



REPUBLIC OF KENYA



**In re Estate of Andrew Achoki Mogaka (Deceased) (Probate & Administration
35 of 2019) [2023] KEHC 2561 (KLR) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2561 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
PROBATE & ADMINISTRATION 35 OF 2019
WA OKWANY, J
MARCH 23, 2023**

BETWEEN

ANASTASIA NDUNGE ACHOKI 1ST APPLICANT

TABITHA KEMUNTO ACHOKI 2ND APPLICANT

AND

PRISCILLA BOSIBORI ACHOKI 1ST RESPONDENT

JOB MECHA ACHOKI 2ND RESPONDENT

RULING

1. This ruling is in respect to the application dated October 6, 2022 wherein the applicants (2nd & 4th petitioners) seek orders as follows:-
 - 6 Spent
 7. That the Honourable Court be pleased grant Parties an order to file a joint consent on mode of distribution and in default, parties be at liberty to file separate proposals on distribution within the timeline to be provided by the court Manor House Farm/32829/2, Mwongori Settlement Scheme/17 Measuring 8.1 Ha, Bonyunyu Plot, Motor Vehicle KAS 825 N and KAA 537 G.
 8. The honourable court be pleased to revoke the confirmed grant made to the petitioners on August 15, 2021.
 9. That the honourable court be pleased to distribute the estate of the deceased Andrew Achoki Mogaka equally between the 1st & 2nd house.
 10. The parties to file consent on distribution and/or file separate proposals on the distribution of the deceased estate.
 11. That costs of this application be provide for.



2. The application is supported by the 2nd petitioner's affidavit and is premised on the grounds that: -
 - (a) The deceased herein died on August 14, 2018 at MP Shah.
 - (b) That the deceased died intestate leaving behind 2 widows and several children.
 - (c) That the court confirmed letters of administration and issued a certificate of confirmation of the grant dated April 15, 2021.
 - (d) That proceedings to obtain the confirmed grant were defective in substance.
 - (e) That confirmed grant was obtained fraudulently by making false statement or by concealment from court of something material to the cause.
 - (g) That the distribution is unfair and that the ancestral property has been conspicuously omitted from the proceedings considering that the deceased died intestate.
 - (h) That all the purchasers of Manor House Farm/32829/2 have been excluded and the acreage of the purchasers disclosed is not accurate.
 - (i) That it will be fair and in the interest of justice that the grant be revoked and an equal distribution be made.

3. The respondents opposed the application through the 3rd petitioner's replying affidavit sworn on October 17, 2022. The 3rd petitioner avers as follows: -
 3. That the 1st and 2nd applicant/petitioners are my step-mother and sister respectively (the 2nd house).
 4. That on January 31, 2019 in a family meeting attended at our Mwangori Settlement Scheme, family home attended by both applicants, it was unanimously agreed that the applicants do represent the 2nd house of the deceased as petitioners, whereas I and Priscilla Bosibori Achoki (1st petitioner) were to represent the 1st house.
 5. That the meeting was attended by senior members of the wider Achoki family (brothers and uncles) whose interest was a peaceful and equitable distribution of the estate of the deceased. Annexed are minutes of that day showing all issues that were discussed marked "JMA"1.
 6. That the question of who had bought land from the deceased at Kitale Manor House farm was discussed and the list presented by our Advocate on record, Mr. Samba adopted unanimously.
 7. That I want to state that we realized much later that one Mr. Thomas Assa's acreage had erroneously been indicated as 1 acre.
 8. That in the schedule on the mode of distribution dated March 24, 2021 this error was corrected and Thomas Assa's acreage reflected correctly as 2 acres. Annexed is the agreement for sale dated 8/12/2009 marked "JMA2"
 9. That David Wanyonyi Simiyu purchased 1 acre of land from the deceased as per a handwritten agreement dated May 4, 2005 at a consideration of Kshs. 120,000/= Agreement annexed as "JMA3"
 10. That the said David Wanyonyi Simiyu's interest is thus recorded as a creditor of the deceased on account of 1 acre purchased.



