



REPUBLIC OF KENYA



KENYA LAW

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**In re Estate of Gladys Muthondu Katula alias Muthondu Katula (Deceased)
(Succession Cause 812 of 2012) [2023] KEHC 21239 (KLR) (24 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21239 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE 812 OF 2012**

MW MUIGAI, J

JULY 24, 2023

**N THE MATTER OF THE ESTATE OF GLADYS
MUTHONDU KATULA ALIAS MUTHONDU KATULA
(DECEASED)**

BETWEEN

MARY NTHENYA MUNYAO APPLICANT

AND

HENRY MUTISYA KATULA ADMINISTRATOR

RULING

Background

1. The deceased herein died on June 7, 2000.
2. The Petition for letters of administration intestate was filed on August 16, 2012 and the Grant of letters of Administration Intestate were issued on October 18, 2012.
3. The beneficiaries of deceased's estate as per the Petition are;
 - a. Sarah Miriam Katula
 - b. Joseph Muyendi Katula
 - c. Philip Munyao Katula
 - d. Henry Mutisya Katula
 - e. Danmus Mutuku Katula
 - f. Elizabeth Kalekye Katula



- g. Milcah Mwikali Katula
 - h. Christine Mutile Katula
 - i. Fiddan Musau Katula
4. The assets that comprise of the deceased's estate are as follows;
- a.Iveti Mungala/1126
5. After gazettelement of the Petition on September 28, 2012 the grant was issued to Henry Mutisya Katula on October 18, 2012
6. Summons for confirmation of grant dated November 19, 2018 was/were filed on May 7, 2019 and Further Affidavit by Administrator filed on July 16, 2019 and Certificate of confirmation of grant issued on October 29, 2019.

Summons For Rectification & Confirmation Of Grant

7. Summons for rectification and confirmation of grant dated January 28, 2021 was filed by Peninah Muyendi Kalulu and sought prohibition orders as the distribution was ongoing and the portions were not equivalent to the 2.5 HA or 6.2 acres of LR Iveti/Mungala/1126.

REPLYING AFFIDAVIT

8. The Administrator filed Replying Affidavit on February 17, 2021 and deposed that the Application was not merited and was to delay the conclusion of distribution of the deceased's estate and nothing will be achieved as the family agreed to the mode of distribution. Secondly, the Applicant did not portray the true picture of events as the whole family has no issue with distribution of the estate save for the Objector Applicant Peninah Muyendi Kalulu who was stubborn and did not cooperate with others.

The court upon hearing the matter issued among other orders that;

- i. Application be served for further orders on February 23, 2021
 - ii. Let there be Stay of Confirmation of Grant as regards Land Parcel No. Iveti/Mungala/1126 pending further orders
9. On February 23, 2021, the said summons came for hearing and the court issued orders that;
- a. Let the Machakos County Surveyor in conjunction with the Advocates for the parties visit the suit property and make provision for requisite access roads and file a report showing the remaining portion of land.
 - b. Mention for further orders on May 17, 2021.
 - c. Interim orders be and are hereby extended.

Summons For Revocation Of Grant

10. On March 2, 2021 Summons for revocation of grant or annulment of grant dated February 25, 2021 was filed by Mary Nthenya Munyao and she raised issues/sought orders that the grant issued to Henry Mutisya Katula be revoked/annulled; the estate of the deceased to be preserved and the Court appoints new Administrators.



11. The Applicant Mary Nthenya Munyao deposed that the Administrator refused to proceed diligently with the process of administration of deceased's estate.
12. The Administrator was alleged to have refused to render accounts on the progress of administration of deceased's estate.
13. The Administrator was alleged to have refused to sign the requisite transmission forms in favor of the beneficiaries.
14. The beneficiaries will suffer irreparable losses.

Replying Affidavit

15. The Respondent/Administrator filed Replying affidavit on March 9, 2021 and he deposed that he did not refuse to distribute the estate of the deceased but there was an application to correct the grant of confirmation of grant before distribution.
16. There were also stay orders which were lifted on February 23, 2021 and County Surveyor was to conduct survey and provide the court with the Report and that the beneficiaries filed application contesting the mode of distribution of the estate of the deceased.
17. The administrator denied meddling with estate and allocating himself a larger portion of land.
18. The Administrator deposed that the deceased while alive allocated property to 5 sons and 1 daughter to settle on the property and they are settled and have put up houses and are settled.
19. The administrator disclosed that beneficiaries sold land and should await the distribution as per survey/subdivision of the estate is completed.
20. On perusal of the Application the court directed that;
 - a. The application be served for further orders on March 10, 2021.
 - b. The estate of the late Gladys Muthondu Katula alia Muthondu Katula (deceased) be preserved pending the hearing and disposal of the application.
21. On July 21, 2022 the matter came up for hearing and the court directed that the surveyor proceeds to implement the order issued on February 23, 2021.

