



**In re Estate of Geoffrey Kiarie Njoroge (Deceased) (Succession Appeal
2 of 2021) [2024] KEHC 13843 (KLR) (7 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 13843 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
SUCCESSION APPEAL 2 OF 2021
CM KARIUKI, J
NOVEMBER 7, 2024**

BETWEEN

**FRANCIS KANGETHE KIARIE 1ST APPELLANT
JOHN NDUNGU KIARIE 2ND APPELLANT
HANNAH NJERI WANGONDU 3RD APPELLANT
JANE WACUKA NGANGA 4TH APPELLANT
GEOFFREY KIARIE KANGETHE 5TH APPELLANT**

AND

PAUL MAINA KIARIE RESPONDENT

AND

JANE GATHONI MURAYA INTERESTED PARTY

JUDGMENT

1. The Appellants vide memorandum of appeal dated 19th July 2021 appealed against the Ruling delivered by Hon. J. Wanjala on behalf of Hon. Ocharo Momanyi, PM on 30th June 2021 in Nyahururu Chief Magistrate’s Court Succession Cause No. 55 of 2015 on the following grounds inter alia:-
2. That the Learned Trial Magistrate erred in law and in fact in failing to find that the Respondent had not satisfied the conditions set out under Section 76 of the *Law of Succession Act* CAP 160 Laws of Kenya to warrant the Revocation of the grant issued on the 29/7/2009.
3. That the Learned Trial Magistrate erred in law and in fact is revoking the grant issued on the 29/7/2009 against the weight of the evidence on record and in particular the fact that no evidence was adduced by the Respondent and his witnesses in support of revocation of the grant dated- 29/7/2009 which grant was properly issued.



4. That the Learned Trial Magistrate erred in law and in fact in failing to find that the Respondent had invoked the wrong provisions of the law and the wrong procedure in seeking to set aside and to revoke the Certificate Confirmation of Grant dated 19/2/2010.
5. That the Learned Trial Magistrate erred in law and in fact in finding that the Respondent and other beneficiaries were absent and did not participate in the process of confirmation of grant contrary to the evidence on record.
6. That the Learned Trial Magistrate erred in law and in fact in failing to tress the issue on the delay of over 7 years occasioned in filing the summons for revocation of grant and the fact that the Certificate of Confirmation of grant dated 27/4/2020 had been executed and title deeds issued to the beneficiaries some of whom had already sold and transferred their shares to innocent third parties.
7. That the Learned Trial Magistrate erred in law and in fact in falling to find that the Respondent did not prove fraud and forgery to the required standard to warrant revocation of grant.
8. That the Learned Trial Magistrate erred in Law and in fact in failing re address all the issues raised by the parties in support of and in opposition of the summons for revocation of grant and in completely ignoring the written submissions tendered by the 1st Appellant and dated 3/6/2021 in his Judgement.
9. That the Learned Trial Magistrate erred in law and in fact in failing to address the issue of third parties who are buyers not having been enjoined in the suit for revocation of grant and for condemning them unheard.
10. That the Learned Trial Magistrate erred in law and in fact in allowing the summons dated 20/6/2017 ignoring the evidence tendered by the 1st Appellant and his witnesses and for awarding the costs of the suit to the Respondent.
11. Reasons Wherefore the Appellants pray for the ruling dated 30/6/2021 to be set aside and for the summons for revocation of grant dated 20/6/2017 to be- dismissed with costs.

Appellants' Written Submissions

12. The Appellants stated that the appeal emanates from an application dated 20th June, 2017 which the Respondent sought among other orders for revocation and/or annulment of the grant of Letters of Administration Intestate for the Estate of Geoffrey Kiarie Njoroge (Deceased) issued to the 1st Appellant (Applicant then) and the Respondent in this suit on 29th July, 2009 and confirmed on 19th February, 2010. (See page 24 of the Record of Appeal.)
13. On 4th June, 2017, the 1st Appellant, the 1st Administrator of the estate, appointed the current advocates on record and filed a Notice of Preliminary Objection which was later withdrawn and thereafter filed a Replying Affidavit sworn on 25th August, 2017 vehemently opposing the application. Equally, the 2nd Appellant filed a Relying Affidavit sworn on the even date above equally opposing the Application of the Respondent herein. Subsequently, the Respondent was granted leave to file supplementary affidavits. Thereafter, the matter proceeded vide viva voce evidence with three witnesses testifying on behalf of the Respondent and 2 witnesses on behalf of the 1st Appellant.
14. After close of each parties' case, parties filed written submissions and thereafter a ruling was delivered on 1st July, 2021 in favour of the Respondent herein. Aggrieved by the judgement, the Appellants mounted this appeal on the grounds indicated above.
15. The Appellant stated that they rely entirely on our submissions before the lower court dated 3rd June, 2021. Further reliance was placed on Section 76 of the Law of Succession.



