



REPUBLIC OF KENYA



Mutuma & 6 others v Wakithae & another; Kithae (Interested Party) (Succession Cause 621 of 2015) [2023] KEHC 885 (KLR) (2 February 2023) (Ruling)

Neutral citation: [2023] KEHC 885 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
SUCCESSION CAUSE 621 OF 2015**

LW GITARI, J

FEBRUARY 2, 2023

BETWEEN

MARTIN MUTUMA 1ST APPLICANT
KAREN GITONGA 2ND APPLICANT
VANESSA GITONGA 3RD APPLICANT
RICHARD MUNENE GITONGA 4TH APPLICANT
NICKSON MURITHI KITHAE 5TH APPLICANT
JONES GIKONYO 6TH APPLICANT
MICHELLE WANJIRU 7TH APPLICANT

AND

HUMPREY NGAI WAKITHAE 1ST RESPONDENT
MERCY KARIMI NYAGAH 2ND RESPONDENT

AND

GRAHAM MUGENDI KITHAE INTERESTED PARTY

RULING

1. Before this court is the summons application dated March 16, 2022 seeking to revoke the grant of letters of administration made on November 14, 2019 and the subsequent certificate of confirmation of grant dated March 14, 2022 on grounds that the confirmation thereof were obtained due to fraudulent concealment of facts. The applicants further prayed for orders that a fresh grant be issued to Graham Mugendi Kithae and Martin Mutuma and that the costs of the application be in cause.



2. The application is based on the grounds on the face of it and supported by the affidavit of the 1st applicant sworn on March 16, 2022 on his own behalf and on behalf of the 2nd - 7th applicants. He deposes that the applicants are grandchildren of the late Richard Kanampiu Nachu (the deceased herein) and that they were all dependants of the deceased. It was his testimony that 6th and 7th applicants and himself are children of the late Lucy Gatwiri. That the 5th applicant is the son of the late Nickson Murithi while the 2nd, 3rd and 4th applicants are the children of the late George Gitonga. It is the applicants' case that the deceased apportioned them pieces of land in his estate before his demise, where they have been living and farming for years. That notwithstanding, the respondents omitted their names and the names of their deceased parents in the mode of distribution suggested in their affidavit dated March 14, 2020. Further, the applicants contend that their grandmother and the deceased's widow, Julia Muthoni Kithae, who was still alive at the time, was also left out in the mode of distribution. For this reason, the applicants are fearful of being disinherited and being left destitute. They thus urged this court to allow the application as prayed.
3. The application is opposed by the affidavit sworn by the 1st respondent on April 25, 2022. He deposes that the application is an afterthought meant to ensure that litigation in this matter will never come to an end. The 1st respondent asserted that the applicants were given time to file their protests for a period of almost 3 years, running from October 8, 2020 until March 8, 2022 when the grant was confirmed, but failed and/or refused to file their protests despite attending court. It is the 1st applicant's contention that the applicants cannot contend that they were denied an opportunity to be heard when they kept the court at abeyance for 3 years. It is further the 1st respondent's case that one Edith Mukwaiti is the widow of the deceased. The 1st respondent alleges that the applicants are settled on the estate of Julia Muthoni who got the same from the deceased herein and that the applicants do not stand to be disinherited. The 1st respondent thus deposed that the present application does not lay grounds for revocation of grant and as such, urges this court to dismiss the same with costs.
4. In a rejoinder, the applicants filed two further affidavits sworn by Graham Mugendi Kithae and the 1st applicant on May 27, 2022 and June 2, 2022 respectively. Graham Mugendi Kithae is an uncle of the applicants and the son of the late Julia Muthoni Kithae. He deposed that he does not reside in Kenya and that at all times, he had a lawyer who represented him in this succession cause. That with the assistance of his lawyer, he filed an affidavit of protest dated November 10, 2020 jointly with his late mother. That following the death of his mother, he was informed by his lawyer that the protest was still valid and that he was shocked that the grant was confirmed on the same day that he had been advised by his lawyer that the court was to mention the matter to take directions on hearing of his protest.
5. On his part, the 1st Applicant stated that he was aware Edith Mukwaiti is the mother to the 2nd Respondent but denied claims that the said Edith Mukwaiti was a wife to the deceased. He asserted that the reliance by the Respondents on the fact that Edith Mukwaiti's name appeared on a funeral/burial program of the deceased, is not proof of marriage. He conceded that the 2nd respondent is a child of the deceased and that as such, she is entitled to a share of the estate of the deceased. As for the said Edith Mukwaiti, it is the 1st applicant contention that she is a stranger to the estate and should not be included in the list of the deceased's beneficiaries. In response to the allegation that the applicants have a share in the estate of their late grandmother Julia Muthoni, the 1st applicant reiterated that the applicants were dependants of the deceased and the estate of their late grandmother will be the subject of a different succession cause which should not form a basis of denying the applicants a share of the deceased's estate.
6. The application was canvassed by way of written submissions.



