



REPUBLIC OF KENYA



**In re Estate of Joseph Kiarie Mbugua (Deceased) (Succession Cause
784 of 2007) [2024] KEHC 12882 (KLR) (Family) (18 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12882 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 784 OF 2007
PM NYAUNDI, J
OCTOBER 18, 2024
IN THE MATTER OF THE ESTATE OF JOSEPH KIARIE MBUGUA (DECEASED)**

RULING

1. This ruling relates to the 4 Applications filed herein. The first is Application dated 24th June 2024 presented by the 4th Administrator, Sylvia Murugi Mbugua. In which she seeks to prevent the sale of LR Nos. 6000/4, 5949/8 and 5949/4 by the 2nd Administrator. The Second Application is dated 22nd March 2023 and is presented by a beneficiary Karen Nyaruiru Mbugua, who seeks to compel the 2nd Administrator to furnish comprehensive accounts of her management of the Estate with a further prayer that she be removed as an administrator if she is found to have acted outside the law. Attached to her application are notices evidencing that assets she asserts are estate property are at risk of being auctioned.
2. The third Application is that presented by John Njuguna Kiarie dated 13th April 2023 in which he seeks to compel the Administrators to furnish accounts and also a revocation of the grant and certificate of confirmation of grant. The Fourth Application is application dated 22nd April 2024 was filed by Jane Elizabeth Wairimu Mbugua seeking; revocation of the grant based on the consent order dated 2nd July 2010; an order for provision as a beneficiary of the estate; an order to compel the Respondent to pay the directors allowance on the monthly basis to Jane Elizabeth Wairimu Mbugua equal to other beneficiaries; an accurate audited account on the Net Intestate Estate should be rendered to court immediately.
3. The 2nd Administrator vide affidavit sworn on 29th May 2024 has responded to Application dated 22nd March 2023. The 3rd Administrator has responded to Application dated 13th April 2023 vide undated Affidavit. Jane Wairimu Mbugua has sworn an affidavit on 7th November 2023 in support of the Applications dated 13th April 2023 and 22nd March 2023. The 1st, 3rd and 2nd Administrators have sworn affidavits (15th April 2024 and 31st May 2024 respectively) on the status of the Administration of the Estate. John Njuguna Kiarie has sworn a replying affidavit on 12th July 2024 to accounts filed by the 1st and 3rd Administrator.



4. The 3rd Administrator has sworn a further affidavit on 29th August 2024 in response to the Affidavits sworn by John Kiarie and Jane Elizabeth Wairimu Mbugua on 12th July 2024 and 10th May 2024 respectively. Counsel for Jane Elizabeth Wairimu Mbugua has submitted an undated statement in response to the Affidavits by the 1st and 3rd Applicant. The 2nd Administrator has filed a replying affidavit on 11th October 2024 in response to application by the 4th Administrator.
5. Pursuant to courts directions the parties have filed their written submissions as hereunder-
 - a. Karen Nyaruiru Mbugua submissions dated 23rd September 2024
 - b. Submissions by the 1st and 3rd Administrator dated 7th October 2024
 - c. 2nd Administrators Submissions dated 11th October 2024
6. The issues emanating from the applications are surmised as hereunder
 - a. Whether this Court should vacate the Consent order of 28th June 2010 emanating from the adoption of Consent dated 2nd June 2010.
 - b. Whether the Court should bar the 2nd Respondent from disposing of LR Nos. 6000/4, 5948/8 and 5949/4
 - c. Whether the Certificate of Confirmation of Grant issued herein on 6th July 2015 should be revoked
 - d. Whether the Grant of Letters of Administration Intestate issued to the 1st and 2nd Respondent should be revoked
 - e. Who should pay costs of the suit
7. The requirement that the Administrators provide accounts of the estate was dispensed with as a preliminary issue with the Court having directed on 16th November 2023 that the 1st, 2nd and 3rd Administrators file final report on the dealings with the Estate within 120 days. In compliance with the directive the Administrators have filed status reports vide affidavits sworn on 15th April 2024 (1st and 3rd Administrator) and 31st May 2024 (sworn by 2nd Administrator). The beneficiaries (Karen Nyaruiru, John Njuguna Kiarie and Jane Elizabeth Wairimu Mbugua) have separately challenged these accounts, I will address their rejoinders later in the ruling.
8. On the 1st issue, Whether this Court should vacate the Consent order of 28th June 2010 as sought by Jane Elizabeth Wairimu Mbugua in her application dated 22nd April 2024. The grounds upon which she seeks to vacate the consent order is that she was not involved in the negotiations and proceedings preceding the recording of the consent. The 1st and 3rd Administrator rebut this and have submitted email correspondence between the Applicant and counsel for the 1st and 3rd Administrator giving her consent to the consent. It is further contended that the consent having been recorded in 2010, there is inordinate delay in seeking to set it aside as the estate has been transmitted pursuant to the Court order.
9. Noting that the Applicant has not challenged the averment that she authored the consent to Counsel for the 1st and 3rd Administrator, I find that the ground upon which she seeks to void the consent cannot stand. The principles upon which a court may vary or set aside a consent order are well established by judicial precedent as set out in the cases enumerated below-



10. In the Court of Appeal decision in the case of Board of Trustees National Social Security Fund versus Micheal Mwalo [2015] eKLR the Court stated as follows;

The judgment arose from a consent of the parties to the suit. The law pertaining to setting aside of consent judgments or consent orders has been clearly stated. A Court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court.

