



**In re Estate of Onesmus Nyamai Kyengo (Deceased) (Succession Cause 107 of 2009) [2023] KEHC 20190 (KLR) (14 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20190 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
SUCCESSION CAUSE 107 OF 2009**

**G MUTAI, J**

**JULY 14, 2023**

**IN THE MATTER OF THE ESTATE OF ONESMUS NYAMAI KYENGO (DECEASED)**

**BETWEEN**

**DANIEL KATUMO NYAMAI ..... PETITIONER**

**AND**

**ANNA NDINDA NYAMAI ..... 1<sup>ST</sup> OBJECTOR**

**JAPHETH MWENDWA NYAMAI ..... 2<sup>ND</sup> OBJECTOR**

**RULING**

1. Before the court is a Summons for Revocation of Grant dated 28<sup>th</sup> February 2023. vide the said summons the Objector seeks the following orders: -
  - a. Spent;
  - b. Spent;
  - c. Spent;
  - d. That the grant was obtained fraudulently by the concealment from the Court of something material to the case i.e.;
    - i. The omission of Japheth Mwendwa Nyamai and or his estate as a son/beneficiary to the estate of the deceased as ordered by the Court's ruling on 12<sup>th</sup> July 2019 (para. 23);
    - ii. Failure to disclose to the Court of pending interlocutory application i.e. the 1<sup>st</sup> Objector's application dated 28<sup>th</sup> October 2019 to which they were aware of and had in fact responded to;
  - e. The proceeding to obtain the certificate of confirmation of grant of probate were defective for;



- i. Failure to comply with (a) (i) & (ii) above
    - ii. Failure to serve or otherwise notify the Objector of the summons for confirmation of grant of probate filed on 18<sup>th</sup> July 2022.
  - f. Costs provided for.
2. The said Summons is supported by the affidavit of Annah Ndinda Kaluka aka Ann Ndinda Nyamai the sole surviving Objector. In her affidavit the Objector states that she is the personal representative of the estate of Japheth Mwendwa Nyamai. She deposes that the certificate of confirmation of grant of probate was obtained fraudulently. She states that the Petitioner went to the Changamwe area chief and attempted to evict her from the suit premises. She was apprehensive the eviction was imminent. She had lived in the suit premises for a long time. She averred, that eviction will permanently deprive her (and her son's estate) of the rightful share of the estate of the deceased. She claims that she wasn't served with a copy of the application. That the Applicant concealed material information that there was a pending application and hence confirmation was premature. Being a family matter, it was urged that all pleadings and issues should be carefully canvassed before any distribution could be done. It was also argued that confirmation of the grant rendered the application the Objector/Applicant had filed nugatory, null and void, an academic exercise and an act in vain and Courts don't act in vain.
  3. The application is opposed. The Executor/Respondent filed a Replying Affidavit vide which he responded to the summons for Revocation of Grant. The said Executor deposed that the deceased died on 7<sup>th</sup> November 2008. On 25<sup>th</sup> March 2008 he filed a Petition for Grant of Probate as the deceased had left a will dated 5<sup>th</sup> May 2004 in which he was named as the executor. Before the grant of Probate was issued several Objections were filed to wit:-
    1. Objection filed on 24<sup>th</sup> June 2009 by one Carex Keli Wa Yaa. This objection was withdrawn;
    2. Objection filed on 27<sup>th</sup> July 2009 by Carex Keli Wa Yaa, Dorcas Mthoki Olangh and Phoebe Mueni Kilele challenging the validity of the will;
    3. Objection filed on 19<sup>th</sup> November 2009 by Ann Ndinda Kaluku and her now-deceased son Japheth Mwendwa Nyamai vide which they claimed to be beneficiaries of the deceased's estate. In the said objection it was alleged that Plot No. 2639/VI/MN belonged to the 1<sup>st</sup> Objector and was not part of the estate. It was further stated that the will was invalid for want of due execution and for failing to make provisions for the Objectors who were dependants and thus entitled to reasonable provisions.
  4. The objections by Carex Keli wa Yaa and Dorcas Mthoki Olangh were withdrawn at the commencement of the hearing leaving that of the Objectors herein and also that of Phoebe Mueni Kilele.
  5. The objection by the Objectors herein was then heard. Following a hearing the Objector's application dated 19<sup>th</sup> November 2009 was dismissed by Lady Justice M. Thande on 12<sup>th</sup> July 2009 for lack of merit. The objectors never appealed against the said decision nor sought to have it reviewed.
  6. On 16<sup>th</sup> January, 2020 Phoebe Mueni Kilele withdrew her objection. Her objection was dated 27<sup>th</sup> July, 2009.
  7. The 1<sup>st</sup> Objector herein filed a Notice of Motion application dated 28<sup>th</sup> October 2009. Vide the said application the Objector sought to be substituted as the 2<sup>nd</sup> Objector's legal representative as the latter had died on 25<sup>th</sup> May 2019. This application was withdrawn on 18<sup>th</sup> February 2021.



