

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT THIKA**

**SUCCESSION CAUSE NO. E023 OF 2025**

**IN THE MATTER OF THE ESTATE OF GRACE WAIRIMU**

**CHEGE (DECEASED)**

**ELIZABETH WANJIRU**

**CHEGE.....1<sup>ST</sup>**

**APPLICANT/ADMINISTRATRIX**

**MARGARET NJERI**

**KIONGERA.....2<sup>ND</sup>**

**APPLICANT/ADMINISTRATRIX**

**VERSUS**

**PAUL MUKUI**

**CHEGE.....RESPONDENT/ADMINISTRATOR**

**R U L I N G**

**Brief facts**

1. The application dated 18<sup>th</sup> April 2023 seeks for orders of setting aside the proceedings and consent dated 20<sup>th</sup> July 2020 in which the respondent was added as an administrator to the deceased's estate. The applicants further urge the court to remove the respondent as an administrator and to issue a fresh grant in their names and that the respondent be directed to file a full and

accurate inventory of all the assets as well as the liabilities of the deceased's estate and a full and accurate account of all his dealings concerning the deceased's

estate as required under **Section 83 of the Law of Succession Act** for the period commencing 23<sup>rd</sup> September 2017, when the deceased passed away to date.

2. In opposition of the said application, the respondent filed a Replying Affidavit dated 7<sup>th</sup> July 2023.

### **The Applicant's Case**

3. The applicants aver that they petitioned for grant of letters of administration intestate with scanty information as the respondent took custody of the deceased's residence and all her documents thus denying all the other beneficiaries access and information. The applicants state that they objected to the respondent's summons for revocation dated 8<sup>th</sup> May 2019 however they came to learn on 20<sup>th</sup> July 2020, without their knowledge, consent or instructions the grant issued on 6<sup>th</sup> November 2018 was revoked and a fresh grant issued in the joint names of the parties purportedly by consent of parties in the presence of Mr. Njengo, Advocate for the administrator and holding brief for Ms. Gichio for Timothy Chege and Miss Kiruthi for the objector.
4. The applicants aver that they did not consent to the recording of the said consent which was in direct

contravention of the express wishes of the beneficiaries present at the meeting held on 14<sup>th</sup> October 2017.

5. The applicants argue that since the respondent was appointed as an administrator he has refused to administer the deceased's estate by distributing the estate without a confirmed grant and without the consent of all the beneficiaries. The respondent and his wife one Mrs Lydia Nyakio Mukui were the sole beneficiaries of the secret sale of the ancestral land situate at Mangu, Gatundu North where their late father was buried; 2 acres of a parcel of land situate at Ruiru Gatundu Nyakinyua (HA-KAIRU); a residential plot in Thika Phase 13 (A scheme originally owned by Thika Municipal Council Employees' Sacco to which the deceased was a member) and later other prime plots at Runda Estate Thika and Thika Municipality Block 18/511, which was sold after the deceased passed away and is currently occupied and has been developed by a company called Eurochem International. Improperly collecting or receiving rents, profits, income and dividends received from assets of the deceased. The applicants state that the respondent opened a private bank account with KCB Bank Thika Branch which account he instructed the deceased's tenants to deposit future rent payments. Entering into lease agreements with respect to stalls number 7, 8, 9, 11 and 12 within Madaraka Market in Thika which were in the

names of the deceased, the 1<sup>st</sup> applicant and the late Rosemary Wambui, a daughter of the deceased. The respondent failed to co-operate with his co-administrators by taking custody of the original title documents of the deceased's properties and has failed to provide a full and accurate inventory of all the assets and liabilities of the deceased's estate despite numerous requests.

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

6. The respondent states that following the deceased's demise, the applicants proceeded to apply for letters of administration without informing or obtaining consent from the other beneficiaries of the estate. The respondent further states that he learnt of the filing of the case from the usual Notice in the Kenya Gazette. The respondent states that he filed objection proceedings and summons for revocation vide his application dated 10/5/2019. The application was set down for hearing on 28/5/2019 when the Honourable Court advised that he come on board as a co-administrator instead of objecting to the confirmation of grant. The respondent avers that vide a court order dated 10/9/2020 he became a co-administrator and the court directed that all the administrators were at liberty to file summons for confirmation of grant either jointly or separately before the lapse of six months. The respondent states that the order was issued in the presence of all counsels on record at the time, Mr. Njengo for the applicants, Ms Gichio for Timothy Chege and Ms. Kiruthi.

