



In re Estate of CMG (Deceased) (Succession Cause 437 of 2008 & 339 of 2009 (Consolidated)) [2023] KEHC 4097 (KLR) (5 May 2023) (Judgment)

Neutral citation: [2023] KEHC 4097 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 437 OF 2008 & 339 OF 2009 (CONSOLIDATED)**

TM MATHEKA, J

MAY 5, 2023

(CONSOLIDATED WITH MOMBASA HC SUCC NO. 339 OF 2009)

IN THE MATTER OF THE ESTATE OF CMG (DECEASED)

BETWEEN

MJP ADMINISTRATOR

AND

JMM OBJECTOR

JUDGMENT

1. Two grants were issued and confirmed with respect to the deceased’s estate. The first one was issued to the administrator on 27/11/2008 vide Nakuru HC Succession Cause No. 437 of 2008 (Nakuru Cause). It was confirmed on 02/03/2009.
2. The second grant was issued to the objector on 01/04/2010 vide Mombasa HC Succession Cause No 339 of 2009 (Mombasa Cause). It was confirmed on 25/05/2010.
3. In their respective petitions, both the administrator and objector indicated that they had petitioned to administer the estate in their capacities as widows of the deceased.
4. Upon finding out that there were two causes with respect to the deceased’s estate, both of them applied to have the ‘foreign’ grants revoked. The two files were eventually consolidated on 23/01/2014. This Court has therefore been tasked with determining the fate of the two applications.

The Application by the objector (JMM)

5. The application is dated 25/11/2010. She seeks the revocation of the grant issued to the administrator on the grounds that:
 - a. The proceedings to obtain the grant were defective in substance.



- b. The grant was obtained fraudulently by using forged and/or false statement and/or concealment from the Court of the material facts.
6. In her supporting affidavit sworn on the same date, she deponed that she was the deceased's widow and had authority to swear the affidavit on behalf of her children; TNM and AMM. She exhibited a letter of authority as TNM-1, the death certificate as TNM-2 and her children's birth certificates as TNM-5 and 6.
7. She exhibited the grant and certificate of confirmed grant issued to her by the High Court at Mombasa as TNM-3 and 4 respectively.
8. It was also her deposition that she started living with the deceased sometimes in 1979 and they formalized their marriage sometimes in 1988. That she was not aware of the deceased's other wife and children hence the administrator and one SGM were total strangers to her.
9. She deponed that she was not notified about the petition filed by the administrator and her consent was not obtained. Further, she deponed that the properties left by the deceased were:
 - a. L.R No. 12249/1XX
 - b. Kwale/Shimba Hills/1XX
 - c. Shares at Barclays Bank 8545 valued at 619,512.50
10. The application is opposed through the replying affidavit of MJP sworn on 07/02/2011. She deponed that she got married to the deceased through customary law in the year 1979 and they were blessed with one issue by the name SGM.
11. She exhibited the confirmed grant as MJP1 and deponed that when her petition for letters of administration was gazzetted, she did not receive any objections within the prescribed 30 days. She deponed that the objector was aware of her existence and that of her son since she (administrator) got married before her.
12. She deponed that the properties listed in the application belong to her and her son since she took out the letters of administration with the full support of the deceased's sister. She exhibited a letter of confirmation of marital status as MJP2. She deponed that the decision by the objector, to take out letters of administration two years after the deceased's death, is questionable and should be treated as an afterthought.
13. It was also her deposition that she lived with the deceased upto the time of his demise and he even entrusted her with all his assets and documents. She deponed that the property known as LR No. 12249/1XX was no longer a part of the estate since the deceased sold it to her in the year 2007. She exhibited a copy of the sale agreement as MJP3 and documents from the municipal council of Nakuru as MJP4. She deponed that the only thing pending is a transfer from the Nairobi lands office.
14. She exhibited her son's birth certificate as MJP5 and deponed that she had applied for nullification of the grant issued to the objector. The application is exhibited as MJP6.

