



**In re Estate of Njoroge Kimani (Deceased) (Succession Cause E947 of 2021) [2024] KEMC 173 (KLR) (18 July 2024) (Ruling)**

Neutral citation: [2024] KEMC 173 (KLR)

**REPUBLIC OF KENYA  
IN THE NAKURU LAW COURTS  
SUCCESSION CAUSE E947 OF 2021  
PA NDEGE, SPM  
JULY 18, 2024**

**BETWEEN**

**HANNA WANJIRU MWANGI ..... APPLICANT**

**AND**

**LEAH NYAMBURA WAMBUI ..... RESPONDENT**

**RULING**

1. Summons for Revocation or Annulment dated 30/01/2023 brought under Sections 76 and 47 of the [Law of Succession Act](#) and Rules 49, 62 and 73 of the Probate and Administration Rules seek for orders of revocation of grant issued and confirmed on 28<sup>th</sup> October 2022 in favor of the respondent, Leah Nyambura Wambui, on grounds that the same was obtained based on concealment of facts since the respondent was not a wife to the deceased. Upon the revocation or annulment, the summons further pays that: -
  - a. Hanna Nyambura Wambui, the applicant herein, be appointed administrator of the estate of the deceased.
  - b. The Honorable court annuls, revokes, cancels and invalidates any dispositions or resultant titles issued or procured based on the letters of administration and certificate of Confirmation that arose from Succession Cause E947 of 2021 and consequently the estate of the deceased be distributed afresh.
  - c. Costs of this application be provided for.
2. There is a Replying Affidavit by the Respondent sworn at Nakuru on 25/10/2023, which however, appears to responds to a Notice of Motion application dated 28/01/2023; and not the summons herein. I have however gone through the averments therein and they directly attack or respond to the averments and the paragraphs in the Applicant's supporting affidavit sworn on 30/01/2023. It is also to be noted that the Applicant obtained leave to file a further affidavit in response to the Replying



Affidavit. I nevertheless find the averments therein to be relevant opposition to the summons herein. I do therefore take it that the summons herein has been well opposed.

3. The Summons were heard on the basis of the affidavits filed by the parties and the learned counsel written submissions. 234

### **The Applicants' Case.**

4. The Applicant's case is mainly founded in her Supporting Affidavit sworn at Maralal on 30/01/2023. She deposes that the deceased was her husband. That the deceased died on 22/07/2021, leaving behind 4 beneficiaries as being herself, her daughter with the deceased, B. N., and 2 sons which he sired with the respondent, N. K and K. M. That the 2 sons were sired by the deceased and the respondent even though there existed no marital relationship between them since the year 2004 when they broke up due to irreconcilable differences. That from the year 2004, the deceased never supported the respondent in any way and they were never in communication. That following their irreconcilable differences, the deceased took her as his wife and that they cohabited together for years before his demise. That she became aware of the respondent's underhand dealings and the fact that she filed a succession cause after she heard that she was selling all the properties of the deceased and that upon further enquiries, this cause was pointed out to her by a person close to the respondent. That the respondent herein was not a wife to the deceased as at the time of his death. That she appeared after the death of the deceased almost immediately after the deceased was buried and moved to court to file the instant succession cause. That the entire succession proceedings proceeded discretely before the court leading to the issuance of a certificate of confirmation of grant on 28/10/2022 where the respondent inherited the estate of the deceased. That the respondent did not only mislead the court that she was a wife to the deceased but also conspicuously left the applicant and her daughter out. That the respondent also concealed the fact that the deceased held bank accounts and had properties including a 5-acre piece of land in Mombasa and another piece of land in Njoro, facts which shall become clear at the hearing hereof. That the deceased operated several bank accounts and had more assets than the ones listed by the respondent who appears to have been in a hurry to file for succession cause in secrecy. That a certificate of confirmation of grant was issued and the property was distributed to the respondent yet she was neither a wife nor a defendant of the deceased. That the action of the Respondent, being the current administrator, to disenfranchise her and her daughter while alleging to be the wife of the deceased was actuated by malice coupled with material non-disclosure all meant to deprive the actual beneficiaries from benefitting from the estate of the deceased. That the chief's letter attached to the petition is misleading and probably a product of bribery and corruption as everyone knew her as the wife of the deceased including the chief, area residents and even the deceased's work colleagues. That she has now moved with speed, upon learning of the respondent's shrewdness and cunning ways that have misled the court into conferring her the administration of the estate of the deceased and later confirming the same, to have the grant revoked and for the estate to be preserved. That the respondent is an irresponsible person who has even failed to provide for the minors she sired with the deceased and she has come to learn that the older boy even dropped out of school since she refused to pay school fees for him and even drove him away from their home. That she cannot therefore be entrusted to hold anything in trust for the minors.

