



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

FAMILY CIVIL APPEAL NO. E013 OF 2023

**DAVID MIRITI.....1ST
APPELLANT**

**FRANK MUTUA.....2ND
APPELLANT**

VERSUS

**JERUSHA KALAYU.....
.....RESPONDENT**

**(Being an appeal from the Ruling of Hon.R.Ongira (SRM) delivered
on 5th June,2023 in Tigania PM SUCC. Cause No.45 of 2018)**

JUDGEMENT

1. This judgement arises from the ruling and order of Hon R.Ongira in the aforementioned suit.
2. The Ruling arose from the undated Application by which the Appellant sought for revocation of grant issued to the Respondent herein on 19.3.2019 on the basis that the same was procured through false representations, without their knowledge or consent, by including the Respondent as a beneficiary in contravention of the law and excluding them

despite being the son and grandson of the deceased respectively.

3. In her response to the application, the Respondent denied the grounds advanced by the Appellants, asserting that they were aware of the proceedings and have been provided their respective share in this matter.
4. Vide a ruling delivered on 5th June,2023, the trial court dismissed the Appellants' application on grounds that: -
 - i. The 1st Appellant, David Miriti was listed as a beneficiary in the Affidavit in support of the confirmation of grant and having been present in court on 31st August 2021 and consented to the mode of distribution, cannot claim that the petition was secretly filed.
 - ii. The 2nd Appellant was also included in the distribution of the estate of the deceased but had not received his share as he had not paid the necessary fee to effect its transfer, and thus he cannot claim to have been excluded.

- iii. The Respondent being the widow of the deceased, rightly listed herself as a beneficiary.
5. Dissatisfied with the decision of the trial court, the Appellants lodged this Appeal raising 10 grounds of appeal, summarized as follows: -
- a) The Learned Senior Resident Magistrate erred in Law and fact in holding that the 1st Appellant was present in court on 31st August, 2021 and had agreed with the proposed mode of distribution.
 - b) The Learned Senior Resident Magistrate erred in Law and fact in failing to find that the Appellants were neither provided for nor listed as beneficiaries in the consent for the mode of distribution filed by the Respondent.
 - c) The Learned Senior Resident Magistrate erred in Law and fact in holding that the succession cause was filed with their knowledge.
 - d) The Learned Senior Resident Magistrate's ruling was against the law and the weight of evidence on record.

6. The Appellant therefore prayed that the appeal be allowed, that they be declared entitled to a share of the deceased's estate, that Land Parcels Nos. Nyambene/Uringu 1/241 and 1/2947, belonging to the estate of Julius M'Itimitu alias Itimitu Mbui, be equally distributed among all beneficiaries and for the costs of the appeal.
7. The Appeal was canvassed through written submissions. Only the Appellants' submissions are on record.

Appellant's Submissions

8. The Appellants contended that the record shows they were neither listed as beneficiaries of the deceased nor provided for and that there was no evidence of their consent to the filing of this cause or the mode of distribution by the Respondent.
9. They thus urged the Court to allow their appeal.

Analysis & Determination

10. The Appellants sought for revocation of grant before the lower court. Revocation of grant is provided for under section 76 of the Act. This section provides 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.”

11. A reading of the Appellant’s application leaves no doubt that the grounds cited fell under **section 76 (a) & (b)** above.

12. In the case of **Jamleck Maina Njoroge vs Mary Wanjiru Mwangi (2015) eKLR** the court reiterated the grounds upon which a grant can be revoked. It stated as follows:

“. The circumstances that can lead to the revocation of grant have been set out in Section 76 Law of Succession. For a grant to be revoked either on the Application of an interested party or on the court’s own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.”

13. Having examined the lower court record, the court notes the following:

i. In the letter from the chief, dated 30/5/2018, which the respondent used to file the petition for

the letters of administration the respondent was listed as the widow and the following were listed as children;

- a) Agapius Mururu Mitu(deceased)
- b) Abel Mwenda Mitu,
- c) David Miriti
- d) Salome Mwari Mitu
- e) Jeremiah Mwongela Mitu,

- ii. The 1st appellant was listed as a son/beneficiary of the deceased estate.
- iii. The 2nd appellant was not listed in the chief's letter or the affidavit in support of the petition. However, from his affidavit in support of the summons to revoke the grant, he is said to be a child of Agapius Mururu Mitu(deceased) who is a child of the deceased.
- iv. The consent to the making of a grant filed on 27th June 2018 was not signed by any of the beneficiaries.

