

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
(FAMILY DIVISION)

SUCCESSION CAUSE NO 18 OF 2017

IN THE MATTER OF THE ESTATE OF MWATELA CHARO RUMBA
(DECEASED)

KAINGU USHURU MCHAROAPPLICANT

VERSUS

BARAKA MWATELA

STEPHEN

NYAMAWI

RUMBAH

.....PETITIONERS/RESPONDENTS

JUDGMENT

1. This succession cause has a long and chequered history. It has been in various courts.
2. The cause was filed on 22nd March 2017 by the petitioners/respondents, **Baraka Mwatela** and **Stephen Nyamawi Rumbah**, described as the son and nephew of the deceased. According to the affidavit in support of the petition for letters of administration intestate, the deceased died on **27th July 1988** at **Mzambaraoni**, in Shimo La Tewa within the Mombasa County. He left behind his wife, Kadzo Chai Chembe, and Baraka Mwatela, the 1st petitioner/respondent, described as his son. The deceased had one property, Title No Kilifi/Mtwapa/231, whose estimated value was given as **Kes.60,000,000/-**.

3. The petitioners/respondents attached to the petition a certificate of death issued on 15th August 2014, which indicates that the deceased died on **27th July 1988** at **Mzambaraoni**, Shimo La Tewa, Mombasa, from a cough with prolonged illness. At the time of his demise, he was 67 years old.
4. The petitioner /respondents also produced a letter from the Assistant Chief, Shimo La Tewa sub location, that showed that the deceased had two wives, **Nzingo Nzai** (deceased with no children) and **Kadzo Chai Chembe**, who had one child, **Baraka Mwatela**, who was then a minor.
5. The petition was gazetted on 29th September 2017, vide Kenya Gazette Notice No. 9646 of 2017. There being no objection, the grant was issued on **15th December 2017** to **Baraka Mwatela** and **Stephen Nyamawi Rumbah**, both of P.O. Box 94, **Mtwapa**.
6. As the forestated matter was pending in this court, **Kazungu Ushuru Mcharo** and **Garama Ushuru Mcharo**, both of P.O. Box 1520 - 80100 Mombasa, petitioned the Malindi High Court for the grant of letters of administration in intestate in respect of the estate of the deceased. They averred in the petition that they were heirs of the deceased's brother, **Ushuru Mcharo Rumba**. However, in the affidavit in support of the petition, they described themselves as the deceased's sons. Like the petitioners/respondents herein, they listed the deceased's sole asset as **Title No. Kilifi Mtwapa/231**, whose value they gave as **Kes.41,500,000**. It bears noting that the death

certificate they produced had serial number **314329** and had the date of the death of the deceased as 27th July 1988; the said certificate was issued on **15th August 2014**. Although they attempted to dismiss the said death certificate as a forgery, it forms part of their petition.

7. The applicants in the Malindi cause relied on the letter dated 21st July 2017 written by Ms Halima Hammad, Assistant Chief Kidutani Mwamba Sublocation, Mtwapa Location. The deceased, according to the said letter, had one wife, Nzingo Nzai, with whom he had no children, and lived with his younger brother, Ushuru Mcharo Rumba, and his children. The children, it was claimed, were the deceased's only heirs upon the demise of Mr **Ushuru Mcharo Rumbah** on 23rd March 2008. These children are Kazungu Ushuru Mcharo, Garama Ushuru Mcharo, Kaingu Ushuru Mcharo, Samuel Ushuru Mcharo, Mohamed Ushuru Mcharo, Said Julius Mbigu, and Beatrice Tabu Ushuru.
8. Before the grant could be issued, the 1st petitioner /respondent filed a summons for revocation of the grant. The summons was dated 22nd October 2019. The basis of the said summons was the averment that the Kaingu Ushuru Mcharo and Garama Ushuru Mcharo had used a forged certificate of death serial number 180094, entry number 148802315/19, to purport that the deceased died on 27th July 1987 in a bid to disinherit the petitioner/respondent and his mother. He contended that the deceased died on 27th July 1988 and not 27th July 1987.

