



REPUBLIC OF KENYA



In re Estate of Wang'ombe Wachiuri alias Wang'ombe s/o Wachiuri (Deceased) (Succession Appeal E016 of 2021) [2025] KEHC 893 (KLR) (29 January 2025) (Judgment)

Neutral citation: [2025] KEHC 893 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION APPEAL E016 OF 2021
DKN MAGARE, J
JANUARY 29, 2025**

**IN THE MATTER OF THE ESTATE OF WAMG'OMBE
WACHIURI ALIAS WANG'OMBE S/O WACHIURI (DECEASED)**

BETWEEN

**JAMES MURIUKI WANG'OMBE 1ST APPELLANT
SHELMITH WANJA WANG'OMBE 2ND APPELLANT
JACKLINE NYACHIHI WANG'OMBE 3RD APPELLANT**

AND

**WILLIAM WACHIURI WANG'OMBE 1ST RESPONDENT
PETERSON KAHARIRI WANG'OMBE 2ND RESPONDENT
DAVID WACHIRA WANG'OMBE 3RD RESPONDENT
CAROLINE MUTHONI WANG'OMBE 4TH RESPONDENT**

JUDGMENT

1. This appeal arises from the Ruling of Hon. Nelly Kariuki, Principal Magistrate delivered on 20.5.2021 in Nyeri CM Succ. Cause No. 211 of 1989.
2. The Appellants materially set out the following grounds in the Memorandum of Appeal dated 18.6.2021:
 - a. The learned magistrate erred in law and fact in finding that the Appellants participated in the summons for confirmation of grant dated 4.9.2020.
 - b. The learned magistrate erred in law and fact in not recognizing that the Appellants are the children of the deceased entitled to equal shares.



- c. The learned magistrate erred in law and fact in failing to find acts of material concealment in the confirmation of the Grant.
- d. The learned magistrate erred in law and fact in ordering the children of female children to be held in trust without reason.
- e. The learned magistrate erred in law and fact in confirming the grant in the absence of all beneficiaries who were not served to appear.
- f. The learned magistrate erred in law and fact in finding that the Appellants had the advantage of reading the affidavit in support of the summons for confirmation of grant dated 4.9.2020.
- g. The learned magistrate erred in law and fact in failing to apply the law of succession in distributing the property.

Pleadings

- 3. The Appellants filed summons dated 17.12.2020 seeking rectification of the certificate of confirmation of grant issued on 8.10.2020. The Application was supported by the Affidavit of James Muriuki Wangombe as follows:
 - a. The Applicant was dissatisfied with the mode of distribution.
 - b. The estate of the deceased should be inherited equally.
 - c. The Application should be allowed to enable distribution in equal portions.
- 4. In response to the application for revocation of the Grant, the Respondents filed a Replying Affidavit dated 17.2.2021 in which it was deposed as follows:
 - a. The Appellants fully participated in the proceedings leading to the confirmation of Grant.
 - b. The Applicants were guilty of laches as their summons dated 1.8.2019 seeking to revoke the grant was dismissed vide the ruling dated 6.2.2020.
 - c. The orders leading to the confirmation of the grant could not be rectified in the manner sought by the Applicants, as rectification would apply to typographical errors and not redistribution.

Submissions

- 5. On 4.11.2024, the parties undertook to file submissions within 7 days each. However, at the time of writing this ruling, there was none on the record or e-filing platform by either party. Noting the pains of keeping the issues raised by the Appellant in this appeal pending in court three and a half months after filing it, vis-a-vis the lower court matter filed in 1989, 35 years ago, I proceed to write the Judgment.

Analysis

- 6. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus classicus case of *Selle and another Vs Associated Motor Board Company and Others* [1968]EA 123, where the judges in their usual gusto, 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 re-trial and the Court of Appeal is not bound to follow the trial Court’s finding of fact if it appears either that he failed to take account of particular



circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”

7. In the case of Mbogo and Another vs. Shah [1968] EA 93 the Court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

8. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the lower court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

9. In the case of Peters vs Sunday Post Limited [1958] EA 424, court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

10. The issue before me for determination is whether there is any lawful ground for rectifying or annulling the Certificate of Confirmation of Grant issued on 8.10.2020, thereby setting aside the Ruling and Order of the lower court dated 20.5.2021.

11. In the impugned Ruling, the lower court dismissed an application by the Appellants that sought to rectify the grant and redistribute the property in equal shares.

12. Though indicated as a rectification, it was in reality summons for revocation of grant. This was not based on the issues dealt with earlier but that the Appellants did not take part in confirmation. As the Appellant had sought to set aside the mode of distribution and redistribute the property, the court will also examine the existence or otherwise of the grounds for revocation or annulment of grant of Letters of Administration set out in Section 76 of the Law of Succession 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.

13. The power to seek revocation of grants and for this court to revoke a grant is stipulated in the first part of section 76 of the [Law of Succession Act](#) as doth:

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.

