



In re Estate of Frashier Mukuhi Kariuki (Deceased) (Succession Cause 548 of 2001) [2023] KEHC 23357 (KLR) (19 September 2023) (Ruling)

Neutral citation: [2023] KEHC 23357 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 548 OF 2001
SM MOHOCHI, J
SEPTEMBER 19, 2023**

IN THE MATTER OF THE ESTATE OF FRASHIER MUKUHI KARIUKI (DECEASED)

BETWEEN

**EDITH WANJIRU KARIUKI 1ST APPLICANT
GRACE MUTHONI 2ND APPLICANT
HELLEN NJERI MUHORO 3RD APPLICANT
LEAH WANGARI 4TH APPLICANT**

AND

JAMES MUGO RESPONDENT

AND

SUSAN WANGARI KARIUKI INTERESTED PARTY

RULING

1. By Summons dated the 14th December 2020, filed pursuant to Section 76 of the *Law of Succession Act* and Rule 44(1) of the *Probate and Administration Rules* seeking the following Orders:
 - a. That the grant of letters of administration to Josiah Kariuki Kanuthu made on the 3rd January, 2003 and confirmed on 7th April, 2003 be revoked and/or annulled.
 - b. That any loss/damage incurred by the Applicants as a consequence of the administration of the aforesaid estate by the Respondents herein be borne by the Respondent.
 - c. That costs of these proceedings be borne by the Respondent.
2. This Application is supported by the affidavit of Edith Wanjiru Kariuki and is premised on the following grounds:



- a. That the Applicants are lawful beneficiaries of Frashier Mukuhi Kariuki (Deceased).
 - b. That the grant of letters of administration was issued/obtained by fraud and/or non-disclosure of the fact that the Applicants are dependants and/or beneficiaries of Frashier Mukuhi Kariuki (Deceased).
 - c. That the grant was confirmed without the knowledge of the A4. That the administrator who was given the grant failed to disclose to the court there are other members of the family entitled to benefit from the deceased estate.
 - d. That the proposed distribution of the estate is vitiated by the Respondent's ill attempts in depriving other beneficiaries.
3. This matter came for *viva voce* evidence on diverse dates between 4th October, 2022, and 12th May, 2023 and upon closure thereof, the court directed parties to file written submissions.

The Applicants case

4. That the Applicants and the Respondent are siblings in a family of eight (8) children.
5. The deceased Frashier Mukuhi Kariuki was their mother and passed on the 16th of July 2001 and prior to her demise she owned property named parcel number Bahati Settlement Scheme/38.
6. Upon her demise, their father Josiah Kariuki Kanuthu (Deceased) together with his three sons namely Samuel Kariuki (Deceased), James Mugo and Wilson Kamau (Deceased) proceeded to institute succession proceedings on their late mother's estate. The same was done without the knowledge of the female children of the family namely Edith Wanjiru Kariuki, Hellen Njeri Muhoro, Leah Wangari and Josephine Wairimu (Deceased).
7. The deceased's aforementioned property measuring approximately 10 acres was consequently bequeathed to their late father who subsequently re-married in the year December, 2003 to one Susan Wangari.
8. Their late father proceeded to unfairly sub-divide their mother's parcel of land and include their stepmother who the Applicants feel was not entitled to a share of their mother's property.
9. The Applicants' issue is that the distribution of the property was unfair and they were excluded from the entire process. The Applicants were bequeathed 4.5 acres out of the entire property, the remainder thereof was shared equally among the beneficiaries of the deceased estate and lastly, 1 acre was bequeathed to the interested party.
10. That it is only fair and just that the Applicants be given a share of the said property which was unlawfully bequeathed to their step-mother, one Susan Wangari now wish to revoke the confirmed grant issued on the ground of fraud.
11. The Applicants framed the following two issues for consideration:
 - a) Whether the grant of letters of administration to Josiah Kariuki Kanuthu made on the 3rd of January, 2003 and confirmed on 7th April 2003 be revoked and/or annulled.
 - b) Whether the Applicants should be included in the distribution of the deceased estate.
12. As to whether the grant of letters of administration to Josiah Kariuki Kanuthu made on the 3rd of January, 2003 and confirmed on 7th April 2003 be revoked and/or annulled.



