



In re Estate of Simeon Mutunga Abdallah Kithu (Deceased) (Succession Cause 91 of 2015) [2024] KEHC 16221 (KLR) (17 December 2024) (Ruling)

Neutral citation: [2024] KEHC 16221 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 91 OF 2015**

G MUTAI, J

DECEMBER 17, 2024

**IN THE MATTER OF THE ESTATE OF SIMEON
MUTUNGA ABDALLAH KITHU (DECEASED)**

BETWEEN

DAVID MUMO KITHU PETITIONER

AND

MUSYOKI MUMO KITHU 1ST INTERESTED PARTY

FREDRICK MUINDE KITHU 2ND INTERESTED PARTY

JUMA KITHU MUMO 3RD INTERESTED PARTY

MBITHI KITHU MUMO 4TH INTERESTED PARTY

HASSAN WAMBUA KITHU 5TH INTERESTED PARTY

KYALO KITHU MUMO 6TH INTERESTED PARTY

MICHAEL KITHOME KITHU 7TH INTERESTED PARTY

CAROLINE MAPYA KITHU 8TH INTERESTED PARTY

RULING

1. The deceased person whose estate is the subject of these proceedings is Simeon Mutunga Abdalla Kithu. I shall hereafter refer to him as the “deceased”. According to the death certificate filed herein, the deceased was 70 years old at the time of his death. He died on 24th September 2012 at Mariakani Hospital from a heart attack, hypertension, and diabetes mellitus.
2. According to the Assistant Chief of Mariakani/Mitungoni sub-location, Mr Sammy C Kombe, the deceased had three dependants whose names he gave as being: -



- a. Alice Kachii Nzomo, widow, then aged 78 years;
- b. David Kithu Mumo, son, then aged 48 years; and
- c. Paul Kithu Mumo, son, then aged 41 years.

The said letter of the Assistant Chief was dated 6th December 2013.

3. Vide a Petition filed on 17th March 2025, the Petitioner herein, David Mumo Kithu, sought letters of administration intestate of the estate of the deceased. He listed as the sole asset of the deceased a shamba at Mariakani, known as Block 4/117/424, whose estimated value he stated to be Kes.40,000,000/-. The Petitioner filed a consent form (Form 38) executed by his mother, Alice Kachii Nzomo, and brother, Paul Kithu, on 12th September 2014 before a Commissioner for Oaths.
4. The grant was subsequently issued on 30th September 2015.
5. Vide summons for confirmation of grant dated 11th August 2016, the Petitioner/Respondent sought to have the grant issued to him confirmed. In paragraph 5 (a) of the affidavit in support of the summons for confirmation of grant, sworn on 11th August 2016, he identified the sole asset of the deceased as being shamba (Title No. Kilifi/Kadzonzon/Madzimbani/1654) and proposed that the same would be distributed in the following ratios:-
 - a. Alice Kachi Nzomo - 40%;
 - b. David Kithu Mumo - 30%; and
 - c. Paul Kithu Mumo - 30%.
6. The Petitioner/Respondent attached to the said application a copy of the title, Title Number Kilifi/Kadzonzon/Madzimbani/1654, issued by the Kilifi District Land Registry on 8th August 2013. The said parcel of land measures 5.18 hectares.
7. The Summons for Confirmation of Grant was heard on 3rd October 2013 when Alice Kachii Nzomo and David Kithu Mumo were present, and on 24th October 2016, Paul Kithu Mumo attended court. On this latter date, the grant was confirmed as prayed. The court issued the Certificate of Confirmation of Grant dated 24th October 2016.
8. The Applicants filed the Summons for Revocation and or Annulment of Grant dated 30th May 2024 vide which they seek two orders to wit that:-
 - a. The confirmed grant of letter of administration intestate issued to said David Mumo Kithu in this matter on 30th September 2015 be revoked and annulled; and
 - b. That Hassan Wambua Kithu be appointed as the administrator of the estate of Simeon Mutunga Abdalla Kithu in place of David Mumo Kithu.
9. The Applicants aver that the impugned grant was obtained fraudulently by the making of false statements and the concealment from the court of something material to the case by the Petitioner herein. The application was supported by the annexed joint affidavit of all the Applicants herein sworn on 5th June 2024.
10. The deponents of the said affidavit averred that the deceased was their brother. They deposed that Title No Kilifi/Kadzonzon/Madzimbani/1654 belonged to their late father, Abdallah Kithu Mumo. It was their statement that the letter of allotment of the said plot was issued on 16th June 2006 and bore the name of "Simeon Mutunga Kidhu and Others". In their view, "others" in the letter of allotment



