

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
(CORAM: R. MWONGO, J.)
SUCCESSION APPEAL NO. E003 OF 2024

IN THE MATTER OF THE ESTATE OF DANIEL MUGO KAMURUANA (DECEASED)

PURITY NJOKI MUGO.....1ST APPELLANT
SUSAN MUTHONI MUGO.....2ND APPELLANT
STEPHEN NYAGA MUGO.....3RD APPELLANT
MARGRET WANJERI MUGO.....4TH APPELLANT
NANCY MURANGI MUGO.....5TH APPELLANT
JANE NJURA MBUVA.....6TH APPELLANT

-VERSUS-

MARTHA WANJIRU MUGO.....RESPONDENT

Being an appeal arising from the decision of Hon. J. Otieno SRM in Embu CM

Succession Cause No. E071 of 2021 delivered on 05th February 2024

JUDGMENT

Memorandum of Appeal

1. The appellants filed a memorandum of appeal dated 22nd February 2024 through which they seek the following orders:
 - a) The appeal herein be allowed;
 - b) The judgment of the Senior Resident Magistrate be set aside;
 - c) The appellant's application for revocation be allowed;
 - d) The appellants be awarded costs of this appeal; and
 - e) Any other relief this Honorable Court deems fit to grant.
2. The appeal is premised on grounds that:
 - 1) The Learned Trial Magistrate erred in law and facts by holding that there was no any wrong doing when it was very clear that grant was obtained by making of false statement or by concealment from the court something mentioned to the case thereby occasioning a gross miscarriage of justice;
 - 2) The Learned Trial magistrate erred in law and fact by not making a finding that the grant was obtained by means of untrue allegations of a false essential in purity of law to justify the grant notwithstanding the allegation was made in ignorance or inadvertently;

- 3) The Learned Trial Magistrate erred in law and fact by holding that the law succession Act does not limit beneficiaries of the deceased's estate to his dependants only;
- 4) The Learned Trial magistrate erred in law and fact by making a finding of that land of a deceased person cannot be sold until the grant is confirmed thereby occasioning a gross miscarriage of justice by awarding land of the deceased portion to a party who is not entitled;
- 5) The Learned Trial magistrate erred in law and fact by not making a finding that one of the parties a co-administrator who was awarded a share of the estate of the deceased was dead a material fact concealed to the court;
- 6) The judgment of the Trial magistrate is bad in law, unjust, unfair and offered no justice at all.

Background

The grant and its confirmation

3. The deceased died on 02nd February 2017. A grant of letters of administration in his estate was issued on 12th February 2021 to his 1st and 2nd wives respectively, namely Martha Wanjiru Mugo, and Susan Gaturi Mugo. The administrators filed summons for confirmation of grant dated 07th September 2021 together with an affidavit in support. They named the beneficiaries of the estate of the deceased including his 2 wives and their children. The estate consists of land parcel number Ngandori/Kirigi/9182, and they proposed that it be distributed as follows:
 - a. Martha Wanjira Mugo- 0.045Ha
 - b. Stephen Nyaga Mugo- 0.10Ha
 - c. Susan Gaturi Mugo- 0.04Ha
 - d. Peter Mwaniki Mugo- 0.06Ha
 - e. Francis Ng'ang'a Maina- 0.05Ha
 - f. Abraham Munyi Mugo- 0.12Ha
 - g. John Njeru Mugo- 0.095Ha
 - h. Joseph Gicovi Mugo- 0.095Ha
 - i. Ndwiga Mugo- 0.11Ha
4. There being no protest filed, a certificate of confirmation of grant was issued on 30th August 2022, and the estate was distributed as proposed.

The summons for revocation

5. The applicants herein filed summons for revocation dated 12th April 2023 seeking revocation of the grant issued to Martha Wanjiru Mugo and Susan Gaturi Mugo

(dcd). An order was also sought that the land making up the estate of the deceased be reverted to the name of the deceased. The summons was grounded on the averments that the administrators obtained the grant fraudulently by making of a false statement or by concealment from the court, of something material to the case.

