



REPUBLIC OF KENYA



**In re Estate of the Daudi Mbogori (Deceased) (Succession Cause
206 of 1994) [2023] KEHC 23961 (KLR) (23 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23961 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 206 OF 1994
G MUTAI, J
OCTOBER 23, 2023**

BETWEEN

**LEMMY K MBOGORI 1ST PETITIONER
PETER MBOGORI M'MBUI 2ND PETITIONER
JULIUS KIBANGA MBOGORI 3RD PETITIONER**

AND

**DORINE CERIA MAKENA MUTHINJA 1ST OBJECTOR
TEDDY MWITI MUTHINJA 2ND OBJECTOR
ABIBA TIRINDI MUTHINJA 3RD OBJECTOR**

RULING

1. The objectors/applicants are the children of Joseph Muthinja Mbogori (deceased). Joseph Muthinja Mbogori was the son of the deceased person whose estate is the subject matter of these proceedings. The objectors/applicants aver that despite being aware of their existence, the Petitioners/Administrators filed a petition for letters of administration intestate of the estate of the deceased in which they claimed that Joseph Muthinja Mbogori was not married at the time of his demise and that he had no children. On the basis of the alleged misrepresentation, this court issued a grant, which was subsequently confirmed.
2. The objectors/applicants having become aware of the grant moved this court vide summons for revocation of grant dated July 19, 2023. The summons seeks the following orders;
 - a. Spent;
 - b. Spent;
 - c. Spent;



- d. That the grant of representation to the estate of Daudi Mbogori (deceased), issued to the petitioners herein on 8th June 1994 and or rectified /amended thereafter, be revoked and a fresh grant do issue to the applicants herein or as the honourable court may deem fit;
 - e. That the honourable court be and is hereby pleased to cancel all transfers, subdivisions and all dealings with the estate of the deceased comprised but not limited to Meru Town/ Block 11/110, Ntima/igoki/2219, Jd Mbogori Gakoromone Plot, Jd Mbogori Mwendantu Plot, Giaki Shamba, Gitugu Shamba, Mitungu Shamba, Mvita Shares, Kenya Breweries Shares, Mombasa /block X Ii/62, Mombasa /block Xii/63, Mombasa /block Xii/64, Mombasa /block Xii/76, Mombasa /block Xii/73, Mombasa /block Xii/75, Mombasa/block /mn/2232, Mombasa/block/mn/2242, Mombasa /block/mn/2249, Giaki/172, Nyaki/giaki/145 the same to revert to the name of Daudi Mbogori (deceased) for proper distribution;
 - f. That the honourable court be pleased to rectify/amend the grant to include LR /No. Meru Town Block 11/110 and the same be distributed wholly to the applicants in common; and
 - g. That costs of this application be provided for.
3. The summons is premised on the grounds stated in the body of the application and also on the supporting affidavit of the 1st objector/applicant, sworn on her own behalf, and also on behalf of the other 2 objectors/applicants.
 4. The 1st objector/applicant deposed that she, together with the 2nd objector/applicant objectors, are the children of Joseph Muthinja Mbogori (deceased), who is a son of the deceased person herein, and a husband to the 3rd objector/applicant.
 5. She stated that they were minors when the petition was instituted as they were born in 1980 and 1985, respectively, and the petition was instituted in 1994. The petitioners conspired to disinherit them by totally excluding them as beneficiaries of the estate of the deceased. She deposed that the issue of succession and sharing of one of her grandfather's properties came up during a family meeting held in June 2023. They then instructed their advocates, who did investigations and discovered that a succession cause had been filed and distribution of the estate of the deceased done. It was then that they discovered that they had been disinherited fraudulently.
 6. She averred that the distribution was done to the exclusion of their father and or his surviving family. She submitted that they had been disinherited through concealment of material facts. She stated that they had been denied access to their father's certificate of death and burial permit. She urged the court to grant the prayers sought.
 7. In response, the petitioners/respondents filed a replying affidavit sworn by the 1st petitioner/respondent on August 10, 2023. He stated that the 3rd petitioner is deceased while the 2nd petitioner is of advanced age and unable to participate in these proceedings.
 8. He stated that the three administrators were nominated by the family in the year 1994 to administer the estate of the deceased, who was their father. The estate of the deceased has been fully administered and equitably distributed amongst all beneficiaries. Thus, the orders sought by the applicants cannot be issued as the suit properties have since been transferred to the respective beneficiaries, and others sold off to 3rd parties who are not parties to the suit.
 9. He further stated that at the time the letters of administration intestate were taken out the 3rd objector/applicant had run away from her matrimonial home, abandoning the 1st and 2nd objectors/applicants who were of tender age. At that time, the 3rd objector/applicant was married to another man, Mr Lwin