referred to them and, therefore, that the said property belonged to all the issues of their father, Abdallah Kithu Mumo. They averred that they were in occupation of the said property and relied on a survey report dated 10th August 2015 done by Philomu Mapping Services.

11. They averred that although the title bears the name of the deceased, he was registered as the owner in trust for them as beneficiaries of their late father, as reflected in the allotment letter. They thus stated that the Petitioner deliberately listed the property as belonging to the deceased to defraud them. They urged that the grant was obtained fraudulently by the making of false statements and by concealment of material information to the case on the ownership of the property from the court. In so doing, he breached his duty to act in good faith. It was thus argued that the court ought to revoke or annul the grant issued to the Petitioner for material non-disclosure and intentionally withholding vital information from the court.
12. In response, the Petitioner filed a Preliminary Objection dated 5th July 2024 and a Replying Affidavit sworn on 25th June 2024 in which he averred that the Applicants took too long to file the summons for revocation of grant contrary to what is provided for under Section 76 of the [Law of Succession Act](#). The Petitioner averred that he was lawfully appointed as administrator under a transparent process. He denied that there had been fraud in the process leading to his appointment.
13. The petitioner denied that his father held the property in trust for his siblings and averred that the claim was unfounded. David Mumo Kithu deposed that the Applicants knew and participated in the succession proceedings. He alleged that the Applicants' advocates had withheld the title documents and court documents and that, being the case, it could not be said that they were unaware. He stated that a meeting was held on 2nd May 2015 when the family members agreed that the certificate of title in respect of Title No Kilifi /Kadzozzo/Madzimbani /1654 should not be cancelled.
14. He further deposed that it had not been demonstrated that there had been fraud or misrepresentation. Further, the application was a grave abuse of the process of court, which should not be entertained.
15. The application was canvassed through both oral and written submissions.
16. The written submission of the Applicants is dated 27th September 2024.
17. The applicants identified issues for determination as being: -
 - a. Whether the grant issued to the Petitioner should be revoked for fraud and concealment of material facts; and
 - b. Whether the Applicants are time-barred from applying for the revocation of the grant issued to the Petitioner.
18. With respect to the first issue, it was averred that when the suit property was initially allotted, the allottees were "Simeon Mutunga Kidhu and others". When the title was issued, however, it only had the deceased's name.
19. It was urged that due to harmony in the family, it wasn't deemed necessary to change the title. However, sometime in 2023, the Petitioner, his mother and his brother evinced an intention to sell it. This is what triggered the present kerfuffle.
20. The Applicants' counsel averred that the grant was obtained fraudulently upon making a false statement and concealment from the court of something material to the case. Therefore, the impugned grant was liable under Section 76 of the [Law of Succession Act](#) to be revoked. Reliance was placed in the case of *Re Estate of Prisca Ong'anyo Nande (deceased) [2020]eKLR*.



21. It was urged that the Petitioner had the intention of defrauding the applicants hereof their inheritance.
22. Further reliance was placed on the case of re Estate of Caleb Joseph Wadenya alias Caleb Andenya Opiyo (deceased) [2023] KEHC 772 KLR, where the court held that:-