The Application by the Administrator (MJP)

15. The application is dated 20/11/2010. She seeks the revocation of the grant issued to the objector on the grounds that:
 - a. Spent.



- b. Spent.
 - c. That the respondent be ordered to deliver to this honorable Court the original grant of letters of administration intestate pending the hearing and determination of this application.
16. The gist of the application is that the objector failed to disclose the existence of the Nakuru cause and the fact that a grant had been issued and confirmed.
 17. In her supporting affidavit sworn on 22/11/2010, she exhibited the letters of administration and confirmed grant as MJP1. She deponed that the objector was aware of the Nakuru Cause hence it was an abuse of Court process for her to file another cause in Mombasa. She exhibited copies of correspondence as MJP2. She deponed that the objector is guilty of concealing material facts from this Court.
 18. The application is opposed through the replying affidavit of JMM sworn on 20/01/2011. The documents exhibited in the affidavit have already been exhibited in her application for revocation. They are; the authority from her children to swear this affidavit (JMM2), their birth certificates (JMM 3 &4), the deceased's death certificate (JMM5), the grant and confirmed grant issued by the Mombasa High Court (JMM 6 &7).
 19. She deponed that the deceased was her legal husband and they solemnized their marriage on 28/10/1988. She exhibited a copy of certificate of entry of marriage as JMM2. Further, she deponed that she was not aware that the deceased had another wife and children.
 20. She deponed that she discovered the Nakuru Cause after filing the Mombasa Cause and consequently instructed her Advocate to apply for revocation of the Nakuru Cause. She deponed that the Court ordered for consolidation of the two causes and the order is exhibited as JMM8.
 21. She deponed that the administrator caused the grant issued in the Nakuru Cause to be confirmed before lapse of six months hence a clear indication that she had no intention of including her (objector) or her children in the petition.
 22. She deponed that the administrator has not, in any way, demonstrated that she is a widow or beneficiary/dependant of the deceased. It is also her deposition that annexure MJP2 in the administrator's affidavit was addressed to the administrator after the filing of the Mombasa Cause. She deponed that the administrator had not approached Court with clean hands and cannot claim to be the deceased's widow without tangible proof.
 23. The applications were canvassed orally and the parties filed submissions thereafter.

The Trial

24. The objector testified that she is a businesswoman in Mombasa. She said that she would like her application and affidavit to be considered as evidence. That the deceased was her husband for 26 years from 1979. That they had three children now all adults. She produced a consent as P. Exh1, letters of Administration as P. Exh2, certificate of confirmation of grant as P.Exh 3, two birth certificates as P.Exh 4 and 5.
25. On cross examination, she said that the grant issued to M was obtained fraudulently as she knew about her (objector) existence but did not mention it. She said that she started living with the deceased from 1979 up to 2005 when he moved to Nakuru because of his health.
26. It was her testimony that M began to live on the deceased's property after the death of M. That it was she who had constructed that house. She testified that M's fraudulent act was to file the petition



