



In re Estate of Daniel Rotich alias Kipkemoi A. Rotich (Deceased) (Succession Cause 89 of 2014) [2023] KEHC 17699 (KLR) (16 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17699 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
SUCCESSION CAUSE 89 OF 2014**

JK SERGON, J

MAY 16, 2023

**IN THE MATTER OF THE ESTATE OF DANIEL
ROTICH ALIAS KIPKEMOI A. ROTICH (DECEASED)**

BETWEEN

LEAH CHEPKOROS KIMETTO & 4 OTHERS PETITIONER

AND

JOSEPH KIPTONUI BETT APPLICANT

RULING

1. The grant to the estate of the late Daniel Rotich was confirmed and certificate of confirmation of grant issued on February 2, 2023 in favor of the petitioners and consequently the applicant filed an application for revocation of grant dated February 28, 2023 in his capacity as the first born son of the deceased and a bona fide beneficiary to the estate. The applicant in his application for revocation contended that the process of obtaining the grant was shrouded in non-disclosure, concealment of material information and by reliance on false statements. The 2nd petitioner in response to the application for revocation filed a preliminary objection dated March 27, 2023.
2. The instant preliminary objection dated March 27, 2023 was raised by counsel for the 2nd Petitioner/ Respondent against the summons for revocation of grant and the supporting affidavit dated February 28, 2023 filed by the Applicant herein on the following grounds;
 - i. The Objector /Applicant's summons for revocation of grant is hopelessly misconceived, frivolous, totally devoid of merit and mala fides.
 - ii. The Objector /Applicant's application is fatally defective as the advocates on record Meingati & Co Advocates have acted in contravention of the *Advocates Act* and the Civil Procedure Rules, which requires advocates to obtain leave of the court before appearing for a party in a case where a grant of representation has been issued.



- iii. The Application in its entirety is res judicata since the same issues had been heard and determined suo moto and therefore the court is functus officio and can only appeal to the court of appeal
3. Given the foregoing, counsel for the 2nd Petitioner/Respondent therefore sought to have the summons for revocation of grant struck out with costs.
4. I have considered the preliminary objection herein, oral and written submissions by the parties and I find that the issues for determination are;
 - i. Whether the preliminary objection meets the threshold set in the case of *Mukisa Biscuit Co Ltd v West End Distributors (1969) EA 696*
 - ii. Whether the application dated February 28, 2023 is res judicata
 - iii. Whether the counsel for the applicant is properly on record
5. The preliminary objection came up for hearing on April 24, 2023, Mr Sang representing the 1st Administrator stated that the preliminary objection was two pronged, firstly, on the irregular representation of the applicant and secondly, that the court could not entertain summons for revocation of grant herein as it was functus officio.
6. On the issue as to whether counsel for the applicant was properly on record, Mr Sang argued that Miengati & Co Advocate acted contrary to order 9 rule 9 of the [Civil Procedure Rules](#) and that there are two ways of coming on record after confirmation of grant, first, is to seek leave of court by way of an application and secondly, by filing a consent. Mr. Sang argued that the firm on record did not come into record as envisaged by the provisions of order 9 rule 9 which is coached in mandatory terms and therefore the court ought to dismiss any pleadings filed by the said advocate and cited the court of appeal cases of *Musyoka v Nzuki & Anor (2014) eKLR*, *Kiwanuka v Kiwanuka & 2 Ors (2017) eKLR* & *Onditi v Onditi (2017) eKLR* whereby the court dismissed applications for revocation on account of the failure of the advocates therein to seek leave of court, prior to filing their applications.
7. On the issue as to whether the court could entertain the summons for revocation, Mr. Sang argued that the court was functus officio as the same issues raised in the application had been dealt with suo moto by Lady Justice Ongeru. Mr Miruka and Ms Kitur agreed with the sentiments of their colleague Mr Sang.
8. Mr Langat representing the applicant vehemently opposed the preliminary objection and filed written submissions opposing the said preliminary objection. On the issue as to whether the preliminary objection met the legal threshold, whilst citing section 1 (A) & (B) [Civil Procedure Act](#) and article 159 (2) (d) of the [Constitution](#) the applicant submitted that preliminary objection herein as filed was not properly before court and ought to be struck out with costs, the applicant relied on the following cases *Mukisa Biscuit Co Ltd v West End Distributors (1969) EA 696* & [Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 Ors Application No 50 of 2014 \[2015\] eKLR](#).
9. On the issue as to whether the application for revocation of grant dated February 28, 2023 was res judicata, and the parties only had recourse in the court of appeal, the applicant argued that the application leading to the instant preliminary objection was an application for revocation of grant which is founded in section 76 of the [Law of Succession Act](#) which provides for revocation and annulment of grant and the grounds for revocation and annulment are well set out therein. The applicant further argued that the revocation can be at the instance of an applicant or by the court suo moto as long as the conditions for revocation are proven whilst placing reliance on the case of