6. That it was obtained by means of untrue allegations of facts essential in point of law to justify the grant. It was also their case that the administrators left them out of the proceedings and that they forged their signatures as appearing on the consent form annexed to the summons for confirmation of grant. They also contended that a part of the property was allocated to a stranger Francis Ng'ang'a Maina yet he is not a beneficiary. That at the point of confirmation of the grant, one of the administrators Susan Gaturi Mugo (dcd) had died but the court was not informed.
7. The respondent filed a replying affidavit in which she stated that indeed her co-administrator had died by the time the summons for confirmation was being heard. However, even though she did not inform the court of the same, the law allows her to continue administering the estate. That at the confirmation hearing, the appellants were present but they did not raise any objections to the proceedings therein.
8. She stated that all the appellants appeared before court and identified themselves through national IDs which the court verified during confirmation. As for the argument that a part of the estate is going to a stranger, she stated that Francis Ng'ang'a Maina gave them money for instituting the proceedings and this money was in exchange for a part of the estate. She stated that all the beneficiaries were made aware of this arrangement and they agreed. She denied concealing any facts from the court and stated that the revocation summons are based on falsehoods and are an afterthought.

Summary of the Evidence in the trial Court

9. The summons for revocation was heard *viva voce*.
10. PW1 was Jane Njura Mbuva the deceased's daughter. She stated that the administrators who are the wives of the deceased petitioned for the grant without the knowledge or participation of the appellants. That their signatures were forged on the consent form accompanying the summons for confirmation, which summons bequeathed a part of the estate to a stranger who is Francis Ng'ang'a. That the grant was confirmed after one of the administrators had died yet she was not substituted. On this basis, she prayed that the grant be revoked. On cross-

examination, she stated that she never attended court when the grant was being issued, she opposed allocation of land to James Muchangi and stated that they never agreed that the sons of the deceased would receive $\frac{1}{4}$ acre of land each.

11. PW2 was James Ndege Ndwiga, a brother to the deceased, who stated that the appellants informed him that the deceased's land had been subdivided yet they were not aware of any succession proceedings. He advised them that the only way that a deceased person's land would be subdivided is through succession. Later, the appellants learned that succession proceedings had been completed without their knowledge and a part of the land had been given to a stranger. On cross-examination he stated that PW1 informed him about the succession proceedings in August 2023. He did not know the whereabouts of the estate or of its distribution.
12. DW1 was James Muchangi, a son of the deceased and step brother to PW1. He stated that he was aware of the succession proceedings and he participated. He stated that he attended court together with Margret, Purity and Stephen and that Margret and Purity expressed that they were not interested in any property. That Stephen agreed to get 0.1Ha of the land. That it was agreed that all the sons of the deceased would get 0.1Ha of land while the daughters would inherit through their mothers. He stated that they also agreed to give a portion of the same land to Francis Ng'ang'a Maina who was taking the portion belonging to Peter Mwaniki Mugo.
13. On cross-examination, he said that the portion given to Susan Mugo, the other administrator, does not indicate that she was holding the land in trust for others. That the mode of distribution is based on the wishes of the deceased expressed in 1980's, and it was his wish that the land goes to his 7 sons. That he was assisting with the process of administration even though he did not have any land himself. On re-examination, he stated that his mother has 3 children with the deceased and that none of the applicants is his biological sister. That the deceased administrator attended court for confirmation but she was in critical condition.
14. DW2 was Martha Wanjira, the respondent. She relied on her replying affidavit and stated that the deceased had 7 sons and 7 daughters. That following his death, the family held a meeting where it was agreed that succession proceedings be instituted and a mode of distribution was agreed upon. Part of the agreement was that the sons of the deceased would be given land in their names while the daughters would be given land through their mothers. She stated that the appellants all participated in the proceedings and that they are lying to the court.