16. It was contended that the gist of the application of the Respondent is that the beneficiaries did not consent to the issuance of the confirmation and the thereof signatures are forged; the Respondent never signed the confirmed grant; the daughters of David Njoroge(Deceased) were left out; the beneficiaries were not present when the grant was being confirmed and the mode of distribution was not equitable. So, the question that begs to be asked is, did the Learned Trial Magistrate correctly apply his mind to the law, evidence tendered, submissions submitted in order to render the grant issued liable for revocation?
17. It was contended that page 20 of the Record of Appeal clearly indicates that all the beneficiaries listed in the Chief's letter save for the Respondent signed the consent. That the 1st Appellant clearly followed the law to the letter by informing the beneficiaries in the order of priority as stipulated at Section 66 of the [Law of Succession Act](#) and notified the beneficiaries as per Rule 26 of the Probate Rules. In any event there is no evidence to state that the signatures were forged or in any way doctored.
18. On the Respondent claim that he did not sign the consent, the Appellants invited this Court to look at page 201 line 18 of the Record of Appeal, where he testified on oath that he did agree with the distribution. Equally during cross-examination of the 1st Appellant, he confirmed that the Respondent was aware of the confirmation but he did not sign and gave no reasons for refusal. They asserted that this affirmed the depositions in the 1st Appellant's replying and supplementary affidavits deponing that he informed everyone about the confirmation.
19. It was asserted that the Respondent was always aware of the grant and the Chief's letter which listed the beneficiaries. He never objected to it up until confirmation. At page 201 line 5 of the Record of Appeal, the Respondent testified that the share of David Njoroge(Deceased) was with him. At page 204 line 5 of the Record of Appeal, the Respondent confirmed that he farms on the said share, share of David Njoroge(Deceased). It should not be lost that land in question, which is Nyandarua/Wanjohi/1256 was already sold to a third party.
20. The Appellants argued that despite mentioning the children of David Njoroge(Deceased), there were no birth certificates or any evidence whatsoever that such children exist and/or belong To DAVID NJOROGI. They therefore submitted that the Respondent failed to discharge the burden of proof and that this was back door of the Respondent trying to sneak in issues in order for the grant to be revoked, which the Learned Trial Magistrate failed to apply his mind on.
21. It was contended that the share in question has already been distributed and already sold. The provisions of Section 93(1) of the [Law of Succession Act](#) which is couched in mandatory terms, the right of the buyer is protected and therefore was supposed to be enjoined in this case, thus the Learned Trial Magistrate condemned them unheard. Title has already changed hands.
22. As for the Respondent and beneficiaries not being present during confirmation of grant and the 1st Appellant getting the lion's share, it was stated that it is crystal clear that the Deceased had expressed his wishes on how the estate was to be divided. They submitted that the Respondent was economical in truth. In his application he deponed that the deceased had expressed his wishes to the extent that about three and quarter acres along the main road, would be separated and kept intact for the lifetime of their mother and later subdivided into nine plots. It was asserted that while testifying the Respondent testified that 1 acre was to go to the boys and the rest to the mother, Beatrice Njoki (deceased). It was also averred that during cross-examination, PW2 confirmed that Francis Kangethe and John Ndungu was not in the meeting.
23. The Appellants stated that what is deponed by the Respondent was not effectively analyzed by the Learned Trial Magistrate as there is a lot of disparity in the stories. That to that extent the Respondent failed to prove Beatrice Njoki (Deceased) was not fully entitled to Nyandarua/Wanjohi/1252 land



which was the larger portion of 3.3 acres. That it should be taken into account that the matrimonial house was built on 1252 and therefore Beatrice Njoki(Deceased) was entitled to this portion absolutely as compared to life interest. Further, it was averred that it is on record that there is an agreement dated 12th March, 2011 marked as "PKK1" indicating and affirming that Beatrice Njoki(Deceased) was given 2.3 acres. Additionally, there is equally another letter dated 15th February, 2011 affirming this position. (See page 229 line 8 of the Record of Appeal.)