- Mynt, with whom they were blessed with one child, Alex. Mr Lwin Mynt died and was buried in Mombasa. The 3rd objector/applicant relocated to Germany, where she lives to date at the 1st objector/applicant's home together with the 2nd objector/applicant.
10. He further averred that their brother Joseph Muthinja disappeared, never to be seen again, and was therefore presumed dead. The 1st and 2nd objectors/applicants were then taken into the custody of their grandmother and under the care of his sister Emily Kanini, who, after the sale of two family properties, transmitted the proceeds received to the 2nd objector/applicant. The court appointed their grandmother Cecilia Karoki Mbogori as the guardian and trustee of the 1st and 2nd applicants in respect of their shares in the estate of the deceased herein.
 11. He stated that upon the demise of their grandmother, the 1st and 2nd objectors/applicants, being of the majority age, took over the administration of their share of the estate and continued to receive their share, including proceeds from the sale of properties. When the 1st objector/applicant took over the management of their share, she changed the tenant of the property, being part of Plot LR No. Meru Town/Block 11/110. He deposed that Plot No. Meru Town /Block 11/110 is being shared out by four beneficiaries, and thus the objectors/applicants cannot claim the entire property.
 12. He deposed that the affidavit sworn by 3rd objector/applicant was commissioned in Meru, while she stays in Europe, which offends the law on swearing and commissioning of affidavits, and thus it ought to be expunged from the record. Further, the application by the objectors/applicants is mischievous, lacks any merit and should be dismissed with costs.
 13. The applicants filed a further affidavit sworn by the 1st objector/applicant on August 29, 2023.
 14. In the said affidavit, she denied the averments in the respondent's replying affidavit and stated that being minors, their shares of the estate ought to have been specifically held in trust by their mother. She stated that the respondent has admitted to being aware of their whereabouts but never took any action to involve them in these proceedings. Further, their grandmother was only allocated one property thus, it cannot be said that she was allocated their share to hold in trust while the respondents were allocated 11 prime properties.
 15. She further stated that the respondents have not proved their allegations and or averments in the replying affidavit and urged the court to grant the orders sought.
 16. When the matter came up for hearing on September 21, 2023, Mr Thangicia, learned counsel for the applicant, reiterated the averments by the objectors/applicants in their affidavits and submitted that the applicants did not get their share from the estate of the deceased. Counsel submitted that the respondents did not comply with section 51(2) (g) of the Law of Succession Act. He urged that the succession was done fraudulently and that material facts were concealed from the court.
 17. Counsel submitted that this honourable court has power under Section 47 and rule 73 of the Probate and Administration Rules, and the same cannot be fettered by time and wishes of the respondents. He urged the court to revoke the grant and redistribute the same. He submitted that there are properties that are yet to be distributed, which should be given to the applicants.
 18. Counsel submitted that the allegations by the respondents had not been substantiated.
 19. Mr. Mokaya, learned counsel for the petitioners/respondents, reiterated the averments in the 1st respondent's affidavit and submitted that the applicants are guilty of extreme laches as the grant was confirmed 30 years ago and the 3rd applicant being the mother to the 1st and 2nd applicants was not a minor then. There was no reason given for the inaction by the objectors/applicants.



20. Counsel submitted that the application was meant to defeat justice and urged the court to dismiss the same.
21. In a rejoinder, Mr. Thangicia, learned counsel for the objectors/applicants, submitted that where minors are involved, the law requires that a trust be created. There must be two trustees. However, in this case, there is no proof of the same. He urged the court to revoke the grant and redistribute the estate.
22. I have considered the summons, the responses and rival submissions by counsels, and the issues that emerge for determination are:-
- a. Whether the applicants are guilty of laches; and
 - b. Whether the grant should be revoked.

Are the objectors/applicants guilty of laches?

23. This issue was only raised by the petitioners/respondents in their submissions. It is trite law that parties are bound by their pleadings. In the interest of justice, I will discuss the issue of laches in succession matters. The respondents' argument is that the grant herein was issued and confirmed in 1994, about 30 years ago. The fact that the 1st and 2nd applicants were minors then is not disputed. However, the respondents argue that the 3rd applicant being an adult, ought to have taken action.
24. The court in the case of *In re Estate of Josephine Magdalena Motion (deceased)* [2016] eKLR stated that:-

“My reading of this is that an application founded on section 76 of the *Law of Succession Act* can be made at any time. There is no limitation set by the provision for the making of the application. The provision is open-ended. Of course there is room for bringing in the test of reasonableness into the play. That, however, does not introduce time limitation; it merely requires the court to bring in to bear reasonableness in its exercise of discretion on whether or not to revoke a grant...

The *Limitation of Actions Act* prescribes periods for limitations of actions and arbitrations. My reading of the actions to which that statute applies is that it does not include succession causes, or, at any rate, causes or actions governed by the *Law of Succession Act*. It covers such matters as actions founded on contracts and torts, actions to recover land and rent, actions to recover money, actions in respect of trust property or movable property of a deceased person, and related causes. In short, it envisages ordinary civil suits brought within the framework of the *Civil Procedure Act* and Rules. It does not envisage the special proceedings governed by such statutes as the *Law of Succession Act*.”

