



In re Estate of the Late Gasper Walele Mwanguwa (Deceased) (Succession Cause E031 of 2023) [2024] KEHC 14765 (KLR) (19 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14765 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE E031 OF 2023
G MUTAI, J
NOVEMBER 19, 2024
IN THE MATTER OF THE ESTATE OF THE LATE
GASPER WALELE MWANGUWA (DECEASED)**

BETWEEN

KATHERINE WAMBUGHA WALELE PETITIONER

AND

FOCUS MWANGUWA WALELE 1ST OBJECTOR

JULIUS MNDWARIGAH WALELE 2ND OBJECTOR

JOHN IGHACHO WALELE 3RD OBJECTOR

RULING

1. The Administrator/Respondent filed this succession proceedings on 10th May 2023. In Form P&A 80 (the Petition), she stated in paragraph 1 as follows:-

“1. The deceased died “intestate” domiciled in Kenya.”

In the said Petition, she described her capacity as that of the widow of the deceased.

2. In her petition, the Administrators/Respondent did not attach the consent of the beneficiaries entitled to the grant in the same degree or in priority to her, nor did she cite them. This is presumably because, as the widow of the deceased, she ranks higher than the children of the deceased.

3. The Petition was gazetted. After the requisite period lapsed with no objection being received, the grant was issued to the Administrator/Respondent herein.

4. Vide Summons for Revocation of Grant dated 22nd April 2024, the Objectors /Applicants sought the following three orders:-



- a. Spent;
 - b. That the grant of letters of administration issued to Katherina Wambugha Walele on 29th January 2024 (sic!) be revoked and cancelled;
 - c. That the costs of this application provided for.
5. In the supporting affidavit sworn by John Ighacho Walele on 2nd August 2024, the deponent averred that the Grant of Probate in respect of the estate of the deceased was issued jointly to him, Veronica Kalamba Walele and Julius Mndwarigha Walele on 18th January 2019 and that the same was confirmed on 11th November 2022 with the Certificate of Confirmation of Grant being issued on 30th November 2022 in High Court Succession Cause No. 355 of 2010. He annexed the relevant rulings of the Probate & Administration Court (differently constituted) vide which they were appointed.
 6. He urged that whereas some assets of the deceased were not included in the will, they were in the process of filing the necessary Petition when they came across this Petition. He averred that the Administrator/ Respondent obtained the grant by means of untruthful /false statements, material nondisclosure, and concealment of crucial information in the cause.
 7. In her response, made vide a Replying Affidavit sworn on 22nd July 2024, the Administrator/ Respondent deposed that her Petition was in respect of the assets that were not in the will. She averred that there was nothing wrong with having two grants of representation for the same estate, and there would be no conflict between the two as one was in respect of the testate estate while the other was for the intestate estate.
 8. On 22nd July 2024, the Administrator/Respondent filed Summons for Confirmation of Grant vide which she sought to have the grant issued on 26th January 2024 confirmed.
 9. The Summons for Revocation of Grant was canvassed through written submissions. Both parties filed written submissions. The written submissions Applicants are dated 9th September 2024.
 10. It was submitted that there was already a Grant of Probate regarding the estate of the deceased and that the lodgment of this matter was an abuse of the court process. Counsel submitted that the assets of the deceased not in the will could be handled under the intestacy provision within the Petition already filed.
 11. It was thus argued that the administration of the deceased's intestate estate be determined in Succession Cause No. 335 of 2010 and not in this matter. Counsels for the Applicants accused the Administrator/ Respondent of not having disclosed the details of the bank accounts belonging to the estate of the deceased, which were under her control and of not accounting for the incomes she received from the properties of the deceased and which run into millions of Kenya Shillings. They thus urged that the Grant issued to the Administrator/Respondent be revoked.
 12. The Administrator/Respondent submissions are dated 23rd September 2024. Vide the said submissions the Administrator/Applicant's counsel submitted that there were 4 issues coming up for determination to wit whether; it had been established that the Respondent made a false statement; it had been established that the Respondent concealed critical information; there was any other ground warranting the revocation of grant and if the application was merited
 13. Counsel for the Respondent submitted that the deceased died partly testate and partly intestate and that the Respondent was within her right as the widow of the deceased to apply for the grant of letters of administration intestate in respect of the intestate estate. It was urged that in her petition the Respondent disclosed that her petition was in respect of the estate of the deceased that was not



contained in his written will. For that reason, counsel stated that a reading of the application does not demonstrate that the Respondent made a false statement.