- and not mention her yet she knew that she existed. She said she had filed the cause late because the documents were with M. That they had lived together in Mombasa upto to 2005 when he moved to Nakuru due to ill health. She denied that M's son was M's son despite the certificate of birth.
27. The administrator testified that she was the deceased's wife and the objector was not known to her. That she only learnt about her through this case. She produced the following documents as her exhibits.
- a. Letters of administration issued on 27/11/2008
 - b. Letter of confirmation of marital status dated 19/10/2007
 - c. Sale agreement for LR No.12249/1XX
 - d. Demand notices from Municipal Council of Nakuru
 - e. Birth Certificate for Stephen Gachoki
 - f. Summons for revocation of grant dated 20/11/2010
 - g. Letter from J M
28. On cross examination, she said that she got married to the deceased in 1978 through the Miji Kenda customary law. That there was traditional brew and a goat was slaughtered. That the people present included; the deceased, the aunt to deceased, chief of Kisauni area, wazee and other people all of whom were deceased. She said even her parents were deceased. She had no photographs of her and the deceased. she said that she knew J when J sued her. That when she got married she and the deceased lived in Kirinyaga. They then moved to Nakuru in 2001 and lived on LR 12249/1XX which was in the deceased's name. She said that he used to go to Mombasa where he had another house but she never asked what he used to do there. She testified that it was she, her son and the deceased's brother who took care of the deceased during his illness. She denied that she and her son were caretakers of the said Nakuru property. She confirmed that her father gave the deceased Ksh 200,000/= as purchase price for the Nakuru property as per the sale agreement she exhibited. She confirmed to have found some documents showing that there were properties in the joint names of the deceased and J M.
29. It was her testimony that for the period that she lived with the deceased on the Nakuru property and the duration of his sickness J never came to visit the deceased so despite knowing her name she did not know who the person was.

Submissions by the Administrator

30. She has identified the following as the issues for determination;
- a. Whether or not the grant issued to the Administrator on 27/11/2008 and confirmed on 29/01/2009 ought to be revoked?
 - b. Whether or not the grant issued to the Objector on 01/04/2010 and confirmed on 25/05/2010 should to be revoked?
 - c. Who should bear the costs of these proceedings?
31. On issue (a), she submits that the grant was lawfully issued and confirmed procedurally. She contends that the objector must sufficiently prove the grounds outlined in section 76 of the [Law of Succession Act](#).



32. As to whether the proceedings to obtain the grant were defective in substance, she submits that proof must be shown that; some mandatory procedural step was omitted or the deceased made a valid will and then a grant of letters of administration intestate was made instead of a grant of probate or vice versa.
33. With regard to her capacity, she submits that she approached the Court as a widow to the deceased having married him under customary law in 1979. She submits that the marriage was evidenced by a letter of confirmation of marital status which was authored by the area chief. She contends that being an adult of sound mind and disposition, she is capable of administering the estate. Further, she contends that the objector's application does not attempt to detail any flaw in the process of obtaining the grant in Nakuru HC Succession Cause No 437 of 2008.
34. As to whether there was material non-disclosure of facts, she submits that the objector must demonstrate that the process of obtaining the grant was marred with fraud and misrepresentation, concealment of material facts, false statements and untrue allegations of fact essential in point of law. She submits that the objector must show that failure to include her and her children in the petition was deliberate and that she (administrator) was fully aware of their existence. Further, she submits that it was incumbent upon the objector to demonstrate that the land known as L.R No. 12249/1XX was registered in the deceased's name in order to justify its inclusion in the petition.
35. It is also her submission that the objector did not prove that she was a widow to the deceased.
36. On issue (b), she submits that the mere fact that the grant was issued subsequent to the one issued to her (administrator) is sufficient evidence to demonstrate that the proceedings were defective in substance, irregular and an abuse of the Court process. She contends that the gazettment of the Nakuru Cause gives rise to a presumption that the objector was notified of the same. She relies on *Re Estate of Zakaria Lugonzo Amalemba (2021) eKLR* for the proposition that there can never be two grants in respect of one estate.
37. With regard to costs, she cites *Republic –vs- Rosemary Wairimu Munene, Ex-parte Applicant –vs- Ihururu Dairy Farmers Co-operative Society Ltd* where the Court held that:-

“The issue of costs is the discretion of the Court as provided in the above section. The basic rule on attribution of costs is that costs follow the event... it is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather, it is for compensating the successful party for the trouble taken in prosecuting or defending the case.”

