



REPUBLIC OF KENYA



**In re Estate of Muronga M'Mungania (Succession Cause
E048 of 2023) [2024] KEMC 94 (KLR) (5 July 2024) (Ruling)**

Neutral citation: [2024] KEMC 94 (KLR)

**REPUBLIC OF KENYA
IN THE GITHONGO LAW COURTS
SUCCESSION CAUSE E048 OF 2023
AT SITATI, SPM
JULY 5, 2024**

IN THE MATTER OF THE ESTATE OF MURONGA M'MUNGANIA

BETWEEN

SUSANA KANYATTA KARONGA PETITIONER

AND

SAMUEL NDUBAI MURONGA APPLICANT

RULING

1. By a Summons dated 17th May, 2024 supported by an affidavit of similar date, the applicant prayed for:
 1. Spent
 2. Spent
 3. That this Honourable Court be pleased and/or annul the Grant of Representation issued to Susana Kanyatta Karonga on 8.3.2024 in relation to the estate of the late M'muronga M'mungania Alias Muronga S/o Mungania (Deceased).
 4. That costs of this application be borne by the Respondent.
2. The Applicant relied on 21 paragraphs which could be summarized into 4 main grounds:
 - i. The petitioner acted in complete secrecy.
 - ii. The applicant who is from the second house was not notified of the succession cause.
 - iii. The deceased made a distribution of the estate during his lifetime and this was concealed by the petitioner in her petition.
 - iv. The final distribution in the certificate of confirmation was unfair and prejudicial to the applicant.



2. The exhibits relied on were Consent form 38 showing that the applicant did not sign the consent. Certificate of the confirmation of grant. His application to the High Court seeking a revocation of the certificate of the confirmation of grant but which application he withdrew.
3. The application was opposed by a Replying Affidavit of 27th May, 2024. In summary, the respondent deposed that the Applicant/Objector was informed of the existence of not only the petition for letters of administration but also the Summons for the Confirmation of grant but he chose to deliberately ignore the same. It was further deposed that on the fixed for the confirmation of grant, the applicant's wife and brother were physically present in court but declined to participate and declined to raise any objections. It was stated further that there was no truth in the contestation that the deceased had distributed the land prior to his demise. The deponent urged the court to reject the application for revocation of grant terming the same as a non-starter, frivolous and vexatious.
4. The parties did not exchange any written submissions. The firm of Muia Mwanzia & Company Advocates represented the applicant/objector while the firm of Thurania Atheru & Company Advocates represented the Petitioner/Respondent.

Issue For Determination

5. The only issue for determination is whether or not the applicant has satisfied the threshold for revocation of grant as set out in section 76 of the *Law of Succession Act* cap 160 laws of Kenya.

Determination

6. Revocation of grants is regulated 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.”



7. In the present case, the applicant relied on 2 grounds: Concealment of facts Failure to notify the parties affected by the suit and thereby proceeding in secrecy.

Issue 1: Failure To Notify The Parties

8. The averment that the applicant was unaware of the existence of the suit was strongly challenged by the petitioner. While it was undisputed that the applicant did not sign the consent form, the Petitioner deposed in her replying affidavit that notwithstanding the applicant's failure to sign the consent, the applicant was nonetheless aware of the succession cause. Further that the applicant's wife and brother were aware too and even attended the confirmation hearing but declined to raise any objection. The affidavit of service dated 6th March, 2024 by Joel Maitethia M'rukunga shows that when the process server went to serve the pleadings, his brother Zakayo Mugambi accepted service on behalf of the second house of Naomi and said that he would notify and did notify the applicant herein of the receipt of the pleadings. This aspect is unchallenged and there is no contrary material to rebut the issue of service.
9. This averment was not dislodged by the applicant who did not file a further affidavit either from his wife or brother to dispute their physical presence in court.
10. In the result, the court finds that the applicant was aware of the existence of the suit and opted to have his wife and brother attend court for the confirmation although they declined to make any comments in court. In the result, this ground of non-service fails.

Issue 2: Concealment Of Facts To The Prejudice Of The Applicant

11. From the affidavit in support of the application for revocation, the applicant deposed that their deceased father had made actual distribution of the land during his lifetime. This averment was challenged by the petitioner who stated that there was no such distribution.
12. In the court's assessment of this issue, the court noted that the applicant did not annex any minutes to prove that the deceased held a family meeting to discuss the distribution of the estate. He did not annex any written Will by the deceased to prove that the deceased specifically distributed the land and in what shares. Furthermore, if it was true, and it appears that it is not, that the deceased had distributed the land, the applicant could have just extracted a mutation form proving the said subdivision aforesaid. A perusal of the court record however, shows that the applicant did not annex any mutation form to prove the purported distribution of the land during the lifetime of their father. If such distribution had been made it would have been treated as a gift inter vivos and considered accordingly under the provisions of section 42 of the Law section 42 of the *Law of Succession Act*:

42. Previous benefits to be brought into account.

Where—

- (a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or
- (b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.



