



REPUBLIC OF KENYA



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In re Estate of Dominic Namukonyi Nzabayi (Deceased) (Succession Cause 477 of 1995) [2025] KEHC 829 (KLR) (30 January 2025) (Ruling)

Neutral citation: [2025] KEHC 829 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 477 OF 1995
SC CHIRCHIR, J
JANUARY 30, 2025**

IN THE MATTER OF THE ESTATE OF DOMINIC NAMUKONYI NZABAYI (DECEASED)

BETWEEN

JOSEPH NZABAYI MAKOKHA PETITIONER

AND

PROTAS NZABAYI NAMUKONYI APPLICANT

RULING

1. Through the Summons dated 26th June 2023, the Applicant herein seeks for the revocation of the Grant of letters of Administration intestate, with all consequential orders, issued on 22nd March 1996, to the Respondent, and that a fresh Grant be issued to him. The application is supported by an affidavit sworn by the applicant and on the grounds appearing on the face of the Application.

The Applicant's case

2. It is the Applicant's case that the Grant was obtained through fraudulent means; that it offended the law of Succession on the law relating to priority of dependants; that there was no consent to have the petitioner as an Administrator of the deceased's Estate; that his consent was not sought and finally that the petitioner represented himself as the son of the deceased, when he was not.
3. The Applicant further states that the deceased had three sons, namely, Juma Makokha Mukabana, Peter Makokha and himself. while the petitioner was a son to his late father's brother. He states that he ranks that he ranks in priority to the petitioner on the Administration of the deceased's estate and that the petitioner has no locus standi to represent the estate.
4. He further complains that the distribution of the property was unfair and in any event, and that the petitioner has not distributed the property despite the directions of the court given on 31st January 2003.



The Respondent's case

5. The petitioner/ Respondent admits that the deceased was his uncle , but insists that he obtained the grant using the correct channels.
6. He points out that that the Applicant's mother had filed a similar application seeking for the same orders and the said Application was dismissed on 29th January 2003; That subsequently land parcel S/ Wanga/Ekero/563 was divided among the beneficiaries and each beneficiary is currently in peaceful occupation.
7. The petitioner further states that his own father died in January 1967 and he and his brother were left in the care of their uncle, the deceased. That the deceased took over their grandfather's land which was meant to be shared by his father and uncle with the intention of later giving them their share. The deceased died before he could do so . He stated that he was forced to petition for the grant when the Applicant showed no keenness in applying, he states.
8. The respondent filed submissions which I have perused. The Applicant had not filed submissions as at the time of writing this Ruling.

Analysis and determination.

9. I have considered the parties' rival positions on this matter. The only issue for determination is whether the grant should be revoked. The grounds for revoking a Grant in terms of section 76 of the [Law of succession Act](#) are well – settled.
10. The grounds were reiterated in the case of Jamleck Maina Njoroge –vs- Mary Wanjiru Mwangi (2015) eKLR where the court stated: “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.”
11. The case against the respondent is that he presented himself to the court as the son of the deceased and that the consent of the beneficiaries was not sought.
12. Rule 26 provides that letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant. Further that in an application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.
13. There is no evidence that the Applicant was notified and indeed having been the heir of the deceased he ranked higher in priority in comparison to the Petitioner.
14. A perusal of the petition also shows that the petitioner described himself as the son of the deceased , while in response to the present Application , he has admitted that the deceased was his paternal uncle.
15. In view of the foregoing uncontested facts , should the grant be revoked?
16. Whereas it is true that there is no evidence that the petitioner notified the Applicant herein, a perusal of the court records shows that the applicant's mother had applied for revocation of the grant on 20th



September 1999. The Application for revocation was on the same ground. During the hearing of the mother's Application, the Applicant herein was present in court .

17. The Judge put a question to him and the Applicant responded as follows: “ It is true that the land belonged to both my father (the deceased) and the petitioner's father . Before the deceased died he had shown the petitioner his side of the land. We all live in the same land. I have no quarrel with the 3 acres that I got and that the petitioner got. My quarrel is that his brother got 2 ½ acres while my brother got only 2 acres.”
18. What that testimony shows is that the Applicant herein was aware of these proceedings all along; that the matter he is raising had been adjudicated upon as the following extract of the judgment show delivered on 29th January 2003 shows. The Judge stated as follows: “ The main complaint of the objector and her sons appears to be that the sons of Lawrence got a total of 5 1/2 acres while the sons of the deceased got a total of 5 acres. This is a difference of only one half of an acre. It appears to be not in dispute that each family got a share of the Land in the side which they have been occupying throughout. If the two families were supposed to share the Land equally, and no one has contended so, the difference of an acre is really nothing to require upsetting everything. Then the Judge dismissed the Application for revocation.
19. It is evident that the Applicant's side of the family was unhappy and instead of appealing against the decision , opted to lie low for some years , then move back to court albeit through another family member. This was of course done to ward off the defence of resjudicata principle.
20. However the issues were the same, the petitioner had listed all the beneficiaries in the petition ; the distribution of the properties was fairly done and accepted by the court.
21. Thus notwithstanding, the faults committed by the petitioner, to revoke the grant, for the process to begin afresh , and when the end results will certainly be the same ,is to sacrifice substantive justice in the alter of procedural justice.
22. Further this matter is now on its 19th year in court, no prejudice has been suffered by any of the parties, save what has been pointed out by Justice Waweru, and considered inconsequential. To reverse the gains made would mean more years in courts and uncalled for monetary expense by the parties. This court cannot do that.
23. The Application is unmerited. It is hereby dismissed
24. The Petitioner is given a further 30 days from the date of this ruling to report back on the progress on the transmission process.

DATED, SIGNED AND DELIVERED AT KAKAMEGA, THIS 30TH DAY OF JANUARY 2025.

S. CHIRCHIR