7. The applicants filed their written submission on June 13, 2022. It was their submission that section 76 of the *Law of Succession Act* gives this court the authority to revoke a grant, even after it has been confirmed, if the administrator(s) have misled the court. It further their submission that rule 40(8) of the *Probate and Administration Rules* requires for the filing of form 37 which lists all the beneficiaries of an estate, which requirement, according to them, is not an idle requirement. It was their case that the applicants have been cut out of the deceased's person estate, and yet they are dependants of the deceased. They relied on the case of *Beatrice Mbeere Njeru v Alexander Nyaga Njiru* [2022] eKLR and urged this court to revoke the confirmed grant in order to pave way for the confirmation of another grant that has a more equitable mode of distribution to the right beneficiaries.
8. On the other hand, the respondents' submissions were filed on October 7, 2022. It was their submission that the grant that the applicant is seeking to revoke was issued with knowledge of the applicants herein. The said grant was issued on March 14, 2022 and the respondent the court's keenness in indulging all beneficiaries who were represented before the ultimate confirmation of the grant.
9. It is the respondents' contention that the applicants asking this court to sit on an appeal from its own decision that confirmed the grant. According to them, this court does not have jurisdiction on that sole basis. As such, it is their stand this court should not consider an issue that is meant for another forum, that is, the Court of Appeal. They thus prayed that the application be dismissed with costs.
10. Section 76 of the *Law of Succession Act*, cap 160, Laws of Kenya and rule 44 of the *Probate and Administration Rules*, provide 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.”
11. On the other hand, rule 44 provides as follows:

“(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 annul 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.”

12. Under Section 76 of the Act, 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.

13. I have considered the applicants' application dated March 16, 2022 seeking the revocation of grant as well as the respective affidavits and submissions of the parties in support and opposition of the application. The applicants contend that they were left as dependants of the deceased after their parents died and that as such, the respondents failed to disclose to this court all the beneficiaries of the deceased. One George Gitonga who is deceased and the father of the 2nd, 3rd, and 4th applicants is said to be a son of the deceased. He was however not disclosed by the respondents in their application for confirmation of grant. This non-disclosure, in my view, constitutes concealment from the court of something material to the case which consequently warrants this court to exercise its powers under section 76 of the Act and revoke the confirmed grant.



14. The upshot of the above, is that the summons for revocation of grant dated March 16, 2022 is merited. I allow the application and orders that the confirmed grant is hereby revoked. A fresh grant to issue to Humprey Ngai Wa Kithae, Mercy Karimi Nyaga, Martin Mutuma, and Graham Mugendi Kithae.
15. They will file a summons for confirmation of grant within 30 days as the matter has been pending in court for a long time. I make no orders as costs.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 2ND DAY OF FEBRUARY 2023.

L.W. GITARI

JUDGE

The ruling has been read out in open court.

L.W. GITARI

JUDGE

2/2/2023