### **The Respondent's Case.**

5. In the Replying Affidavit, the respondent avers that the application herein is an abuse of court process, hopelessly incompetent, baseless, brought in bad faith and meant to serve no other purpose than to hoodwink the Honorable Court and derail the just distribution of the Estate. That the application is premised on the wrong provisions of the law and therefore ought to be struck out at the earliest opportunity. That the averments thereat are unsubstantiated, baseless and in any event not supported



by documentary evidence or otherwise and hence she is not in a position to conclusively respond to them. That she is the surviving widow of the deceased. That there is no evidence led by the applicant to prove their long cohabitation with the deceased or that Kikuyu customary marriage ceremonies and rituals were performed between herself and the deceased. That in the absence of the same, the applicant is merely a stranger to the estate and matters pertaining therein and was therefore not entitled to be enjoined and/or involved in the succession cause herein. That moreover, the inclusion of the deceased's name in a birth certificate is not evidence of paternity. That the minor's father is George Njoroge Kimani and not the deceased herein. That in light of the foregoing, the applicant and her child are not dependants of the estate of the deceased Njoroge Kimani within the meaning of Section 29 of the Law of Succession Act. That the applicant's sole intention is to enrich herself at the expense of the real beneficiaries of the estate of the Deceased. That she was not aware of the bank accounts listed in the applicant's supporting affidavit and she did not therefore deliberately conceal them from the honorable court. That the application herein is therefore untenable and ought to be dismissed forthwith for lack of merit.

### **Applicant's Response.**

6. In her Further Affidavit, the applicant averred that she was living with the deceased up to the time of his demise and that even when he became sick, she was the one who was staying with him. That she even took him to the hospital and took care of him for the entire period of his stay in hospital prior to his demise. That the respondent despite alleging to be a widow has also not provided any proof whatsoever of her assertions and that she has not provided any evidence of having ever been married to the deceased throughout his life. That she was the known wife to the deceased who had introduced her to his family as his wife. To this end, she attached a photograph of the deceased's sister while holding her baby, marked as annexure HWM-1. That if the inclusion of the deceased's name in a birth certificate is not conclusive evidence of fatherhood, then even the respondent's 2 children ought to be removed as beneficiaries of the estate of the deceased since all she can show as proof that the said children are deceased's is a chief's letter as she has not attached any birth certificate or any other document(s) whatsoever. That during her delivery, she underwent a caesarian operation and was therefore not in a position to fill the notification hence the deceased himself gave out the names to be filled and therefore indicated their daughter's name as they appear therein, including Njoroge as the father. That the deceased's various certificates of merit from the Ministry of Education bear his names as either Njoroge K. George or George Njoroge Kimani. She attached copies of the certificates of merit as HWM-4A, HWM-4B and HWM -4C. That the fact that the respondent did not know the deceased's name George is further evidence that she was never a wife as there has never been a wife who would not know the name of her husband. That the respondent took advantage soon after the death of the deceased when she secretly filed the instant succession cause in Nakuru yet the deceased and herself had been living in Limuru – Kiambu County where he was a teacher prior to his death. That this shows her determination to disinherit her and her baby in a clear attempt to unjustly enrich herself while she had no relationship whatsoever with the deceased for at least 8 years. That it is further clear that the respondent was not a wife to the deceased and was not in his life given that the respondent appears not to be aware of most of the deceased's properties other properties in Coast province that are publicly well known.

### **Parties Submissions.**

7. Parties filed written submissions. Nothing much came from the Applicant's counsel's learned submissions except some academic notes on the grounds for revocation of grants, and who can file for revocation. For the respondent, learned counsel referred the court to the provisions of section 29 of the Law of Succession Act which defined a 'dependent' for purposes of the Law of Succession Act.



