



In re Estate of Njoka Njanguru (Deceased) (Succession Cause 86 of 2010) [2023] KEHC 19085 (KLR) (14 June 2023) (Ruling)

Neutral citation: [2023] KEHC 19085 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
SUCCESSION CAUSE 86 OF 2010
LM NJUGUNA, J
JUNE 14, 2023**

BETWEEN

NGITHI NYAGA 1ST APPLICANT

JOSEPH NAMU NYAGA 2ND APPLICANT

AND

JEREMIAH NJUE NAMU RESPONDENT

RULING

1. Before this court is the summons dated August 23, 2016 which seeks for revocation and/or annulment of the grant of letters of administration made to the respondent in relation to the estate of the deceased herein.
2. The said summons is based on the grounds on its face and it's supported by the affidavit annexed to the application.
3. In a nutshell, it is the applicant's case that the said grant was obtained by means of untrue allegations of facts, fraudulently by making of a false statement or by concealment from court of something material to the case and the proceedings to obtain the grant being defective in substance. The applicant's claim is that the grant was defective in nature and substance by concealment to the court of the fact that she together with her family were disinherited by the respondent herein. It was submitted that the respondent's father in his affidavit in support of confirmation of grant indicated himself as the sole beneficiary of the estate of the deceased herein thus disinheriting the applicants who are the rightful beneficiaries of the estate of the deceased. In the end, the applicants urged this court to allow the application herein.
4. The application is opposed by the respondent vide his replying affidavit sworn on October 31, 2016 wherein he deposed that at the time of filing of the succession cause herein, the only surviving relative to the estate was his father. That the two land parcels Mbeere/Mbita/996 and Mbeere/Mbita/2114



- though belonging to his uncle, the deceased herein, it is his late father who pursued the said land parcels through the adjudication committee as the said parcels of land had been fraudulently taken away by third parties. He claimed that the applicants never utilized or lived on the parcels of land and given that his father was the only brother to the deceased herein, and having secured the said properties through numerous court cases, he is entitled to inherit the same. It was his contention that the applicants were not dependants to the deceased and therefore, the application herein should be dismissed.
5. Directions were taken that the application be canvassed by way of viva voce evidence and, thereafter, parties were to file written submissions and which directions all the parties complied with.
 6. The applicants submitted that the respondent through his father, filed the succession cause leading to the confirmation of the grant sought to be revoked without disclosing the same to the applicants herein. That when he applied for confirmation of the grant and distributed the deceased's estate, herein, he neither involved nor informed the applicants and did not obtain their consent. It was submitted that the respondent's father in his affidavit in support of confirmation of grant indicated himself as the sole beneficiary of the deceased's estate. The applicants reiterated that they are equally entitled to inherit the estate herein as the same is an entitlement. In the end, the applicants urged this court to allow the application herein.
 7. The respondent submitted that the estate herein relates to the brother of the original petitioner one Namu Njanguru who died before the cause could be concluded. It was submitted that the current petitioner was substituted in place of his late father and that the applicant's claim as grandchild and daughter in law to the intestate were not proved. That no evidence of marriage was tendered by the 1st applicant to show that she had been married by the son of the intestate. Reliance was placed on the case of *Memo v Fimnjaru* [2009] eKLR. Further that, the 2nd applicant and his alleged brother and sister did not produce any evidence to show that they are the grandchildren of the intestate and that their father was a son to the intestate. No birth certificate or any other evidence was tendered to support their claim. That the mere allegation that he is a grandson is not sufficient, more so due to the fact that the petitioner questioned his paternity.
 8. Similarly, it was argued that the evidence on record clearly shows that they have never utilized the estate in that they only attempted to build temporary iron sheet structures on the suit land when the case herein was still pending. That the applicants failed to demonstrate the requirements for revocation of grant as envisaged under section 76 a-e of LSA. Reliance was placed on the case of *Moses Parantai & Peris Wanjiku Mukuru* suing as the legal representatives of *Sospeter Mukuru Mbeere (Deceased) v Stephen Njoroche Macharia* (supra) and *Central Bank of Kenya Ltd v Trust Bank Ltd & 4 Others*. [1996] eKLR.
 9. The respondent submitted that were it not for his father, there would be no estate to inherit. That the applicants did not give any explanation why they did not participate in the numerous cases pertaining to the estate. They did not also explain why the intestate did not participate in the cases as it remained uncontroverted that only the petitioner participated. That the original petitioner expended numerous resources towards pursuing the case. This court was therefore urged to dismiss the application herein.
 10. I have perused the application herein, the response thereto by the respondent, the evidence on record and it is my view that the matter for determination is whether the orders sought herein can obtain.
 11. In determining the suit herein, the first question I need to consider is whether the respondent and / or his father had the right to apply for Letters of Administration. The applicants have submitted that they are the rightful beneficiaries of the estate herein while the respondent in denying the same stated that he does not know them and that they are not dependants of the deceased. It was his case that his father having spent a lot of money in recovering the estate herein, should be the rightful beneficiary.



