



In re Estate of Ruth Tabia Elkana aka Ruth Charles (Deceased) (Succession Cause 146 of 2001) [2024] KEHC 16844 (KLR) (2 August 2024) (Ruling)

Neutral citation: [2024] KEHC 16844 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 146 OF 2001**

G MUTAI, J

AUGUST 2, 2024

**IN THE MATTER OF THE ESTATE OF RUTH TABIA
ELKANA, AKA RUTH CHARLES (DECEASED)**

BETWEEN

- PATRICK LUTWAMA FONDO 1ST APPLICANT**
- THOMAS LUTWAMA HAINDI CHIBUNGU 2ND APPLICANT**
- NATHAN MATANO LUTWAMA 3RD APPLICANT**
- TABIA RUTH FRANCINA 4TH APPLICANT**
- NELLY LUTWANA 5TH APPLICANT**
- JOSHUA MOSI ELKANA 6TH APPLICANT**

AND

- ALBERT FARRAR MAOGA 1ST RESPONDENT**
- SARAH ELKANA MUSOKI AKA SARAH KOMBO 2ND RESPONDENT**

RULING

1. Before this court is a summons for the revocation of the grant dated 25th October 2022 seeking the following orders:-
 - a. That the grant of probate of written will dated 29th January 2002 to the respondents be revoked and/or annulled;
 - b. That the honourable court do hereby order the grant of probate of written will of the estate of Ruth Tabia Elkana, aka Ruth Charles (deceased), to be distributed in accordance with the will; and



- c. That the cost of this application be provided for.
2. The application is premised on the grounds therein and the supporting affidavit of Patrick Lutwama Fondo, sworn on 25th October 2022.
 3. Mr Fondo deposed that he is a grandchild of the deceased, being a son to Esther Likana Joshua, and thus a legitimate beneficiary to the estate of the deceased herein. He stated that the other applicants are also grandchildren of the deceased.
 4. It was his statement that at the time of her death, the deceased had bequeathed all her property, including Plot No. Mombasa/Freretown/41 and the structure on the said parcel of land, which was registered in her name. The said properties were to be shared and distributed equally among her beneficiaries.
 5. He stated that the respondent secretly petitioned the court for a grant of probate with a written will and a grant was issued on 29th January 2022. They learnt of the same on realising that 2nd administrator, Sarah Elkana Musoki, aka Sarah Kombo had transferred the same. The respondents obtained the said grant by making false statements that the deceased had only four grandchildren as the only surviving beneficiaries, namely, Sarah Jane Pili Haindi, Sarah Kombo aka Sarah Elkana Musoki, Elizabeth Haindi and Miriam Ndune. The respondent omitted/left out all the children of Esther Likana Joshua. He did not seek the consent of all beneficiaries when petitioning for the said grant, and, therefore, the proceedings vide which the grant was obtained were defective to the extent they were not based on the wishes of the deceased.
 6. Mr Fondo further deposed that the estate was fraudulently distributed without a confirmed grant. He thus urged the court to revoke the said grant.
 7. In response, Sarah Elkana Musoki, aka Sarah Kombo, the 2nd petitioner/respondent, filed a replying affidavit sworn on 25th July 2023 in which she stated that the subject grant was issued after the court was duly satisfied that the deceased had appointed an executor of the will. She deposed that she was present and witnessed the testator sign the said will. The court assessed the will and was duly satisfied that it was legitimate. The grant was issued as per the deceased's wishes. The will was prepared and executed by the testator without coercion and therefore, the issue of fraud doesn't arise.
 8. She further stated that the petition was duly gazetted before confirmation of the grant, and the applicants did not raise any objection within the period stipulated by the law. The summons filed herein was, therefore, in her view, an afterthought and should be dismissed.
 9. She stated that the petitioners were requested to petition for a grant because some of the applicants had embarked on selling parts of the parcel of the land belonging to the estate. Being of sound mind, the deceased had all the right to bequeath her property to whomever she desired.
 10. She averred that the applicant's mother, Esther Elkana Joshua(deceased), had sold a part of the parcel of land at Mombasa Frere town without the beneficiaries' consent and could not claim a further share of the said parcel of land. She urged the court to dismiss the application.
 11. The 1st applicant filed a further affidavit sworn on 9th June 2023 in which he stated that the replying affidavit sworn by the petitioner is non-meritorious, fatally defective and should be dismissed in limine for reasons that the respondent has come to equity with dirty hands. He further urged that the affidavit of the 2nd petitioner/respondent did not respond to any of the specific allegations raised, and as such, the summons for revocation of the grant was unopposed, and the same ought to be allowed as prayed.