Submissions by the Objector

38. The objector submits that in the oral evidence given in Court, the administrator confirmed that the deceased had a home in Mombasa where he would go and then return to Nakuru. Accordingly, she contends that the administrator was aware about her (objector) and deliberately omitted her from the proceedings.
39. As regards land parcel L.R No.12249/1XX, she wonders how the deceased could have sold the land to the administrator yet they resided on it until the deceased's demise. Further, she submits that the administrator was at a loss in explaining how she got married to the deceased and how the marriage was celebrated. That no photographic evidence was availed to show that such an important ceremony was conducted. She submits that having a child with the deceased does not prove the existence of marriage.



40. She submits that the administrator interacted with her (objector's) documents and willfully chose not to include the properties bearing her name and that of the deceased. She relies on *Re Estate of Kihara Thatu Gatu* (2019) eKLR where the Court stated that:

“Marriage is a serious union with profound legal and social ramifications. It cannot be second guessed. One is either married within any of the legally recognized systems or a marriage can be presumed within the parameters known in law.”

41. She also relied on *MWK –vs- AMW* (2017) eKLR where the Court held that:

“Since then, our case law has been consistent in following English Common law requiring that a presumption of marriage arises only when a person proves two factual predicates; Quantitative element-namely the length of time the two people have cohabited with each other and Qualitative element-namely, acts showing general repute that the two parties held themselves out as husband and wife. Factors tending to demonstrate these qualitative elements include whether the parties had children together, whether the community considered the two as husband and wife, whether the two carried on business jointly or whether they took a loan jointly, whether the two held a joint bank account and so forth.

These elements must be considered conjunctively and not disjunctively.”

42. Having looked at the applications, the replying affidavits, the rival submissions and entire record, it is my considered view that the only issue for determination is; which of the two grants should be revoked?

Which grant should be revoked?

43. The circumstances and grounds upon which a grant may be revoked are provided for in Section 76 of the *Law of Succession Act* 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 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 grant within one year from the date thereof or such longer period as the Court may 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 an inoperative through subsequent circumstances.

44. It is trite that there cannot be two grants in respect of one estate. The question is whether either party had the capacity to petition for the grant. S. 66 of the LOSA provides for preference to be given to certain persons to administer where deceased died intestate viz;

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference –

- (a) surviving spouse or spouses, with or without association of other beneficiaries;
- (b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;
- (c) the Public Trustee; and
- (d) creditors: (emphasis mine)

45. The deceased died intestate. Each of the parties claims to have been a spouse of the deceased.

46. Spouse is defined by the LOSA "spouse" means a husband or a wife or wives recognised under the Marriage Act (No. 4 of 2014); Both of them claim to be widows of the deceased. The LOSA states "wife" includes a wife who is separated from her husband and the terms "husband" and "spouse", "widow" and "widower" shall have a corresponding meaning; The objector produced a certified copy of 'An Entry of Marriage' which shows that she got married to the deceased under customary law on 20/10/1988. The marriage was registered by the registrar of marriages on 01/12/2010. Further, the objector testified that she had lived with the deceased for 26 years-from 1979 to 2005. She also produced two birth certificates for the children which she got with the deceased. Accordingly, it is evident that she was a spouse of the deceased.

47. As for the Administrator, her evidence was that she got married to the deceased under Miji Kenda customary law in 1978 and the union was blessed with one child. She testified that a traditional ceremony was conducted but the witnesses had passed on. She produced what she referred to as a certificate of confirmation of marriage and it is basically the chief's letter addressed to the District Civil Registrar, Nakuru. The chief confirmed that the administrator was the deceased's wife and requested the Registrar to issue the death certificate to her.