- 9.** The petitioners in the Malindi cause conceded that they did not disclose that they had filed Kilifi SRMCC succession cause No 6 of 2009; In the Matter of the Estate of Mwatela Charo Rumba, in which Baraka Mwatela was named as the son of the deceased. This led to the filing of the summons for revocation of the grant, to wit, Mombasa HCC Succession Cause No. 193 of 2011.
- 10.** The two matters were consolidated on 19th February 2020 by Nyakundi, J.
- 11.** Although the matter was referred to court-annexed mediation, the mediation failed.
- 12.** The summons for revocation of the grant before this court is dated 21st June 2018. It was filed by Kaingu Ushuru Mcharo, the nephew of the deceased. Mr Kaingu contended that the deceased had only one wife, Mary Nzingo Nzai, who died in 1990 and was childless, and that he and his siblings were the nearest kin. He deposed that the petitioners/respondents used a forged death certificate to obtain the grant. He denied that Baraka Mwatela was the deceased's son. He alleged that Baraka was the son of Hamdhalla Mbui, a distant relative.
- 13.** The matter proceeded by way of viva voce evidence. I shall give a summary of each witness's evidence below.

14. In his evidence, Mr Kaingu Ushuru Mcharo testified that the 1st petitioner/respondent was the son of Hamdhalla Mbui and that Baraka's mother, Kadzo Chai Chembe, was the wife of Hamdhalla. He averred that Hamdhalla Mbui was not a close relative.

15. The second witness was Mr Kenneth David Otieno. Mr Otieno is a registration officer in Malindi. Mr Otieno testified that the deceased died on 27th August 1988. It was his evidence that the certificate of death serial No 148820315/19 was not genuine, while that showing that the death occurred in 1988 was genuine.

16. The petitioner/respondent was the first witness for the respondents. He testified that he was born in May 1988, 2 months before the deceased died. According to him, Kazungu and Garama are the children of his uncle, Ushuru Mcharo Rumba. He denied that Hamdhalla Mbui was his father, stating instead that Hamdhalla was his uncle.

17. The second witness for the respondents was Kadzo Chai Chembe. She denied that Hamdhalla was her husband. It was her testimony that the deceased was her husband and that they lived together in the Ndonya area at the time of his death. Ms Chembe testified that Bakari was born in May 1988, although she did not produce a birth certificate.

18. Mr Hamdhalla Mbui Rumba was the 3rd witness for the respondent. He denied that Baraka was his son, stating instead that he was the son of the deceased.

19. The last witness was Shauri Matano Beja. He testified that Baraka was the deceased's only son.

20. The matter was canvassed by way of written submissions. The submissions of the applicant's counsel are dated 7th July 2025. Those of the petitioner/respondent counsel are dated 25th June 2025. I shall provide a summary of each party's submissions below.

21. The applicant's counsel submitted that the 1st respondent had a duty to show that he was a dependent with the meaning of Section 29 of the Law of Succession Act. He further submitted that there was a question regarding the legitimacy of the 1st respondent, which had not been rebutted by way of adduction of evidence.

22. It was submitted that the deceased did not produce a birth notification form, a clinic card, or a birth certificate to confirm that he was the biological child of the deceased.

23. The applicant submitted, relying on Section 107 of the Evidence Act, in support of his submissions that since Baraka wanted the court to believe that he was born 2 months before the deceased died, it was his obligation to produce evidence to support the said assertion.

24. Mr Odhiambo contended that the applicant's evidence that the 1st respondent's mother was married to Hamdhalla Mbui had not been challenged.

25. It was therefore urged that the grant be revoked under section 76 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules, 1980.

26. The submissions of the respondents gave the history of the matter. Mr Omollo, learned counsel for the petitioners/respondents, submitted that the certificate of death that purports to show that the deceased died on 27th July 1987 was forged and should be disregarded

27. It was submitted that the applicant's contention that the 1st respondent was not the child of the deceased was controverted by the testimony of Kadzo Chai Chembe, Hamdhalla Mbui, and by the applicant's own witness, Mr David Otieno Owiti, who testified that Baraka Mwatela was born before the deceased died.

