



**In re Estate of the Late Risper Kinani Sule (Succession Cause  
295 of 2008) [2023] KEHC 20532 (KLR) (18 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20532 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
SUCCESSION CAUSE 295 OF 2008**

**MS SHARIFF, J**

**JULY 18, 2023**

**IN THE MATTER OF THE ESTATE OF THE LATE RISPER KINANI SULE**

**AND**

**IN THE MATTER OF AN APPLICATION FOR REVOCATION OF GRANT BY;-**

**BETWEEN**

**JENNIFER YOTO AKONGO ..... APPLICANT**

**AND**

**CLEOPHAS LWANDA NJOM ..... 1<sup>ST</sup> PETITIONER**

**JOSEPH OGENDO NJOM ..... 2<sup>ND</sup> PETITIONER**

**RULING**

1. The applicant *vide* an application dated January 20, 2020 seeks revocation of grant issued to the petitioners on October 23, 2008 and confirmed on May 8, 2009. She also prays that upon revocation as above, she be appointed the sole administrator of the estate.
2. The application is premised on the grounds that the applicant was the deceased's only child and the petitioners are distant nephews. That at the time of her mother's death, she had been married and when she went back home, she found the petitioners had carted away her mother's properties. She also confirmed from the land's registry that the deceased's parcels of land had been transferred to the petitioners. she alleges that the petitioners have disinherited her.
3. Cleophas Lwanda Njom filed a replying affidavit deponing that the deceased herein survived her husband the late Joseph Ooyi (his paternal uncle) and they had 1 son who perished in a road accident before the death of the said Joseph Ooyi. He depones that the applicant herein joined the deceased herein when she was about 10 years and stayed with them. That all the properties of Joseph Ooyi were transmitted to the deceased herein.



4. He states that during the deceased lifetime, she gifted land parcel Kisumu/Kasule/4190 jointly to him and his step brother, the 2<sup>nd</sup> petitioner. The deceased also gifted Kisumu/Kasule/210 to Cleophas and Kisumu/Kasule/264 to Joseph Ogendo (now deceased) and the transmission of the respective parcels was effected upon conclusion of the succession cause while land parcel Kisumu/Kasule/4190 was sold to a third party.
5. It was the testimony of this witness that the late Joseph Ogendo and his wife have been cultivating the parcel of land gifted to them since 1970 and throughout the deceased's lifetime. He disputes knowledge of land parcels Kisumu/Kanywegi/3931 and Kisumu/Kanywegi 3932.
6. He depones that all the gifts were given to them in the presence of the applicant and that under the Luo traditions, it is not common for a girl or a child from another clan to claim inheritance from where her mother is married as she is not a blood relative to Joseph Ooyi.
7. He depones that he and his step brother are the rightful beneficiaries of the estate of the deceased as the latter's ownership is traceable to their paternal uncle the late Joseph Ooyi. He distances himself and his late step brother from any fraud as no facts were concealed.
8. The matter was heard by way of *viva voce* evidence. The applicant testified as OW-1. Her evidence was that land parcels Kisumu/Kasule/3171,210,264 and 1713 were given to her by her late mother Risper Kinani Oyoo although the structures which were on the land were demolished by the petitioner. She stated that she had never cultivated on the parcels.
9. On cross examination, she stated that her deceased father was a paternal uncle to the petitioner's fathers. She is not aware of any gift to the petitioners from the deceased and was not present when her mother allegedly gifted the petitioners. She stated that Leonida Akumu Ogendo was given a parcel of land to plant vegetables and not to own. She asserted that she is a biological daughter to Joseph Ooyi and she was not aware that the parcels originally belonged to the petitioners ancestrally.
10. The petitioners did not testify.
11. The parties were directed to file their written submissions. Only the applicant complied.
12. Mr Odeny for the applicant submits that the petitioners did not comply with section 51(2) (g) of the *Law of Succession Act*, which requires certain information to be disclosed. That the petitioners admit that the applicant was the deceased's sole child but cannot inherit due to cultural inhibition that discriminates against the applicant on the basis of her gender.
13. That the cultural discrimination against the applicant is prohibited by article 27(3) of the *Constitution*. Reliance is placed on the works of Justice Musyoka W in the book *Law of Succession* at Pg 118, the decision in *estate of M'Ngarithi M'Miriti alias Paul M'Ngarithi M'Miriti (deceased)*(2017) eKLR.
14. It is submitted that section 29(a) of the *Law of Succession Act*, does not classify children on the basis of gender or marital status and that pursuant to section 66 of the Act, the court has discretion on who should be granted letters of administration and in this case, the applicant being the deceased's sole child is the best candidate.
15. In this regard, the authority in *estate of Solomon Ngatia Kariuki (deceased)* (2008)eKLR and in *re; Peter Karumbi Keingati & 4 others v Dr Ann Nyokabi Nguthi & 3 others* (2014) eKLR have been cited.

### **Analysis And Determination**

16. The instant application seeks a revocation of grant issued to the petitioners on October 22, 2008 and confirmed on May 8, 2009.