Jamleck Maina Njoroge v Mary Wanjiru Mwangi (2015) eKLR. The applicant argued that it had laid out a plethora of grounds and evidence of wrongdoing which was overlooked and believed that it was sufficient to warrant revocation of the grant. The Applicant further argued that a strict interpretation of section 76 of the *Law of Succession Act*, case law indicates that the trial court has jurisdiction to revoke a grant if the conditions are satisfied which is in furtherance of a probate court's mandate to distribute free property of the deceased to the rightful beneficiaries while citing *Mathew Njenga Njogu & Another v Rosemary Muthoni Njue (2021) eKLR* and the insinuation that once the trial court has confirmed a grant its hands are tied and the only viable option to an aggrieved party is to file an appeal at the court of appeal was flawed and against the spirit of section 76 of the *Law of Succession Act*.

10. The Applicant argued that order 9 rule 9 of the Civil Procedure Rules is specific for litigants who had previously engaged advocates, the applicant was a beneficiary of the estate who was unrepresented during the succession proceedings, after the confirmation hearing upon the discovery of injustice, applied for revocation of grant, he therefore appointed an advocate to act for him and a proper notice of appointment filed as envisaged under order 9 rule 7 of the Civil Procedure Rules.
11. The Applicant reiterated that the preliminary objection seeking to challenge the application for revocation of grant was misconceived, unmerited and unjustified, should be dismissed with costs and the court should set down the application for revocation of the grant for substantive hearing.
12. I have considered the preliminary objection, the arguments by both parties and the relevant legal provisions. On the issue as to whether the applicant's advocate is properly on record, one hand, Order 9 Rule 9 of the Civil Procedure Rules provides as follows; When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected by order of the court— (a) Upon an application with notice to all the parties; or (b) Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be. On the other hand, Rule 63 (1) of Probate and Administration Rules provides the provisions in the Civil Procedure Rules which apply to succession proceedings as follows: Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules. While taking into cognizance the fact that order 9 rule 9 of the Civil Procedure Rules serves a special and important purpose in litigation, order 9 rule 9 of the Civil Procedure Rules is not one of the rules directly imported into and applies to succession cases.
13. On the issue as to whether the court can revoke the certificate of confirmation of grant, I find that the same issues raised in the application had been dealt with before confirmation of grant, I wish to associate myself with the sentiments of the Learned Judge though merely persuasive *in re Estate of Juma Shitseswa Linani (Deceased) [2021] eKLR* where it was held that where a person is unhappy with the process of confirmation of grant, such a person ought not to move the court under section 76 for revocation of grant. Instead, the person should file an appeal against the orders made by the court on distribution or apply for review of the said orders. This is because the court confirming a grant largely becomes functus officio so far as confirmation of the grant is concerned, and cannot revisit the matter unless upon review.
14. Accordingly, I uphold the preliminary objection dated March 27, 2023. The Application for revocation of grant dated February 28, 2023 is dismissed with each party bearing their own costs

DATED, SIGNED AND DELIVERED AT KERICHO THIS 16TH DAY OF MAY, 2023.



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J.K. SERGON

JUDGE

In the presence of:

C/Assistant - Rutoh

Langat for the Beneficiaries/Applicants

Mr. Sang for Petitioners