28. On the merits of the case, it was urged that the applicant failed to prove his allegations. Reliance was placed on the case of Matthew Njega Njogu & Another v. Rosemary Muthoni Njue (2021) eKLR and in re Estate of Benjamin Kiregenyi Muri (deceased) [2022]eKLR.

29. The court was urged to dismiss the summons with costs and to strike out the petition filed in the High Court at Malindi, also with costs.

30. I have considered the two petitions carefully. In my view, the said petitions turn on the question of whether the petitioner/respondent in the Mombasa petition is the son of the deceased and whether his mother

was the deceased's wife. The court has been asked to revoke a grant. That being the case a review of the applicable provision of the Law of Succession Act is imperative.

31. Section 76 of the Law of Succession Act provides 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 may 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.”

32. The power to revoke a grant is discretionary. Courts, when exercising discretionary jurisdiction, must act judiciously, not whimsically. This was succinctly stated in the decision of Mwita, J in the case of **Albert Imbuga Kisigwa v Recho Kavai Kisigwa [2016] KEHC 1528 (KLR)** wherein it was stated that: -

“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.”

33. Musyoka J considered the grounds under which the court may revoke a grant in the case of the **In re Estate of Prisca Ong’ayo Nande (Deceased) [2020] KEHC 6553 (KLR)**, where it was held 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.”

- 34.** It is clear to me that the applicant seeks to have the grant revoked on the ground that petitioners/respondents used a forged certificate of death. Was the certificate of death forged? In my view, it wasn't. This is so for the following reasons.
- 35.** Firstly, the certificate of death produced by the applicant's brothers in the Malindi matter gave the date of death as 27th July 1988. The said certificate of death was annexed to the affidavit of Kazungu and Garama as annexure 'A' dated 22nd November 2017, filed in court on 19th January 2018.
- 36.** Secondly, the applicant's own witness, a registrar from the Office of Registrar of Birth and Deaths, disowned the certificate of death serial No 18009 and affirmed that the certificate of death serial No 314329 was the genuine certificate of death.
- 37.** Thirdly, the applicant failed to tender any evidence to confirm that the certificate of death attached by the petitioners/respondents was forged, beyond making the said claim.
- 38.** Although it was claimed that the 1st petitioners/respondent was not the son of the deceased the said claim was undermined by the prior conduct of the applicant and his siblings, to wit, admitting in the Kilifi succession proceedings that the 1st petitioner/respondent was

the child of the deceased and also in letter written in 2012 where it was stated that the matter could be settled if the 1st petitioner made concessions by giving the applicant and his family 2 acres of land.

39. This petition was filed by the 1st and 2nd petitioners. The applicant seeks to have the grant revoked. In my view, under sections 107 to 109 of the Evidence Act, he had the duty to prove his case by tendering cogent evidence. The burden of proof lay on him to show that the 1st petitioner isn't the son of the deceased. Put differently, he had the duty to show that the 1st petitioner was not a legitimate issue of the deceased. The applicant cannot shift the burden of proof to the 1st petitioner/respondent.

40. The 1st petitioner produced an identification card showing that he was born in 1988. That being the case provision of section 118 of the Evidence Act is irrelevant.

41. The upshot of the foregoing is that the applicant hasn't proved his case. The summons for revocation of the grant dated **21st June 2018** is hereby dismissed for being without merit.

42. What of costs? Costs are at the court's discretion under section 27 of the Civil Procedure Act. Having said that, the applicants' conduct has been oppressive. He and his siblings have done everything possible to disinherit the 1st petitioner and his mother, and have even gone to the extent of uttering false/forged documents. This court cannot ignore such misconduct. In the circumstances, I dismiss

the summons dated **21st June 2018**. I grant the petitioners/respondents the costs of the application.

43. I order that the petitioners/respondents file summons for confirmation of the grant within 30 days of the date hereof.

44. I direct that Malindi HCC Succession Cause No. 3 of 2018 be closed forthwith.

45. Orders accordingly.

Dated and signed this 25th day of November 2025. Delivered virtually through **Microsoft TEAMS**.

Gregory Mutai
JUDGE

In the presence of:-

Mr Odhiambo, for the Objector/Applicant;

Mr Omollo, for the Petitioners/Respondents; and

Arthur - Court Assistant.