



**In re Estate of Francis Maina Kabiru (Deceased) (Succession Cause
2484 of 2007) [2023] KEHC 21800 (KLR) (Family) (21 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21800 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 2484 OF 2007
PM NYAUNDI, J
JULY 21, 2023**

BETWEEN

ROSE WANJIKU WAMAE APPLICANT

AND

JECINTER WAITHIENGA WACHIRA 1ST RESPONDENT

PURITY WAITHIEGENI MAINA 2ND RESPONDENT

JUDGMENT

1. Vide Summons for Revocation of Grant of Letters of Administration dated 8th August 2008, presented under Section 76 (b) of the [Law of Succession Act](#) and Rule 44 and 73 of the Probate and Administration Rules the Applicant seeks for orders that-
 - a. The grant of letters of Administration made out to Jecinter Waithiegeni Wachira And Purity Njeri Maina herein be revoked and/ or annulled on the grounds that the same were obtained fraudulently by concealment from the Court material facts.
 - b. Spent
 - c. The Respondent be condemned to pay the costs of this application.
2. The Summons is supported by the Affidavit of the Applicant sworn on 8th August 2008 and further Affidavit sworn on 17th December 2008. The Respondents oppose the Application and have sworn an affidavit in opposition by the 1st Respondent on 5th December 2008.
3. The matter proceeded by viva voce evidence in open Court on 26th April 2023



Summary Of The Applicants Case

4. PW1, Rose Wanjiku Wamae is the Applicant. She is the mother to Charity Maureen Mumbi Maina, whom she sired with the deceased arising out of an intimate relationship with the deceased in. She produced birth certificate serial no. xxxx dated 19th August 1991 and immunization card for the Child that identifies the deceased as her father.
5. As proof of kinship in addition to the birth certificate and clinic (immunization) card, she presented DNA Test results from Nairobi Hospital dated 6th October 2009. The samples were collected from a brother of the deceased Stephen Muriuki and the Child along side the Applicant. The report indicated that the results were not conclusive in determining whether Charity was a niece to Stephen Muriuki.
6. It is her evidence that the Deceased was present in the life of the Child. Attending her birthday parties, school events and other social activities. She submitted photographs as evidence of this, showing the deceased at different events with the Child.
7. On the basis of this she seeks that the grant be revoked and that Charity Maureen Mumbi be included among the beneficiary of the estate.
8. On cross examination she admitted that the report on the DNA Analysis was not conclusive and stated that after the 1st Respondent refused to avail her children the next best bet was the brother of the deceased. She concedes that she did not apply to the Court to compel the other children of the deceased to undertake the DNA test.
9. She contended that the Respondent while Petitioning for grant concealed the fact that the deceased had another child, a fact within her knowledge.
10. She does not know if the deceased introduced the child to the Respondent. She confirmed that she and the Child attended the burial of the deceased and was introduced as a friend of the deceased who had a child with him.
11. She stated that the deceased introduced the child to his brother Stephen Muriuki. She moved to revoke the grant after she learnt that the Respondent had excluded the minor from the estate.
12. On re-examination she reiterated that she did not seek to be recognised as a wife but sought to have her daughter recognised as a beneficiary. She contends that at the time of the burial the 1st Petitioner knew her very well. She pointed out that the deceased had introduced the child to his family members.
13. PW2 Duncan Ojiambo relied on his witness statement dated 27th November 2008. At the material time he was a teacher at Soweto Academy Primary School. The Child, Charity Wambui Maina was a student there. He was her class teacher. The Child joined the school in 2002 and left in 2005 after sitting her KCPE Exam.
14. He says he met the deceased once when he came to pay fees for the Child and asked for permission to leave with her to take her shopping. And returned her to school in the company of her mum (Applicant)
15. He also remembers seeing him during the class 8 graduation ceremony.
16. On cross examination he confirmed that he did not work in the Cash office. He was certain the Applicant is the mother of the child.
17. On re-examination he confirmed that one of the necessary documents at the time of registering the student in school was the birth certificate as it provides that names of the parents.



