, they proceeded to go and hand over the land to the Objector/Applicant and his family but who incited his sisters and they all declined to acknowledge or receive the said parcel of land. He averred that land parcel No. Bungoma/Kiminini/344 was distributed by the deceased to his household and that they have been utilizing the same even prior to the death of the deceased thus it should not be distributed as massive developments have been done on the parcel. He averred that they are still willing to settle the Objector/Applicant's household either in Misikhu or any other locality of their choice so long as the value of the land is within their means. He averred that they have continued to cater towards the needs of the Objector/Applicant's household vide regular remittances to their M-pesa accounts and that the Objector/Applicant is merely seeking attention of the court. He averred that the Objector/Applicant has delayed all efforts of distribution of the deceased's estate as he declines to co-operate despite several proposals and meetings held to deliberate on the matter. He argues that the Objector/Applicant has failed to establish sufficient grounds supporting his application and that his urge to be an administrator is driven by greed.
 4. The application was canvassed by way of written submissions. Both parties filed and exchanged their respective submissions.
 5. I have duly considered the summons for revocation, opposing arguments and the parties' respective submissions. The only issue for determination is whether the Objector/Applicant has made a case for the revocation of grant issued to the Administrators/Respondents.
 6. It is noted that the objection is predicated on section 76 of the *Law of Succession Act*, Cap 160, Laws of Kenya and Rule 44 of the *Probate and Administration Rules*, which provides that:

“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.”

7. On the other hand, Rule 44 provides:

“44. Revocation or annulment of grant

- (1) Where any person interested in the estate of the deceased seeks pursuant to the provisions of section 76 of the Act to have a grant revoked or annulled he shall, save where the court otherwise directs, apply to the High Court for such relief by summons in Form 107 and, where the grant was issued through the High Court, such application shall be made through the registry to which and in the cause in which the grant was issued or, where the grant was issued by a resident magistrate, through the High Court registry situated nearest to that resident magistrate’s registry.
- (2) There shall be filed with the summons an affidavit of the applicant in Form 14 for revocation or annulment identifying the cause and the grant and containing the following particulars so far as they are known to him—
 - (a) whether the applicant seeks to have the grant revoked or annulled and the grounds and facts upon which the application is based; and
 - (b) the extent to which the estate of the deceased has been or is believed to have been administered or to remain un-administered, together with any other material information.
- (3) The summons and affidavit shall without delay be placed by the registrar before the High Court on notice in Form 70 to the applicant for the giving of directions as to what persons (if any)



shall be served by the applicant with a copy of the summons and affidavit and as to the manner of effecting service; and the applicant, upon the giving of directions, shall serve each of the persons so directed to be served with a notice in Form 68, and every person so served may file an affidavit stating whether he supports or opposes the application and his grounds therefor.

- (4) When the persons (if any) so directed to be served (or such of them as the applicant has been able to serve) have been served with a copy of the proceedings, the matter shall be placed before the High Court on notice by the court to the applicant and to every person so served, and the court may either proceed to determine the application or make such other order as it sees fit.
- (5) Where the High Court requires that notice shall be given to any person of its intention of its own motion to revoke or annual a grant on any of the grounds set out in section 76 of the Act the notice shall be in Form 69 and shall be served on such persons as the court may direct.”

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

- I. 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.
- II. 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 grant because the administrators had not kept any records of account of their administration.
- III. 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.



- IV. 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.
- V. 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 Opicbe Olela v William Ogida Ochuodho & another](#) [2014] eKLR.
9. In the instant case, the application for revocation is predicated on the grounds inter alia; that the Administrators/Respondents have intermeddled with the estate of the deceased; that they have failed to execute their mandate; that they sold off part of the estate of the deceased to innocent buyers; that the grant has become inoperative and useless. According to the Objector/Applicant's supporting affidavit, the deceased herein died in the year 2000 and that the grant was issued to the Administrators/Respondents on 21st June 2001; that the Administrators/Respondents only filed an application for confirmation of grant herein dated 20th February 2023; that prior to his demise, the deceased had settled them on land parcel Ndivisi/Ndivisi/344 and that the Administrators/Respondents proceeded to sell 13 acres off the said parcel with clear intentions of disinheriting him and his siblings.
10. Section 82 of the [Law of Succession Act](#) provides that no immovable property of a deceased person shall be sold before confirmation of grant yet the Administrators/Respondents indicated that they purchased land parcel number Ndivisi/Ndivisi/231 with the proceeds from the sale of part of the estate of the deceased. Sale agreement was witnessed on 13th May 2021, confirming that the sale took place before confirmation of grant. Therefore, it follows that the sale of part of the estate of the deceased by the Administrators/Respondents was illegal null and void. Further, the sale of part of the estate of the deceased to effect medical payment of the 2nd Administrator/Respondent hospital bill was also illegal. The administrators were under obligation to first file summons for confirmation of grant and have the grant confirmed before engaging in disposal of such properties. Further, in the least of circumstances, leave of the court must be sought before such action is taken. The record does not confirm that such a course was taken by the administrators.
11. I am also guided by the finding of the court [In re Estate of Jamin Inyanda Kadambi \(Deceased\)](#) [2021] eKLR where it was stated that;
- “ A valid sale of estate property can only be by those to whom the assets vest by virtue of *section 79*, and who have the power to sell the property by virtue of *section 82*. Even then, immovable assets, like land, such as Kakamega/Kegoye/30, cannot be disposed of by administrators before their grant has been confirmed, and if land has to be sold before confirmation, then leave or permission of the Court must be obtained. That is the purport of *section 82(b) (ii) of the Law of Succession Act*. Clearly, the sale transaction that was carried out by the administrators was contrary to *sections 45 and 82(b) (ii) of the Law of Succession Act*, and was invalid for all purposes. It cannot be asserted at all, and am surprised that persons to whom administration of the estate herein can purport to support a sale transaction that was carried out contrary to the very clear provisions of the law.
- a. For avoidance of doubt, sections 45, 79 and 82 of the [Law of Succession Act](#) provide as follows:
- b. “45. No intermeddling with property of deceased person



