



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Wachira Wanjahi Mbogo (Deceased) (Succession Cause
18 of 2007) [2023] KEHC 18909 (KLR) (15 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18909 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION CAUSE 18 OF 2007
FN MUCHEMI, J
JUNE 15, 2023**

BETWEEN

SAMUEL MAINA WACHIRA 1ST APPLICANT

CHARLES MWITA WAMBUGU 2ND APPLICANT

AND

NDIRANGU WACHIRA WANJAHU RESPONDENT

RULING

1. This application dated January 27, 2022, brought under Section 47 and 76 (c) of the [Law of Succession Act](#) and Rules 44(1) and 73 of the [Probate & Administration Rules](#) seeks for orders of revocation of grant that was confirmed on July 3, 2018.
2. The respondent opposed the application through his Replying Affidavit sworn on May 9, 2022.

The Applicants

3. The applicants state that the grant confirmed on July 3, 2018 was obtained fraudulently by the making of false statements and concealment of facts material to the cause. It is argued that the grant was obtained without involving or notifying the applicants and as such they did not participate in the succession proceedings. It is averred that the applicants came to know of these proceedings when the respondent was in the process of executing grant. The applicants further state that the respondents obtained the grant after the death of one of the administrators, Simon Ndirangu Wachira, who died on June 9, 2015 without substituting him.

The Respondent

4. The respondent states that when the succession cause began, one Wanjahi Wachira and himself were the objectors and the 1st applicant's interests was being taken care of by the petitioner, Simon Wambugu



Wachira. Furthermore, the respondent states that although the 2nd applicant argues that he is a direct beneficiary, his status in the matter is vague as he is not a child or dependant of the deceased and was included in the Chief's letter as a beneficiary.

5. The respondent argues that the petitioner in the cause was represented by the firm of Mbao Gitahi & Co. Advocates and the court record shows that service was always effected to the said firm of advocates. It would be misleading for the applicants to allege that there was no service or that there was fraud or concealment of facts in the matter.
6. Moreover, the respondent avers that the interests of all heirs was taken care of in the distribution of the estate and that the 1st applicant got the rightful share. The respondent states that as per the share of the estate allocated to the beneficiaries, the estate has been transmitted. He further avers that he is the one who incurred all the expenses of the cause including that of transmission. He further states that for the Ngarengiro Settlement Scheme Plot No. 697, he has paid the outstanding arrears totalling to Kshs. 288,000/-.
7. The respondent argues that the application is aimed at delaying the proceedings which commenced in 2007. He further states that the applicants ought to have moved the court for substitution of the administrator or other beneficiaries who passed on during the pendency of the cause.
8. Parties disposed of the application by way of written submissions. The applicants did not file submissions despite their advocate Mbao Gitahi being granted a further (7) seven days beyond the earlier 14 days given to each party on March 29, 2023.

The Respondent's Submissions**

9. The respondent submits that the Summons for Confirmation of grant was filed on May 13, 2010 and the Protest was subsequently filed on July 20, 2010. The matter came up for hearing of the protest on June 11, 2018 and a hearing notice was served upon the firm of Mbao Gitahi & Co. Advocates who represented the petitioner and the beneficiaries from the 2nd house. The firm acknowledged service by signing the hearing notice on the reverse. The matter was subsequently fixed for hearing on July 3, 2018 and service was duly effected. The respondent further submits that the grant was confirmed on July 3, 2018. Thereafter the respondent submits that the summons general dated February 25, 2019 was then served which was scheduled for hearing on September 23, 2019.
10. According to the respondent, the counsel for the applicants Mr Mbao has not sworn an affidavit to deny that service was effected upon him or to explain his non-attendances. The applicants did not fault their counsel Mr. Mbao for not keeping them informed of the progress of the cause. The claim of the applicants is that they were not served with the pleadings, which the respondent contends is untrue. To support his contentions, the respondent has cited the case of *Re Estate of Macro Tindi* (Deceased) [2018] eKLR.
11. The respondent submitted that the applicants were granted several opportunities by the court to prosecute the protest. The respondent further argues that if the protestor was deceased at the time of confirmation, no evidence was presented to the court by his counsel to allow the issuance of relevant directions or orders for substitution. The respondent argues that counsel ought to have appeared in court and if indisposed or unavailable, he ought to have sent someone hold his brief or to explain the circumstances surrounding his non-attendances.
12. The respondent submits that he stands to suffer great prejudice if the application is allowed as he has incurred very high costs during the process of transmission.



Whether the applicants have presented sufficient evidence to warrant revocation or annulment of the grant.