24. As for Beatrice Njoki (Deceased) giving her portion of the land to the 1st Appellant, it was the testimony of the 1st Appellant that he was directed by Beatrice to transfer land to his name. In support of the testimony of the 1st Appellant, at page 185 of the Record of Appeal do indicate that Beatrice was present during confirmation of grant and she did not raise any objection and/or file protest. As regards to her not being mentally sound and/or being senile, they submitted there is no evidence tendered in support of this. To that extent they submitted that the Learned Trial Magistrate failed to take into account the evidence tendered by the 1st Appellant thus arriving at wrong conclusion.
25. The Appellants argued that a certificate of confirmation of grant is not grant of representation, but a certificate to the effect that the grant had been confirmed by the Court. The discretion alluded in Section 76 of the Law of Succession Act therefore is not to the certificate of confirmation of grant but rather the grant issued on 29th July, 2009. They urged this Court to be persuaded by the case in re estate of Kiberenge Mukwa (deceased) [2021] eKLR
26. Following the cited decision above and relying on the authorities cited in our lower Court submissions, they submitted that the Learned Trial Magistrate used the wrong provisions to revoke the certificate of confirmation of grant thus erred in law and in fact in revoking the certificate under Section 76 of the Law of Succession Act. In any event, no conditions were met by the Respondent under the said section as demonstrated herein. They added that the Respondent not being present and/or consenting at the confirmation stage is not a ground for revocation of grant under Section 76 of the Law of Succession Act and the only recourse is either appeal or review of the order confirming the grant.
27. It was contended that the application of the Respondent came too late in the day and the Application was only an after-thought. That his intention is to get the bigger share of the estate and he has denied the Appellants from enjoying the estate which conduct include denying them firewood yet he is the one cutting trees.
28. Lastly, it was averred that, it is trite law that award of cost is discretionary and follow event pursuant to Rule 69 of the Probate and Administration Rules thus they prayed for the same to be awarded to them.
29. Parties were directed to canvass appeal via submissions but the Respondent's Submissions were not available in file at the time of drafting this judgement.

Analysis and Determination

30. Having given due consideration to the appeal herein on the basis of the supporting grounds, the replying affidavit and the submissions, this court is required to determine whether the trial magistrate erred in law and fact in revoking the grant of Letters of Administration Intestate for the Estate of Geoffrey Kiarie Njoroge (Deceased) issued to the 1st Appellant and the Respondent herein on 29th July, 2009 and confirmed on 19th February, 2010.



31. This being a first appeal, the duty of this Court is as was stated by the Court of Appeal in the case of Abok James Odera t/a A.J. Odera & Associates vs. John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR, where the Court pronounced itself as follows: -

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kustron (Kenya) Limited 2000 2EA 212 wherein the Court of Appeal held, inter alia, that: -‘On a first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.’”

32. Revocation of a grant is governed by Section 76 of the Law of Succession Act which states as follows:-

76. Revocation or annulment of grant ;

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.

36. Additionally, Section 76 above was clearly expounded on by the court In re Estate of Prisca Ong'ayo Nande (Deceased) [2020] eKLR where it was stated that:

“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 procedurally, but the administrator, thereafter, got into problems with the exercise of administration, such as 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.”