SUMMONS

22. The Applicant Mary Nthenya Munyao filed Summons dated 30.08. and upon consideration by the court, the following orders were issued;
 - a. The application dated August 30, 2022 be and is hereby certified urgent.
 - b. Order of stay of the orders made on July 21, 2022 be and is hereby issued implementing the orders issued on February 23, 2021 and all consequential orders made thereto pending hearing and determination of this application.
 - c. The application be served for further orders on September 21, 2022.

Application For Rectification Of Grant

23. The Administrator filed Summons for rectification of grant dated December 28, 2022 filed on February 7, 2023 and included property left out during filing of the Succession Cause LR 2375



Katelembo Athiani Muputi Farming & Ranching Cooperative Society Ltd as the transfer process commenced and the Lands Office was awaiting Rectified Certificate of Confirmation of Grant. The suit property to be transferred and registered in the name of the Purchaser Margaret Esther Matee.

24. The court on February 23, 2023 directed that the application to proceed is that for revocation of grant dated February 25, 2021 filed on March 2, 2021.

Summons For Revocation Or Annulment Of Grant Dated February 25, 2021

25. The Summons seek the following orders;
- a. Spent.
 - b. The Grant of Letters of Administration intestate issued herein to the Administrator/ Respondent and confirmed on 9.10.2019 be revoked and annulled.
 - c. Spent.
 - d. The Honourable court be pleased to appoint new administrators of the estate from amongst the beneficiaries and fresh grant of letters of administration be issued to them jointly.
 - e. The costs of this application be borne by the administrator/respondent.
26. The summons is supported by the Affidavit of Mary Nthenya Munyao who deposed that she is one of the beneficiaries of the estate and since issuance of the grant, the administrator has failed to diligently complete administration of the estate by failing to distribute and transfer to the beneficiaries of the estate their respective shares. It was contended that prior to the demise of the deceased herein, she had subdivided the sole asset being Iveti/Mungala/1126 to five of her children including the administrator who subsequently sold his entire allocated portion to third parties prior to confirmation of the grant making it difficult to distribute the estate and is thus guilty of intermeddling.
27. It was deposed that the administrator could not be trusted to faithfully complete administering and/or distributing the estate. It was alleged that since issuance of the grant, the Administrator has become disinterested in completing the process of administration hence the grant has become inoperative and useless. Further, that the Administrator has refused to render an account and/or brief some beneficiaries on the process or progress of administration of the estate.

Replying Affidavit

28. The administrator in his response filed on March 8, 2021 denied failing to distribute the estate and stated that stay was granted as a result of an application before the court. The orders were lifted on February 23, 2021 where a county surveyor was/is to make a report and the matter has a date for determination of what portions each beneficiary should get. He denied meddling with the estate and stated that once stay was lifted, he has been following the court order to enable the County Surveyor make a report as directed. That whatever happened took place under the deceased's watch and should not be subject of succession unless the administrator had taken a bigger share than what is due to him. He contended that he is diligent and all the other beneficiaries have faith in him.
29. It was averred that the objector is a resident in the property and enjoying the benefit of cultivating unoccupied spaces therefore it makes sense for her to continue enjoying the status quo. That she has started construction of rentals on a portion of the land away from her homestead against the administrators advise.



30. That the Objector was aware that the deceased only directed where her children should settle pending final sub-division. Further, that the objector was also aware that the Administrator was not the only one who had sold part of the perceived parcels before the grant was given but even five of the beneficiaries including the objector's husband.
31. Christine Mutile Mwangi, a beneficiary of the estate also filed a replying affidavit on March 8, 2021 in which she stated that the deceased, her mother, directed where her five sons and one daughter (not married) should settle where they had put up their houses pending sub division and instructed one of her sons in law, now deceased, to hive out portions around each homestead to enable all beneficiaries get their rightful share.
32. She deposed that she had confidence in the capacity of the Administrator to do justice in all administration of the estate by subdividing the parcel of land equally. She averred that some of the beneficiaries had already disposed of some pieces of land by the time of grant and the purchasers had built residential houses and settled on the land which had been factored in by the Administrator in the mode of distribution. She said she understood the complexity of the subdivision exercise and knew the administrator had not stalled the process thus considered the application to be in bad faith.
33. She said she was aware that the administrator had sold off part of the parcel allocated for his homestead way back before the grant was issued and the rest of the brothers including her late husband. Further, that the sub division process was stopped by the Honorable court and not the Administrator.