8. There being no objection to the issuance of the grant the grant of Letters of administration Interstate of the estate of the deceased was erroneously issued to the executor on 13<sup>th</sup> October 2020. As this was erroneous the grant of probate of the written will of the deceased was issued to the executor on 18<sup>th</sup> October 2021. The said grant was confirmed on 2<sup>nd</sup> August 2022 in the presence of the named beneficiaries.
9. The executor submitted that there was no fraud in the manner the grant was issued to him. He thus prayed that the summons for revocation of grant be dismissed as it had no merit.

### **Proceedings Before the Court**

10. The Objectors filed the Summons for Revocation of Grant under a Certificate of Urgency. The same was placed before me on 1<sup>st</sup> March 2023. I certified the summons as being urgent and directed that it be served for hearing inter parties on 13<sup>th</sup> March 2023. On 13<sup>th</sup> March 2023 I directed that the application be canvassed by way of Written Submissions.

### **Analysis of the Facts and the Law**

11. This is the second objection by the Objectors. The 1<sup>st</sup> objection was filed by Ann Ndinda Nyamai and Japheth Mwendwa Nyamai (now deceased) on 27<sup>th</sup> August, 2009. In the said objection the two claimed inter alia, that they had been unlawfully omitted, the will was invalid and that it failed to make provision for the objectors “who are dependants and are entitled to reasonable provision.” After hearing the parties Lady Justice M. Thande dismissed the objection. She found that the “objectors have failed to prove their case on a balance of probabilities”.
12. Vide the application before Court the Objectors object to the confirmation of the grant of probate of the written will of the deceased. They seek an order that the certificate of confirmation of grant or probate issued to Daniel Katumo Nyamai made on 31<sup>st</sup> October 2022 be revoked and or annulled. Can a certificate or confirmation of grant be annulled?
13. In my view the answer to the question above is in the negative. The certificate of confirmation of Grant is not the grant. I am guided by the persuasive decision of Musyoka J *In re estate of Joel Cheruiyot Ronoh* [2016]eKLR where he held as follows:-

- “4. I am being invited to revoke a certificate of confirmation of grant. The certificate is not an order of the court. A certificate is not a judicial order. It is an extract from a court order made in the confirmation proceedings. The certificate is generated from the court order. It is important for the parties to differentiate between the character of a grant of representation and a certificate of confirmation of the grant. A grant is a court order; it is a judicial pronouncement to the effect that some person has been appointed as administrator and granted the power to act as such. The certificate of confirmation of grant on the other side merely certifies that orders have been made to confirm the grant. The certificate of confirmation of grant is not the order itself.
5. I wonder whether any purpose would be served by revoking the certificate without touching the orders that gave rise to the certificate. If I revoke the certificate dated 29<sup>th</sup> February 2012, another certificate can still be generated



from the orders of 29<sup>th</sup> February 2012, for the revocation would leave those orders intact.”

14. I am further guided by the holding of Kemei J *In re Estate of Kiberenge Mukwa (deceased)* [2021]eKLR which I reproduce in extenso below:-

“Grants of representation take the form stated in sections 53 and 54 of the *Law of Succession Act*. They are either a grant of probate or of letters of administration intestate or of letters of administration with will annexed or limited grants. A certificate of confirmation of grant does not take any of those forms, and it cannot possibly, therefore, be a grant of representation. It is a document extracted from the orders that a court makes after confirmation of a grant under section 71 of the *Law of Succession Act*, as evidence by the fact that a grant of representation has been confirmed. It should be emphasized that the confirmation process does not produce another grant.