15. On cross-examination she stated that the appellants are her step children and they had a meeting during the lifetime of the deceased. It was at this meeting where he told them his wishes regarding distribution of the estate and they followed this direction. On re-examination, she stated that she called a meeting before initiating the succession proceedings and that all the children of her deceased co-administrator attended.
16. DW3 was Margret Wanjiru Njeru the deceased's daughter. She stated that the succession proceedings were instituted after the whole family met and agreed to commence them. That it was agreed that everyone would inherit except James Muchangi who already had a piece of land. That was the reason why all the beneficiaries signed a consent. On cross-examination, she stated that all the beneficiaries attended court for the confirmation of grant and their IDs were verified for that purpose by the court.
17. DW4 was Joseph Gicobi Mugo the deceased's son. He testified in the same terms as DW3. On cross-examination, he stated that his sisters did not attend court. He also denied signing the consent.
18. DW5 was John Njeru Mugo also the deceased's son. He testified in the same terms as DW1. On cross-examination, he stated that he signed the consent accompanying the summons for confirmation. He stated that it was agreed that the daughters of the deceased would inherit under their mothers.
19. DW6, Peter Mwaniki a son of the deceased. He testified in the same terms as DW1. On cross-examination, he denied signing the statement and he stated that the signature on it is not his.
20. DW7 was Francis Ng'ang'a Mawira who stated that in January 2021 Peter Mwaniki Mugo, a son of the deceased approached him offering to sell a part of his inheritance from the estate of the deceased. This offer would be in exchange for a consideration which would go towards facilitating succession proceedings. It would mean that he would join the proceedings as a beneficiary in the circumstances. He attended court together with the appellants, save for Susan Muthoni Mugo and the grant was confirmed, giving him his portion as agreed. In cross-examination, he stated that the portion sold to him by Peter Mwaniki was the share of the land he was entitled to inherit. He asserted that he helped the family to institute succession proceedings.

Finding of the Trial Court

21. The trial court relied on section 83 of the Law of Succession Act (LSA) to find that it was unnecessary to substitute the deceased co-administrator since she was automatically survived as administrator by the respondent. The court also relied on section 76 of the LSA and caselaw and analyzed the facts to find that the appellants had failed to prove grounds for revocation of the grant. The summons for revocation was dismissed.

Submissions on Appeal

22. The appeal herein was canvassed by way of written submissions.

23. The appellants stated that the respondent's co-administrator had died on 12th January 2022 but the respondent did not disclose this fact to the court at the time of confirmation of grant. That the deceased co-administrator was also allocated land from the estate even though she was already dead. In the view of the appellants, this amounts to injustice. They submitted that it was also unlawful to permit the distribution which allowed the daughters to inherit through their mothers yet the mode did not expressly show that the portions to the mothers was to be held in trust for the daughters. That the trial court failed in not finding that the estate of the deceased could not be sold before the grant was confirmed as this contravenes section 82 of the LSA. The appellants faulted the trial court's finding that their denial of the signatures on the consent was not sufficient proof. They stated that the court did not consider any of their evidence that they did not participate in the proceedings.

24. The respondent submitted that the appellants did not satisfy the threshold for revocation under section 76 of the LSA. She relied on the cases of **Albert Imbuga Kisigwa v Recho Kawai Kisigwa [2016] KEHC 1528 (KLR)** and **John Mundia Njoroge & 9 others v Cecilia Muthoni Njoroge & another [2016] KEHC 6254 (KLR)**. She stated that no fraud or concealment of material facts was demonstrated by the appellants to the trial court. She stated that the estate legally remained with an administrator despite the death of one her co-administrator. She urged the court to dismiss the appeal.

Issues for Determination

25. The issues for determination are as follows:

- 1) Whether the death of Susan Gaturi Mugo, a co-administrator with the respondent warranted revocation of the grant;
- 2) Whether Francis Ng'ang'a is a bona fide beneficiary of the estate of the deceased through purchase;

- 3) Whether the appellants have demonstrated that the summons for revocation met the threshold set out in section 76 of the LSA.

Analysis and Determination

26. The court is required to re-examine the evidence adduced at trial in determining the appeal herein. This was held in the case of **Selle & Another vs. Associated Motor Boat Co. Ltd & Others (1968) EA 123**, thus:

“...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...”