Further Affidavit

34. The objector in response filed this affidavit and stated that prior to the death of the deceased herein, she shared out her parcel of land and prior to confirmation of the grant, the administrator with the concurrence of all beneficiaries swore an affidavit on July 2, 2019 in support of the Summons for Confirmation of grant capturing the wishes of the deceased. Further that the deceased daughters vide an affidavit sworn on November 19, 2018 acknowledged and acquiesced to the deceased wishes on how her property ought to delve.
35. Parties filed written submissions.

Submissions

Protestor's Submissions

36. The objector filed submissions on March 17, 2023 and while relying on the case of Re estate of Prisca Ong'ayo Nande (deceased) [2020] e KLR and section 76 of the LSA that submitted that the further affidavit sworn on 2.07.2019 captures the agreed mode of distribution which was consented by all beneficiaries and by recording their consent which was recorded in court during confirmation. It was submitted that the further affidavit was filed for purpose of introducing Peninah Kalulu muyendi, a co wife of Margaret Mumbua Muyendi.
37. It was contended that the deceased declared her wishes on how her property was to be shared and this was buttressed by the affidavit of November 19, 2018 by Elizabeth Kalekye Mathula, Milcah Mwikali Katula & Christine Mutile Mwangi who acknowledged and acquiesced to the deceased's wishes on how the estate should be distributed. It was submitted that the certificate of confirmation of grant issued on 19.10.2019 did not follow the agreed mode of distribution.
38. Whereas the applicant is entitled to inherit 0.88Ha to hold in trust for herself and other beneficiaries as specified under paragraph 3 (d) on the schedule of distribution in the further affidavit sworn on



July 2, 2019, her share has been reduced to 0.64ha in the certificate of confirmation of grant and also included three other beneficiaries who had renounced their interest in the estate. It was submitted that there was unlawful redistribution and the court was urged to revoke the grant, if not then issue a fresh grant of confirmation.

Administrator's Submissions

39. The Administrator filed submissions on April 5, 2023 in which it was submitted that no beneficiary listed in the certificate of confirmation had renounced their interest in the estate vide affidavit filed on May 7, 2019 was not true as a dispute arise in court and the court directed parties to sit and agree on the mode of distribution. That there was no waiver disclosed in the affidavit. Further, the court had already dealt with this affidavit and cannot revisit the same. She signed the consent and all the issues she is raising now were within her knowledge at the time of confirmation of the grant.
40. That the deceased had not apportioned any beneficiary a certain number of acreage, she only expressed her desire which was never reduced into writing and having died intestate then the Law of Succession comes into play. Reliance was placed on the cases of re estate of John Musambayi Katumanga – deceased (2014) e KLR, Re estate of Chesimbili Sindani (deceased) [2021] e KLR AND Njiru Njamiu & 2 others vs Njeri Njamiu & 2 others [2021] e KLR.
41. It was submitted that none of the grounds for revocation of grant under section 76 of the LSA Act had been proven. The Court was asked to dismiss the application as it was not made in good faith.