18. PW3 Charity Maureen Mumbi at the time the matter was presented in Court she was a minor. She knew the Deceased as her father and used his name 'Maina' He undertook parental responsibility towards her. She stated that he would attend her birthday party accompanied by his other children. She attended the burial of the deceased, she was not introduced. At that time her paternity was not denied.
19. On cross examination, she confirmed that the Application was filed when she was a child, she had not applied to take over its prosecution after she became an adult. The Deceased had not introduced her to his children.
20. On re-examination she stated she would like to be an administrator to the Deceased's estate.
21. At the Close of the Applicants Case, the 1st Respondent testified as the sole witness of the Respondents case.
22. DWI Jecinta Wathiegeni Wachira stated that she was the wife to the deceased having been married on 4th July 1997 as per marriage certificate serial number 71844.
23. She stated that she was not aware that the Deceased had a child with the Applicant and that the Applicant never disclosed this to her at any time, including at the burial of the deceased when those with claims against the estate of the deceased were invited to do so.
24. She asserted that the Applicants had not discharged the burden of proving their case and that the Birth Certificate, DNA results were not sufficient to establish that the deceased was the father of the Charity.
25. She stated that the authenticity of the birth certificate was in question.
26. At the close of their respective cases each of the parties submitted submissions.

Summary Of The Applicant's Submissions

27. The Applicant identifies the following issues as falling for determination
 - a. Whether Charity Maureen Mumbi is a biological daughter of the deceased and thus a beneficiary of his estate.
 - b. Whether the Applicant's motion meets the threshold for revocation of a grant for representation.
 - c. Whether Charity Maureen Mumbi should be enjoined as a co- administrator of the Estate of Francis Maina Karaibu.
28. On the first issue, whether the Deceased is the father of Charity Maureen Mumbi, the Applicants urge that they have established this relying on the DNA results, birth certificate and the immunization card, and assert that the evidence has not been controverted.
29. The Applicants rely on the decisions in Wilfred Koinange Gathiomi v Joyce Wambui Mutura & Anor [2016] eKLR, Re Estate of Jackson Nicholas Kyengo Mulwa (Deceased) [2021] eKLR and Gitarau Peter Munya vs Dickson Mwenda Kithinji & 3 Others [2014] eKLR
30. On the 2nd issue, whether the Applicant has met the threshold for revocation of a grant of representation. It is alleged that at the time of filing of the Petition the Respondents were aware that the 2nd Applicant being a child was a beneficiary to the estate and the decision to exclude her was therefore deliberate, fraudulent and malicious and therefore fell within the provisions of Section 76 of the [*Law of Succession Act*](#).



31. For this proposition the Applicants rely on the decisions in *Jamleck Maina Njoroge v Mary Wanjiru Mwangi* [2015] eKLR and *Re Estate of Julius Ndubi Javan (Deceased)* [2018] eKLR
32. On the 3rd Issue Whether Charity Maureen Mumbi should be enjoined as a co- administrator of the Estate of Francis Maina Karaibu. While conceding that the 1st Respondent as the widow has the priority in applying for grant of letters of administration the Applicants aver that her conduct demonstrates she will not act in the interests of Charity Mumbi.

Summary Of The Respondents' Submissions

33. The Respondent contend that the Applicants have not discharged their obligation under Section 107 of the *Evidence Act*. Further that the Applicants have not succeeded in proving any fraud or deliberate concealment to court of any information.
34. The Respondents contend that paternity having been challenged the best evidence was DNA testing. For this proposition the Respondents rely on the decision in *Wilfred Koinange Gathiomi vs Joyce Wambui Mutura & Anor* [2016] eKLR and *Jackson Nicholas Kyengo Mulwa (Deceased)* [2021] eKLR.
35. The Respondent further distinguishes the authorities relied on by the Applicant as it is submitted that in this case there was no evidence of defective proceedings or non-disclosure of material facts.
36. Finally, it is contended that as widow of the Deceased the 1st Respondent is the proper person to apply for letters of administration.

Analysis And Determination

37. Having reviewed the pleadings, evidence submitted rival submissions, authorities cited and the law I discern that the issue that arises for determination is whether Charity Maureen Mumbi is a child of the deceased. The determination of the other issues which are-
 - a. Whether Charity Maureen Mumbi is entitled to a share of the deceased's Estate
 - b. Whether the grant should be revoked
 - c. Whether Charity Maureen Mumbi should be appointed to administer the Estate of the deceased
 - d. Who should pay the Costs; will depend on the outcome of the resolution of whether paternity has been sufficiently proved.
38. On Whether Charity Maureen Mumbi is a child of the deceased- Apart from the birth certificate, the Applicant relies on the DNA test results, the clinic card and photographic evidence. Both parties relied on the decisions in *Wilfred Koinange Gathiomi vs Joyce Wambui Mutura & Anor* [2016] eKLR and *Jackson Nicholas Kyengo Mulwa (Deceased)* [2021] eKLR.
39. The Respondent challenges the authenticity of the birth certificate and states in the circumstances the only way that paternity can be established is by DNA tests. They contend and I agree that the DNA results before court are inconclusive. I observe though the only tests that would have answered the question of paternity conclusively were with samples collected from the deceased or the other children of the deceased.
40. It is on record that the Respondents declined to subject the other children of the deceased and that is how the brother of the Deceased provided samples. This was an exercise in futility given that what was



sought to be established was the relationship between the Charity Maureen Wambui and the deceased. Nothing therefore turns on this result.

