



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Jacob Gikombi Njochomba (Deceased) (Succession Cause
465 of 2011) [2023] KEHC 3196 (KLR) (15 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 3196 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

SUCCESSION CAUSE 465 OF 2011

LM NJUGUNA, J

FEBRUARY 15, 2023

IN THE MATTER OF THE ESTATE OF JACOB GIKOMBI NJOCHOMBA (DECEASED)

BETWEEN

JACKSON NJIRU JACOB GIKOMBI 1ST APPLICANT

FRANCIS MUGO MUNYI 2ND APPLICANT

CATHERINE KANYIVA GIKOMBI 3RD APPLICANT

MARTIN NJERU NJOCHOMBA 4TH APPLICANT

AND

CACILIA WAVETI JACOB 1ST RESPONDENT

CHRISTINE MURUNGI MUTURI 2ND RESPONDENT

RULING

1. Before this court is the summons dated September 26, 2020 and filed in court on September 29, 2017 which seeks revocation and/or annulment of the grant of letters of administration made to Cacilia Weweti Jacob in relation to the estate of the deceased herein.
2. The said summons is based on the grounds on its face and it's supported by the affidavit annexed to the application.
3. In a nutshell, it is the applicant's case that the said grant was obtained by means of untrue allegations of facts, fraudulently by making of a false statement or by concealment from court of something material to the case and the proceedings to obtain the grant were defective in substance. It appears that the applicant's claim is that the grant was defective in nature and substance in that the 1st respondent misrepresented facts to this court that she was the only wife to the deceased herein. It was their contention that the deceased was married to three wives and that the 1st respondent/administrator



failed to include and/or inform the other family members of the succession herein thus inheriting the estate all by herself.

4. The application is opposed by the respondents and wherein the 1st respondent deponed that LR Gatari/Nembure/5992 belonged to her late husband, the deceased herein. She deponed that after the completion of succession, the land was transferred to herself, the 4th applicant benefitted with ½ acre and the remaining 1 acre, was registered in her name to hold in trust for her four daughters. She swore that the applicants are strangers to her and that they have never depended on the estate of the deceased given that she has lived on the land from the year 1975 and that no one has ever claimed the land. She contended that given that she had been chased away from the land that she previously occupied, she sold the same to the 2nd respondent in order to relocate elsewhere for the sake of her own peace.
5. The 2nd respondent filed a replying affidavit dated December 1, 2021 in which she depones that she was not privy to the contents contained in the said application. That she bought LR Gatari/Nembure/5992 from the 1st respondent after exercising all due diligence as a purchaser and she acquired a good title since she was not aware of any dispute which might have arisen in the process of pursuing the succession case. That the grant was confirmed on 13.12.2012 while she bought the land eight years later as exhibited in the sale agreement. She contended that her title should not be affected by the orders sought in the application for revocation of the grant for the reason that the applicants can amicably resolve the differences between them and the 1st respondent given that she is their mother. That the estate has other properties that can offset what the applicants feel was unfairly acquired.
6. Directions were taken that the application be canvassed by way of written submissions and the parties complied with the directions.
7. The applicants in their submissions contended that the grant was obtained fraudulently by the administrator/1st respondent and that the assistant chief misrepresented facts to this court that the administrator was the only wife to the deceased. That the deceased was married to three wives and had several children as was noted in the chief's letter dated October 12, 2021. It was their case that the total acreage of land LR Gatari/Nembure/5992 was 6 hectares and therefore, each family ought to benefit with 0.2 ha each. They thus urged this court to allow the application.
8. The 1st respondent/administrator submitted that the applicants claim that they are children of the deceased herein is not supported by any evidence. That the applicants have not come to court with clean hands and their only desire is to reap where they did not sow. She contested the reliance on the chief's letter dated October 12, 2021 stating that the same was written 19 years after the demise of the deceased and further that, the chief belonged to a different location and therefore, could not have known the family of the deceased well. It was her prayer, therefore, that the application herein be dismissed with costs to the respondents.
9. The 2nd respondent submitted that she was not privy to the Succession Cause herein given that the grant was issued to the 1st respondent/administrator way back in the year 2012 while she bought the piece of land LR Gatari/Nembure/5992 on 26.05 2021. She contended that she is a bonafide purchaser of LR Gatari/ Nembure/5992 and relied on the case of Lawrence Mukiri v Attorney General & 4 Others [2013] eKLR to buttress her position that she did due diligence before purchasing the land and acquired the necessary consent from the Land Control Board and as such, she acquired a good title as the owner of LR Gatari/Nembure/5992. It was submitted that Article 40 of the Constitution empowers this court to protect the rights of a proprietor in so far as the property in question was legally and lawfully acquired. In the end, this court was urged to dismiss the application herein with costs to the respondents.