Determination

42. The Court perused the Summons for Revocation of Grant and other Applications and their responses thereto and the submissions on record and the issues that arise are;
 - a. Whether the confirmed grant issued on October 9, 2019 should be revoked and annulled
 - b. Whether a new grant is issued and administrators should be appointed.
43. It is not in dispute that the estate property being Iveti/Mungala/1126 to five of the deceased children herein and that each of them has a portion of the same. The objector takes issue with the mode of distribution in the confirmed grant and what is on the ground.
44. Summons for rectification and confirmation of grant dated January 28, 2021 was filed by Peninah Muyendi Kalulu and sought prohibition orders as the distribution was ongoing and the portions were not equivalent to the 2.5 HA or 6.2 acres of LR Iveti/Mungala/1126.
45. The Trial Judge Hon. G.V. Odunga ordered on February 23, 2021
 - Let the Machakos County Surveyor in conjunction with the Advocates for the parties visit the suit property and make provision for requisite access roads and file a report showing the remaining portion of land.
46. To date, the Court orders have not been complied with that is the County surveyor visiting the suit property that comprises the estate of the deceased so that each beneficiary obtains their beneficial interest as per the certificate of confirmation of grant and obtains separate new title to the property.
47. Instead there issues raised by beneficiaries as follows; there have been allegations of settlement on the land by Beneficiaries without survey /subdivision as ordered by the Court. There are also allegations on the exact portion each beneficiary is entitled to. There are allegations that widows of deceased sons of the deceased are settled on the deceased's property and seemingly have more say, whereas biological



daughters of the deceased are left out on claims that they renounced their entitlement and that the deceased made her wishes known on distribution of the estate; that 5 sons and 1 daughter would inherit the land and that the Administrator was gifted more land than other beneficiaries and that the Administrator sold property not included in the Summons for Confirmation but included in the Rectification of grant and apportioned to the buyer one Margaret Esther Matee.

48. This Court notes with concern due to the above issues raised by beneficiaries there is a back and forth on the subdivision of this property caused by various parties that has led to a stalemate on this matter proceeding for hearing and determination of the Application(s) and non-compliance of Court orders.
49. The Court also issued stay orders twice on the issue of the surveyor visiting the property to ascertain the status of the suit property that comprises of deceased's estate and distributed as the confirmed grant so as to enable the Court arrive at a just conclusion.
50. Secondly, revocation of grants is provided for extensively under Section 76 of the [Law of Succession Act](#), Cap 160, Laws of Kenya which states 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 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 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 and inoperative through subsequent circumstances.”

51. The onus is on the Applicant to prove that there is any of the grounds for revocation that have been satisfied in the above section for the court to exercise its powers and revoke the confirmed grant. The Applicant contends that the Administrator sold his entire allocated portion to third parties prior to confirmation of the grant which has not been denied by the Administrator. I note that the administrator and Christine Mutile Mwangi have also confirmed that some of the beneficiaries have already disposed of some of the pieces of land by the time the grant was issued and the purchasers have built residential houses and settled on the land. This includes part of the portion allocated to Applicant's husband. A fact that was not denied by the Applicant.



52. First and foremost, the administrator and the beneficiaries should be aware that any action taken before the grant was confirmed was/is illegal and amounts to intermeddling with the estate of the deceased. I am guided by the case of *In re Estate of Benson Maingi Mulwa (Deceased)* [2021] eKLR where Odunga J as he then was stated as follows;

“In my view since intermeddling can be committed even by administrators, any person interested in the estate of a deceased person as a beneficiary or otherwise is properly entitled to move the court and seek orders intended to preserve the estate.”

53. Section 45 LSA provides that;

No intermeddling with property of deceased person

- (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
- (2) Any person who contravenes the provisions of this section shall—
 - (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
 - (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.

54. The Court refers to the case of *In re Estate of M’Ngarithi M’Miriti* [2017] eKLR it was held that:

“Whereas there is no specific definition provided by the Act for the term intermeddling, it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. The category of the offensive acts is not heretically closed but would certainly include taking possession, or occupation of, disposing of, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the *Law of Succession Act*. I should add that any act or acts which will dissipate or diminish or put at risk the free property of the deceased are also acts of intermeddling in law. I reckon that intermeddling with the free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or fine or both under section 45 of the *Law of Succession Act*. That is why the law has taken a very firm stance on intermeddling and has clothed the court with wide powers to deal with cases of intermeddling and may issue any appropriate order(s) of protection of the estate against any person.” Emphasis added.

55. All the beneficiaries of the estate herein who sold a portion of the land before the grant was confirmed can be charged with intermeddling and those acts constitute illegal acts. However, as it stands no evidence has been presented of any particular party intermeddling and the same remain allegations until an inventory is done or evidence of the same is presented.

56. Back to the issue of whether the grant should be revoked or annulled, I have perused the affidavit in support of the summons and the reasons advanced for the same are that the administrator has engaged in intermeddling and cannot be trusted with administering the rest of the estate. That having sold his



entire allocated portion to third parties, it is extremely difficult for other beneficiaries to administer the estate as ordered by the court in the confirmation of grant.

