



REPUBLIC OF KENYA



**In re Estate of Shamsudeed Nimji alias Shamsudeen Nimji Javer Chandani (Deceased)
(Succession Cause 43 of 2004) [2024] KEHC 11957 (KLR) (Family) (4 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 11957 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

FAMILY

SUCCESSION CAUSE 43 OF 2004

CJ KENDAGOR, J

OCTOBER 4, 2024

**IN THE MATTER OF THE ESTATE OF SHAMSUDEED
NIMJI ALIAS SHAMSUDEEN NIMJI JAVER CHANDANI**

RULING

Background

1. The deceased, Shamsudeen Nimji also known as Shamsudeen Nimji Javer Chandani died on 9th August, 2003 leaving a Will dated 30th June, 1998. In the Will, he named Gulshan Shamsudeen Nimji, his wife, as his Executrix. The Executrix petitioned for Grant of Probate of the Will, which was granted on the 15th March, 2004. The Deceased was survived by three children, one son and two daughters. The Applicant is the son, while one of the daughters is the Respondent.
2. The Executrix died on 18th October, 2016 leaving part of the said estate unadministered. Upon her death, the Respondent on 28th June, 2018 petitioned for Letters of Administration with Written Will annexed of assets unadministered. She sought the Applicant's consent but the Applicant declined to give his consent. The other sibling, their sister, gave her consent to the application.
3. On 5th November, 2019, the Respondent petitioned for the revocation of a Grant of Probate issued to the deceased executrix on the ground that the Confirmed Grant of Probate had become inoperative due to her death. She also sought to be appointed executrix of the estate in place of the deceased executrix. She prayed that she be issued with a Grant of Letters of Administration with Will annexed. On 4th February 2020, a Grant of Probate was issued to the Respondent and was confirmed on the same day.
4. The Applicant brought summons dated 26th February, 2024 seeking revocation of the Grant of Probate issued to the Respondent. In his supporting affidavit dated 26th February, 2024 and the Supplementary Affidavit dated 5th July, 2024, the Applicant stated that he did not consent to the Respondent's petition for representation. He maintained that he had a right to apply for representation to the deceased's estate which is equal in priority to that of the Respondent. For this reason, he stated that the Grant should be revoked because it was issued erroneously and without his consent.



5. The Respondent filed a replying affidavit dated 7th June, 2024 in which she defended the Grant. In the affidavit, she claimed that there is no basis in law to revoke the Grant because it was issued to her lawfully and procedurally. She maintained that the Applicant was fully informed of the Court proceedings but chose not to participate. She also stated that the Court was fully informed of the Applicant's refusal to consent to the Grant. Parties filed their respective submissions.

Applicant's Written Submissions

6. The Applicant argued that the Grant of Probate should be revoked because the proceedings to obtain the grant were defective in substance. He also argued that the Grant was not issued procedurally and lawfully. His reasons are that he did not give consent for the process and that his consent was crucial for the issuance of the Grant to the Respondent. He also argued that he was not served with any of the documents filed in Court; he was not notified of the Court hearings that took place and did not, therefore, participate in the proceedings leading to the issuance of the grant.
7. On who should administer the estate of the deceased herein, the Applicant submitted that the Will should be administered by the residuary legatees in terms of Section 63 of the *Law of Succession Act* because the executrix had since died. In that case, he argued that the Applicant and his siblings have equal right to apply for the grant of representation because the deceased had named the three as his residuary legatee under the will.
8. He also argued that the deceased executrix could not in law appoint the Respondent as the only residuary legatee of the estate of the Deceased and could not confer to her special rights over the other siblings. Based on this, he argued that the Respondent did not have the first right to apply for the Grant of representation as she did in this case. He relied on the case of *Mumbua Musyoki & 6 others vs Mbenya Musyoki* (2016) eKLR.

Respondent's Written Submissions

9. The Respondent submitted that the Grant should not be revoked for want of Applicant's consent. She argued that the law does not require that such consent must be granted but rather requires the consent of a person entitled to apply for a grant 'be sought.' He submitted that in instances where the consent is sought but not granted, the Court may nevertheless proceed to issue the grant. She argued that she sought the Applicant's consent as required by the rules and that the law does not envisage a situation where a beneficiary's failure to give his consent hampers the administration of an estate.
10. On whether the Court should revoke the Grant, the Respondent submitted that the court should not revoke the grant because there has been no evidence that the Respondent has acted against the interests of the estate. She also argued that the revocation of the grant will undermine the prosecution of suits instituted to recover estate assets, to the detriment of all beneficiaries. She also submitted that the grant should not be revoked because the Applicant is not prejudiced in any way whatsoever should the Respondent be allowed to proceed with administration of the estate.
11. On these points, he cited the following cases, *In The Matter Of The Estate Of Ngari Gatumbi Alias James Ngari Gatumbi* (Deceased Nairobi High Court Succession Cause No.783 Of 1993, In re Estate of Seth Namiba Ashuma (Deceased) [2020] eKLR, *In Re Estate of Stephen Kurgat Kimwei – Deceased* [2017] eKLR, In *Albert Imbuga Kisigwa vs Recho Kawai Kisigwa* Succession Cause No. 158 of 2000 and In the Matter of the *Estate of Thareki Wangunyu also known as Thareka Wangunyo* Nairobi High Court succession cause number 1996 of 1999.



