



In re Estate of Miti Njuki Gucenda alias Miti Njuki Gacenda (Deceased) (Family Appeal E013 of 2024) [2025] KEHC 18142 (KLR) (3 December 2025) (Judgment)

Neutral citation: [2025] KEHC 18142 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
FAMILY APPEAL E013 OF 2024**

**RM MWONGO, J
DECEMBER 3, 2025**

**IN THE MATTER OF THE ESTATE OF MITI NJUKI GUCENDA ALIAS MITI NJUKI
GACENDA (DECEASED)**

BETWEEN

DISHON MUNYI MITI 1ST APPELLANT

ERASTUS NJIRU MITI 2ND APPELLANT

AND

JOSEPHINE WANJIRA MITI RESPONDENT

(rd October 2024 in Siakago MC Succession Cause No. E036 of 2023)

JUDGMENT

The Appeal

1. Through a memorandum of appeal dated 19th November 2024, the appellant seeks for orders that the appeal be allowed with costs and the parties do take directions on the summons for revocation.
2. The appeal is premised on the following grounds:
 1. That the learned trial magistrate erred in law and fact by allowing the Application for Summons for Revocation of Grant dated 19th January, 2024; while the matter had not proceeded to taking directions on how to canvass the Summons; thus leading to a miscarriage of justice;
 2. That the learned trial magistrate erred in law and fact by applying wrong and inapplicable principles of law which did not form part of any basis to warrant her decision to allow the summons without taking into account the evidence, thereby arriving at an erroneous decision;



3. That the learned trial magistrate erred in law and fact by exercising her discretion capriciously and not judiciously;
4. That the learned trial magistrate erred in law and fact by finding that the Respondent did not have a chance to explain or ventilate the matter thus leading to a miscarriage of justice contrary to the laws of natural justice; and
5. That the costs of the Appeal be borne by the Respondent.

Background & Summons for revocation

3. Following the death of the deceased on 13th October 2013, the appellants petitioned for a grant of letters of administration of his estate. The grant was issued in their joint names of 29th March 2023. The appellants filed summons for confirmation of grant which was scheduled for hearing. On the date of the hearing, the court noted that not all the beneficiaries were present in court. Again, on 2 more occasions after that, the parties were absent in court. Pending hearing and determination of the summons for confirmation, the respondent filed summons for revocation of grant dated 19th January 2024.
4. The summons for revocation was premised on grounds that the proceedings to obtain the grant were defective in substance that the grant was obtained fraudulently by making of a false statement or by concealment from the court of something material to the case; and that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant.
5. The respondent deposed in a supporting affidavit to the summons for revocation that the deceased had 4 wives and not 3 wives as has been stated by the appellants. That the consent of the respondent as wife of the deceased and her children were not sought at the point of petitioning for the grant. She stated that while she and her children were not included in the distribution proposed in the summons for confirmation, some strangers known as Agostino Njuki Mitu, Njiru Njuki and Benjamin Njiru Ileri were provided for in the estate.
6. It was the respondent's case that the appellants were untruthful, dishonest and untrustworthy administrators of the estate of the deceased and they cannot be trusted to fairly administer it. She urged the court to revoke the summons for revocation for these reasons.
7. When the summons for revocation came up for hearing, the respondent's advocate informed the court that the appellant's advocate had taken his number for purposes of serving upon him a replying affidavit to the summons for revocation but they had not done so. He urged the court to treat the summons as undefended and allow the same. He added that the respondent was apprehensive that if the grant is not revoked, the estate will be wasted. Counsel holding brief for the appellant's advocate stated that his instructions were that the matter was coming up for mention to confirm filing of statements. The court ruled that the summons for revocation was undefended and it was allowed as prayed. This ruling is the basis of the appeal.

Parties' Submissions

8. The appeal herein was canvassed by way of written submissions.
9. The appellants submitted that there was a miscommunication with their advocate regarding the purpose of the court attendance on the day the summons for revocation was revoked. They urged the court to allow the appeal based on its wide discretion under section 47 of the *Law of Succession Act* and Rule 73 of the Probate and Administration Rules.