13. The Applicants submit that, Section 76 was clearly expounded on by the Court in *Re Estate of Prisca Ongayo Nande (Deceased)* [2020] where it was stated:

“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 the administrator, thereafter, got into problems with the 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.”

14. The Applicants invite the Court to revoke the grant of letters of administration for the reasons that the Respondent obtained the confirmed grant by way of concealment of material facts. The Applicants are lawful beneficiaries of the Estate of Fashier Mukuhi Kariuki (Deceased).
15. The grant of letters of administration was issued/obtained by fraud and/or disclosure of the fact that the Applicants are dependants and/ or beneficiaries of Frashier Mukuhi Kariuki (Deceased). James Mugo Kariuki in his replying affidavit dated 19th October 2021 stated that he did not petition for the letters of administration of this succession cause and that he is not aware whether or not his late father Josiah Kariuki Kanuthu obtained consent from the Applicants before filing the succession cause. In addition, Susan Wangari Kariuki, in her replying affidavit dated 26th February 2022 stated she was not privy to the succession proceedings save for the gift that her late husband Josiah Kariuki Kanuthu gave her during his lifetime and that at the time she got married to the late Josiah Kariuki Kanuthu in December 2003, the grant of letters of the estate of the deceased had already been confirmed and the estate distributed.
16. The grant was confirmed without the knowledge of the Applicants and the administrator who was given the grant failed to disclose to the court there are other members of the family entitled to benefit from the deceased estate.
17. Whether the Applicants should be included in the distribution of the deceased estate.
18. Article 27(3) of *the Constitution* which specifically provides that women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural, and social spheres’.
19. Additionally, International instruments like CEDAW (*Convention on the Elimination of All forms of Discrimination Against Women*) also prohibit such discrimination. Kenya has ratified CEDAW. Section 38 of the *Law of Succession Act*, enshrines the principle of equal distribution of the net



intestate estate to the surviving children of the deceased irrespective of gender and whether married and comfortable in their marriage or unmarried.

20. In the *Matter of the Estate of M'Ngarithi M'Miriri alias Paul MNgarithi M'Miriri (Deceased)* [2017] KLR, it was stated clearly as follows: -

“..discrimination in inheritance on the basis of gender or sex or status is prohibited discrimination in law and *the Constitution...*”

21. Therefore, a son will not have priority over a daughter of the deceased simply because he is male; all male and female siblings- are equal before the law and are entitled to equal protection of the law.

Conclusion

22. The *Law of Succession Act* does not discriminate between female and male children when it comes to the distribution of the deceased estate. Further, the Applicants have proven that the grant of letters of administration was obtained fraudulently by making of a false statement and by the concealment from the Court of something material to the case. The Applicants humbly invites the Court to excise its unfettered discretion in favour of the Applicants.

Respondents Case

23. In his replying affidavit dated 19th October 2021 the Respondent contends that, he did not petition for letters of administration in this succession cause and that his father, the late Josiah Kariuki Kanuthu applied for the grant of letters of administration for the estate of the deceased herein.
24. The Respondent is not aware whether or not his late father obtained consent from the Applicants before filing the succession cause and that he is not guilty for any wrongdoing.
25. The Respondent is aware that his late mother's property was bequeathed to the petitioner who was his father.
26. The Respondent confirm that Susan Wangari was given 1 acre of Bahati Settlement Scheme /38 and that his late father held the property in issue in trust for the children of the deceased herein who include the Applicants.