7. The respondent avers that he was helping the deceased run all her affairs during the last years of her life. Further, the respondent states that he has neither sold nor transferred any properties belonging to the deceased. That notwithstanding, the respondent states that the deceased had already bequeathed property to her daughters during her lifetime and the 1<sup>st</sup> applicant refused and stated that she was not interested.
8. The respondent states that Ms. Kiruthi and Mr. J. M. Njengo communicated via tele-conversations at least twice with a view of getting them to file separate summonses for confirmation of grant and thus the applicants cannot claim that they were unaware and recently learnt of the court order issued by the court on 20/6/2020 revoking the grant. Further, the applicants are guilty of laches and dishonest in claiming they have learnt of his status as co-administrator three years later as it has been well within their knowledge based on their allegations that he failed to administer the estate.
9. The respondent argues that the proper remedy is to call for accounts to be availed and not for his removal as an administrator seeing as the applicants were also at liberty to file summons for confirmation but failed to do so. The respondent states that he is ready and willing to render accounts at the opportune time.
10. The applicants filed a Supplementary Affidavit dated 10<sup>th</sup> November 2023 and states that the respondent has

improperly annexed affidavits sworn by persons who are not parties to the suit contrary to the court of Appeal decision in **Moiwo Matanya Ole Keiwua vs Chief Justice of Kenya & 6 Others (2008) eKLR** and thus ought to be expunged.

11. The applicants state that the respondent has improperly collected dividends that should have gone to the estate prior to his addition

as an administrator which amounts to intermeddling and thus he ought to account for all the amounts collected.

12. Parties put in written submissions.

### **The Applicant's Submissions**

13. The applicants refer to the cases of **Sammy Ndungu Waity & Another vs Independent Electoral and Boundaries Commission & 3 Others [2017] eKLR** and **Moiwo Matanya Ole Keiwua vs Chief Justice of Kenya & 6 Others (2008) eKLR** and submit that the respondent has improperly annexed affidavits sworn by persons who are not parties to the instant suit and thus they ought to be expunged from the record.

14. The applicants argue that the respondent ought to be compelled to give a full and accurate account of the assets of the estate of the deceased pursuant to **Section 83(h) of the Law of Succession Act**. Further, the

respondent has confirmed in his affidavit that he is ready and willing to do so thus the said orders ought to be granted.

15. The applicants further argue that the respondent has alienated all the other beneficiaries and has in breach of his duty as a trustee of the estate dealt with the estate unilaterally and in a manner that is prejudicial to the other beneficiaries. Relying on the case of **Tabitha Nitbuka Mboroki vs Julius Gitonga M'Marete [2016] eKLR**, the applicants argue that the respondent has contravened the provisions of the Law of Succession Act and breached his duties as

an administrator of the estate as well as his fiduciary duties to the beneficiaries of the estate which are grounds for his removal as an administrator of the estate.

16. The applicants further rely on the case of **Samson Ole Tina vs Clerk, Trans-Mara County Council & Another [2010] eKLR** and submit that they did not instruct their advocates to record a consent and revoke the grant. Further, their previous advocates did not notify them that the respondent was added as an administrator by consent and it was only after their current advocates perused the file that it became apparent that the previous advocates had acted contrary to their express instructions.

## **The Respondent's Submissions**

17. The respondent relies on **Rule 73 of the Probate and Administration Rules** and the case of **Re Estate of Elijah Mbondo Nthekeha (Deceased) [2017] eKLR** and submits that the instant application is an abuse of the court process as they failed to carry out their duties as administrators. The respondent further relies on **Section 76 of the Law of Succession Act** and the case of **Re Estate of Stephen Chege Kimari (Deceased) [2016] eKLR** and submits that an application for removal of an administrator is meant to be supported by consent of all the other beneficiaries, which is not the case herein.
18. The main issue for determination is whether sufficient grounds have been laid out to warrant revoking of the grant issued to the respondent.

## **The Law**

### **Whether sufficient grounds have been laid out to warrant revoking of the grant issued to the respondent**

19. **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.

20. In the case of **Re Estate of Prisca Ong'aya Nande (Deceased) 2020 eKLR** the court held as follows:-

**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 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 circumstance, such as where the sole administrator loses the soundness of his mind for whatsoever 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.**

21. In the instant matter, it is not in dispute that to date the grant has not been confirmed and the estate has not been distributed to the beneficiaries. The court on 20<sup>th</sup> July 2020 revoked the grant issued to the applicants on 6<sup>th</sup> November 2018 and issued a new grant in the names of the applicants and the respondent. The court further directed that parties were to apply for confirmation of grant within six months either jointly or separately. From the record, only the respondent complied with the said directive as he filed Summons for Confirmation of Grant on 4<sup>th</sup> November 2024. In this regard, the applicants have

failed to show how the respondent has failed to perform his duty as an administrator. In fact the applicants have not explained to the court why since 20<sup>th</sup> July 2020 they have never moved the court to finalize the administration of the estate. In my view, the applicants cannot seek to have the respondent removed as an administrator yet they themselves have failed to administer the estate since the year 2020.