10. I have perused the application herein and the responses thereto by the respondents and it is my view that this court has been called upon to determine whether the orders sought for, in the summons for revocation of the grant issued to the petitioner/1st respondent can be granted.
11. As I have already noted, the application herein seeks revocation of the grant made to the administrator/1st respondent.
12. The circumstances under which a grant of representation may be revoked are provided for under section 76 (a)- (e) of the [Law of Succession Act](#) and include;
 - 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.
13. What is clear from the above provision is that when a court is dealing with an application for revocation of grant, it is supposed to consider only the process of obtaining the grant. Such that issues touching on the process of confirmation of the grant and distribution of the estate amongst the beneficiaries is beyond what the court should consider as it is not covered by section 76 and thus, cannot form a basis of revoking a grant but ought to be challenged through a review or appeal. [In Re Estate of Prisca Ong'ayo Nande \(Deceased\)](#) [2020] eKLR, W Musyoka, J after analyzing section 76 and discussing the meaning of a grant within the provisions of the laws governing succession in Kenya held thus: -

“ 17. I have very closely perused through the provisions of the [Law of Succession Act](#), and I have not come across any provision that provides a remedy to a person who is aggrieved by confirmation orders. Sections 71, 72 and 73 of the [Law of Succession Act](#), which deal with confirmation of grants, do not address the question of redress for parties who are unhappy with the confirmation process, nor do they deal generally with flaws in the confirmation process. As stated above, section 76 has nothing to do with the confirmation process, and provides no relief at all to any person unhappy with the confirmation process. In the absence of any provision in the [Law of Succession Act](#), for relief or redress for persons aggrieved by such orders, the aggrieved parties have only two recourses under general civil law, that is to say appeal and review, to the extent that the same is permissible under the [Law of Succession Act](#). I would



believe that one can also apply for the setting aside or vacating of confirmation orders, where the same are obtained through abuse of procedure.”

14. From the perusal of the application herein, the applicant’s ground for seeking revocation is mainly hinged on the fact that the 1st respondent obtained the grant fraudulently after misrepresenting facts to the court that she was the only wife of the deceased thus concealing the fact that there were two other wives and their children who equally had the right to benefit from the estate of the deceased. I have perused the record herein and I note that indeed the 1st respondent indicated (in the petition for letters of administration intestate) that she is the wife of the deceased and further listed her children as the only beneficiaries of the estate herein.
15. I have noted that from the chief’s letter dated October 11, 2011, the following were listed as the beneficiaries: Cecelia Waveti Jacob – Wife; Catherine Kanua Gikombi, Martin Njeru Gikombi, Lucy Muthoni Jacob, Hellen Njoki Jacob and Jackline Muthanje Jacob as children of the deceased. Further, Form 38 filed by the 1st respondent herein, reveals that the said Catherine Kanua Gikombi, Martin Njeru Gikombi, Lucy Muthoni Jacob, Hellen Njoki Jacob and Jackline Muthanje Jacob as children of the deceased signed the consent to the making of grant of administration intestate to the 1st respondent herein. This court has mirrored the same against the application herein filed by the applicants on behalf of the alleged children and 1st and 2nd wives of the deceased.
16. This court also notes that the 3rd applicant has supported the 1st, 2nd and 4th applicants in the filing of the application herein, and has stated that she was not fully made aware of the proceedings and that the distribution was not fair though she previously signed Form 38 giving her consent to the making of grant to the 1st respondent; the 2nd applicant, Martin Njeru Njochomba equally signed the same form.
17. In the circumstances, therefore, the said grant cannot be said to have been obtained fraudulently by making of a false statement or by concealment from the court of something material to the case; or that the grant was obtained by means of untrue allegation of a fact essential in point of law. The 3rd and 4th applicants did not prove the alleged fraud. I say so having noted that the duo were in court at the time of confirmation of the same.
18. As I have already pointed out elsewhere, 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 in the interest of justice. The 3rd and 4th applicants herein do not deserve the said discretion.
19. In reference to the 1st and 2nd applicants, it was submitted that the 1st respondent was the 3rd wife of the deceased herein and further that, they were left out of the distribution of the estate and yet they are the children of the deceased although from the co-wives of the 1st respondent. Section 66 of the [Law of Succession Act](#) bestows this court with the discretion to as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made. The court in exercise of the said discretion is mandated to accept as a general guide the following order of preference;-
 - a. surviving spouse or spouses, with or without association of other beneficiaries;
 - b. other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;
 - c. the Public Trustee; and