Interested Party's Case

27. The Interested Party herein opposed the said summons vide a replying affidavit dated 26th February, 2022 stating *inter alia*, that the said application is a non-starter, frivolous, vexatious, and an abuse of the Court process and relied on the said replying affidavit entirely.
28. First, the 1st Applicant purported that she had the authority of the 2nd, 3rd, and 4th Applicants to institute the instant proceedings on their behalf. However, no such authority was placed before this court in support of the said allegations.
29. That in the case of *Lucy Ougo & 3 Others v County Government of Nairobi & Another*[2021] eKLR, the court while considering a similar matter held that:-

“In the instant case, the 1st plaintiff purports to institute the suit on behalf of the 2nd to 5th plaintiff without their written authority ... in the event a plaintiff does not have written authority from her Co-plaintiffs, then she cannot purport to represent them. Lack of such



an authority... incapacitates the plaintiff from purporting to represent her co-plaintiffs. The suit is treated as that of the one plaintiff"

30. The Interested Party concurs in the finding and determination of the Court in the above-cited authority and urge this Court to be persuaded therewith. In the instant case, the 1st Applicant purported to have filed the instant application on her behalf and on the behalf of her sisters, the 2nd - 4th Applicants herein. However, she did not produce authority to plead from the said sisters. It is thus settled that lack of authority to plead on behalf of the 2nd -4th Applicants incapacitates her from purporting to represent them. The Interested Party urges this Court to find and hold as much.
31. That this being a discretionary power, it is settled that the same must be exercised based on sound and well-established principles and for the purposes of these proceedings, in the best interest of the estate.
32. In the case of *Matthew Njega Niogu & Another v Rosemary Muthoni Njue* [2021] eKLR the Court held that:-

“The 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 for revocation or annulment of 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.”
33. The Interested Party concurs with the finding and determination of the court in the above cited authority and urge this court to be persuaded therewith. That it is evident that in exercising the discretion to revoke grant, this court is required to take into account the interest of all the beneficiaries herein. In the instant case, the 1st Applicant and the Respondent herein admitted that all the beneficiaries got their shares from the only property of the deceased being Bahati Settlement Scheme/38 as summarized by the Interested Party under paragraph 8 of her replying affidavit.
34. That in any event, the 1st Applicant equally admitted her son also got a portion of the land. The Applicant and the Respondent equally confirmed that all beneficiaries have their title deed for their respective portions and are in occupation and use thereof as exhibited- in annexures S.W.K.II and III in the Interested Party's replying affidavit.
35. That revocation of the grant herein does not serve the best interest of the estate and the beneficiaries herein. All the beneficiaries were adequately provided for and are enjoying quiet and peaceful occupation and use of their respective portions.
36. That the Applicant has not demonstrated sufficient reason to merit the revocation of the grant herein. In any event, such revocation would be expensive to the estate and the individual beneficiaries who would be forced to undergo a painstaking process of cancellation of the resultant titles, reversion of the same to the deceased with full knowledge that re-distribution thereof shall remain the same. In any event, the Applicant herein did not give any proposal on how she would want the estate of the deceased to be re-distributed for the Court's consideration.
37. Finally, the Applicants submitted that the Interested Party equally benefitted from the estate of the deceased yet she was not a beneficiary thereof she contends that hers was a gift from her husband and not as a beneficiary to any estate.



38. The Interested Party relies on *Re Estate of The Late Gedion Mantbi Nzioka (Deceased)* [2015] eKLR, addressed the issue of gift *inter vivos* as hereunder:-

“In law, gifts are of two types, There are the gifts made between living persons (gifts *inter vivos*), and gifts made in contemplation of death (gifts *mortis causa*)....For gifts *inter vivos*, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trusts or the presumption of Gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts *inter vivos* must be complete for the same to be valid.”