37. From the trial record, the Respondent invited the trial court to revoke the grant issued to him and the 1st Appellant on grounds that the application for confirmation was made fraudulently to the exclusion of the Respondent. It was asserted that the application for confirmation was defective as he and some beneficiaries did not consent to the same and the signatures exhibited were either forgeries or fraudulently obtained.
38. Further, that the confirmation disinherited some of the beneficiaries and awarded unfair gain to the 1st administrator/ the 1st Appellant herein at the expense of other beneficiaries and that some beneficiaries had not received their share of the estate even after more than 7 years since the grant was issued and that the administration process was incomplete due to the recalcitrance of the 1st Appellant.
39. Consequently, the trial magistrate proceeded to grant the summons for revocation through his ruling dated 1st July 2021, noting in summary that:-the Respondent never participated in confirmation of the grant;the list of beneficiaries as drawn and filed by the chief has 9 beneficiaries but not all of them attended the confirmation proceedings as required by the court;the deceased’s widow, surviving spouse was not in court when the grant was confirmed in order to explain why no share was allocated to her;the confirmation of grant filed was not signed by the Respondent who was also a co-administrator;the issue of the 1st Appellant getting the bulk of the estate as per the proposed distribution was not comprehensively addressed in court in the presence of the other beneficiaries;the further affidavit introduced other beneficiaries who are not listed in the chief’s letter;there was a variance between the distribution in paragraph 5 of the affidavit in support of the summons for confirmation as read with the further affidavit;there appeared to be an alteration in paragraph 5 of the affidavit in support of summons for confirmation
40. Evidently, it appears that there were procedural missteps occasioned by the 1st Appellant during the confirmation of grant process. A court while confirming a grant has the responsibility, under the proviso to Section 71(2) of the *Law of Succession Act*, to satisfy itself that all the persons beneficially entitled had been ascertained, and their interests too had been ascertained. Further, it is my considered view that the court should have put the 1st Appellant to task to explain the exclusion of beneficiaries and the 2nd administrator because he had a duty, under the proviso to section 71(2) and Rule 40(4) of the Probate and Administration Rules to ascertain them and provide for them, and where provision is not made for them, account for the non-provision
41. It is clear that the Respondent disputed the confirmation of grant process and the process of obtaining the consent on the mode of distribution. He even stated as much in the summons for revocation of



grant where he averred that although the grant was properly issued, the application for confirmation was made fraudulently to his exclusion. Although I agree with the trial magistrate and the Respondent on the 1st Appellant's impropriety during the confirmation of grant, In re Estate of Juma Shitseswa Linani (Deceased) [2021] eKLR the court held that where a person is unhappy with the process of confirmation of grant, such a person ought not to move the court under section 76 for revocation of grant.

42. Instead, the person should file an appeal against the orders made by the court on distribution or apply for review of the said orders. This is because the court confirming a grant largely becomes functus officio so far as confirmation of the grant is concerned, and cannot revisit the matter unless upon review.
43. Accordingly, the power or discretion granted to the court by Section 76 of the [Law of Succession Act](#) is for revocation of grants. As was stated In re Estate of Kiberenge Mukwa (Deceased) [2021] eKLR:-

The ideal situation, where a person is unhappy with the process of confirmation of grant, for it would appear that that is what the Appellant herein is aggrieved about, is not to move the court under section 76 for revocation of grant, as the reasons that I have discussed in the foregoing paragraphs show. What such a person should do instead, is to file an appeal against the orders made by the court on distribution. The court confirming a grant largely becomes functus officio so far as confirmation of the grant is concerned, and cannot revisit the matter unless upon review.

44. Consequently, it is my considered view that the Respondent ought to have appealed against the orders that confirmed the grant, if he was not satisfied with the distribution that the court ordered. Alternatively, the Appellant should have mounted an application for review of those orders, if he had the competence to file such an application, and if she had grounds upon which she could urge review.
45. At this point, it is important to state I disagree with the trial magistrate's finding that the application for revocation of grant herein certified the requirements of Section 76. Further, having looked at the orders granted by the trial magistrate, he clearly overstepped his mandate. However, in invoking the inherent discretion of this court under Rule 73 of the Probate & Administration Rules and having considered the foregoing circumstances, I make a finding that the order on confirmation of grant and distribution of the estate made on 19th February 2010 is hereby set aside and any certificate of confirmation of grant, issued on the basis of it is hereby cancelled. All transactions undertaken on the strength of the said certificate of confirmation of grant be and are hereby declared null and void "ab initio" with the estate property being reverted back to the name of the deceased
46. In the upshot, this court gives the following orders: -
 - I. The ruling and orders of the trial magistrate in Nyahururu CM Succession Cause No. 55 of 2005 delivered on 1st July 2021 are hereby set aside;
 - II. The order on confirmation of grant and distribution of the estate made on 19th February 2010 is hereby set aside and any certificate of confirmation of grant, issued on the basis of it is hereby cancelled.
 - III. The administrators are at liberty to file for fresh summons for confirmation of grant within 30 days of this Judgement and involve all the beneficiaries of the estate of the estate in the lower court.
 - IV. Each party shall bear their own costs.



RULING, DATED, SIGNED AND DELIVERED AT NYANDARUA THIS 7TH DAY OF NOVEMBER 2024

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C KARIUKI

JUDGE

