



REPUBLIC OF KENYA



**In re Estate of Ndirangu Francis Kiago (Deceased) (Succession Cause E501 of 2021) [2023] KEHC 3245 (KLR) (Family) (18 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3245 (KLR)

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

**FAMILY**

**SUCCESSION CAUSE E501 OF 2021**

**EKO OGOLA, J**

**APRIL 18, 2023**

**BETWEEN**

**JOHN NDIRANGU KIAGO ..... APPLICANT**

**AND**

**ELIZABETH ADISA CHENI ..... RESPONDENT**

**RULING**

1. Before the court for determination is the Summons application dated April 27, 2022 in which the Applicant herein John Ndirangu Kiago seeks that the grant of letters of administration made to Elizabeth Adisa Cheni be revoked on the grounds that:
  - 1 The proceedings to obtain the grant were defective in substance contrary to Section 58 of the [Law of Succession Act](#)
  - 2 That grant was obtained fraudulently by concealing from the court of something material to the case specifically that there is a continuing trust and the application was made by one person alone
2. The application is supported by an Affidavit of even date sworn by the Applicant.
3. This matter relates to the estate of Francis Kiago Ndirangu the deceased. The Applicant's case is that the Respondent obtained grant of letters of Administration of the estate of the deceased through proceedings that were defective in substance.
4. According to the Applicant, the Respondent deliberately concealed from the court material facts by not disclosing that there was a continuing trust since all other beneficiaries of the estate are all minors.



5. The Applicant deposes that the Respondent has already withdrawn some benefits from the deceased's Capital Markets Authority Trust Fund that had been reserved for the minors and there is real danger that if the grant is confirmed to the Respondent alone, the interests of the minor beneficiaries will not be adequately catered for.
6. The Applicant stated that having not been served with the Application, the Orders given are prejudicial to her and she prays for the orders to be stayed and set aside.
7. In response the Respondent filed a Replying Affidavit dated July 20, 2022 opposing the Application.
8. The Respondent's case is that when she filed the petition for grant of letters of Administration, the same was gazette vide the Kenya Gazette as required by the Law. According to the Respondent, no objection was ever raised regarding the petition.
9. The respondent states that the applicant has not raised sufficient reasons to warrant the revocation of the grant. The respondent states that when she was making the petition for grant of letters of Administration to the estate of the deceased, it was during the Covid-19 Pandemic and the respondent could not have guaranteed the physical presence of any other family members to enjoin in the petition as a co-administrator.
10. The Respondent states the Capital Markets Authority benefits were reserved for her and her children and not the Applicant and his family who allegedly wanted the entire sum of benefits to be put in a joint account in both the applicant's and respondent's names.
11. The Respondent further states that the said benefits are for sustenance of herself and the children since the deceased who was the respondent's husband was the sole breadwinner, and the deceased's family froze the deceased's account upon his demise.
12. The parties filed submissions. The Applicant's submissions are dated October 12, 2022, while the respondent's submissions are dated October 18, 2022.

### **Determination**

13. I have carefully considered the Application, the Affidavits and the Written Submissions by the parties.
14. 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 has ordered or allowed; 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
- iv. The grant has become useless and inoperative through subsequent circumstances.

15. 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 Mwita J stated:-

“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.”

16. In this case, the Applicant argues that the proceedings for grant of letters of administration were defective as the respondent did not disclose that there is a continuing trust. The respondent argued that as per section 58 of the *Law of Succession Act*, where there is a continuing trust, grant of letters of administration shall not be made to a sole administrator.

17. *In Re The Estate of Lameck Omwoyo (Deceased)* [2008] eKLR, Justice Musinga held that: -

“Where an intestate leaves behind a spouse and children the surviving spouse is entitled to the personal and household effects of the deceased absolutely and a life interest of the net intestate estate. The spouse holds the property in trust for the children of the deceased. The life interest operates as a safeguard for the children of the deceased in cases where the surviving spouse is likely to waste the estate.”

18. Section 35 of the *Law of Succession Act* caters for a situation where the deceased is survived by a spouse and children. The surviving spouse is entitled to the deceased’s chattels and a life interest on the residue. Under this section, upon the determination of a life interest the estate should be shared equally between all the children. There is also provision for appointment exercisable by the surviving spouse.

19. Judge Musyoka *in Re Estate of John Musambayi Katumanga – (Deceased)* [2014] eKLR held that: -

Under Part V, a surviving spouse is entitled absolutely to the deceased spouse’s chattels and a life interest in the remainder. The surviving spouse, particularly the widow, is regarded as having the greatest stake in the estate. Spouses during marriage take care of each other. They depend on one another for a variety of material and emotional things. The dependency is usually higher on the part of the wife. In the traditional step-up the wife takes care of the home and the children, while the husband is out looking for resources for the family’s sustenance. Often the women are housewives or persons holding lowly jobs, which afford them time to be close to their homes and family. It is in recognition of this arrangement that the law of marriage imposes a duty on husbands to provide for and maintain their wives. This duty remains even after death, but this time the burden is on the estate. It is because



of it that the surviving spouse takes the household goods and enjoys a life interest in the capital assets.

Ideally, an estate ought not be distributed during life interest. Life interest and minority are on the same face of the coin; they result in a continuing trust which ends with the termination of life interest or minority. This would mean that the surviving spouses and minor children occupy a special place in the succession arrangement. They are vulnerable and need protection, and therefore they deserve special attention during distribution.”

20. In the instant case, the Respondent while petitioning for the letters Administration clearly specified that the other beneficiaries were minor children. The Applicant cannot therefore be heard to say that the respondent did not disclose that fact. However, it is clear that a continuing trust results where there are minor beneficiaries involved and there are assets like land forming part of the estate of the beneficiary. In this case then there exists a continuing trust.

21. Section 58 of the Act provides that:

58. Number of administrators where there is a continuing trust

(1) Where a continuing trust arises—

(a) no grant of letters of administration in respect of an intestate estate shall be made to one person alone except where that person is the Public Trustee or a Trust Corporation;

(b) .....

(2) Where an application for a grant of letters of administration in respect of an intestate estate is made by one person alone and a continuing trust arises the court shall, subject to section 66, appoint as administrators the applicant and not less than one or more than three persons as proposed by the applicant which failing as chosen by the court of its own motion.

22. Section 66 of the Act gives final discretion as to who should be appointed an Administrator of an estate in the following preference: -

- i. Surviving spouse or spouses, with or without association of other beneficiaries
- ii. Other beneficiaries entitled on intestacy with priority according to their respective beneficial interests as provided under Part V
- iii. The Public Trustee; and
- iv. Creditors

23. Where there is a continuing trust and only one person is appointed as an Administrator, the remedy does not lie in revocation of the grant but the court has the discretion to appoint a Co-Administrator as provided by Section 66. The Applicant herein does not fall under the category above since he is the father of the deceased, and since the deceased had a spouse and children, they are the only ones entitled to the estate of the deceased. However, in fulfillment of Section 58, since there exists a continuing trust, the estate should have more than one Administrator.



24. From the foregoing, this Court finds that there are no grounds for revoking the Grant issued to the Respondent therefore the Application is dismissed. The Applicant is however at liberty to Apply to be enjoined as an Administrator for consideration by this court.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18<sup>TH</sup> DAY OF APRIL 2023.**

**E K OGOLA**

**JUDGE**

**Ruling read and delivered in chambers online in the presence of:**

**Mr Muigai for the Applicant**

**M/s Mwaniki for the Respondent**