22. The applicants have further argued that they did not consent to the respondent being made as a co-administrator on 20<sup>th</sup> July 2020. On 20<sup>th</sup> July 2020, parties through their respective advocates entered a consent revoking the grant issued on 6<sup>th</sup> November 2018 and directing a fresh grant be issued in the names of the applicants and the respondent.
23. There is currently a dearth of authorities on the law governing the setting aside of a consent judgment or order. The case of **S. M. N vs Z. M. S & 3 Others [2017] eKLR** summaries the case law and grounds upon which a consent may be varied or set aside as follows:
  - i. Where the consent was obtained fraudulently;**
  - ii. In collusion between affected parties;**
  - iii. Where an agreement is contrary to the policy of the court;**
  - iv. Where the consent is based on insufficient material facts;**

v. Where the consent is based on misapprehension or ignorance of material facts;

vi. Any other sufficient reason.

24. Generally, a court will not interfere with a consent judgment except in circumstance such as would provide a good ground for varying or rescinding a contract between parties.

25. In **Flora N. Wasike vs Destimo Wamboko [1988]** **eKLR Hancox JA** held the view that:-

**It is now settled law that a consent judgment or order has a contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out.**

26. The Honourable Judge went further and cited **Setton on Judgments & Orders 7<sup>th</sup> Edition Vol. 1 page 124** and reiterated that:-

**Any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and those claiming under them.....and cannot be varied or discharged unless obtained by fraud, or collusion or by an agreement contrary to the policy of the court....or if the consent was given without sufficient material facts,**

or in general for a reason which would enable a court set aside an agreement.

27. In **Kenya Commercial Bank Ltd vs Specialised Engineering Company Ltd [1982] KLR 485, Harris J:**

**1. A consent order entered into by Counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.**

**2. A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.**

28. In **Kenya Commercial Bank Ltd vs Benjoh Amalgamated Ltd & Another [1998] eKLR** this court cited a passage in the **Supreme Court Practice 1976 (Vol 2) paragraph 2013 page 620** stating:-

**“Authority of solicitor- a solicitor has a general authority to compromise on behalf of his client, if**

he acts bona fide and not contrary to express negative direction, and it would seem that a solicitor acting as agent for the principal solicitor has the same power (Re Newen) [1903] 1 Ch pp817, 818; Little vs Spreadbury [1910] 2KB 658. No limitation of the implied authority avails the client as against the other side unless such limitation has been brought to their notice. Welsh vs Roe (1918-9) All ER Rep 620.”

29. Similarly in the Ugandan case of Lenina Kemigisha Mbabazi Star Fish Ltd vs Jing Jeng International Trading Ltd (HCT-OO-MA-344-2012):-

“The court cannot set aside a consent judgment when there is nothing to show that counsel for the applicant has entered into it without instructions. Furthermore, that even in cases where an advocate has no specific instructions to enter a consent judgment but has general instructions to defend a suit, the position would not change so long as counsel is acting for a party in a case and his instructions have not been terminated, he has full control over the conduct of the trial and apparent authority to compromise all matters connected with the action.”

30. Essentially, the above-cited authorities are clear that a consent order will only be set aside if it can be demonstrated that it was procured through fraud, non-

disclosure of material facts or mistake. From the record, the applicants have failed to show that their advocate entered into the consent without their instructions. Unless otherwise proved, the applicants counsels had the general authority to compromise the dispute on behalf of their clients for the reason that they were on record for the parties. Under Section 66 of the Succession Act, the respondent and the applicants rank equally in being appointed administrators in their deceased mother's estate by virtue of them being children of the deceased. The bringing of the respondent on board as a co-administrator was meant to expand representation of the beneficiaries as much as possible which was within the law.

31. The court after appointing the parties herein has directed them to file summons for confirmation jointly or separately, as the case may be.
32. I have perused the record and noted that the respondent Paul Mukui Chege filed Summons for Confirmation of grant dated 31<sup>st</sup> October 2024. The applicants ought to have filed their protests if they did not agree with the mode of distribution. This was not done, probably because the applicants decided to file and prosecute this application.
33. For the reasons given herein, I decline to grant the order for removal of the respondent as an administrator with the hope that he will cooperate and work with the applicants in administration of the estate.

34. Having made the foregoing observations, I hereby make the following orders:-

- a) That the application dated 18<sup>th</sup> April 2023 is partly successful.
- b) That the applicants do file their protest(s) in respect of the Summons for Confirmation of grant dated 31<sup>st</sup> October 2024 within twenty-one (21) days.
- c) That a bank account be opened in the joint names of the administrators within 30 days for depositing income of the deceased's estate.
- d) That the respondent do file in court within twenty one (21) days an account of the income of the deceased's assets for the period from October 2017 to date.
- e) That the administrators shall cooperate in the management of the deceased's assets and liabilities for the benefit of all the beneficiaries pending the distribution of the estate.
- f) This cause be mentioned after sixty (60) days to confirm compliance.

35. It is hereby so ordered.

***RULING DELIVERED VIRTUALLY, DATED AND SIGNED  
AT THIKA THIS 20<sup>TH</sup> DAY OF NOVEMBER 2025.***

**F. MUCHEMI**  
**JUDGE**