17. The legal provision governing revocation of grant is section 76, the [Law of Succession Act](#) which provides;

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
- (e) that the grant has become useless and inoperative through subsequent circumstances.

18. The objector asserts that she is the only surviving child to the deceased. The petitioners on their part insist the objector is a daughter to the deceased proprietor and not their paternal uncle who predeceased the objector's mother.

19. The petitioners also insist that the objector having been from a different lineage from their uncle is not entitled to inherit on cultural grounds which work against a girl from inheriting and that the parcels and been given to them by the deceased during her lifetime.

20. The issue in this application is whether the grant was obtained through concealment of material facts by the petitioners. One uncontroverted fact is that the objector was brought in by the deceased as her daughter when she was round 10 years and stayed with her until she was married.

21. Section 29(a) of the Act provides;

the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

22. In this case, it is not in dispute that the objector is the registered owner's child.

23. Section 51(2) of the Act provides information that must be disclosed by a party when making an application for letters of administration. One such information is the relationship the applicant has with the deceased.



24. The objector also asserts that her consent was not obtained prior to launching the application for letters of administration.
25. On the requirement to obtain consent from those entitled in the same degree or in priority to the petitioners for a grant of letters of administration, rule 26 of the *Probate and Administration Rules* states that:
  - 1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to 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 renunciation, 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.
26. In the instant case, it has not been disputed that the objector was a dependant of the estate and her consent ought to have been obtained bearing in mind that the objector is the registered owner's daughter.
27. It is my finding that failure to obtain the objector's consent was fatal misstep rendering the grant liable for revocation.
28. According to P & A 80 filed herewith, the petitioners described themselves as the deceased's sons. This goes against the disposition filed in opposition to the instant application where the petitioners now describe themselves as being related to the husband to the deceased herein. This description at the point of launching their application is incorrect and misleading.
29. Be that as it may, given the nature of the relationship existing between the objector and the deceased herein and the petitioners on the other hand, I find that the petitioners fraudulently misrepresented themselves.
30. The petitioners also introduced the argument that the land parcel was gifted to them by the deceased. They particularly asserted that the objector was present when the petitioners were gifted with the parcels. However, this assertion must remain an allegation that it is for the reason that the petitioner tabled no evidence that the same was gifted to them.
31. I agree with the petitioner that the parcels were given to the 2<sup>nd</sup> petitioner and his petitioner to cultivate and nothing more.
32. Another issue raised by the petitioners is that the objector is precluded from inheriting on grounds of cultural bar.
33. From the material on record, the estate is registered in the name of Rispar Kinani Sule, the objector's mother. The petitioners contend that the estate initially belonged to their paternal uncle. However, looking at the evidence, I find no evidence in support of such a contention.
34. Further, section 29 of the *Law of Succession Act* does not distinguish between a male child and a female child. This assertion does not in my view hold water and on this specific issue and cannot stand the present constitutional dispensation where discrimination is prohibited. I am guided by the decision in *Peter Karumbi Keingati & 4 others v Dr. Ann Nyokabi Nguthi & 3 others* (2014) eKLR where Kimaru J held:

“as regards to the argument by the applicants that married daughters ought not to inherit their parent's property because to do so would amount to discrimination to the sons on



account on the fact that the married daughters would also inherit property from their parent's in-laws, this court takes the view that the argument as advanced is disingenuous. This is because if a married daughter would benefit by inheriting property from her parents, her husband too would benefit from such inheritance. In a similar fashion, sons who are married, would benefit from property that their wives would have inherited from their parents. In the circumstances therefore, there would be no discrimination. In any event, the decision by a daughter or a son to get married has no bearing at all to whether or not such son or daughter is entitled to inherit the property that comprise the estate of their deceased parents. The issues that courts would grapple with during distribution are the issues anticipated by section 28 of the Law of Succession Act. This court is of the view that the time has come for the ghost of retrogressive customary practices that discriminate against women, which have a tendency of once in a while rearing its ugly head to be forever buried. The ghost has long cast its shadow in our legal system despite of numerous court decisions that have declared such customs to be backward and repugnant to justice and morality. With the promulgation of the Constitution 2010, particularly article 27 that prohibits discrimination of persons on the basis of their sex, marital status or social status, among others, the time has now come for those discriminative cultural practices against women be buried in history.'

35. Having said as above, I come to the conclusion that the grant herein was obtained through material non-disclosure and is therefore bound to be revoked.
36. On the issue of appointment of an administrator, I am alive to the provisions of section 66 of the Law of Succession Act which reserves on the court the final discretion when it comes to appointment of administrators. In the instant application, I find that the best suited person to apply for letters of administration and the proper person to be appointed as such is the objector by virtue of her relationship to the deceased.
37. In the premises, I hereby appoint the objector, Jeniffer Yoto Akongo as the administrator of the estate of the later Risper Kinani Sule in place of the petitioners.
38. This being a family matter, each party shall bear its own costs.

**DELIVERED, DATED AND SIGNED AT KISUMU THIS 18<sup>TH</sup> DAY OF JULY 2023.**

**MWANAISHA. S. SHARIFF**

**JUDGE**