“When a court is called upon to exercise this discretion, it must take into account the interest of all the beneficiaries entitled to the deceased’s estate and ensure that the action taken will be in the interest of justice. Generally, the trial court has jurisdiction to revoke grant if the conditions under section 76 are satisfied.”
23. Counsel submitted that this court should protect the interest of all the beneficiaries by revoking the grant.
24. The Applicant’s counsel submitted with respect to the second issue that there was no time bar regarding the Applications brought under section 76 of the *Law of Succession Act*. Reliance was placed on the decision of the court in re Estate of Josephine Magdalena Motion (deceased) [2016]eKLR and Mary Njeri Gachie & another vs Peter Ngigi Kamau & 2 others [2017] eKLR.
25. It was thus urged that I allow the application.
26. The submissions of the Petitioner/Respondent were filed on 27th September 2024.
27. Counsel for the Petitioner urged that the correct procedure was used during the process of the acquisition of the grant of representation.
28. The Petitioner/Respondent identified five issues coming up for determination as being: -
 - a. Whether the application for revocation of the grant is valid;
 - b. Whether there was evidence of fraud or coercion, or concealment of material facts;
 - c. Whether there was sufficient explanation for the delay in bringing the application;
 - d. Whether the applicants were involved in obtaining the grant; and
 - e. Whether the estate has been administered fairly and lawfully.
29. On the first issue, it was urged that it hadn’t been shown that the Petitioner engaged in fraud or misrepresentation, nor had they offered or produced any evidence. Counsel referred to the case of Matheka and Another vs Matheka [2005] 2 KLR 455 in support of his submissions that revocation of a grant is a drastic remedy that should be issued sparingly.
30. On whether fraud or concealment of material information had been shown, the Petitioner’s counsel argued that the allegation to that effect was unsubstantiated. Relying on the case of RG Patel vs Lalji Makani (1957) EA 314, it was urged that fraud must be specifically pleaded and proven. Counsel stated aht there was no evidence backing the claim that the property in dispute was held in trust.
31. Counsel submitted that a delay of 8 years in bringing the application defeated the application. He urged that section 76 of the *Law of Succession Act* required such applications to be brought within a reasonable time. Reliance was placed on the decision of the court in the case of Abigail Barma vs Mwangi Theuri; ELC cause No 393 of 2013.
32. The counsel for the Petitioner/Respondent submitted that the applicants were involved in the process leading to the issuance of the grant, and they could not now resile from it.
33. Lastly, the Petitioner /Respondent urged that the estate had been lawfully and fairly administered.



34. In the circumstance, it was urged that the application before the court be dismissed.
35. I have considered the application, the responses thereto, as well as the written and oral submissions of the parties. The onus on this Court is to determine whether the application is merited and, if so, what orders should be issued.
36. In my view the dispute herein is and of ownership of Title No Kilifi/Kadzozzo/Madzimbani/1654. Did it belong to the deceased absolutely, or was he holding it in trust for himself and his siblings?
37. From the evidence adduced, it is evident that when the Petition was filed, the suit property was registered in the name of the deceased, as evidenced by the certificate of title, whose provenance is not disputed.
38. I have perused the Petition, affidavits in support of the Petition, and the supporting documents and considered the proceedings before the Judge. I note that: -
- a. The pleadings correctly identified all the dependants;
 - b. Consent of all the dependants was sought by the Petitioner;
 - c. Details of the assets of the deceased was given;
 - d. There is nothing defective about the procedure that was used in so far as: -
 - i. The Court issued the grant was issued after due notice was given;
 - ii. The grant was confirmed after the due period had lapsed.
39. The Petitioner averred that the summons was time-barred after being filed out of time. With respect, this is incorrect. The correct position was stated by the court in re estate of Josephine Magdalena Motion (deceased) [2016]eKLR as being:-
- “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 application to be made. The provision is open-ended. Of course, there is room for bringing the test of reasonableness into the play. That, however, does not introduce time limitation. It merely requires the court to bring to bear reasonableness in its exercise of discretion on whether or not to revoke the grant.”
40. The foregoing decision was echoed in the case of Mary Njeri Gachie & another vs Peter Ngigi Kamau & 2 others [2017] eKLR, where it was stated that: -
- “the use of the words “...may at any time ...” suggests that there is no time bar as to when the right set out therein can be exercised. That right can be exercised at any time by either the interested party or the court, whether the grant has been confirmed or not.”
41. The ineluctable conclusion I draw from the above decisions is that summons for revocation of a grant can be filed at any time cause is discovered. Since the remedy sought is a discretionary one, and as discretion must be exercised on sound principles, the court will naturally consider the delay, when deciding whether or not to revoke a grant.
42. In the circumstances I am not persuaded that the Preliminary Objection has any merit. The same is thus dismissed.