39. Further reliance is placed on the case of *Re Estate of Ruth Wanjiku Karugu (Deceased)* [2021] eKLR quoted with approval the High Court Succession Cause No. 15 of 2015 *in the Estate of the Late Gichunge M’itwerandu Alias Githungu Mntbiiri* where Justice Mabeya held: -

“A person can deal with his property as he wills during his life time. Whoever feels aggrieved on how his/her parent had dealt with his property should at the earliest opportunity question such a person during his/her lifetime. He/She cannot wait until such person dies to raise issues of discrimination or unfairness. Such issues can only validly be raised in cases of a will since wills are kept secret until the testator passes on. However request that are given as gifts *inter vivos* openly so given and in my view whoever is dissatisfied is at liberty to question the same before the demise of the giftor,”

40. The Interested Party urges this Court to find that the Applicant and the Respondent confirmed that the Interested Party did not participate in the succession proceedings and that LR. No. Nakuru Bahati Settlement Scheme/313 was given to the Interested Party by the late Josiah Kariuki Kanuthu (Deceased) in 2009 while the succession proceedings were conducted in the year 2003.

41. That the Applicants did not question their late father regarding the gift to the Interested Party during his lifetime and only waited until his demise to Wreak havoc upon their step-mother.

42. That the application has therefore been made by the 1st Applicant in bad faith with a sole intention of harassing, intimidating and/or depriving her of peaceful occupation and use of the said gift notwithstanding that the 1st Applicant and her son were the greatest beneficiaries of the estate herein.

43. That in the upshot the Summons for Revocation of Grant dated 14th December, 2020 is marred with malice, devoid of merit hence fit for nothing but dismissal with costs to the Interested Party.

44. In Conclusion the Interested Party prays for costs of the application owing to mala fide on the part of the 1st Applicant

45. In submission the Applicants have significantly regurgitated the assertions as contained in their affidavit dated 22nd September 2022, and I shall not repeat the same here. The Applicants submit that the estate cannot remain un-administered and that the Respondent failed in this duty, having failed to apply for confirmation.

46. That lack of diligence is one of the grounds for revocations under Section 76 of the Law of Succession.

47. This Court is thus being invited to substitute the Respondent with the Applicants and issue them with a grant of representation.



48. Letters of Administration were issued to the Respondent and Paul Kinuthia Thinga (Deceased) on the 25th June 2010. The two administrators never applied for the confirmation of grant despite repeated notices from the Court. Eventually on the 20th July 2015 Justice Ongeru revoked the grant of representation.
49. By the time the Applicants moved Court on the 5th October 2022 it was almost five (5) years to the date since the grant was revoked. This estate has been and continues to be without an official administrator.
50. This Court is equally unpersuaded that a substitution of administrators can occur through pronouncement by the Court under succession law.
51. In the case of *Florence Okutu Nandwa & Another vs. John Atemba Kojwa*, Kisumu Civil Appeal No. 306 of 1998, the Court of Appeal made it clear that:
- “A grant of representation is made in personam. It is specific to the person appointed. It is not transferable to another person. It cannot therefore be transferred from one person to another. The issue of substitution of an administrator with another person should not arise. Where the holder of a grant dies, the grant made to him becomes useless and inoperative, and the grant exists for the purpose only of being revoked. Such grant is revocable under section 76 of the *Law of Succession Act*. Upon its revocation, a fresh application for grant should be made in the usual way, following procedures laid down in the *Law of Succession Act* and the *Probate and Administration (Rules)*...”
52. This Court would thus hasten that, a revoked grant cannot be reactivated for purposes of substitution.
53. This Court is equally alive to the fact that the estate of the deceased has been without an administrator since July 2015 and shall issue appropriate directions in regard to the same.

Conclusion

54. In the upshot, prayer number (iii) of the application dated 21st September 2020, fails for want of merit and is accordingly dismissed. I issue the following orders invoking the inherent jurisdiction of this court:
- a. The 1st and 2nd Applicants are hereby directed to submit and file a complete petition for issuing letters of administration within the next 30 days from the date hereof.
 - b. This being a family matter, parties shall bear their own costs.
 - c. Mention date for direction immediately after 60 days from today to be fixed by the Court Assistant.

It is So Ordered.

SIGNED, DELIVERED VIRTUALLY ON TEAMS PLATFORM ON THIS 19TH SEPTEMBER 2023

Mohochi S.M

JUDGE

In the presence of: -

1. J. Maritim & Co. Advocates - for Applicants