Learned counsel then argued that the Respondent herein was the lawful wife of the deceased herein. That the letter from the area chief Limuru Sub-Location dated 21/04/2022 depicts as much. That when it comes to the Applicant who also claim to be a wife of the deceased, this Honorable Court cannot with the pleadings before it conclusively determine the issue, prima facie, as there is no credible evidence that the deceased ever married the Applicant. That there is no other evidence tendered from either the local chief, sub-Chief or even a village elder, or any relatives of the deceased to support the fact that the applicant was the wife of the deceased.

### **Issues for determination.**

8. After careful analysis, we humbly submit that the main issue for determination is whether the applicant has presented sufficient evidence to warrant revocation or annulment of the grant, and subsequent granting of the other orders sought in the application herein.

### **The Law.**

9. Section 76 of the *Law of Succession Act* gives the court the powers to revoke a grant provided the conditions stipulated therein have been met. It 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 has ordered or allowed; 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
  - iv. The grant has become useless and inoperative through subsequent circumstances.
1. The circumstances in which a grant can be revoked were discussed in the case of *In The Matter Of The Estate Of L.a.k. (deceased) [2014] eKLR*: -

Revocation of grants is governed by Section 76 of the *Law of Succession Act*. The relevant portions of Section 76 are paragraphs (a), (b) and (c) since the issues raised relate to the process of the making of a grant. A grant may be revoked where the proceedings leading up to its making were defective, or were attended by fraud and concealment of important matter, or was obtained by an untrue allegation of a fact essential to the point.



11. Notably, the power to revoke or uphold a grant is a discretionary one. This principle was enunciated in the binding decision in *Albert Imbuga Kisigwa Vrs Recho Kawai Kisigwa Succession Cause No.158 of 2000* where Mwita J stated: -

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.

12. In this case, it is not in dispute that the respondent petitioned for letters of administration on 23.12.2021. The deceased herein died on 22.07.2021. The respondent meticulously followed through all the processes and even obtained and attached a chief's letter dated 23.09.2021 introducing her as the only wife hence widow of the deceased. The other beneficiaries were her 2 sons. The Applicant alleges bribery or corruption on the part of the chief without availing any evidence of the same. All the processes were followed including advertisement in the *Kenyan Gazette*, and there were no objections or protests leading to the grant being issued and subsequently confirmed by this Honorable Court. I thus find no evidence of fraud, or secrecy, obscurity, or concealment as claimed by the applicant. One question one would ask is where was the applicant all these times if indeed she was a wife or a dependent of the deceased who lived with him upto and until his demise?
13. I do agree with the learned counsel for the respondent, that the issue of the Applicant being a dependent by virtue of marriage, actual or presumptive, as depicted in the application herein requires serious proof which cannot be achieved via this casual affidavit evidence and the pleadings as drawn and filed herein. Furthermore, I find most of the averments in her affidavit, more so the Supporting Affidavit, to be bare and not adequately backed by evidence. All the annexures have not been securely sealed under a seal of the commissioner and marked with serial letter of identifications as required. On this, Rule 9 of the Oaths and Statutory Declarations Rules requires that annexures should be sealed and stamped. The said rule stipulates as follows: 'All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner and shall be marked with the serial letters of identification.'
14. In the case of *Abraham Mwangi Vrs S. O. Oboo & Others HCCC No. 1511 of 2002 Hayanga J* (as he then was) quoted Order 41 of the Rules of Supreme Court of England that dealt with forms of affidavits and exhibits. That Order 41 divided exhibits into documents and non-documents and maintained that fly papers are misleading and fraught with uncertainty. He held:

Exhibits to affidavits which are loose fly sheets for identification attached to them and do not bear exhibits marks on them directly must be rejected. The danger is so great. These exhibits are therefore rejected and struck out from the record. That being the case the application fails and is dismissed.

15. Similarly, in the case of *FRancis Balinya Vrs Cecilia N. Waema [2017] eKLR*, the annexures had not been marked completely. The judge held that:

The law that requires the sealing and marking of annexures with serial letters is in mandatory terms and must be complied with... in the instant case, the law has provided in mandatory terms the manner in which evidence by way of annexures can be received by court. The failure to comply with that law, like in the instant case can only lead to one thing, the striking out of the offending documents. However, considering that the supporting affidavit in itself



complies with the law, it is only the annexures that can be expunged from the record, and not the supporting affidavit and the application.