(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall

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be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”

“79. Property of deceased to vest in personal representative The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.”

“82. Powers of personal representatives Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers— to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative; to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

Provided that—

ii. no immovable property shall be sold before confirmation of the grant...”

12. For the foregoing reasons, i find that the grant should therefore be revoked. The Administrators/ Respondents did not avail any court order authorizing them to sell off part of the estate of the deceased to settle the 2nd Administrator/Respondent’s medical bill or even use the proceeds from the sale to purchase land parcel Ndivisi/Ndivisi/231. The administrators have also failed to furnish good reasons as to why they had not filed summons for confirmation of grant once the pending appeal was concluded by the Court of Appeal in 2019. This thus reinforces the Objector’s claims that the Administrators are out to frustrate the objector and his siblings despite the court having declared them as beneficiaries of the estate and thereafter deny them their rightful entitlements under the estate.

13. Also, in the case of *Morris Mwiti Mburungu v Denis Kimathi M’Mburungu* [2016] the Court held as follows:-

“... Where any person interferes with the free property of the deceased or deals with an estate of a deceased person contrary to the provisions of section 45 and 82 of the Act that is intermeddling, is unlawful and cannot be protected by the court. The transaction is subject



to be nullified and set aside at the instance of innocent beneficiaries who may have been affected by the act but were not involved in the same.”

14. Section 76 envisions that a grant can be revoked 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. I find that the Administrators/ Respondents failed to proceed diligently with administration as they proceeded to sell off part of the estate of the deceased without the authorization of the court as the grant was yet to be confirmed. The Administrators/Respondents have countered the Objector’s claims and maintain that the Objector is motivated by greed and an attention seeker. However, iam not persuaded by the assertions of the Administrators as their action of disposing the deceased’s property without the grant being confirmed ran afoul the provisions of section 82 and 45 of the Law of Succession Act. The prudent thing was to fast track the summons for confirmation of grant and thereafter proceed to sell the portion that has been distributed to the particular beneficiary. Since this was not followed, then the grant should be revoked so that a fresh grant is issued to a new set of administrators who would then proceed to conclude this old matter.
15. It is noted that the Administrators have since filed summons for confirmation of grant dated 20.2.2023 and which is now pending determination. It is also noted that the Objector had through his counsel gave the Administrators counsel a proposal on the distribution of the estate but which was rebuffed forcing the Objector to file the present application. Ordinarily, the parties could have concentrated on the pending summons for confirmation as the same would have led to the conclusion of the matter. It is also noted that the Objector and his siblings had been determined as beneficiaries of the estate of the deceased and that the Administrators’ appeal to the Court of Appeal was subsequently dismissed thereby confirming the status of the Objector and his siblings as beneficiaries of the estate of the deceased. Due to the simmering acrimony and the conduct of the Administrators in intermeddling with the estate prior to confirmation of the grant and due to the need to bring this old matter to a conclusion, i find it is appropriate to revoke the grant and a fresh one issued in the names of the present administrators and the objector and that the three should move with speed and prosecute the pending summons for confirmation of grant. Leaned counsel for the Objector in his submissions has urged this court to issue orders compelling the Administrators to render an account of how they have run the estate. Whereas such an order is appropriate, such a prayer had not been sought by the Objector and hence the Administrators will have been condemned unheard. I will decline the said request.
16. In view of the foregoing observations, i find the Objector’s application dated 17.5.2023 has merit. The same is allowed in the following terms:
 - A. The grant of letters of administration intestate issued on 21st June 2001 to Jackton Mark Kegohi and Belice Kavundi Ndiwa is hereby revoked.
 - B. A fresh grant is hereby issued in the names of Jacton Mark Kegohi, Belice Kavundi Ndiwa and Levis Anyanda Kegohi.
 - C. The titles arising from the sale of part of the estate of the deceased are hereby cancelled and that the same reverts back to the name of the deceased herein Jonathan Kegohi Kasavuli Ndiwa and to await distribution to the rightful beneficiaries.
 - D. The new administrators to set down the pending summons for confirmation of grant dated 20.2.2023 for hearing on priority basis.
 - E. The matter shall be mentioned on 19.7.2024 to confirm compliance and for further orders.



F. As this is a family matter, i order each party bear their own costs.

DATED AND DELIVERED AT BUNGOMA THIS 5TH DAY OF JULY 2024

D.KEMEI

JUDGE

In the presence of:

No appearance Angima for Objector/Applicant

Kipkemboi for Administrators/Respondents

Kizito Court Assistant

