

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
SUCCESSION CAUSE NO E009 OF 2024
IN THE MATTER OF THE ESTATE OF AGNES WAYUA (DECEASED)
TREVOR JOHN FELLOWS
.....APPLICANT

VERSUS

DANIEL WAMBUA WAYUA (AS THE ADMINISTRATOR
OF THE ESTATE OF AGNES WAYUA (DECEASED)
.....RESPONDENT

RULING

1. The deceased whose estate is the subject of these proceedings is **Agnes Wayua**. I shall thereafter refer to her as the deceased. Ms Wayua died on **2nd November 2023**. At the time of her death, she was 62 years old. The cause of her death was given as kidney failure.
2. The deceased died testate, having executed a last will and testament on 12th September 2022 in which she appointed Mr **Mike Kyalo Mulei**, an advocate of the High Court of Kenya, of P.O. Box 80812-80100 Mombasa as the executor of the said will and bequeathed her share in the properties listed in the said will, situated in Kenya and the United Kingdom, to her son, **Daniel Wambua Wayua**. The will was executed in the presence of 2 witnesses and was registered in the Registry of Documents on the **16th day of September 2022**.
3. Although the executor initially petitioned for a grant of probate of the written will of the deceased, he renounced executorship before the grant was issued to him. Daniel Wambua Wayua subsequently applied for and was issued with a grant of probate of the deceased's

written will on 4th March 2025. I note that the petition was gazetted in the 27th January 2025 edition of the Kenya Gazette as Gazette Notice No. 721. The grant was issued after the lapse of the requisite 30-day period and upon the court being satisfied that no objection had been filed.

4. Mr Daniel Wambua Wayua subsequently filed a summons for confirmation of the grant dated 9th June 2025, vide which he sought to have the grant that had been issued to him confirmed, even though 6 months had not lapsed. The grounds for the said application were that the applicant was the sole issue of the deceased and her only heir. He deposed that there was no dispute regarding the grant and that no prejudice would be occasioned to anyone if the same was confirmed early. Further, he averred that confirmation of the grant would prevent the wastage of the estate.
5. This court heard the summons for confirmation of the grant on 30th July 2025. Being satisfied that it was just to do so, the grant issued to Mr Daniel Wambua Wayua was confirmed on the said date.
6. Before the certificate of confirmation grant was issued, Mr **Trevor John Fellows**, the former husband of the deceased filed summons for revocation of grant dated 18th August 2025 in which he contested the early confirmation of grant on the grounds that the grant was obtained by concealment of material information to wit that there was a judgment of the High Court in **HCFOS No. 1 of 2020 (OS) Trevor John Fellows v Agnes Wambua Fellows** which divided the

property the subject of the succession proceedings between Mr **Trevor John Fellows** and the deceased. Mr Fellows appealed against the High Court's decision, and the matter was before the Court of Appeal.

7. It was stated that the proceedings before the Court of Appeal were not disclosed in these proceedings. Further, the property sought to be devolved to the executor/respondent had not been crystallized so as to enable confirmation of the grant and the distribution as contemplated in the deceased person's will.
8. The administrator /responded to the summons for revocation of the grant through a replying affidavit sworn on 29th September 2025, in which he averred that there was no stay pending the hearing of the appeal. That being so, the administrator was within his rights to apply for confirmation of the grant, as the mere filing of an appeal did not amount to a grant of a stay of further proceedings before this Court.
9. He deposed that he applied for confirmation of the grant so as to preserve the estate. Regarding the appeal, it was urged that the same had, under Rule 102(2) of the Court of Appeal Rules and Order 24 of the Civil Procedure Rules, abated. He claimed that the application was a ploy by Mr **Trevor John Fellows** to disinherit him.
10. The matter was canvassed through oral submissions on 1st October 2025. The executor/respondent filed written submissions dated 29th September 2025. Although Mr Rono, for the applicant,

stated, while submitting, that they had filed submissions dated 18th September 2025, I have been unable, despite my best efforts, to locate the said submissions in the CTS.

- 11.** Mr Rono urged that there was concealment of material information by the administrator/respondent, *to wit*, that there was a pending case before the **Court of Appeal**. He submitted that the confirmation of the grant was intended to defeat the appeal. He prayed that the grant ought to be revoked and that the applicant be awarded the costs of the application.
- 12.** Ms Wasike, for the administrator/respondent, prayed that the application be dismissed. She urged that the judgment of 22nd May 2020 was valid and enforceable, even as the appeal was pending, as no stay orders had been issued. Counsel averred that the will bequeathed the deceased's shares to the administrator/respondent. She urged that the applicant aimed to defeat the appeal pending at the Court of Appeal. She accused the applicant of attempting to disinherit the administrator/respondent and of seeking to circumvent justice.
- 13.** The applicant's counsel, in response, denied that there was any ill intention or that what he sought to do was to disinherit the administrator/respondent, arguing that he was in occupation of the subject properties. He also denied that the property in the United Kingdom had been transferred.

14. I have considered the summons for revocation of the grant, the response thereto, as well as the parties' submissions. The question facing the court is whether the grant it issued on 4th March 2025 should be revoked on the grounds of non-disclosure of material information.

15. The power of this court to revoke grants of representation is stated in section 76 of the Law of Succession Act. The said section 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.”

- 16.** The said provision has been the subject of wide and varied judicial consideration. Musyoka, J, while considering the said provision, in the case of **In re Estate of Prisca Ong'ayo Nande (Deceased) [2020] KEHC 6553 (KLR)** stated as follows: -

“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.“

17. When considering whether or not to revoke grants, the court exercises judicial discretion. As with all discretion, the court, while determining whether to revoke a grant, must exercise it judiciously, not whimsically or capriciously. This was aptly stated by Mwita, J, in

the case of Albert Imbuga Kisigwa v Recho Kawai Kisigwa [2016] KEHC 1528 (KLR), where the learned Judge 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 a discretion to be exercised whimsically or capriciously. There must be evidence of wrongdoing 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.”