27. Grounds for revocation of a grant are provided for under section 76 of the Law of Succession Act as follows:

“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.”

28. From the above provision, a party proving any one of the five positions in Section (a) – (e) would succeed in establishing revocation.
29. The appellants stated in this appeal that the grant was issued to the respondent and Susan Gaturi Mugo who are the wives of the deceased. That Susan Gaturi Mugo died in January 2022, before the grant was confirmed in August 2022. The appellant argued that the respondent ought to have informed the court of the death of this co-administrator but she concealed the matter. That the deceased co-administrator ought to have been substituted before the proceedings continued. It is noted that the summons for confirmation of grant was filed on 7th September, 2021 months before the deceased Co-administrator died.
30. Since this co-administrator was a wife of the deceased, the family had, seemingly, agreed that the daughters of the deceased would inherit through their respective mothers, yet one of them was now deceased. In the proposed mode of distribution, despite this agreement, the daughters of the deceased did not feature and the portions given to their mothers were not indicated as being held in trust for the daughters. Regardless, after the summons for revocation was dismissed, the grant was confirmed adopting the mode of distribution proposed by the administrators.
31. On the first issue for determination, it may be noted as follows. Where there is more than one administrator in an estate and one or more of them die, the position in law is that a vacancy does not arise, but that the estate remains to be automatically administered by the surviving administrator(s). Section 81 of the LSA provides:

“Upon the death of one or more of several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executors or administrators shall become vested in the survivors or survivor of them:

Provided that, where there has been a grant of letters of administration which involve any continuing trust, a sole surviving administrator who is not a trust corporation shall have no power to do any act or thing in respect of such trust until the court has made a further grant to one or more persons jointly with him.” [Emphasis added]

32. If there was only one administrator in the estate and that administrator dies, it would result in a vacancy which would disable administration of the estate. As such, it

would be prudent for an interested party to seek revocation of the grant on the grounds of section 76(e) of the LSA since the grant becomes inoperative/useless following the death of the sole administrator. In **Re Estate of Elijah Oktah Mikah Tsimbwele (Deceased) [2021] eKLR**, Musyoka, J. stated that:

“The death of one or more administrators does not affect the grant, in terms of rendering it invalid or inoperative or useless. Under Section 81 of the Act, the powers and duties of personal representative rest in the surviving personal representative on the death of one of them. Section 76(e) of the Act only applies where there is a sole administrator who then dies.....” see also the cases of **Re Estate Of George Ragui Karanja (Deceased) [2016] eKLR**, **Re Estate Of Mwangi Mugwe Alias Elieza Ngware (Deceased) [2003] eKLR** and **(Probate & Administration 65 of 1987) [2025] KEHC 2239 (KLR)**.*[Emphasis added]*

33. As stated hereinbefore, in this case, the deceased co-administrator was survived by the respondent herein. Which means that the grant remained valid and still operable under section 81 of the LSA. That being said, the trial court did not err in making a finding to this effect.

34. From the evidence adduced, DW1 and DW2 testified that Francis Ng’ang’a Maina was taking the portion of land belonging to Peter Mwaniki Mugo who sold the said land to him to enable the family institute succession proceedings. DW7, Francis Ng’ang’a Maina, confirmed this and stated that the family agreed that he would take that piece of land in place of Peter Mwaniki Mugo who had sold him his share before the succession proceedings were instituted. Peter Mwaniki Mugo did not end up being appointed as an administrator in the estate.

35. Section 82(a) and (b) of the LSA provide thus:

“Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers-

(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;

(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

Provided that-

(i) any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and

(ii) no immovable property shall be sold before confirmation of the grant; [Emphasis added]

36. The portion of land claimed by Francis Ng'ang'a Maina was sold to him by a son of the deceased, Peter Mwaniki Mugo. He would have been a beneficiary to the estate but declined his share. He sold this land to the purchaser before the administrators were appointed. After such appointment, the appellants moved the court claiming that land since the purported beneficiary thereof is a stranger to the estate.

