

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

HIGH COURT SUCCESSION CAUSE NO. 650 OF 2001

IN THE MATTER OF THE ESTATE OF FRANCIS MAGONDU

GITHINJI MWARA (DECEASED)

WILSON MACHARIA MAGONDU.....APPLICANT

VERSUS

LOISE WANGARI MAGONDU.....ADMINISTRATOR

JUDGEMENT

1. Before this Court for determination is the Summons for revocation of Grant dated **28th November 2022** filed by the Applicant **WILSON MACHARIA MAGONDU** seeking the following orders:-

“1. THAT the grant of letters of Administration Intestate issued to Respondent Loise Wangare Magondu on **28th October 2010 be revoked and a fresh grant be issued in the joint names of the Applicant **WILSON MACHARIA MAGONDU** and the Respondent herein.”**

2. The summons was premised upon **Section 76 of the Law of Succession Act, Cap 160 Laws of Kenya and Rule 44 of the probate and Administration Rules** and was supported by the affidavit of even date sworn by the Applicant.
3. The Summons was opposed by **LOISE WANGARI MAGONDU** the Administrator of the estate through the Replying Affidavit dated **17th March 2023**. The matter was canvassed by way of written submissions. The Applicant filed the written submissions dated **3rd April 2025**, the interested parties filed the submissions dated **2nd February 2026**, whilst the Respondent did not file any submissions.

BACKGROUND

4. This succession cause relates to the estate of the late **MAGONDU GITHINJI MWARA** (hereinafter '**the Deceased**') who died intestate on **15th October 2001** at the Consolata Hospital in Nyeri. There has been much litigation over this estate. On **28th October 2010** Grant of letters of Administration was made to the Respondent **Loise Wangari Magondu**. The Applicant now seeks orders to

have that grant revoked and prays that a fresh grant be issued in the joint names of himself and the Respondent.

5. The Applicant avers that the confirmation of the Grant was suspended pending the determination of a civil claim over estate land by interested parties. That suit being **ELC No. 9 of 2014** (the **ELC case**) was determined by way of a consent dated **31st May 2021** which consent granted fifty (50) acres of the estate land to third parties. The Applicant contends that by agreeing to and entering into this consent in her capacity as the Administrator of the estate, the Respondent failed in her duty to protect estate assets and the interest of the beneficiaries. That attempts by the Applicant and other beneficiaries to undo the consent were dismissed through a ruling delivered by **Hon. Justice Olola** on **28th July 2022**.
6. The Applicant further accuses the Respondent of failing in her duties as administrator by purporting to cede her powers to administer the estate to her son **Stephen Magondu Githinji** through a Power of Attorney dated **3rd February**

2016, which action is likely to expose the estate to prejudice.

7. The Respondent in opposing the summons averred that she did not in any way compromise the interests of the estate through the consent entered into in the **ELC case** as the interested parties were found by the ELC Court to be bonafide purchasers. That all the beneficiaries were at liberty to participate in the mediation but for reasons best known to themselves they did not do so.
8. The Respondent denies that she has through a Power of Attorney ceded the management of the estate to her son. She states that the said Power of Attorney was only donated for her own personal issues and is not related to the administration of the estate. The Respondent states that it would be in the interest of all the beneficiaries to have the estate distributed immediately.

ANALYSIS AND DETERMINATION

9. I have considered the summons for revocation of Grant, the reply filed thereto as well as the submissions on record. It is not in dispute that letters of Administration Intestate in

respect of this estate was made to the Respondent **Loise Wangare Magondu** on **28th October 2010**. It is also not in dispute that the Applicant **Wilson Macharia Magondu** is also a son to the Deceased and is a beneficiary to the estate.

10. The Applicant has prayed that the Grant which was issued to the

Respondent be revoked.

11. The grounds upon which a Grant may be revoked are set out in

Section 76, Law of Succession Act Cap 160, Laws of Kenya 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 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 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**
- (iv) that the grant has become useless and inoperative through subsequent circumstances.”**

12. This provision of the law was expounded upon in the case of **RE ESTATE OF PRISCA ONG'YA MANDE (deceased) 2020 eKLR** where it was 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 of administration, such as where he fails to apply for confirmation of grant within the time allowed, or 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, 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.”