18. It is a common ground that the subject will stated as follows, as far as relevant: -

“2. I appoint Mike Kyalo Mulei, advocate, ID No. 11354012 of Post Office Box Number 80812-80100 Mombasa in the Republic of Kenya, to be the sole executor and trustee of this, my will.

3. In case of my death, my share in the properties hereunder shall go to my son Daniel Wambua Wayua:-

- a. house at Mtwapa on LR No 1556 and 1563, section 3 Mainland North, Mombasa;**
- b. Plot No 3088 Section 1 Mainland Land North Mombasa;**
- c. A residential house in the United Kingdom. Flat No 82C, Dove Street, Bristol; and**

d. Any money in any of my personal or business accounts or becoming due to my estate after my death.”

19. Clearly, the deceased claimed only that part of the properties that was her share. This was also stated in the affidavit of Mr Daniel Wambua Wayua, sworn on 14th October 2024, at paragraph 6 thereof.

20. It is a trite law that what may be distributed by the Probate Court is the free property of a deceased person. “Free property” is defined in section 3 of the Law of Succession Act in the following terms: -

“Free property’ in relation to a deceased person, means the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interests has not been terminated by his death.”

21. The shares of the parties in the matrimonial properties were determined by Thande, J, in case number HCFOS No.1 of 2020, between them. That determination is the subject of an appeal. Parties agree that there is no stay pending the hearing and determination of the appeal. Does that mean that the shares of the properties as determined by the court are the “free properties” of the deceased, liable for distribution by the Probate Court?

22. In my view, they aren’t. I say so as to hold otherwise would fly in the face of the doctrine of *lis pendens*. The doctrine of *lis pendens*

is a common law doctrine that prohibits the transfer “*pendete lite*” of the properties that are the subject matter of litigation. The doctrine was discussed by Madan, J, as he then was, in the case **Baber A Mawji v United States International University & another [1976] KEHC 16 (KLR)** wherein he quoted with approval the holding by Turner, LJ *Bellamy v Sabine* (1857) 1 De G & J 566, 584 that:-

“It is ... a doctrine common to the Courts both of law and equity, and rests, as I apprehend, upon this foundation – that it would plainly be impossible that any action or suit could be brought to a successful termination, if alienations *pendente lite* were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendant’s alienating before the judgment or decree, and would be driven to commence his proceedings *de novo*, subject again to be defeated by the same course of proceeding.”

- 23.** In the case of *Abdalla Omar Nabhan v The Executor of the Estate of Saad Bin Abdalla Bin Abuod & another*, (2013) eKLR, it was held that:-

“...the purposes of the principle of *lis pendens* is to preserve the suit property until the suit is finally determined or until the court issues orders and gives terms on how the suit property should be dealt with. The doctrine of *lis pendens* is founded on public policy and equity.”

24. What flows from the foregoing is that the administrator/respondent was under an obligation to disclose the pendency of the appeal to this court. This is so because the pendency of the appeal was a relevant fact, material to the case. With that kind of information, the court could have determined whether to treat the deceased's shares as free property. By not disclosing the said information, the administrator/respondent concealed from this court something material to the case.

25. It cannot be emphasized enough that full disclosure of material information is important in judicial proceedings. In the case of **In re Estate of Laurent Ntirampeba (Deceased) [2017] KEHC 2988 (KLR)**, where it was held that:-

“24. On the question of revocation of the grant issued, it is settled law that a person who approaches the Court for grant of relief, equitable or otherwise, is under a solemn obligation to candidly disclose all the material/important facts which have a bearing on the adjudication of the issues raised in the case. A duty is owed to the court to bring out all the facts and refrain from suppressing any material facts. If one is found guilty of concealment of material facts or making an attempt to pollute the pure stream of justice, the court not only has the right, but the duty to deny relief to such person. This was the expression of the court in R. v. Kensington Income Tax Commissioner [1979] 1 KB 486 by Viscount Reading, Chief Justice of the Divisional Court.”

26. In my view, the non-disclosure of the pending appeal is a sufficient warrant to revoke the grant.
27. Even if this court was wrong, it is clear that the process used to obtain the grant was defective, for upon the renouncement of executorship by Mr Mike Kyalo Mulei, a grant of probate could not issue. What should have been issued instead were letters of administration with a written will annexed to Mr **Daniel Wambua Wayua**. As shown by the gazette notice and the grant, Daniel Wambua Wayua was granted probate of the written will. This was clearly erroneous. The process was defective thereof. In making this finding, I am guided by the decision of Musyoka, J, in the case of **re Estate of Prisca Ongayo Nande (deceased)** (supra).
28. Does it matter whether the appeal has abated? I am afraid not. The abatement of the appeal does not sanitize a defective process before this court.
29. The upshot of the foregoing is that the application has merit. The same is allowed.
30. The orders that commend themselves to me are the following: -
- a. The grant issued on 4th March 2025 is hereby revoked; and
 - b. Each party shall bear its own costs of the application.

31. It is so ordered.

Dated and signed in Mombasa, this 3rd day of November 2025.

Delivered virtually through **Microsoft TEAMS.**

Gregory Mutai

JUDGE

In the presence of:-

Ms Wasike, for the Executor/Respondent;

Mr Rono, for the Applicant; and

Arthur – Court Assistant.

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