- d. creditors:
20. Section 39 on the other hand stipulates that;
- (1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority—
- (a) Father; or if dead
- (b) Mother; or if dead Brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none.
21. Rule 7 of the Probate and Administration Rules 1980 provides that application for grant of representation in relation to an estate of a deceased person to whose estate no grant other than one under section 49 or a limited grant under section 67 of the Act has been made, the application shall be by a petition supported by an affidavit. The said affidavit must contain amongst other details, the names, addresses, marital state and description of all surviving spouses and children of the deceased, or, where the deceased left no surviving spouse or child, like particulars of such person or persons who would succeed in accordance with section 39(1) of the Act [rule 17(e)(i)].
22. Rule 26 provides that letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant. Further that in an application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.
23. The effect of the above provisions is that where a person is applying for a grant of letters of administration intestate, he must get consent from persons of equal or lower priority than him.
24. In the case herein, the applicants have attached the chief's letter dated October 12, 2021 wherein it was listed the alleged beneficiaries of the deceased's estate. *In Re Estate of Shem Kitanga (Deceased)* where Justice Njagi espoused the importance of the chief's letter as;
- “A succession cause starts with an introduction letter from the chief of the area where the intended Petitioner hails from. Though it is not a legal requirement, it is presumed the chief is well familiar with the family of the deceased person and can inform the court of the beneficiaries left behind by the deceased.”
25. Further, in *Re Estate of Ambutu Mbogori* (2018) eKLR Gikonyo, J observed as follows;
- “.....This letter serves an important purpose in the ascertainment of the deceased, the dependants as well as properties of the deceased”
26. In response to the averments by the applicants herein, the 1st respondent submitted that the said letter by the applicants has been brought before this court 19 years after the demise of the deceased and that the same was written by a chief from a different location and, therefore, could not have known well the family of the deceased herein. The applicants did not table any further evidence to rebut such strong response from the 1st respondent. Under those circumstances, can this court safely assume that the applicants herein hold the true version regarding the beneficiaries of the estate of the deceased herein? Or put differently, can it be said that they have proved their case on a balance of probability? This court has a responsibility under Rule 73 of the *Probate and Administration Rules*, to make such orders as



may be necessary for the ends of justice, or to prevent abuse of the process of the court; including, and not limited to the fact that the deceased's estate should only devolve to the rightful beneficiaries.

27. In my considered view, therefore, and on a balance of probability, the evidence adduced by the applicants failed to point to a clear case of concealment of material facts from the court on which the application herein was grounded on.
28. From the foregoing, I find and hold that the application is unmerited and an afterthought. The same is hereby dismissed with no orders as to costs.
29. It is hereby ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 15TH DAY OF FEBRUARY, 2023.

L. NJUGUNA

JUDGE

.....for the Applicants

.....for the Respondents