25. Further, in the case of *In re Estate of the Late Jackson M'Riungu Muindi (Deceased)* [2018] eKLR, the court quoted the case of *Smith v Clay* [1767] ER 55, [1767] 3 Bro CC 646, [1767] 29 ER 743, where Lord Camden, LC splendidly espoused on the application by courts of the doctrine of laches as follows:

“A Court of Equity has always refused its aid to stale demands, where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this Court into activity, but conscience, good faith, and reasonable diligence; where these are wanting, the Court is passive, and does nothing.’ Equity would not countenance laches beyond the period for which a legal remedy had been limited by statute, and that where the legal right



had been barred, the equitable right to the same thing was also barred: "expedit reipublicae ut sit finis litium", is a maxim that has prevailed in this court at all times, without the help of Parliament."

26. I agree with the above decision. Having said that, the court has the discretion to issue appropriate orders where a party has slept on his/her rights. In this case, the explanation given by the 1st objector/applicant is convincing, as the 1st and 2nd objectors/applicants were minors at the time the grant was applied for. They do not appear to have been aware of or been involved in any way, with the administration of the estate.

Should the grant of letters of administration intestate issued herein be revoked?

27. Section 76 of the [Law of Succession Act](#) provides for grounds of revocation 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.

28. The objectors/applicants have argued that they are beneficiaries of the estate of the deceased herein by virtue of being children and wife to the son of the deceased, namely Joseph Muthinja Mbogori, a fact which has not been disputed by the petitioners/respondents. They have also alleged that they were left out in the petition for grant by the respondents which amounted to concealment of material facts from the court. They have submitted that the respondents' actions were thus fraudulent.

29. My reading of section 51(2)(g) of the [Law of Succession Act](#) which provides that:-

"in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased".

Is that the children of Joseph Muthinja should have been listed as beneficiaries. Since the 1st and 2nd objectors/applicants were known to the petitioners/respondents, they ought to have disclosed the fact of their existence to the Court. By falsely claiming that Joseph Muthinja died without heirs, they obtained the grant fraudulently.



30. The court in the case of *In re Estate of Hellen Wangari Wathiai (Deceased)* [2021] eKLR stated:-

“looking at both parties’ submissions, my appreciation of the matter at hand is that the Applicant herein brought this summons before the court as a Beneficiary of the Estate of his late father, who predeceased the deceased herein. A grandchild is a direct heir to the estate of the grandparent, where the parent predeceased the grandparent. The grandchildren get into the shoes of their deceased parents and take the parent’s share in the estate of the grandparents as was enunciated in the case of *Re Estate of Wabome Njoki Wakagoto* [2013] eKLR where it was held: -

“Under part v, grandchildren have no right to inherit their grandparents who die intestate after 1st July 1981. The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents’ indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren’s own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents.”

31. On concealment or non disclosure of material facts the court in the case of *In re Estate of Julius Ndubi Javan (Deceased)* [2018] eKLR stated:-

“Needless to state that, in any judicial proceeding, parties must make full disclosures to the court of all material facts to the case, including succession cases. This general rule of law emphasises utmost good faith (*uberimae fidei*) from parties who take out or are subject of the court proceedings. The said responsibility is part of justice itself. Accordingly, non-disclosure of material facts undermines justice and introduces festering waters into the pure streams of justice; such must, immediately be subjected to serious reverse osmosis to purify the streams of justice, if society is to be accordingly regulated by law.”

32. The petitioners/respondents have not disputed the fact that they did not include the objectors/applicants as beneficiaries of the estate of the deceased in their petition for grant of letters of administration intestate. They acted deliberately, knowingly misled the court and appear to have enjoyed the fruits of their mischief. This court cannot be complicit in their actions.

33. It is, therefore, my finding that the petitioners/respondents did not disclose material facts to the court when petitioning for a grant of letters of administration intestate and fraudulently obtained a grant of representation. A grant obtained in the said manner must be revoked in the interest of justice.

34. In the interest of justice, the estate must be restored to its status quo ante by the invalidation of all acts done by the removed administrators.

35. The upshot of the foregoing is that I allow the Summons for Revocation of Grant dated July 19, 2023 in terms of prayers 4, 5 and 6 of the same. In particular, I order that:-

- a. The grant of letters of administration intestate issued to the petitioners/respondents herein, and confirmed on June 8, 1994, is hereby revoked;
- b. The 1st objector/applicant, in conjunction with the petitioners/respondents herein, is hereby directed to apply for a fresh grant of letters of administration intestate of the estate of Daudi Mbogori (deceased) within 60 days of the date hereof;



- c. All dispositions of the assets of the estate of Daudi Mbogori (deceased) are revoked. The estate shall revert to its original state, as it was prior to the issuance of the grant; and
- d. Each party to bear own costs.

DELIVERED, DATED AND SIGNED IN MOMBASA THIS 23RD DAY OF OCTOBER 2023

GREGORY MUTAI

JUDGE

In the presence of: -

Mr. Thangicia for the Objectors/Applicants;

Mr. Mokaya for the Petitioners/Respondents;

Mr. Arthur Ranyondo – Court Assistant.