12. The 1st applicant stated that her husband died in the year 1991 leaving them on land parcel Mbeere/Mbita/996 with her father in law. That he filed a succession cause in the year 2015 when she was issued with letters of administration in respect to the estate of the deceased. That she came to learn later on that the respondent had also filed a succession cause in relation to the estate herein in an attempt to inherit the whole of the estate through his father. Of importance to note is the fact that the aspect of the 1st applicant's marriage to the son of the deceased was neither brought to perspective nor was the same controverted or tested. The respondent's main argument was that he did not know the applicants herein as they did not depend on the deceased prior to his death. During the hearing, the respondent stated that he did not know the children of Njoka Njanguru as his father was better placed to do so and therefore, should there be an omission, the same ought to be blamed on his father.
13. The fact that the respondent herein did not know of the existence of the applicants, that in my view should not defeat their claim on the estate herein. The respondent did not deny the fact that the estate herein belongs to the deceased. In my view, the evidence by the applicants considered in totality seemed more credible than that of the respondent.
14. Section 66 of the *LSA* provides that preference has to be given to certain persons to administer a deceased's estate where the deceased died intestate and further that the court shall save as otherwise expressly provided, make the final discretion as to the persons or, person to whom a grant of letters of administration shall, in the best interests of all parties concerned, be made. It will however accept as a general guide the order of preference as set out in Section 66(a) – (d). Section 66 provides as follows:-
- “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 interest as provided by Part v;
 - c) the Public Trustee; and
 - d) Creditors:
- Provided that, where there is [atrial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.”
15. Further, guidelines on making of grants are found in Part VII Rule 26(1) and 2 of the *Probate and Administration Rules* which provides as follows:-
- 1). Rule 26 (1) Letters of Administration shall not be granted to any applicant without notice to any other person entitled in the same degree as or in priority of the applicant.
 - 2). An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of communication, or written consent in Form 38 or 39, by all persons so entitled in equality or priority be supported by an affidavit of the applicant and such other evidence as the court may require.”
16. From the evidence on record, the respondent stated that the two land parcels Mbeere/Mbita/996 and Mbeere/Mbita/2114 though belonging to his uncle, the deceased herein, it is his late father who pursued the said land parcels through the adjudication committee as the said parcels of land had been



fraudulently taken away by third parties. He claimed that the applicants never utilized or lived on the parcels of land and since his father as he was the only brother to the deceased herein, secured the said properties through numerous court cases, he is entitled to inherit the same. The applicants on the other hand contested that the deceased's estate ought to devolve to them as they are the rightful beneficiaries. That in as much as the respondent allegedly spent money in the process of recovering the parcels of land herein, the same has not been proved and further, the same has been overtaken by events.

17. A reading of Section 66 of *LSA*, the person given priority over an intestate is the surviving spouse and children. In this case, since the spouse and children were not alive, the spouse of the children of the deceased had priority to petition the court for letters of administration in respect to the estate herein as opposed to a nephew, the respondent herein who lacked the standing to move court under circumstances herein.

18. I now turn to address whether the grant issued to and confirmed to the respondent should be revoked. Section 76 of *Laws of Succession Act* provides 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 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:

19. The Respondent's justification for excluding the applicants from the proceedings in Succession Cause herein was that the deceased did not have dependents and further, it is his late father who pursued the said land parcels through the adjudication committee as the said parcels of land had been fraudulently taken away by third parties. He claimed that the applicants never utilized or lived on the parcels of land and that since his father as the only brother to the deceased, and had secured the said properties through numerous court cases, he was entitled to inherit the same.

20. In the case of *Jamleck Maina Njoroge Vs Mary Wanjiru Mwangi* (2015) eKLR the court discussed circumstances when a grant can be revoked. The court observed:

“11. The circumstances that can lead to the revocation of grant have been set out in Section 76 Law of Succession. For a grant to be revoked either on the Application of an interested party or on the court's own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.” (emphasis added.)

21. In the case of *Albert Imbuga Kisigwa v Recho Kawai Kisigwa*, Succession Cause No.158 of 2000, Mwita J. made remarks on the guiding principles for the revocation of a grant. He stated;

“(13) 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."