11. That the allegations in paragraph 10 of the affidavit of Annastancia Ndunge Achoki is not only a distortion of the truth but also a crafty attempt to introduce people who have actually bought land illegally from the 1st applicant and her children to make it look like they (said buyers) bought the land from the deceased to double benefit from the distribution.
12. That the applicants never questioned the list the list of buyers on January 31, 2019, nor did they contest the list when signing the petition for a grant.
13. That the applicants were also in court on April 15, 2022 when the grant was confirmed but they did not raise any objection.
14. That the argument that the 1st house sits on prime land in Nyamira County and therefore should not have a share of 115.5 acres of land at Manor House Farm, is greedy, an afterthought and contrary to the principle of equity.
15. That Manor House Farm is a prime land where farmers harvest about 30-35 90 kg bags of maize per acre and one wonders why and one wonders why the applicants are starting games to waste time and resources.
16. That there is no fraud or concealment of any matter from the court.
17. That the alleged family land talked about at Bonyunyu in West Mugirango in Nyamira County does not exist.
18. That to my knowledge the deceased sold the land to Joram Ototo Mogaka and transferred the same to him on August 12, 2010. Annexed is a copy of title marked "JMA4".
19. That the deceased had charged title number West Mugirango/Bomanono/1711 to Kenya Commercial Bank and fell into arrears of the loan and the land risked being auctioned.
20. That Dr. Joram Ototo Mogaka helped redeem the land and paid some money for the late mzee's medication and upkeep and on that understanding the deceased in appreciation willingly transferred the land to him.
21. That James Manono Achoki bought 10 Acres for a valuable consideration from the deceased and therefore the 10 acres was not bequeathed to him as purported.
22. That Dorcas Nyakerario Mogaka gave the family a tractor as a valuable consideration for the 2 acres and therefore the same was never bequeathed to her as alleged.
23. That I am advised by Mr. Samba our advocate on record which advice I verily believe to be correct that the petition was notified to the public through Kenya Gazette and objections invited but none of the buyers alleged to have been left out filed any objection and none has been filed to date.
24. That the applicants have not exhibited any evidence with regard to the buyers in paragraph 10 i.e.
 - a. Moses Wanyama Simiyu 2 acres
 - b. Joseph Waliaula Mulongo 11.5 acres
 - c. David Wafula Wanyama 2 acres
 - d. David Wanyonyi Simiyu 2 acres (his name is on our list for 1 acre)



e. Musa Nyangweso 1 acres

25. That the applicants have no locus standi to attempt to have a grant confirmed with their unequivocal consent revoked.
 26. That we propose that the error with regard to Thomas Assa's 1 acre be corrected to show that the total acreage of land sold by the deceased is 29 acres and the distribution of the land between the 1st and 2nd house of the deceased be adjusted accordingly.
 27. That the distribution of the estate of the deceased was conducted fairly and transparently. The application for revocation has no merit, is misconceived and a waste of the court's precious time.
4. Parties canvassed the application by way of written submissions wherein they expounded on the contents of their respective supporting and replying affidavits.
 5. The gist of the applicants' case is that they contest the mode of distribution of the deceased's estate while arguing that the same is skewed in favour of the 1st and 3rd petitioners/respondents who have taken the lion's share of the said estate.
 6. The respondents, on the other hand, submitted that the distribution was done equitably and above board after taking into account the views of all the family members as expressed during a family meeting convened prior to the filing of the succession cause. The respondents maintain that at the said family meeting, the applicants and respondents herein were nominated to be the Administrators of the estate.
 7. It was the respondents' case that the grant was confirmed in the presence of the applicants who were then satisfied with the mode of distribution.
 8. The respondents submitted that the allegation that certain property was left out of the list of properties for distribution is false as the said property was not disclosed and did not therefore form part of the estate of the deceased.
 9. Regarding the allegation that some purchasers' names had been omitted from the list of beneficiaries, the Respondents submitted that none of the alleged purchasers had sworn any affidavits or pursued their interests.
 10. I have considered the application, the Respondents' response and the parties' respective submissions.
 11. The main issue for determination is whether the Applicants have made out a case for the granting of the orders to revoke the confirmed grant.
 12. Section 76 of the *Law of Succession Act* stipulates as follows: -

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
 - a. that the grant has become useless and inoperative through subsequent circumstances.

13. In the present case, I note that not only were the applicants herein also co-petitioners with the respondents in respect to the succession cause, but that they also appeared in court on March 11, 2021 during the hearing for the confirmation of grant. It is noteworthy that the Petitioners herein applied to court to confirm the grant while stating that the beneficiaries had agreed on the mode of distribution.
14. My finding is that in the circumstances of this case, the 2nd and 4th petitioners cannot, one year after the confirmation of grant, turn around and claim that they were not consulted or that they did not consent to the mode of distribution.
15. I am not persuaded that the instant application is merited and I therefore dismiss it with costs to the respondents.
16. It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS THIS 23RD DAY OF MARCH 2023.

W. A. OKWANY

JUDGE