- He further stated that the averments in the replying affidavit amounted to hearsay, which ought to be struck out.
12. He further averred that the said property was not sold by their mother as alleged and that it was sold fraudulently in the year 2008 by Charles Elkana Ndune and Sarah Elkana Musoki. The respondent has failed to discharge his mandate as an executor as required under the law. He urged the court to allow the application as prayed.
 13. The matter was canvassed by way of viva voce evidence and at the conclusion of the hearing the court directed that the parties file written submissions.
 14. Patrick Lutwama Fondo adopted his witness statement dated 22nd August 2023 as his evidence in chief and produced the documents in his List of Documents dated 22nd August 2023 as his exhibits. Mr Fondo testified that his mother wasn't given a share, although his own brother, Thomas, was given a share upon which he had constructed a house. The grant was not confirmed. However, he was unaware of the gazettement of the petition for the grant of probate and didn't object to it. He further testified that he did not consent to the petition for the grant of probate.
 15. He reiterated that his grandmother had four children and that the children of the other beneficiaries had been provided for.
 16. The first witness for the petitioners/respondents was Ms Sarah Elikanah Musoki. Ms Musoki adopted her witness statement as her evidence in chief and produced the documents in her List of Documents dated 28th September 2023 as her exhibits. She told the court that the will was written by the deceased and that she was made the sole administrator, while Albert Farrar Maoga was indicated as the executor. It was her evidence that the petition for the grant of the probate of the written will was gazetted and that there was no complaint.
 17. She testified that the property is a quarter of an acre and that the applicants, that is, Patrick, Tom, and their mother, Esther, were given portions thereon. It was her evidence that Tom built a 24 by 36-foot house while Patrick built a 3-room house, which he sold and moved out. She said that the property was not meant to be sold but to remain in the family.
 18. During the cross-examination, she told the court that they had a meeting prior to petitioning for the grant. It was her evidence that she didn't have evidence that Patrick sold his portion.
 19. During re-examination, she stated that they were present in court during confirmation of the grant. She testified that the transfer was registered on 20th January 2022 and that she participated in the transfer of the property. Ms Musoki testified that Esther was still alive when they obtained the grant and she didn't object to the same.
 20. The 1st petitioner/respondent, Albert J Farrar Maoga, adopted his witness statement dated 28th September 2023 as his evidence in chief and told the court that there were two executors in the will and a sole administrator. The grant was confirmed, and the title changed to the administrator's name, which would have been impossible if it had not been confirmed. That the land is 100 by 100, Patrick occupies 76 by 59, Thomas 27 by 40 and their mother 63 by 33 1/2, and therefore, they have already been adequately provided for in the will.
 21. In cross-examination, he told the court that he had executed the will as per the wishes of the deceased. The estate was meant for the grandchildren; however, only three are mentioned, as the rest refused to sign. There was no formal consent or evidence of confirmation of the grant.



22. In re-examination, he requested the court to conduct a site on the property, which the court did on 28th February 2024.
23. Upon closure of the respondent's case, the court directed parties to file written submissions. Subsequently, the applicants, through their advocates Gitonga Kalawa & Company Advocates, filed written submissions dated 20th January 2024. Counsel submitted on three issues, namely, on whether the estate was fraudulently distributed without confirmation of grants, whether the grant was obtained fraudulently and through concealment of material facts, and who bears the costs.
24. On the 1st issue, counsel relied on section 71 of the *Law of Succession Act* and submitted that the respondents never filed the summons to confirm the grant. They averred that no evidence was tendered to prove that the grant was confirmed. It was urged that the grant was defective and ought to be revoked.
25. On the 2nd issue, counsel submitted the children of Esther Likana Joshua were left out in the will dated 27th October 1989 based on their mother's gender, which amounts to discrimination. They were also left out of the distribution of the estate information, which was not disclosed to this court.
26. Counsel further submitted that the petition for grant of probate was done without the consent of the applicants, who are rightful beneficiaries entitled to apply for it, and the respondents did not disclose this. The petition was not denied during the hearing, and therefore, the grant ought to be revoked.
27. On the third issue counsel submitted that costs follow the event and urged the court to allow the application herein with costs.
28. The respondents, on the other hand, through their advocates Otieno Otwere & Associates, filed written submissions dated 27th February 2024. Counsel relied on section 76 of the *Law of Succession Act* and submitted that the applicants had not demonstrated any ground in the said provision to warrant the revocation of the grant. He urged that the applicants had not disputed the will and gazette notice in respect of the estate. Counsel submitted that the threshold to revoke the grant had not been met and urged the court to dismiss the summons.
29. Have the applicants made a case for the revocation of the grant issued in this matter? What orders ought to be issued? To answer these questions, which are, in fact, the issues in contention, I will start by looking at the statutory provisions in the *Law of Succession Act*, which I shall set out below.
30. Section 76 of the *Law of Succession Act* provides for grounds of revocation as follows: -
 - 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.”
31. The power of the court to revoke the grant has been discussed in very many decisions of the courts of record. In the case of *Albert Imbuga Kisigwa v Recho Kawai Kisigwa* [2016] KEHC 1528 (KLR), the court 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 wrongdoing 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 the interests of all beneficiaries entitled to the deceased’s estate and ensure that the action taken will be in the interest of justice.”
32. In her will the deceased bequeath her estate to her children in the following manner: -
- “bequeath to my grandchildren to hold jointly unto themselves and their successors for their benefit my plot No 41 and the residential premises thereon situated at Frere Town, Mombasa.”
33. It is not in dispute that the applicants are the deceased's grandchildren. Albert Farrar Maoga concedes as much in the replying affidavit sworn on 17th October 2022. The foregoing notwithstanding, they were not included in the petition for the grant of probate of the written will of the deceased, which only lists Sarah Jane Pili Haindi, Sara Kombo, Elizabeth Haindi, and Miriam Ndune as the dependants of the deceased.
34. No cogent or reasonable explanation was given for their exclusion. In my view, there was no evidence that their mother had sold any land. Even if that were so, that fact alone could not affect the express bequest made by the deceased to all her grandchildren without exception.
35. It would appear to me as the reasonable explanation for their exclusion that the applicants were excluded due to the gender of their mother. I can see no other explanation.
36. By not listing all the beneficiaries of the will of the deceased, the petitioners/respondents concealed from the court facts which were material to the case and made false and or untrue statements. In my view, therefore, the grant that was issued must therefore be revoked.
37. I will next turn to the question as to whether, in addition to the above, the grant should be revoked for want of confirmation.
38. Section 71 (1) of the *Law of Succession Act* provides;
- 1. After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall



apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.

39. The court in the case of *In re Estate of Agwang Wasiro (Deceased)* [2020] KEHC 8362 (KLR) in dealing with the revocation on the ground of failure to apply for confirmation of grant stated,

“Both applicants raised issue with failure by the administrator to apply for confirmation of grant within the period allowed in law. Confirmation of grants is provided for in section 71 of the *Law of Succession Act*, the relevant portion says as follows:

“Confirmation of Grants Confirmation of grants

1. After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.”

Under section 71, an administrator is enjoined to apply for confirmation of his grant after expiration of six months from the date the grant was made to him. The provision is in mandatory terms...

So what is the consequence of failing to apply for confirmation of grant with the period prescribed by section 71(1) of the Act? The applicants have asked me to revoke the grant as a consequence. One of them appears to premise his case on section 76, while the other has brought his application under Rule 73 of the Probate and Administration Rules. It would appear, under section 76(d), that a revocation founded on the third ground would only apply where the administrator has been given due notice but fails without reasonable cause to apply for confirmation of grant or to proceed with diligence or to render accounts, as the case may be. It would appear that failure to apply for confirmation of grant generally, without a notice having been issued to the administrator, would not suffice as a ground to revoke a grant. I believe section 76(d) should be read together with section 73 of the *Law of Succession Act*, which provides:

“73. Duty of court to give notice to holder of grant to apply for confirmation

The court shall within one year from the date of any grant of representation, give notice to the holder of the grant to apply for confirmation thereof.”

Read together, these provisions would mean that a grant is not liable for revocation only because the administrator has not applied for its confirmation within the period prescribed under section 71(1), it must be demonstrated that in addition, the court had discharged its duty under section 73, whether suo moto or on application by the parties, of giving notice to the administrator who has failed to apply for confirmation of their grant, and the administrator had failed to harken to that notice. It would appear that it is only then that the provisions of section 76(d) would kick in. It has not been demonstrated that any notice was ever issued on the administrator under section 73, and, therefore, section 76(d) cannot be invoked at this stage.”

40. The grant in respect of this estate was issued on 29th January 2002. According to the court record, the grant was never confirmed. No explanation has been given as to why the executors never procured the



confirmation of the grant. The executors, Cyphus Stephen Farrar and Albert Farrar Maoga failed in their duty to administer the estate.

41. That said, no notice was issued prior to the filing of the summons for the revocation of the grant. For that reason, the want of confirmation as a ground for revocation fails.
42. The site visit report conducted on 28th February 2024 showed that the property had been subdivided. Subdivision and sale before the grant is confirmed is fraudulent, null, and void and contravenes section 82(b) (ii) of the Law of Succession Act. It would appear to me as likely that the 1st applicant was involved in the subdivision and sale. That would make him unfit to be the administrator of the estate of the deceased person.
43. Although it is said that the subject property has been transferred it is my view that the said transaction is null and void and of no effect. As was stated in *Macfoy vs United Africa Company* [1961] 3 All ER 1169:-

“If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to setting aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so.”

44. In the circumstances; I revoke the grant issued to Cyphus Stephen Farrar and Albert Farrar Maoga. I issue a fresh grant of probate to Sarah Elkana Musoki and Nathan Lutwama Haindi Chibungu. The said grant to be confirmed within 30 days.
45. I declare that all sales and transfers in respect Title No. Mombasa/Freretown/41 illegal, null and void and direct that the title reverts back to the estate of the deceased.
46. I order Sarah Elkana Musoki and Nathan Lutwama Haindi Chibungu to register a family trust and to transfer Title No. Mombasa /Freretown /41 to the said trust so that the wishes of the testator can be achieved.
47. As this is a dispute between family members the parties will bear their own costs.
48. Orders accordingly.

DATED AND SIGNED IN MOMBASA THIS 2ND DAY OF AUGUST 2024. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of :-

Mr Gitonga, for the Applicants;

Mr Otwere, for the Respondents; and

Arthur – Court Assistant.