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 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.
14. The deceased died on August 28, 1997 and was survived by his widow and nine children as follows:-
- a. Maria Muthoni Wachira – wife
 - b. Wanjahi Wachira – son
 - c. Ndirangu Wachira Wanjahi – son
 - d. Jane Wambui – daughter
 - e. Teresia Gathoni Wachira – daughter
 - f. David Macharia Wachira– son
 - g. Simon Wambugu Wachira – son
 - h. Boniface Taiti Wachira – son
 - i. Samuel Maina Wachira – son
 - j. Harun Kariuki Wachira – son
15. The background facts are that on January 15, 2007, Simon Wambugu Wachira petitioned for letters of administration intestate in this cause. Thereafter, two other sons of the deceased Ndirangu Wachira Wanjahi and Wanjahi Wachira filed an objection, an answer to petition and petition by way of cross application on October 9, 2009. On November 13, 2009, the court by consent of the parties appointed Ndirangu Wachira Wanjahi and Simon Wambugu Wachira as joint administrators to the estate.



16. On May 13, 2010, the respondent Ndirangu Wachira Wanjahi filed Summons for Confirmation of grant which was opposed by Simon Wambugu Wachira by way of an Affidavit of protest dated April 19, 2010. The court on April 1, 2011 gave directions that the protest ought to be heard by viva voce evidence and fixed a hearing date for September 6, 2017. The matter came up for the hearing of the protest on June 11, 2018 and the protestor was absent despite having been served by the opposite side. The protest was later dismissed for want of prosecution. The court then gave a date for hearing of the summons for confirmation of grant on July 3, 2018. On July 3, 2018, the protestor was absent again despite having been served as shown in the affidavit of service. The court thereafter confirmed the grant since there was no objection adopting the mode of distribution proposed by the applicant (now respondent) in the Summons for Confirmation of grant.
17. The applicants argue that the grant ought to be revoked as it was obtained fraudulently by making false statements and that there was concealment of facts claiming that they were not aware of the succession proceedings. The court record shows that the 1st applicant is a son to the deceased. The 2nd applicant contends that he is a direct beneficiary to the estate of the deceased. However, he failed to explain his relationship to the deceased or to state his interest in the estate. A further perusal of the petition for letters of administration filed on January 15, 2007, it is evident that the 1st applicant signed the consent to the making of the grant of letters of administration. This is evidence that he was aware of these proceedings from inception.
18. The record bears witness that the parties by consent on November 13, 2009 nominated two of their siblings as administrators of the estate. Thereafter, the respondent filed summons for confirmation of grant on May 13, 2009. The Summons for Confirmation of grant were opposed by only one beneficiary, Simon Wambugu Wachira who filed an Affidavit of protest but never prosecuted it. From the court record, the objector on three occasions, January 21, 2014, December 23, 2016 and September 6, 2017 fixed the protest for hearing at the registry and at all times when the protest was coming for hearing he was absent from court. Summons requiring attendance were issued but the protestor did not attend court. Whereas the applicants contend that the protestor died on June 9, 2015 neither his counsel nor the applicants ever attended court to pursue the protest or to apply for substitution. Furthermore, it is worth noting that the applicants in the current application are being represented by the same advocate who was representing the deceased administrator Simon Wambugu Wachira. The counsel has not sworn any affidavit to state that his client was deceased and neither did he make any application for substitution. The counsel has not made any attempt to explain his non-attendance to the court despite being on record for the respondent.
19. In regard to the failure of the surviving administrator to substitute the deceased administrator Simon Wambugu Wachira, it is important to look at the provisions of the law in such a situation. Section 81 of the *Law of Succession Act* provides:-

81 upon death of one or more of several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executors or administrators shall become vested in the survivor or survivors of them.
20. From the above provision, there was no need to substitute the deceased administrator as argued by the applicants. The surviving administrator was empowered by the law to proceed with execution of the grant.
21. It is noted that the 1st applicant was given his share of the estate together with other beneficiaries. He has not complained that the distribution of the estate was unfair or inequitable. The 2nd applicant has been referred to as a stranger in the estate and was shy to express his interest in the estate in these summons.



22. I am of the considered view that the applicants have not met the threshold of revocation of grant under Section 76. None of the grounds set out in the provision has been satisfied. Specifically, the applicants have fallen short of demonstrating any fraud on part of the respondents in obtaining the grant.
23. I find this application unmerited and dismiss it with no order as to costs.
24. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 15TH DAY OF JUNE, 2023.

F. MUCHEMI

JUDGE

Ruling delivered through video link this 15th day of June 2023.