11. Further in Brooke Bond Liebig vs Mallya (1975) EA 266 Mustafa Ag. VP stated thus;

“The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstances, e.g. on grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract. In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could not have been any mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed.”

12. Finally, in the case of Flora N. Wasike vs Destimo Wamboko [1988] eKLR Hancox JA cited Setton on Judgments and orders (7th edition) Vol 1 page 124, and reiterated that;

“Any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and those claiming under them... and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court...; or if the consent was given without sufficient material facts, or in general for a reason which would enable a court set aside an agreement.”

13. Based on the authority of the cited decisions I decline to set aside the consent judgment and consequently the certificate of confirmation of grant emanating therefrom.

14. On the 2nd Issue, Whether the Court should bar the 2nd Respondent from disposing of LR Nos. 6000/4, 5948/8 an 5949/4 the Applicant in application contends that the cited parcels of land are estate assets and in seeking to dispose of them the 2nd Administrator is acting ultra vires her mandate. In support of her application she avers that the subject parcels of land are registered in the name Muringa Brothers Limited and that the 2nd respondent is the sole director.

15. She takes issue with the manner in which the 2nd Respondent is the sole shareholder Director of the Company and further that the asset is held in trust for the beneficiaries of the estate and therefore the 2nd Respondent cannot unilaterally sell the asset. She has also attached agreement of sale between Muringa Brothers Limited and Decalogue International Limited.

16. It is evident that the property is registered in the name of a limited liability company. In her submissions the 2nd Administrator relies on the decision in the matter of the Estate of Eliud Kipchirchir Yego P& [2017] eKLR in support of her argument that the Court does not have the jurisdiction to determine the Application.

17. I am compelled to find that this Court is not the proper forum for the Applicant to challenge the intended sale of the parcels of land by Muringa Brothers Limited as per consultancy agreement dated 6th



March 2024. The limits of the mandate of the probate Court were succinctly articulated by Musyoka J in re Estate of Atibu Oranje Asioma (Deceased) (Succession Cause 312 of 2008) [2022] KEHC 11046 (KLR) (22 July 2022) (Ruling) where he stated-

(8)The probate court is constituted for one sole purpose, distribution of the property of a dead person. The law which governs this area of distribution of assets of a dead person is the Law of Succession Act, cap 160, Laws of Kenya. The preamble says it is “An Act of Parliament to amend, define and consolidate the law relating to intestate and testamentary succession and the administration of estates of deceased persons, and for purpose connected therewith and incidental thereto.”

[9.] The central areas of concern, in probate and administration, are the dead person and his property. With regard to the dead person, what is of importance would be, whether there is proof of his death; and, once that is established, the next consideration will be determination of the individuals entitled to the property. If he died testate, having left a valid will, it will be the individuals named as beneficiaries in the will; if he died intestate, without a will, it will be the persons entitled under the applicable law of intestacy. With respect to property, there is only one critical consideration, whether he owned any property. Modern property is subject to registration, and whether a person owns a piece of property is evidenced by documents of registration or ownership. What is in dispute here is land, what would evidence ownership of the subject property would be evidence of registration of the same in the name of the deceased. The probate court only distributes assets that are undisputedly owned by the deceased. Assets that are unencumbered or the subject of ownership disputes are not undisputedly owned by the deceased, and are not available for distribution by the court until the encumbrances are removed or the ownership disputes resolved. Property available for distribution is defined in section 3 of Law of Succession Act as the free propriety of the deceased.

18. For the foregoing reasons I find that this Court does not have the mandate to stop the sale of the proposed parcels of land as sought by the Applicant in application dated 24th June 2024. The Application is accordingly dismissed in its entirety.

19. On the 3rd Issue, whether the Certificate of Confirmation of Grant ought to be revoked? The Applicant in application dated 22nd March 2023 seeks the revocation of the certificate of confirmation of grant on account of the failure by the 2nd Administrator to render a full and accurate inventory of assets and liabilities of the estate. The issue for determination is whether at law this court can revoke a certificate of confirmation of grant. Section 76 provides for the revocation of grant and not certificate of confirmation of grant. This distinction was elucidated upon by Musyoka J in the case of Re Estate of Joel Cheruiyot Rono [2016] eKLR, where he stated-

A certificate of confirmation of a grant is not a grant representation, but a certificate to the effect that the grant had been confirmed by the court. The discretion given to the court by the provisions in section 76 of the Law of Succession Act is for revocation of grants of representation, not certificates that confirm those grants. There is therefore no power in those provisions for the court to revoke a certificate of confirmation of grant. As can be seen from the outset, the said application stands on shaky ground.