- v. The 1st appellant and the children of Agapius Mururu Mitu(deceased) were not included in the summons for confirmation of the grant filed on 4th December 2018.
- vi. In the affidavit in support of summons for confirmation of the grant dated 29th May, 2019, and filed on 25th May 2021, the disclosed beneficiaries are Jerusha Kalayu Mitu, David Miriti Mitu, Abel Mwenda, Jeremiah Mwongela Mitu, and Salome Mwari Mitu. However, that affidavit does not state whether it corrects the earlier affidavit.
- vii. The estate comprises two parcels namely; NYAMBENE/ URINGU 1/241 and 1/2947.
- viii. According to the proposed distribution, NYAMBENE/URINGU 1/241 was to be shared among Abel Mwenda, Jeremiah Mwongela Mitu and Jerusha Kalayu Mitu with Abel and Jeremiah each receiving 0.10 points, and the remainder going to Jerusha Kalayu Mitu while NYAMBENE/URINGU

1/2947 was to be wholly allocated to Salome Mwari Mitu.

14. On 10th August 2021, when the summons for confirmation of the grant were fixed for hearing the court duly noted that one beneficiary was not present and it correctly adjourned the matter and ordered that he be served.
15. The court record shows that the 1st appellant appeared in court on 31st August 2021 and he is said to have agreed to the proposed mode of distribution. What is interesting about the day's proceedings is that the court recorded that the 1st appellant was in agreement with the proposed mode of distribution even before it had recorded his response. Just after that order, the 1st appellants is recorded as having agreed with the distribution.
16. In my view the proceedings of that day raise an eyebrow due to the sequence of events as set out. The 1st appellant was not listed as getting anything from the estate. The court ought to have either asked him to sign a consent or record his forbearance to getting a share of the estate.

17. The 1st appellant's subsequent application to revoke the grant clearly raises reasonable grounds to suspect that he was not the person who was present in court on 31st August 2021.
18. In my view these are sufficient grounds to revoke the certificate of confirmation of the grant.
19. As regards the 2nd appellant, it emerges that he is grandson of the deceased. His father, Agapius Mururu Mitu was a child of the deceased and upon his death, his children including the 2nd appellant, stepped into his shoes. The demise of Agapius Mururu Mitu was known to the respondent and as such she had a duty to ensure that the children of the said deceased also got their father's share.
20. The respondent was therefore guilty of non-disclosure of a material fact by not informing the 2nd Appellant or his siblings of the cause. She also did not seek or obtain their consent.
21. According to **section 51(2) (g)** of the **Law of Succession Act** and **rule 7(1)(e)** of the **Probate and Administration Rules** the process leading to the grant was defective in

substance. Pursuant to Section 76 (a) & (b) of the Law of Succession Act, the grant issued to her is liable to revocation.

22. However, even if a party succeeds in establishing a case for revocation, as in this matter, the court may, in lieu of revoking the grant, make any other orders that are appropriate to the circumstances.
23. In the case of **In the Matter of the Estate of Thareki Wangunyu aka Thareka Wangunyo (Nairobi High Court Succession Cause No. 1996 of 1999)**, where a widow obtained a grant without disclosing one of her step-children and some of her own children as beneficiaries, the court held that although the matter merited revocation of the grant, it instead ordered that the stepchild left out be included in the list of beneficiaries without interfering with the grant.
24. Looking at the matter, I think that the best way to deal with it is not to revoke the grant issued to the respondent, since she is a widow of the deceased. Instead, I will set aside the orders of confirmation of the grant issued by the lower court.

The respondent is directed to file fresh Summons for

Confirmation of Grant and inform all the beneficiaries, including the 1st appellant and the children of Agapius Mururu Mitu (deceased).

25. In the upshot I allow the appeal and issue the following orders;

- (a) The temporary grant of letters of administration issued to the respondent shall remain as issued by the lower court.**
- (b) The certificate of confirmation of the grant issued by the lower court is hereby revoked/annulled.**
- (c) All transactions arising from the said certificate of confirmation of the grant are cancelled and the property of the estate namely NYAMBENE/ URINGU 1/241 and NYAMBENE/ URINGU 1/2947, is to revert to the name of the deceased.**
- (d) The matter is remitted back to the lower court for the respondent to file fresh**

**summons for confirmation of a grant and
serve all the parties.**

**(e) This being a family matter, each party shall
bear his/her own costs.**

26. Orders accordingly.

**Dated, Signed and Delivered at Meru this 13th day of February,
2026.**

**H. M. NYAGA,
JUDGE.**

In the presence of;

Court assistant - Zakayo

Nyaga for appellant

Mutile for respondent