



**In re Estate of Magdalena Nyangwera (Deceased) (Civil Appeal  
E024 of 2021) [2023] KEHC 2195 (KLR) (7 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2195 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
CIVIL APPEAL E024 OF 2021**

**TA ODERA, J**

**MARCH 7, 2023**

**RE: ESTATE OF MAGDALINA NYANGWERA (DECEASED)**

**BETWEEN**

**PRISKA AJWANG ONYANG ..... APPLICANT**

**AND**

**EMMAMUEL OTIENO OWINO ..... PETITIONER**

**JUDGMENT**

1. Priska Ajwang Onyang the objector/applicant herein filed amended summons for revocation of grant dated September 1, 2020 brought under sections 76, and 66 of the *Law of Succession Act* and rule 44, 63 and 73 of the *Probate and Administration Rules*, seek for orders of revocation of grant confirmed in favour of the respondent on December 6, 2019.
2. Applicant/objector sought restriction of prohibition to be registered on land parcels Kamagambo/ Katieno /3880, 3881, 3882, 3883 which are subdivisions of land parcel Kamagambo/ Katieno 2985 pending determination of the summons for revocation of the grant.
3. That the estate of the deceased who is now Kamagambo/Katieno /3881, 3882, 3883 do revert back to the original title Kamagambo/Katieno 2985 in the name of deceased .
4. The applicant stated that the respondent is a stranger to the estate of the deceased concealed material facts to the court that there is succession cause No 32 of 2015 at Migori High Court in relation to the estate of the same deceased herein and the cause is still pending determination. Further that respondent has no preference over her to be granted letters of administration.
5. In her supporting affidavit dated October 28, 2020 she deponed that she is a wife to Dalmas Onyang Nyagwera (also deceased )who was a brother to Nyagwera Oguno (deceased ) the husband of Magdalena Nyambita Nyawera (the deceased herein ) who as not blessed with any children.



Respondent lied to court that he as a son to deceased which is not the case as he stayed with deceased as a worker and later changed his name from Emmanuel Moi Makiri to Emmanuel Otieno Owino. Also that upon the demise of deceased the respondent started claiming he is a son to deceased and later on changed and said that he is a grandson to deceased. Applicant said she learnt that the respondent had filed the succession cause No 117 of 2018 in the Chief's court at Migori yet her late husband was the petitioner in High Court succession cause No 32 of 2015 Migori which she later took over upon the demise of her said husband and that the same is pending confirmation of grant. Further that he described himself as a son to deceased in the succession documents herein. She told the court that she was surprised to learn that respondent has disinherited her and inherited land parcel No Kamagambo/Katiemo/2985 and had it subdivided and the resultant titles registered in the names of strangers. She said she will be rendered homeless and destitute unless the revocation orders are granted and the parcels are reverted back to the name of deceased. She produced the grant herein- Pao 1 the letters of administration issued to her by the High Court succession cause No 32 of 2015-Pao 6. She deponed that the area chief recognized her late husband as the only son to deceased *vide* letter –Pao 7.

6. In opposition to the application, the respondent filed a replying affidavit dated September 18, 2020 in which she denied the allegations in the summons and stated that he is a son to Magdalena Nyagwera who was married to his father Makiri Nyagwera and that Dalmas Onyang the husband to applicant was a brother to his said father. He said his grandfather Nyagwera Ogungu had Magdalena registered as a proprietor of land parcel No Kamagambo/Katiemo/2985 in trust for his father. He said he is biological son to Makiri Nyagwera a son to the late Magdalena and it is not true that he is Emmanuel Moi and denied that his father did not leave any son. He said his grandmother also left behind close relatives i.e Daudi Mbadi, Washington Odiwuor whom he allocated land numbers 3881 and 3883 out of land parcel No 2895. He denied committing any fraud in the succession cause saying that he was described a son instead of grandson in the succession cause by mistake and that succession cause No 117 of 2018 was not within his knowledge at the time he as filing the succession cause herein.
7. The court took *viva voce* evidence of both parties and ruled in favour of the respondent herein and hence this appeal.
8. The appellant filed memorandum of appeal dated and listed two grounds of appeal to wit;
  1. That the Trial magistrate erred in law and fact by entertaining an application for petition for letters of grant and confirmation of the same estate over the estate of deceased Magdalena Nyambaja Nyangwera whereas similar proceedings for the estate of Magdalena Nyambaja Nyangwera over land parcel No Kanyamkago/Katiemo/2985 are in High Court pending confirmation of grant in the name of the appellant.
  2. That the learned trial magistrate erred in law and fact and thus misinterpreted the law by not being cognizant of the procedure in law where petition for letters of administration has been filed and the orders of precedence for such petitions, he thus prayed for;
    - a. Setting aside of the judgment, order and all consequential actions from Migori CMC succession No 117 of 2018 (estate of Magdalena Nyambaja Nyangwera deceased).
    - b. Pursuant to order a that LR No Kanyanyamkago/Katiemo /2985 reverts back to the name of deceased
9. Both parties filed submissions herein. The appellant submitted that the respondent secretly filed Migori chief magistrates succession cause No 117 of 2018 over the same estate of the deceased herein and the grant was issued and confirmed. She said she pointed out to the court that she had filed High Court succession cause No 32 of 2015 Migori over the name estate and it was pending confirmation



and that respondent was guilty of concealment of material facts. She submitted that there can never be two grants issued by different courts over the same estate of a deceased as was held on Malindi High court succession cause number 146 of 2011 Re: Zakaria Lugonzo Amalemba (deceased) and Kajiado succession cause No 66 B of 2018 Re : Saleh Awke (deceased). Further that section 6 of the *Civil Procedure Act* provides that “ No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