10. They relied on the case of Joseph Ndungu Kamau v John Njihia [2017] KEELC 802 (KLR) as referenced in the case of In re Estate of Mbogo Muthage (Deceased) [2023] KEHC 19830 (KLR) and urged the court to allow the appeal albeit conditionally. It was their case that they ought to have been given a chance to ventilate their side of the case. That the trial court exercised its discretion unjustly. They also relied on Articles 47(1) and 159 of *the Constitution* and urged the court not to pay undue regard to technicalities which occasion injustices.
11. The respondent submitted that the record of appeal does not comply with Order 42 Rule 13(4) of the Civil Procedure Rules which provides for the requirements for an appeal. She argued that the record of appeal does not include a copy of the typed proceedings and the impugned ruling.
12. She relied on the cases of Law Society of Kenya v Centre for Human Rights and Democracy & 12 others [2014] KESC 29 (KLR) and Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others [2016] KESC 2 (KLR). She added that the absence of the impugned ruling and typed proceedings was not a mere technicality under article 159 of *the Constitution* and that it was enough ground to dismiss the appeal in its entirety.

Issue for Determination

13. The issue for determination is whether the appeal should succeed.

Analysis and Determination

14. The appellate court is required to make its decision based on the record of the trial court. This was stated in the case of *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, where it was held as follows:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”
15. The appellants/administrators had filed summons for confirmation of grant but the same was not heard on 3 occasions. While it remained pending, the respondent filed summons for revocation of the grant. On 04th September 2024, the respondent’s advocate told court that there was no response to the application and they were unrepresented in court yet they are the ones who took out the mention date. The court deferred the hearing of the summons for revocation to 23rd October 2024 by which time, the court noted that there was no response to the summons for revocation. The court went on to allow the summons for revocation which was undefended.
16. The appellants have urged the court to apply its discretion as provided under Article 159 of *the Constitution*, section 47 of the *Law of Succession Act* and Rule 73 of the Probate and Administration Rules. On the other hand, the respondent has attacked the record of appeal for being incomplete; that it is missing the impugned ruling and proceedings.
17. From a perusal of the record of appeal, the last 5 pages are copies of the proceedings which end with the impugned ruling. Therefore, the respondent’s arguments are not entirely accurate.



18. Section 76 of the *Law of Succession Act* provides that a grant can be revoked at any time at the instance of a party or on the court's own motion. The Section provides:

“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...”[Emphasis added]

Under what circumstances can a Court decide?

19. The 9th Edition Black's Law Dictionary defines “decision” as:

“A judicial or agency determination after consideration of the facts and the law; especially a ruling, order, or judgment pronounced by a court when considering or disposing of a case.”

20. Before a court reaches a decision, there must be a clear consideration of the facts and law. It does not matter that a suit is undefended; the court should be able to give its reasons for reaching the decision it arrives at. In this case, there was a summons for revocation that was undefended. It raised issues that ought to have been examined by the trial court regardless of the fact that the appellants did not make their case.

21. In the case of *In re Estate of William Wambua Muli (Deceased) [2025] KEHC 1220 (KLR)*, the court was faced with similar circumstances where a summons for revocation was not defended. The Judge held:

“...Although the application is undefended, I must nevertheless determine whether the orders sought ought to be issued. It does not follow, in my view, that an undefended application must be allowed...”

22. In that case, the Judge went on to give a detailed ruling, analyzing and applying section 76 of the Law of Successions Act and case law. Eventually, the Judge did not find it prudent to revoke the grant on grounds that the estate would have been left unadministered before it was distributed and so he appointed a new administrator. The new administrator was ordered to file summons for confirmation of grant.

23. The trial court may have exercised its discretion in revoking the grant under the narrated circumstances. However, it appears that such discretion was not exercised judiciously, a situation that does not embrace the spirit of the law. Therefore, it is prudent to allow the appeal, pursuant to the provisions of Article 48 of *the Constitution* in order to allow all the parties a chance to access justice which they are all entitled to.

Disposition

24. In the circumstances, I am persuaded to allow the appeal. I also make the following orders in the interests of justice.

- a. The ruling of Hon. N. Kahara in Siakago MC Succession Cause No. E036 of 2023 delivered on 23rd October 2024 is hereby set aside;
- b. Siakago MC Succession Cause No. E036 of 2023 shall be referred back to the trial court to be heard by any Magistrate other than Hon. N. Kahara;



- c. The matter shall be mentioned before the new trial Magistrate and the appellant shall file their response to the summons for revocation of grant dated 19th January 2024 within 14 days of that mention by the new trial Magistrate; and
- d. In the event that the appellant fails to file their response to the summons, the trial Court shall be entitled to judiciously consider the summons and make a determination thereon.
- e. No order is made as to costs.

25. Orders accordingly.

DELIVERED ELECTRONICALLY, DATED AND SIGNED AT EMBU HIGH COURT THIS 3RD DAY OF DECEMBER, 2025, PURSUANT TO NOTICES ISSUED ON 24TH AND 26TH NOVEMBER 2025, AS TO ELECTRONIC DELIVERY.

R. MWONGO

JUDGE