14. This section was discussed by the authority of *Micheni Aphaxard Nyaga & 2 others v Robert Njue & 2 others* [2021] eKLR (L.W. Gitari J.) held that:

"The characteristics of the gifts inter vivos are that they are made and settled during the lifetime of the deceased and have been identified, awarded and settled for the person to whom it has been given. It is a gift made to a beneficiary when the deceased was alive and is considered when distributing the net intestate estate so that person who received it may be considered as having received his share and may reduce or diminish any entitlement to the net intestate estate. The gift which is transferred and settled for the beneficiary during the life-time of the deceased, will not form part of his estate but it will be taken into account in determining the share of the net intestate estate finally accruing to that beneficiary.

The concept of gifts is divided into two categories. First gifts inter-vivos and gifts causa mortis. Gifts inter-vivos as contemplated in the Law of Succession are such that the owner of the property or asset donates it to another without expectation of death...Further, it is fundamental to understand the intention of the parties and their acts done sufficient to establish the passing of the gift to the donee....In regard to the matter at hand, there are family members who happened to have been gifted property inter vivos; and the beneficiaries seem to all agree on the same."

15. Without any proof of gift inter vivos, the ground of concealment of facts to the prejudice of the applicant fails.
16. On the ground that the distribution was prejudicial to the applicant, the court notes that this was Equal Distribution of the estate under section 40 of the *Law of Succession Act* for a polygamous estate. Without proof of a gift inter vivos, there is no way that equal distribution can be held to be unfair to the beneficiaries to warrant a revocation of the certificate of the confirmation of the grant. The guiding authority applied for this case was the decision in *Re Estate Of Joseph Eric Owino (deceased)* (2022)eKLR (Naykundi J.):

"The Applicable Law

12. In a case of this nature where the deceased died intestate and was a polygamous man survived by two widows and children the anchor on distribution of his estate is Section 40 of the *Law of Succession Act* which primarily provides as follows;

- "(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate, shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.
- (2) The distribution of the personal and household effects and the residue of the net interest within each house shall then be in accordance with the rules set out in sections 35 to 38"

The basic scheme is in line with the principles expounded in the following cases *Rono –v-Rono* Civil Appeal NO. 66 of 2002, where Waki J.A stated inter alia that;-" More importantly, section 40 of the Act which applies to the estate makes provision for distribution of the net estate to the "houses according to the number of children in each



house, but also adding any wife surviving the deceased as an additional unit to the number of children.” A “house” in a polygamous setting is defined in section 3 of the Act as a “family unit comprising a wife and children of that wife.”

In addition, in the Matter of Re Estate of Benson Ndirangu Mathenge(deceased) Nakuru HCSC NO. 231 of 1998(Ondeyo J), the deceased was survived by his two widows and their children. The first widow had four children, while the second widow had six children. The court stated that the first house was comprised of five units while second had seven units. The two houses of the deceased combined and looked at in terms of units made up twelve units. The court distributed the estate to the children and the widows treating each as a unit. The land available for distribution was forty acres, which was divided by the court into twelve units. Out of the twelve units, five were given to the first widow and her four children, while the remaining seven units went to the second widow and her six children.

Further, In the Matter of the Estate of Nelson Kimotho Mbiti(deceased) HCSC NO.169 of 2000, Koome J directed that the estate of a polygamist be divided in accordance with the provisions of Section 40 of the Act. The estate was divided into units according to the number of children in each house with the widows being added as additional units. The same reasoning was also applied by Judge Ali Roni in the Estate of Ainea Masinde Walubengo(deceased) (2017)eKLR stating that “I am of the view that Section 40 of the Law of Succession Act will apply to the circumstances of this Case. Meaning that the Court will distribute the estate of the deceased according to each house taking into account the number of children in each unit including the surviving widow.”

17. Revocation is such an adverse and monumental order that the ends of allowing the revocation should far outweigh the inconvenience that would arise: In *Mary Wangari Kihika –vs- John Gichuhi Kinuthia & 2 Others* (2015)eKLR it was held:

“The above finding of concealment of material facts or untrue allegations of facts essential in point of law on the part of the respondent would warrant a revocation by the court of the confirmed grant. However, taking into account the fact that the present case been ongoing since 1997 that would not be a just course of action, a revocation of the confirmed grant would cause the parties to return to the drawing board and it could likely take a long time before the distribution of the suit is concluded.”

18. In the result, the application lacks merit and is dismissed with costs. The court orders the Administratrix to move forward and complete the administration process under section 83 of the Law of Succession Act in compliance with the Certificate of the Confirmation of Grant dated 8th March, 2024. The inhibition orders previously issued on 22nd May, 2024 are vacated forthwith. It is so ordered. Right of appeal is 30 days.

DATED, READ AND SIGNED AT GITHONGO LAW COURTS THIS 5TH DAY OF JULY, 2024

HON.T.A. SITAT

SENIOR PRINCIPAL MAGISTRATE

GITHONGO LAW COURTS

Mr. Ngeera Advocate For The Petitioner/respondent - Absent

The Applicant-absent

Brian Court Assistant - Present