14. Counsel submitted that it had not been proved that any material information was not disclosed to the Court.
15. On the third issue, Counsel for the Respondent submitted that the Applicants misconstrued the law. He urged that a Grant of Probate could only be made with respect to the properties whose disposition was subject to the will and that the remainder of assets could only devolve under the law governing intestacy.
16. The Respondent's counsel submitted that the burden of proof lay with the person seeking to revoke a grant to show that the grounds enumerated in section 76 of the Law of Succession Act existed.
17. Counsel, therefore, submitted that the application ought to be dismissed with costs.
18. I have considered the Summons for Revocation of Grant dated 22nd April 2024, the Replying Affidavit and the parties' submissions. I must determine whether the Grant issued herein should be revoked.
19. The grounds upon which a grant may be revoked are set out in section 76 of the Law of Succession Act which provides 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.
20. In the Petition for Grant of Letter of Administration Intestate, the administrator stated categorically in paragraph 1 that the deceased died intestate domiciled in Kenya. In paragraph 4 of Form 5, she deposed that “the deceased died intestate and left the following persons surviving him...”



21. Although she mentioned in paragraph 6 of the Supporting Affidavit that the assets she listed were those “which were not contained in his written will”, the reference to the will therein made, having previously indicated that the deceased died intestate, is in the view of this court, deceptive.

a. This court agrees with the decision of Gikonyo J in *Re Estate of Julius Ndubi Javan (Deceased)* [2018] eKLR wherein he stated:

“(13) Applying the test of law in section 76 of the *Law of Succession Act*, the fact that there was an agreement between the deceased and the Applicant for sale of the suit land is important to these proceedings. It seems also that consideration may have passed between the two parties. I am aware that this court does not have jurisdiction to determine the validity or enforceability of the said agreement. Environment and Land Court does; it is the court which is constitutionally mandated to determine such matters. But of relevance in these proceedings is that such material facts were never disclosed to this court during confirmation of the grant so as to enable the court make an informed decision on distribution of the estate. 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 emphasizes 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.”

22. The Court notes that the Administrator/Respondent made no mention of the existence of the Petition for Grant of Probate nor that the grant issued therein was confirmed and that the proceedings in respect of the testate succession were extremely contentious. This information was within the knowledge of the Administrator/Respondent and would have helped the court determine whether or not to issue the grant to her. Although, as a widow of the deceased, she ranked higher than her children and wasn't required to seek their consent under Rule 26 of the Probate & Administration Rules, a court hearing the intestate succession cause would have had to be cautious in dealing with this matter had all the material information, including that relating to the Probate proceedings been provided.

23. In my view, the Administrator/Respondent had the duty of disclosing all relevant information, including that which would have made it less likely for the court to issue a grant to her. By not revealing the previous Petition, she concealed material information.

24. I note that the power of this court to revoke the grant is not one that ought to be exercised liberally. In the case of *Albert Imbuga Kisigwa v Recho Kawai Kisigwa* [2016] eKLR the Court stated as follows:-

“(13) 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.”

25. In my view, this is one instance where the exercise of the Court's power to revoke the grant is called for. Thus, having concealed material information, I find and hold that the grant issued to the Administrator/Respondent herein ought to be revoked.
26. In the circumstances the grant issued on 26th January 2014 is hereby revoked.
27. I order that Executors do file a petitioner for letters of administration intestate in respect of the intestate estate of the deceased within 30 days of the date hereof.
28. I order that this file be closed.
29. This matter being a family matter I make no orders as to costs.
30. Orders accordingly.

DATED SIGNED AT MOMBASA THIS 19TH DAY OF NOVEMBER 2024. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS

GREGORY MUTAI

JUDGE

In the presence of:

Mr Karega, for the Petitioner /Respondent;

Ms Wambui, holding brief for Mr Waweru, for the Applicants; and

Arthur - Court Assistant.