...I am being invited to revoke a certificate of confirmation of grant. The certificate is not an order of the court. A certificate is not a judicial order. It is an extract from a court order made in the confirmation proceedings. The certificate is generated from the court order. It is important for the parties to differentiate between the character of a grant of representation and a certificate of confirmation of the grant. A grant is a court order; it is a



judicial pronouncement to the effect that some person has been appointed as administrator and granted the power to act as such. The certificate of confirmation of grant on the other side merely certifies that orders have been made to confirm the grant. The certificate of confirmation of grant is not the order itself...

20. I think that puts to rest the issue and accordingly I dismiss the Application dated 22nd March 2023 seeking to revoke the certificate of confirmation of Grant.
21. The 4th issue is whether the grant issued to the 1st, 2nd and 3rd Administrators should be revoked. The Applications of John Kiarie, Karen Nyaruiru and Jane Elizabeth Wairimu Mbugua seek the removal of the 1st, 2nd and 3rd Administrator.
22. In his Application John Njuguna Kiarie is aggrieved that Mawara Holdings Limited and Grafam Limited have not availed their accounts to show income received and dividends paid to the beneficiaries. Further he contends that the Administrators have failed to distribute the estate as per the consent. He further contends that the Administrators have not presented titles to show how the estate has transmitted.
23. In Application dated 22nd March 2023, the Applicant seeks the removal of the 2nd Administrator of the Estate for failing to diligently administer the estate and in particular that she has mismanaged the estate to the detriment of the beneficiaries, including failure to pay the creditors of the estate. The Applicant in the application dated 22nd April 2024 seeks to compel the respondent to pay the Directors allowance on a monthly basis and also to submit accurate audited accounts on the Net Intestate Estate and make provision for her as a beneficiary
24. The Responsibilities of an Administrator are set out Under Section 83 of the *Law of Succession Act* and failure to execute this mandate diligently is a ground for the revocation of the grant as set out under Section 76 (d) of the *Law of Succession Act*. As stated earlier, at the preliminary stages the Administrators were directed to submit accounts of their dealings with the estate. It is their contention that they have administered the estate in accordance with the Certificate of Confirmation of Grant and Consent order of 28th June 2010.
25. The consent was categorical that the spouses in the respective houses would hold the property on behalf of their respective houses and children. Each of the Administrators avers that they have divided the assets as per the consent and since the estate is vast the assets have been registered in the names of companies for ease of management. In their respective affidavits they have enumerated the assets that have been transmitted to the companies and how dividends are paid out to the beneficiaries and how the beneficiaries are provided for. It is beyond the mandate of this Court to call for the audited accounts of the Companies. The Beneficiaries are not without remedy as they can make the appropriate application under the *Companies Act* in the appropriate forum. Accordingly, the Applications of John Njuguna Kiarie and Jane Elizabeth Wairimu Mbugua in so far as they seek accounts of the Companies and provision be made for them by the Companies must fail as this Court does not have the requisite mandate to make those orders.
26. On reviewing the status of administration of the estate as presented by the Administrators on affidavits of 15th April 2024 and 31st May 2024 I am not persuaded that they have failed in their duties so as to warrant a revocation of the grant issued to them, the delay in finalizing transmission of the estate has



been explained. I find grounding in the dicta by Mwita J in *Albert Imbuga Kisigwa vs Recho Kawai Kisigwa Succession Cause No. 158 of 2000* where he 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.”

27. The interests of the estate will be safeguarded by providing a timeframe within which to finalise the transmission of the estate.
28. Accordingly, the Applications only succeed to the extent that the Administrators will finalise the transmission of the Estate with regard to the assets enumerated under
 - a. Paragraphs 11, 12 and 13 of the 1st and 3rd Administrators’ affidavit sworn on April 15, 2024 and
 - b. Paragraphs 18 and 20 of the 2nd Administrators Affidavit sworn on 3May 1, 2024 within 120 days and submit to court a report pursuant to Section 83 (g) of the *Law of Succession Act*.
 - c. The matter will be mentioned on 19th March 2025 to confirm compliance and take further directions.
 - d. This being a family matter there shall be no order as to costs

It is so ordered.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 18TH DAY OF OCTOBER 2024.

P M NYAUNDI

JUDGE

In the presence of:

.....Advocates for the Applicant

.....Advocates for the Respondent

Fardosa Court Assistant