43. Section 76 of the Law of Successions Act states that: -

“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.”

44. In the case of *re Estate of Prisca Onayga Nande (deceased) (2020) e KLR* the court stated that:-

8. 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.

45. The Court of Appeal in *Matheka Vs Matheka (2005) e KLR* held that:-



- i. A grant may be revoked either by application by an interested party or by the court on its own motion.
 - ii. Even when revocation is by the court upon its own motion, there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by the making of a false statement or by concealment of something material to the case or that the grant was obtained by means of untrue allegation of facts essential in point of law or that the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the estate.”
46. It is trite law that revocation of grants is a drastic remedy that the courts grant only in the clearest of cases. Is this one such case?
 47. The Applicants are not the members of the deceased’s immediate family; rather, they are his siblings. They do not dispute that the Petitioner is the son of the deceased or that his mother was married to their deceased brother. Given the provision of section 66 of the Law of Succession Act, the Applicants do not rank as highly as the widow does in the order of preference. I do not think that even if I were to revoke the impugned grant, I would favour the siblings over the deceased spouse.
 48. Although the title is the name of the deceased, it is apparent that the truth may be complicated. Annexure “DMK6”, in particular agenda Item 3, suggests that property may be communal. The minutes of the meeting bear Alice Kachii’s thumbprint. I hasten to note that the Petitioner produced this specific annexure. When this is taken together with the letter of allotment (MKM1), the survey report (MKM2) and the Top Cadastral Map (MKM3), it becomes evident that the Applicants’ claim may not be idle.
 49. Having said so, I note that the Petitioner denies that his father held the land in trust. To the contrary, the Petitioner avers that the property belonged to his father. The dispute, then, is one of ownership. I must, therefore, ask myself if I have the necessary jurisdiction in view of what the Constitution states regarding the jurisdiction of the High Court.
 50. The court in the case of re estate of P N N (Deceased) [2017] eKLR, held that:-

“According to Article 162(2) of the Constitution the Environment and Land Court (ELC) is vested with jurisdiction to determine disputes touching on ownership and the right to occupy and use land. Article 165(5) of the Constitution states that the High Court has no jurisdiction over matters that are the subject of Article 162(2) of the Constitution. It is my considered view that the matter of Ngong/Ngong/[particulars withheld], falls within the purview of Article 162(2) of the Constitution, meaning that this court then, by virtue of Article 165(5) of the Constitution, does not have any jurisdiction over it. Determination of the question of the ownership of Ngong/Ngong/[particulars withheld], as between the deceased and the other claimants should be referred to the ELC for resolution of the matter of as to who between the deceased and his father had bought the property from Paul Karanja Muiruri. Under Rule 41(3)(4) of the Probate and Administration Rules, during the hearing of a confirmation application, like in the present case, where an issue arises as to the identity or share or estate of any person claiming to be beneficially interested in it, the court may set aside the distribution of that share or property to await determination of the matter elsewhere. Under section 71 of the Law of Succession Act, Cap 160, Laws of Kenya, the court seized of a confirmation application may postpone determination thereof for one reason or other.”



51. From the foregoing, it is evident that I have not found any reason to revoke the grant, pursuant to what section 76 of the [Law of Succession Act](#) provides. Determination of disputes of ownership of land does not lie with this Court. To assume a jurisdiction I do not have is judicial overreach. I will do no such thing.
52. In the circumstance, I decline to revoke the grant. Parties are at liberty to take the dispute to the appropriate court for determination.
53. Since this is a matter between family members I make no orders as to costs.
54. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 17TH DAY OF DECEMBER 2024. DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of:-

Ms Iman Said, for the Applicants;

Mr Abeid, for the Petitioner/Respondent; and

Arthur – Court Assistant