13. It is trite law that he who alleges must prove. [see **Section 107 Evidence Act, Cap 63, Laws of Kenya**]. Therefore the burden lies on the Applicant to prove the allegations which he has made against the administrator of the estate.
14. In the case of **Gatirau Peter Munya vs Dickson Mwenda Kithinji & 3 Others (2014) eKLR** the **Supreme Court** held inter alia that:-

“The person who makes such allegations must lead evidence to prove the fact. She or he bears the initial legal burden of proof, which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting

one, and is a requisite response to an already discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence of a fact in issue.”

15. The Applicant has accused the Respondent of acting contrary to the interests of the estate and the beneficiaries thereto by compromising **Nyeri ELC case No. 9 of 2014**. A look at this ELC file reveals that the parties did file a consent in Court on **31st May 2021**. That consent which was a full Mediation Settlement Agreement was duly signed by the Respondent on behalf of the estate and was adopted by the Court on **17th January 2023**.

16. **Section 79** of the Law of Succession Act provides that:-

“The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and subject to any limitation imposed by the grant, all the property

of the deceased shall vest in him as personal representative. [Emphasis my own].

17. Further **Section 82** of the same Act provides that 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. [emphasis my own]

18. Therefore the Respondent acting as administrator of the estate was acting within her duties and powers as envisaged by **Section 82**. The action of reaching a consent in the **ELC case** lay squarely within the Powers of the Respondent as personal representative to the estate. Moreover as pointed out by the interested parties the consent having been duly adopted by the **ELC** amounts to a binding and enforceable

court order. A copy of the decree appears as Annexure '**DMK 1**' to the Replying Affidavit dated **7th March 2023**. I therefore find no merit in this ground of the Summons.

19. The Applicant also alleges that the Respondent has through a Power of Attorney purported to cede her authority as administrator of the estate to her son one **Stephen Magondu Githinji**. A copy of the said Power of Attorney appears as Annexure '**S1**' to the Affidavit of **Stephen Magondu Githinji** dated **27th September 2016**.
20. The duties of a personal representative are personal in nature and cannot be donated to a third party. In **RE ESTATE OF HAJI MOHAMED (Deceased) [2008] eKLR, Hon. Justice M. Thande**, found that a personal representative could not delegate the powers granted to him/her by the court to someone else to administer the estate (in a case where the deceased died intestate) or to execute the will (in the case of testate succession) on his/her behalf. In that case the court held that a personal representative was a Trustee governed by the Trustee Act and as such could only employ an agent to transact business

on behalf of the estate and could remunerate such agents out of the estate.

21. I have carefully perused the Power of Attorney dated **3rd February 2016**. In that document the Respondent at **Clause (j)** purports to grant to her son authority to manage, transact and conduct all lawful business on her behalf relating to

“(i) Probate and administration of the estate.”

22. The Respondent has no authority under the law to delegate her powers as administrator of the estate. Thus to this extent the Power of Attorney would be null and void. If for any reason the respondent felt unable or was unwilling to continue administering the estate then she could apply for substitution of the Grant to another person. The said **Stephen Githinji** has in an affidavit dated **1st November 2023** readily admitted to having misled his mother (the Respondent) into signing the Mediation Agreement obviously an administrator who is susceptible to influence is not qualified to administer the estate. To this extent the summons for revocation is merited.

23. **Section 66** of the **Law of Succession Act**, which states that

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference -

- (a) surviving spouse or spouses, with or without association of other beneficiaries;**
- (b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V; the Public Trustee; and**
- (c)**

24. **Section 47** of the Law of Succession Act and **Rule 73** of the Probate and Administration Rules give the probate court wide discretionary powers. **Section 47** of the Law of Succession Act provides:-

The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.

Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.

Rule 73 of the Probate and Administration Rules provides

that:-

Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

25. It is pertinent to note that this is a very old succession matter in which the deceased died way back in the year **2001** Granted that the case was put on hold whilst the **ELC**

case was prosecuted, however, it is desirable that this matter be finalized in the shortest possible time.

26. Based on the foregoing and in exercise of the powers granted to the court I do allow this Summons for revocation of Grant and make the following orders

(i) The Grant of letters of Administration Intestate made to Loise Wangare Magondu on 28th October 2010 be and is hereby revoked.

(ii) A fresh grant to issue to the Applicant Wilson Macharia Magondu and another person or persons [up to a maximum of four persons) to be nominated by the beneficiaries within fourteen (14) days.

(v) This being a family matter I make no orders on costs.

Dated in Nyeri this 24th day of April 2026

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MAUREEN A. ODERO
JUDGE

ORIGINAL