37. The proviso (ii) to section 82 cited above, prohibits selling of the deceased's estate or any part thereof by the personal representatives. The beneficiaries are even more restricted from selling any part of the estate because it has not been bequeathed yet. In the present circumstances, Peter Mwaniki Mugo sold to Francis Ng'ang'a Maina land that did not belong to him in the first place. The purpose of the transaction notwithstanding, Peter Mwaniki Mugo did not have legal authority to offer a part of the estate for sale to Francis Ng'ang'a Maina and this act amounts to intermeddling which is an offence under section 45 of the LSA which provides:

“(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall-

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”

38. Even if the administrators of the estate were said to have been aware of the sale and they had no problem with it, the law forbids them from disposing any immovable property in the estate before confirmation of the grant. Therefore, the sale is voidable in the face of the appellants' arguments as *bona fide* beneficiaries. As a result, the purchaser is indeed a stranger in the estate and he cannot benefit from any part of it.

39. The other issue is whether the grant ought to have been revoked based on arguments around distribution of the estate, that is, from the point of summons of confirmation of grant. From a reading of section 76, issues of distribution of the estate do not have any bearing whatsoever on the process of obtaining the grant nor can they lead to revocation. Distribution of the estate is a separate process and if a party to the proceedings at confirmation is disgruntled, they must seek recourse through setting aside the certificate of confirmation of grant and not seeking revocation of the grant of representation.

40. In the case of *In re Estate of Prisca Ong'ayo Nande (Deceased)* [2020] eKLR, Musyoka, J. after analyzing section 76 and discussing the meaning of a grant within the provisions of the laws governing succession in Kenya, held thus:

“.....section 76 has nothing to do with the confirmation process, and provides no relief at all to any person unhappy with the confirmation process. In the absence of any provision in the Law of Succession Act, for relief or redress for persons aggrieved by such orders, the aggrieved parties have only two recourses under general civil law, that is to say appeal and review, to the extent that the same is permissible under the Law of Succession Act. I would believe that one can also apply for the setting aside or vacating of confirmation orders, where the same are obtained through abuse of procedure.” [Emphasis added]

41. The trial court found no reason to revoke the grant stating that the appellants did not prove their case on a balance of probabilities. The appellants argued that the signatures on the consent accompanying the summons for confirmation were forged and they did not belong to them. PW1 and PW2 stated that they were not involved in the process of succession, and that they also did not agree with the distribution. Several of the respondent's witnesses stated that the appellants attended court during the hearing of the summons for confirmation. A perusal of the lower court proceedings of 13/10/2021 to 23/03/2022 show that the court took its time to ensure all beneficiaries attended court for the confirmation proceedings. With these arguments and evidence of attendance at the confirmation proceedings, none of the grounds under section 76 of the LSA have been proved. To that end, the trial court was correct in its findings.

Disposition

42. In my view, the appellants cannot benefit from Sec 76 revocation proceedings. They can only move the trial court to set aside the certificate of confirmation of grant if

they find it necessary, to enable redistribution. Otherwise, there is no legal basis shown to revoke the grant that was issued procedurally. Even after the death of a co-administrator, the estate will, in law, be administered under the hand of the surviving administrator.

43. This court also notes that the mode of distribution proposed in the summons for confirmation offends Article 27 of the Constitution by excluding all the daughters of the deceased from directly inheriting from the estate, particularly since there is no evidence of anyone holding in trust for them. On this basis, the court deems it prudent to order setting aside the certificate of confirmation of grant on the basis of discrimination. The court so orders, and directs the parties to file the summons for confirmation afresh before the trial court.

44. There is no order as to costs this being a succession matter.

45. Orders accordingly.

Delivered, dated and signed at Embu High Court this 29th day of April, 2026.

**R. MWONGO
JUDGE**

Delivered in the presence of:

1. Mogusu for Appellants
2. No Representation for Robi Kerato Advocates
3. Francis Munyao - Court Assistant