The grant sought to be confirmed, through that process, remains intact, after confirmation. Whereas a grant of representation appoints personal representatives or administrators, the certificate of confirmation does not do anything of that sort. All what it does is to confirm that the court has approved the persons appointed under the grant to continue to administer the estate, with a view to distribute it in accordance with the distribution schedule approved. A certificate of confirmation of grant is akin to that order or decree that is extracted from a ruling or judgement made by a court; it is an extract of the orders that the court makes on an application for confirmation of grant. Quite clearly, therefore, a certificate of confirmation of grant is not a grant of representation, and for that reason it is not available for revocation under section 76 of the *Law of Succession Act*.

In any event, as the certificate of confirmation of grant is a mere formal expression of the orders made by the court on a confirmation application, the revocation of the certificate, if at all it is revocable under section 76, which I continue to assert that it is not, would be of little consequence, as it is only the certificate that would be affected by such a revocation order, since the orders on confirmation, from which it is extracted would remain intact. The certificate is a mere extract, its revocation would not affect its source, the orders of confirmation of grant. A grant of representation is not equivalent to a certificate, it is not an extract from some order, and it is the order itself, appointing administrators, and it is the court granting representation. The orders on confirmation of a grant remain unaffected by a revocation or annulment of the certificate of confirmation of grant. The proper thing to do should be to have the confirmation orders vacated and thereafter the certificate of confirmation of grant annulled, following the setting aside of the orders from which it draws its life. Otherwise, failure to vacate the orders would mean that a fresh certificate could still be extracted from the same orders. The grant of representation and the certificate of confirmation of grant are two separate or different things.”

15. The instant application in so far as it seeks to revoke and or annul a confirmed grant is misguided. As Kemei J held

“the Court confirming a grant largely becomes functus officio so far as confirmation of grant is concerned and cannot revisit the matter unless upon review.”

16. It would appear to me that the application for revocation of the confirmed grant was made deliberately, in the knowledge that the previous application for confirmation of grant was dismissed. In essence the Objector/Applicant wanted to have a second bite of the cherry.



17. As has been shown above this is the 2<sup>nd</sup> objection application by the objectors. The 1<sup>st</sup> application was dismissed by Mugure Thande J. the 1<sup>st</sup> Objectors filed an application for substitution of the 2<sup>nd</sup> Objector by herself. The 1<sup>st</sup> Objector avers that the latter application is pending and should have been heard and determined first before the grant of probate of the written will of the deceased was confirmed. I have perused the Court file. On 18<sup>th</sup> February 2021 Ms. Gitari and Mr. Mutisya were in Court. Upon an application by Mr. Mutisya the Court marked the application dated 28<sup>th</sup> October 2019 as withdrawn. It is therefore not true that the Objector's application dated 28<sup>th</sup> October 2019 was not disclosed. By the time the confirmation of the grant of probate of the Written Will of the deceased was sought the same, as I have shown above, had been withdrawn. There was therefore nothing to disclose. As the person who applied for the withdrawal of the application this fact was known to Mr. Mutisya.
18. Regarding provision for Japheth Mwendwa Nyamai (deceased) his application, which inter alia sought reasonable provision, was dismissed by Lady Justice Thande. The said decision was not appealed against nor was it reviewed. It should also be pointed out that this is a testate succession. The deceased exercised his testamentary freedom and apportioned his assets to his heirs as he deemed fit. The Objector avers that Court ordered that the late Japheth be added as a beneficiary of the estate in paragraph 23 of the ruling. With respect, the said paragraph makes no such order. It however finds that
- “on a balance of probability the birth certificate is prima facie evidence that the 2<sup>nd</sup> Objector is a son of the deceased”.
19. The upshot of the foregoing is that I find no merit in the application. The same is dismissed. Each party will bear own costs.
- Orders accordingly.

**DELIVERED, DATED, AND SIGNED THIS 14<sup>TH</sup> DAY OF JULY 2023 AT MOMBASA VIA MICROSOFT TEAMS**

**GREGORY MUTAI**

**JUDGE**

In the presence of:-

Ms. Gitari for the Petitioners/Respondent

No appearance for the Objector/Applicant

Mr. Arthur Ranyundo – Court Assistant