16. Further, in the case of Fredrick Mwangi Nganga Vrs Garam Investments & Another [2013] e KLR where an annexure was only marked “A” the court stated:

As a consequence of all the above, I find that although the court has power to allow an amendment to the plaintiffs said Notice of Motion dated 14<sup>th</sup> June 2013 under the provisions of order 8 Rules 5 as well as Section 100 of the Civil Procedure Act, the fact that the plaintiff has breached Rule 9 of the oaths and Statutory declarations rules necessarily means that his application to amend must fail. As I see it, the only option is to withdraw the same and field a fresh application. Further, as I have refused the plaintiff’s application dated 14<sup>th</sup> June 2013 as currently drawn and presented does not support the interim orders sought therein and the same are lifted accordingly.

17. Another decision addressing the matter of annexures to affidavits was made by Judge Mutungi in the case of Solomon Omwega Omache & Another Vrs Zachary O Ayieko & 2 Others [2016] eKLR, where he stated as follows: -

Although the point was not taken up by the plaintiffs the court has a duty to uphold the sanctity of the record noting that this is a court of record. Before the court is a replying affidavit with annexures which are neither marked nor sealed with commissioner’s stamp. Are they really exhibits? I do not think so and they cannot be properly admitted as part of the record. I expunge the exhibits and in effect that renders the replying affidavit incomplete and therefore the same is also for rejection as without the annexures it is valueless. This should serve as a wakeup call to practitioners not to be too casual when processing documents for filing as it could be extremely costly to them or their clients as crucial evidence could be excluded owing to counsels or their assistant’s lack of attention and due diligence.

18. In the instant Application, the annexures form a very critical part of the supporting affidavit as they are the documentary evidence on which the application is anchored. For example the bank accounts statements that were attached but not commissioned were to show that the respondent concealed the same from the court, or were they to prove that the applicant was so close to the deceased that most probably they were married? I however, based on the above superior courts decisions, find that all the documents that were highlighted by the applicant as annexures to her supporting affidavit were not commissioned as required and are therefore fly documents which are hereby expunged from the record, which therefore leaves the applicant’s application or affidavit devoid of any evidence. I do therefore agree with the respondent that the averments thereat are unsubstantiated, baseless and in any way not supported by evidence, documentary or otherwise.

19. The application is grounded on the deliberate concealment of material facts by the respondent. That the respondent failed to include the applicant and her daughter as beneficiaries. The respondent denies that she genuinely does not know them, nor the additional properties that the applicant alleges belong to the deceased. I find no evidence to prove that the respondent deliberately concealed the facts that she genuinely did not know or does not believe in. As held in the case of Albert Imbuga Kisigwa Vrs Recho Kawai Kisigwa Succession Cause No.158 of 2000, the power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds and further, it is not discretion to be exercised whimsically or capriciously. I find no evidence of wrong doing on the part of the respondent that might make me to invoke section 76 and order to revoke or annul a grant. None has been brought out in this application to make me convinced that the respondent acted fraudulently or maliciously. I



have further been unable to conclusively make a determination as to the allegations of the respondent and her child being a beneficiary of the estate as scant or no evidence was tendered to that effect. Perhaps those issues ought to have been better addressed earlier on in the proceedings herein, either via a protest or objection, as the case would have been; and a proper hearing conducted.

20. I am therefore not persuaded by the applicants' arguments that the respondent concealed material facts and thus the grant was obtained fraudulently. I find that pursuant to Section 76 of the [Law of Succession Act](#), the applicant has not satisfied the court or made a case to warrant the revocation of the grant. In this regard, the application dated 30<sup>th</sup> January 2023 must fail. Consequently, I hereby dismiss the application dated 30/01/2023. Notwithstanding the respondent's counsel submissions as to costs, I do feel that in this application, each party to meet their own costs.

It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT NAKURU THIS 18<sup>TH</sup> DAY OF JULY, 2024.**

**ALOYCE-PETER-NDEGE**

**SENIOR PRINCIPAL MAGISTRATE**

In the presence of;

**Applicant's counsel: n/a**

**Respondent's Counsel: Njigina**

**Applicant: n/a**

**Respondent: n/a**

**Other Beneficiaries:n/a**