10. Meru Succession cause No 19 of 200 *Re: Ceasaery Munitbu Ndamba (deceased)* 2004 eKLR where a similar issue was dealt with was also cited. Civil Appeal No 129 of 2018 in *Re Kanyeki Kimatu* (2020) eKLR where the court held that two grants relating to the same estate issued by two different courts is an embarrassment to the court was also cited. In the said Kenyeki case it was further held that 35 “ Based on the aforementioned provisions as read with section 76 of the *Law of Succession Act*, it is my considered view that the grant that was made to Margaret Muthoni Kanyeki in Thika Succession Cause No 170 of 2010, the *Estate of Joyce Gachiru Kimatu* ought to be revoked on the ground that there was concealment of material facts. I am also satisfied that the that the proceedings to obtain the grant therein were defective and illegal in substance. “she sought revocation/annulment of the grant.
11. Respondent submitted that the beneficiaries of the estate of the deceased were disc losed *vide* chiefs letter filed in the Magistrate’s Court and thus the magistrate as right in dismissing the application for revocation of grant. Also that section 76 of the *Law of Succession Act* provides for grounds for revocation of a grant as was held in the case of *Jamleck Maina Njoroge v Mary Wanjiru Mwangi* (2015)eKLR. That revocation of grant is a discretionary order which must be exercised judiciously as was held in the case of *Albert Imbuga Kisigwa v Recho Kavai Kisigwa*. It was also submitted that the titles which came out as a result of the sub division are in the names of people who are not parties to this suit and that they will be condemned unheard if the orders for reversion of the title are granted. Respondent asked this court to uphold the finding of the trial court.

### Issues For Determination

12. From a careful analysis of the summons, the supporting affidavit, the replying affidavit and the submissions filed the only issue that arises for determination is whether the applicant/objector has presented sufficient evidence to warrant revocation or annulment of the grant.

This is a first appellat court and it is trite law that this court is enjoined to re-evaluate the evidence on record and arrive at its own conclusion while bearing in mind that it had no opportunity of seeing the witnesses while testifying as was held in the case of *Selle v Associated Motor Boat Co* [1968] EA 123 that:

“ The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”



## The Law

13. Section 76 of the Law of Succession Act gives the court the powers to revoke a grant provided the conditions stipulated therein have been met. It states that: -

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
14. What the above provision implies is that a grant may be revoked where the proceedings leading up to its making were defective, or where the grant was obtained fraudulently and by concealment of an important fact, or was obtained by an untrue allegation of a fact that is essential.
15. Notably, the power to revoke or uphold a grant is a discretionary one. This principle was enunciated in the case of Albert Imbuga Kisigwa v Recho Kawai Kisigwa Succession Cause No 158 of 2000.
16. In this case appellant says she had filed succession cause No 32 of 2015 in the High court at Migori over the same subject matter and relating to the same deceased herein a matter which applicant was well aware of but he proceeded to file the succession cause herein and hence he concealed the fact of the existence of the sad cause. Respondent said he was not aware of the said High court cause. Section 6 of the Civil Procedure Act is clear that there can be no pending proceedings in more than one court over the same subject matter. In succession causes this is guarded by the requirement before issuance of letters of administration to obtain form 30 from the central registry indicating that no other succession cause has been filed relating to the estate of the same deceased. I note that form 30 of the Probate and Administration Rules filed herein indicates that no other succession cause had been filed relating to the estate of the deceased. I note that the electronic form used to obtain form 30 has the name Macadalina Nyambata Nyangwera instead of Magdalina Nyambata Nyagwera. The name Macadalina made it look like the succession cause was for a totally different person apart from the deceased herein. The same appears to be a deliberate act in view of the evidence by the appellant of the existence of High succession cause number 32 of 2015 Migori. Appellant also raised the issue of respondent being a stranger to the estate of deceased as in the succession cause he described himself as a son to the deceased yet he is not



a son to deceased. Respondent replied saying he is a grandson to deceased and that the documents he filed in the lower court had an error. I noted that in the petition, the supporting affidavit, the chief's letter and the search where he filed restriction it is indicated that he was a son to the deceased which leaves a lot of questions hanging. In the circumstances, I read concealment of material facts on the part of the respondent.

17. I have re-evaluated the entire evidence on record and I find that the trial magistrate erred in dismissing the application for revocation of grant dated September 1, 2020 despite the appellant raising the issue of there being another pending succession cause of the same estate of the deceased herein. The existence of the two succession causes offend the provisions of section 6 of the *Civil procedure Act* which prohibits filing of cases over the same subject matter in different courts as the t courts may issue conflicting orders over the subject matter which may embarrass the court.
18. I also find that the respondent concealed from the trial court material facts of the existence of the succession cause in the High Court and on his relationship with the deceased and thus obtained the grants herein. I proceed set aside the orders disallowing the application dated September 1, 2020 and I allow the same on the following terms;
- a) The grant of administration dated January 16, 2019 and confirmed grant dated August 15, 2019 are hereby revoked.
  - b) The subdivisions of land parcel no Kanyamkago/Katieno/2985 i.e resultant tile numbers Kanyamkago/Katieno/3380,3881,3882 and 3883 are hereby revoked and I order that the same revert to the original land parcel No Kanyamkago/Katieno/2985 in the name of Magdalena Nyambaja Nyangwera.
  - c) This file be closed so that High Court succession cause No 32 of 2015 Migori can proceed to its conclusion.
  - d) Each party to bear his own costs

**T.A. ODERA**

**JUDGE**

**7.3.2023**

**DELIVERED VIRTUALLY VIA TEAMS PLATFORM IN THE PRESENCE OF;**

**Court Assistant: Bor,**

No Appearance for parties.

**T.A ODERA - Judge**

**7.3.223**