Issues for Determination

12. Upon perusal of rival arguments, and all materials placed before this court, the issues for determination can be condensed into two issues.

Whether the absence of the Applicant's consent was fatal to the issuance of the Grant.

Whether the court should revoke the Grant.

Whether the absence of the Applicant's consent was fatal to the issuance of the Grant

13. There is no dispute that the Respondent sought the Applicant's consent during the petition for the Grant of Representation. The Applicant admits this in his Supporting and Supplementary affidavits dated 26th February, 2024 and 5th July, 2024 respectively. Parties are also in agreement that the Applicant expressly declined to give consent. In his Supporting Affidavit dated 26th February, 2024, the Applicant admits that he wrote a letter to the Respondent stating that he had decided not to give consent and would not sign the consent forms.
14. However, the parties do not agree on the legal implication of the Applicant's decision to decline to give consent. On the one hand, the Applicant argued that the absence of his consent vitiated the entire process and cannot be wished away. On the other hand, the Respondent submitted that the absence of the Applicant's consent was not fatal and that courts can proceed to issue a Grant where consent has been sought and not granted.
15. The High Court in the case of *Re Estate of Seth Namiba Ashuma (Deceased)* [2020] eKLR, faced a similar challenge and held as follows;

“ 25. Rule 26(1) (2) applies where representation is sought by a person with equal or lesser right to others who have not petitioned like him. In such case, the petitioner is expected to notify such persons with superior or equal entitlement with notice. The individuals with superior or equal entitlement who have not applied for representation would signify that they had been notified of the petition by either executing their renunciation of their right to administration or by signing consents in Forms 38 or 39, depending on whether the deceased died testate or intestate. Where a consent or renunciation is not forthcoming, then the petitioner should file an affidavit, ostensibly addressing these issues, that is by indicating that notice was given to all the other persons equally entitled and with prior right, and perhaps demonstrating that such persons had failed or refused to renounce their rights or to sign consents to allow him to go ahead with his petition”.

16. Based on the above authority, I agree with the Respondent that the Courts can, on special occasions, proceed to issue a Grant where the Petitioner has sought consent from a person with priority or equal right, but the person has refused to give the consent. I, therefore, find that the Applicant's refusal to give his consent was not fatal to the Respondent's application for the Grant, and thus, the court was right in confirming the Grant.

Whether the court should revoke the Grant

17. The Applicant argued that the Grant was issued irregularly because his consent was not granted. He also submitted that he did not get an opportunity to participate in the proceedings leading to the issuance of the Grant. On the other hand, the Respondent submitted that the Applicant was aware



of the proceedings and that his consent to the issuance of the Grant was sought. The Respondent argued that the grounds raised by the Applicant do not warrant the revocation of the Grant and that she should be allowed to proceed with administration of the estate.

18. 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 Kavai Kisigwa* Succession Cause No. 158 of 2000 where the court held as follows; -

“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. The circumstances under which a Grant can be revoked are outlined under Section 76 (a) - (e) of the *Law of Succession Act*;

- a) Where the proceedings to obtain the grant were defective in substance;
- b) Where 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) Where 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) Where 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) Where the grant has become useless and inoperative through subsequent circumstances.

20. The Learned Justice W. Musyoka in *Re Estate of Agwang Wasiro (Deceased)* [2020] eKLR explained the circumstances under which a Grant can be revoked and stated as follows: -

“Under Section 76 of the Act, a grant of representation is liable to revocation on three general grounds. The first ground would be where the process of obtaining it was attended by glaring difficulties, such as where the same was defective, say because the person who obtained representation was not qualified to be appointed as personal representative, or the procedural requirements were not met for some reason or other. It could also be because the petitioner used fraud or misrepresentation or concealed important information in order to obtain the grant. The second general ground is where the grant is obtained procedurally, but the administrator subsequently runs into difficulties during the process of administration of the estate. Such difficulties include his failure or omission to apply for confirmation of his grant within the period allowed in law, or where he fails to exercise diligence in administration of the estate, such as where he omits to collect or get in an asset, or where



he fails to render accounts as and when he is required to do so by the law. The third general ground is where the grant has become inoperative or useless on account of subsequent circumstances, such as where the sole administrator died or loses the soundness of his mind or is adjudged bankrupt.”

21. The Applicant has not showed this court that the Respondent has acted against the interests of the estate. In addition, he has not proved to this court that his rights as a beneficiary stand to be prejudiced if the Grant is retained. He has also not shown how he is likely to suffer any prejudice or bias in the administration of the estate.
22. Having addressed the issue of the Applicant’s consent, I am therefore not persuaded by the applicant’s arguments that the Grant was obtained un-procedurally. I find that pursuant to Section 76 of the [Law of Succession Act](#), the Applicant has not satisfied the Court or made a case to warrant the revocation of the grant. In this regard, the application dated 26th February, 2024 fails.
23. Consequently, I hereby dismiss the application dated 26th February, 2024. Each party to meet their own costs.
24. It is hereby so ordered.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 04TH DAY OF OCTOBER, 2024.

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C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Kahura: Advocate for Respondent - present