48. Apart from her oral evidence, nothing was tendered in evidence to show that indeed, a marriage under customary law took place in 1978. She said that her son was born in 1979. The certificate of birth was obtained on 25th September 2009 and indicates that he was born in Kisauni in 1979. The document to support her marriage is a letter from the chief Lanet dated 19th October 2007 to the Civil Registrar to issue MJP (who is his wife) with a certificate of death for CMG (deceased). It does not support her claims that they got married under Miji Kenda customary law and lived together as husband and wife from 1979 in Kirinyaga before moving to Nakuru. However her testimony that they moved to Nakuru in 2001 was not controverted. The objector confirms that the deceased moved to Nakuru in 2005 because of his health. There is therefore the probability that the administrator did live in Nakuru with the deceased long enough for the area assistant chief to certify that she was indeed the wife. In addition



there is also an undated letter from the objector to the administrator (MJP2) demanding that she vacates from a property (L.R 12249/1XX) which was initially registered in the deceased's name. This means that she was actually residing in the property. It is also evident from the objectors documents that her marriage with the deceased was customary marriage before 1988 when they solemnized their marriage. It means therefore that the deceased could have entered into another customary marriage before 1988 which would not be nullified by the solemnization of the marriage between the objector and the deceased. It is also curious that at the time the deceased passed on the objector was absent in his life and living with the administrator. That gap in their cohabitation is not explained by the objector in her testimony.

49. The conclusion that comes from these sets of facts is that the two parties each had an idea of the existence of the other party but neither went on to find out more. That explains the reason why the deceased would go live in Mombasa for some time, and move to Nakuru by himself when he fell sick. That explains deceased's two homes; one in Mombasa where he lived with the objector and the one in Nakuru where he lived with the administrator. It is also evident that when he moved to Nakuru due to ill health the objector never followed up on him until he died.
50. Hence I am persuaded that in the totality of all the facts before me these two answer to the definition of spouse or widow as provided for in the LOSA.
51. It goes without saying that the proceedings leading to issuance of grant to the objector were defective in substance for the simple reason that a grant had already been issued to the administrator. The fact that the Nakuru Cause was gazzeted gives rise to a presumption that the objector was adequately notified and on that ground alone, the grant issued to the objector comes up for revocation.
52. As regards the Nakuru Cause, the administrator was accused of concealing material facts in that she did not include the objector and her children in the proceedings. She was also accused of omitting land parcel No. L.R 12249/1XX in the list of assets. The administrator's evidence was that she did not know about them and the deceased never told her that he had another wife. Having looked at the evidence on record, there is really nothing to show that the objector and her children were known to the administrator.
53. As for the property in question It was her testimony that the property was bought by her father from the deceased at Ksh 200,000/=, when the deceased needed some money. She provided a sale agreement dated 14th June 2007 to that effect. That following the said purchase the property was registered in her name. She confirms that the property belonged to the deceased but upon the said purchase it was transferred to her.
54. I have looked at the documents with respect to this transaction. It is evident that the same is purported to have been sold by the deceased to his wife, the administrator at Ksh 200,000/- just a month before he died. Why would he sell the house they were living in to his wife? The claim by the administrator that it was her father who paid the money on her behalf does not add up as that statement is not supported by any other evidence. She said her father was JM but in other documents she says that she is also MJM. What I am saying is that I am not persuaded by the evidence that the deceased sold the house to the deceased just before his death.
55. In the end I find and hold as follows:
 - a. That the two parties herein are widows of the deceased.
 - b. The grant issued to the objector ought not to have been issued as there was one already in existence. On that basis alone the same is revoked together with all consequential transactions emanating from the same.



- c. Each of the widows had the right to file for the administration of the estate and the fact that the objector and her children were not included in the proceedings filed by the administrator, the grant issued to her was absent of material facts and the same is revoked together with all the consequential transactions.
- d. There was no transfer of the Nakuru property to the administrator and the same still forms part of the estate of the deceased.
- e. In the upshot each of the grants is revoked.
- f. A fresh grant to issue jointly to the parties who may file a joint summons for confirmation of grant, or, if that does not work either of them to file and serve the other.
- g. The Summons for confirmation of grant be filed within 45 days hereof.
- h. Each party to bear its own costs

Orders accordingly

DATED, SIGNED AND DELIVERED VIA EMAIL THIS 5TH DAY OF MAY 2023

.....

MUMBUA T. MATHEKA

JUDGE