41. This leaves the Birth certificate. Section 12 of the Section 12 of the Births and Registration Act provides;

Entry of father in register

No person shall be entered in the register as the father of any child except either at the joint request of the father and mother or upon the production to the registrar of such evidence as he may require that the father and mother were married according to law or, in accordance with some recognized custom.

42. In my view therefore, an entry in the Register of Births and Deaths and subsequent issuance of a birth certificate is the best evidence as to the parentage of a child. I am obligated to accept this as factual unless the authenticity of the entry is sufficiently challenged. In the instant case, the Respondent did not raise any credible challenge to the authenticity of the birth certificate.

43. The facts in this case are distinguishable from those in *Wilfred Koinange Gathiomi vs Joyce Wambui Mutura & Anor* where the parties did not have a birth certificate and for that reason the Court directed that scientific evidence would be the best way to determine paternity. Further in the instant case the Child was always ready to undertake a DNA test with the other children of the deceased, who were unwilling. It is disingenuous of them therefore to demand DNA evidence when they are unwilling to offer their samples.

44. In the instant case the Birth Certificate is not challenged. I reiterate that where the authenticity of the birth certificate is not challenged by credible evidence it is the best evidence on parentage. In *re Estate of EAK (Deceased) [2022] eKLR* for example a credible challenge was mounted as to the authenticity by demonstrating material contradictions and the Court ordered DNA tests. I therefore find that Charity Maureen Mumbi is a child of the deceased.

45. On the second issue, Whether Charity Maureen Mumbi is entitled to a share of the Deceased's estate- having found that Charity Maureen Mumbi is a child of the Deceased then by dint of Section 29 of the [*Law of Succession Act*](#) she is entitled to a share of the Estate as a beneficiary of the deceased.

46. On whether the grant should be revoked-

Section 76 provides 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 an 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 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
- e. 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 has produced any such inventory or account which is false in any material particular; or
- f. The grant has become useless and inoperative through subsequent circumstances.'

47. The summons for revocation is presented under Section 76 (b) and it is alleged that the Petition as presented was fraudulent and concealed from the court material facts.

48. The Respondent contends that she did not know about the Child that the Deceased sired with the Applicant, I believe her.

49. However as demonstrated above, there is evidence that Charity Mumbi is the Child of the deceased. I have read the Replying Affidavit of the Respondent and observe that the Respondent challenged the Applicant to prove her claim and that thereafter the Court would determine her share.

50. Section 76 provides that a grant may be revoked either on the Application of an interested party or on the courts motion. In this instance I find that the Grant is revocable under Section 76 (c) as

That [the] grant was obtained by means of untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

51. As provided the grant is revocable once it is established that the allegation was untrue and it does not matter that the allegation was made in ignorance or inadvertently.

52. The question though is whether the in the circumstances the grant should be revoked. I agree with the 1st Respondent that by virtue of Section 66 of the [Law of Succession Act](#) she ranks in priority for grant of representation of the deceased as she is the widow of the deceased.

53. The power to revoke or uphold a grant is a discretionary one. This principle was enunciated in the persuasive decision in [Albert Imbuga Kisigwa vs Recho Kawai Kisigwa Succession Cause No. 158 of 2000](#) where Mwita J stated: -

“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.”

54. In re Estate of the Late Mwaura Makuro (Deceased) [2021] eKLR, Ogola J, observed that the overarching duty of the Court is to uphold substantive justice and, in that case, notwithstanding a basis had been laid for revocation of the grant the court declined to do so. I agree with the reasoning



of Ogola J and decline to revoke the grant and invoking the inherent powers of the Court under Rule 73 of the Probate and Administration rules order as follows

- a. The Respondents to fix Summons for Confirmation for hearing within 30 days, with proposed mode of administration that accommodates Charity Maureen Mumbi.
- b. In this regard the Respondents granted leave to file supplementary affidavit with regard to application dated 30th June 2008
- c. Charity Maureen Mumbi at liberty to file affidavit of protest in the event that she contests the proposed mode of distribution
- d. Matter to be mentioned on 31st October 2023 to confirm compliance and take further directions.
- e. Each party to bear their own costs

It is so ordered

SIGNED, DATED AND DELIVERED VIRTUALLY IN NAIROBI ON 21ST DAY OF JULY, 2023.

P M NYAUNDI

HIGH COURT JUDGE

In the presence of:

Ms. Kogai for Applicant

Court Assistant Sylvia