22. This Court has carefully considered the competing submissions of the parties herein. There is no doubt that the respondent substituted his father who died before the completion of the Succession Cause. The Respondent's father filed the Succession Cause claiming to be the sole beneficiary which this court has since found to be untrue as the rightful beneficiaries were not only alive but also their consent was never sought. Rule 73 of the *Probate and Administration Rules* provides that nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.
23. Further, *In Re Estate of Moses Wachira Kimotho (Deceased)* Succession Cause 122 of 2002 [2009] eKLR, the court made pronouncements on the importance of disclosing all material facts before a court of Law while seeking letters of administration and confirmation thereof. It observed;
- "I am certain that had the applicants been made aware of the application for the confirmation of grant by being served they would have brought to the fore their aforesaid interest in the estate of the deceased and the resultant grant would have taken care of those interests As it is therefore the grant was obtained fraudulently by making of a false statement and or concealment from court of something material to the cause. The respondent knew of the applicants' interest in the estate of the deceased yet she chose to ignore them completely in her petition of letters of administration intestate. She also ignored them completely when she applied for the confirmation of the grant.
24. I also wish to adopt the sentiments of my brother J. Gikonyo in *Re Estate of Julius Ndubi (supra)* when he said:-
- "...in any judicial proceedings, parties must make full disclosures to the court of all material facts to the case including succession cases.
- ...non-disclosure of material facts undermines justices and introduces festering waters into pure streams of justice; such must, immediately be subjected to serious reverse osmosis to purify the streams of justice, if society is to be accordingly regulated by law."
25. I am satisfied that, there is ample evidence that the Respondent through his father did conceal material facts. He went further and misrepresented facts to the court in order to defraud the applicants of their inheritance. The applicants have demonstrated that the respondents grant was fraudulently obtained and there was concealment of material facts and misrepresentation.
26. Further, the court notes that the respondent stated and further annexed evidence of how his father and himself spent money in attempt to keep the estate herein off the hands of third parties; the applicants in response submitted that the same was far from the truth. The court has perused through the said documents and finds that indeed, the respondent's father and equally the respondent herein had for sometime prosecuted cases in relation to a part of the estate herein. Further receipts from the advocate were also attached to reinforce the averments by the respondent herein.
27. Put differently, it is outright that the respondent is trying to assert his rights as a creditor to the estate. Under the law of succession, debts and liabilities take precedence over distribution of the estate. They



should be settled first before the estate is offered for distribution to the beneficiaries. What should be available at distribution should be the net intestate estate that is after paying off debts and liabilities, or taking away what is due to the creditors, liabilities and purchasers.

28. In my considered view, that is the spirit of section 83(d), (e) and (f) of the LSA; thus all the debts of the estate are to be ascertained and paid out; after which the administrators ought to produce a full and accurate inventory of the assets and liabilities of the estate, and a full and accurate account of all their dealings in the estate up to the date of the account; and after that, to distribute all the assets that remain after payment of expenses and debts amongst the persons beneficially entitled.
29. Section 83(d), (e) and (f) of the Law of Succession Act does not make any reference to distribution of the net intestate estate, although the language in section 83(f) of the Law of Succession Act is wide enough to cover that. The term “net intestate estate” is specifically used in Part V of the Law of Succession Act, and particularly at sections 35, 36, 38, 39, 40 and 41. The provisions provide that what is for distribution, in the event of intestacy, would be the net intestate estate. The terms “net estate” and “net intestate estate” are defined in section 3(1) of the Law of Succession Act, as follows:
- “... “net estate” means the estate of a deceased person after payment of reasonable funeral expenses, debts and liabilities, expenses of obtaining probate or letters of administration, other reasonable expenses of administration and estate duty, if any;
- “net intestate estate” means the estate of a deceased person in respect of which he has died intestate after payment of the expenses, debts, liabilities and estate duty set out under the definition of “net estate”, so far as the expenses, debts, liabilities and estate duty are chargeable against that estate...”
30. It would be useful, and would reduce lengthy litigation at confirmation of grant, if administrators were to settle the debts of the estate prior to applying for confirmation of grant, so that the proposals placed before the court at confirmation would relate only to the net estate, and limited to the survivors and beneficiaries. Debts are often contested by the administrators themselves or the survivors and beneficiaries and it would help if those contests are kept out outside of the confirmation process.
31. In the case herein and given that the grant has already been confirmed, it would be useful if the respondent sought for compensation in a different suit.
32. In view of the foregoing I find that the grant issued to the respondent herein ought to be revoked and the same is hereby revoked. Each party to bear its own costs of the summons.
33. It is hereby ordered.

Delivered, dated and signed at Embu this 14th day of June, 2023.

L. NJUGUNA

JUDGE

.....**for the 1st Applicant**

.....**for the 2nd Applicant**

.....**for the Respondents**