57. Upon perusal of all the grounds presented under Section 76 of the LSA, this Court from the evidence on record finds as follows;

- i. the Court orders of maintenance of status quo and County Surveyor to survey the property and determine each beneficiary's entitlement what was/is not complied with to date according to the confirmation of Grant;
- ii. The Administrator has/did not provide Accounts to the beneficiaries on administration of the deceased's estate
- iii. There are allegations and counter allegations by and against Administrator and Beneficiaries that they have sold portions of land
- iv. The confirmation of grant was issued on 7.05.2019 and since then there have been numerous applications by parties to rectify grant and /or revoke the grant which discloses an impasse on distribution of the estate of the deceased.

58. In Re Estate of Prisca Ong'ayo Nande (Deceased) [2020] eKLR the Court observed;

“Under section 76, a court may revoke a grant so long as the grounds listed above are disclosed, either on its own motion or on the application of a party. A grant of letters of administration may be revoked on three general grounds. The first is where the process of obtaining the grant was attended by problems. The first would be where the process was defective, either because some mandatory procedural step was omitted, or the persons applying for representation was not competent or suitable for appointment, or the deceased died testate having made a valid will and then a grant or letters of administration intestate was made instead of a grant of probate, or vice versa. It could also be that the process was marred by fraud and misrepresentation or concealment of matter, such as where some survivors are not disclosed or the applicant lies that he is a survivor when he is not, among other reasons. The second general ground is where the grant was obtained procedurally, but the administrator, thereafter, got into problems with the exercise of administration, such as where he fails to apply for confirmation of grant within the time allowed, or he fails to proceed diligently with administration, or fails to render accounts as and when required. The third general ground is where the grant has become useless and inoperative following subsequent circumstances, such as where a sole administrator dies leaving behind no administrator to carry on the exercise, or where the sole administrator loses the soundness of his mind for whatever reason or even becomes physically infirm to an extent of being unable to carry out his duties as administrator, or the sole administrator is adjudged bankrupt and, therefore, becomes unqualified to hold any office of trust.”

59. For these reasons, the Court finds that the Administrator has not been diligent with the administration of the estate and there is no inventory on record that the grant may become useless and inoperative through subsequent circumstances.

60. In conclusion, the grounds provided under Section 76 (d) (2) of the LSA have been satisfied and the Court ought to revoke the grant. However, to cater for the interests of ALL beneficiaries and expedite the matter, this Court declines to grant the prayer for revocation, but instead under Section 66 LSA enters the names of the applicant Mary Nthenya Munyao & Fiddan Musau Katula in the grant as Co-Administrators jointly with Henry Mutisya Katula.



61. To hasten the process, it is for the benefit of all parties and in the interest of justice after consultations that the surveyor visits the estate property and comply with the orders of February 23, 2021. That way the conclusion of administration and distribution of the estate will be achieved.

Disposition

In conclusion, the Court directs as follows;

1. The Summons for revocation or annulment of grant dated February 25, 2021 is compromised as follows;

The grant shall be issued and now include Co- Administrators appointed by the Court vide Section 66 LSA

- a. Mary Nthenya Munyao
- b. Fiddan Musau Katula with
- c. Henry Mutisya Katula

2. The Administrators shall facilitate negotiations between the family members and/or clan with a view to an amicable agreement and if not consider Court annexed mediation and thereafter file Amended Summons for Confirmation of Grant with consents/protests of parties.

3. If ALL beneficiaries agree to enforce Court orders of February 23, 2021 of having survey done of each beneficiary's portion.

4. In the meantime, for 60 days, there shall maintenance of status quo as of today during delivery of Ruling, each beneficiary to remain in situ where settled on the deceased's estate suit property, permanent structures livestock and/or agricultural produce shall not be destroyed or demolished until Amended Summons of Confirmation is filed or survey completed as ordered on February 28, 2021.

5. Further Mention for directions shall be on October 9, 2023.

6. This being a family dispute, each party shall bear their own costs.

It is so ordered.

**DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 24TH JULY, 2023
(VIRTUAL/PHYSICAL
CONFERENCE).**

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

MR. MUSAU H/B MR. MUSYIMI -FOR THE APPLICANT

MR WERE - FOR THE ADMINSTRATORS

PATRICK - COURT ASSISTANT

HIGH COURT SUCC CAUSE 812 OF 2012 MHC	0
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