14. The ground cited by the Applicant for seeking to rectify the certificate of confirmation of the grant herein appears to be that the children of the deceased were not present in court as they were not called on the date the Grant was confirmed. The Court considered the Summons of rectification of grant, and in its ruling dated 20.5.2021, the lower court established that all the parties had participated in the process through advocates and by consent, the parties revoked the Grant confirmed on 11.6.2019. The court allowed the summons for confirmation of the grant dated 4.9.2020 and issued a certificate of the confirmed grant on 8.10.2020. It is this confirmed grant that the Appellants sought to rectify.

15. Whereas the Appellants sought rectification, they referred to circumstances leading to revocation or annulment instead of rectifying the grant. This is because they sought to redistribute the property on the basis of equal shares. Rectification of the grant is provided for in Section 74 of the [Law of Succession Act](#), Cap 160 Laws of Kenya, and Rule 43(1) of the Probate & Administration Rules. Section 74 of the Act provides as follows:

Errors in names and descriptions, or in setting forth the time and place of the deceased's death, or the purpose in a limited grant may be rectified by the court, and the grant of representation, whether before or after confirmation, may be altered and amended accordingly.

16. On the other hand, Rule 43(1) of the Probate & Administration Rules provides as hereunder:

Where the holder of the grant seeks pursuant to the provisions of section 74 of the Act rectification of an error in the grant as to the names or descriptions of any person or thing or as to the time and place of death of the deceased or, in the case of a limited grant, the purpose for which the grant was made, he shall apply by summons in Form 110 for such rectification through the registry and in the cause in which the grant was made.

17. Therefore, the nature of errors to be corrected during rectification are mistakes in the names, description of any person or thing, or an error as to the time or place of death of the deceased or the purpose for which such grant was issued. As was observed by Muchemi J in *In re Estate of Kahiga Mwathi (Deceased)* [2022] eKLR,:

Rectification of grant of letters of administration is limited to matters set out in section 74 of the [Law of Succession Act](#) in principal to corrections of error which the court may order without changing the substance of the grant. These include errors in names, description of any person or thing or an error as to the time or place of death of the deceased or the purpose for which a limited grant was issued. An error which is envisaged under the section is a mistake which may occur on the face of the grant like typing errors in names of persons or things. As was held in the matter of the Estate of Hasalon Mwangi Kahero [2013] eKLR



“An error is essentially a mistake. For the purposes of Section 74 and Rule 43, it must relate to a name or description or time and place of the deceased’s death, or the purpose of a limited grant. Is an omission of a name or in the description of a thing an error? It would be an error if say, a word in the full name of a person is omitted or a word or number or figure in a description is omitted. But where the full name of a person or a full description of a thing or property is omitted, it would be stretching the meaning of the word “error” too far to say that that would amount to the error or mistake envisaged in Section 74 and Rule 43.

18. The purpose for which the Appellants sought rectification of the grant was to be granted time to participate in its confirmation, which was arrived at following the consent of the advocates but without their personal presence. What I understand the Appellants to assert is that the deceased’s estate should be equally distributed among all beneficiaries because they did not consent to the mode of distribution.
19. What the petitioners seek in the form of rectification is limited in nature. The history of the matter is not impressive. The petition was filed in 1989, a period of 36 years ago. Parties have had a reed dance since then to date. They were all acting in person. The record is not complete but as at 13.2.1997, William Wachiuri Wangombe indicated that he was for the petitioners and applied to the court to authorize the Executive Officer of the court below to sign documents to transfer Kirimukuyu/Gachiuro/419.
20. There was a lull until 26.4.2019 when an application was made to rectify the grant to read different names. The original grant of letters of administration was made on 27.2.1992 to as per an attached order, with beneficiaries getting between 1 acre to 3 acres. The Applicant got a lion’s share of 3 acres while two daughters were to subdivide one acre each. A consent for rectification was filed with 4 persons signing excluding James Muriuki Wangombe. The 2nd and 3rd Appellants signed the same, together with the 2nd and 3rd Respondents. On 3.7.2019, the 1st Respondent filed an application to alter the grant to change the names of the deceased’s name in respect to one specific parcel of land to read, Wang’ombe s/o Wachiuri.
21. The record reflects that on 11.6.2019, a rectified grant was issued with the sharing of land parcel No. Kimukuyu/Gachiuro/419 as follows:
 - i. William Wachiuri Wang’ombe – 3 Acres
 - ii. Peterson Kahariri Wang’ombe – 2.5 Acres
 - iii. James Muriuki Wang’ombe – 1.2 Acres
 - iv. David Wachira Wang’ombe - 2.5 Acres
 - v. Shelmith Wanja Wang’ombe
 - vi. Jackline Nyachihi Wang’ombe To share 1 acre equally.
22. On 1.8.2019 James Muriuki Wang’ombe filed summons for revocation of grant seeking the following prayers:
 - a. That the grant of letters of administration granted to the Respondent William Wachira Wang’ombe on 24th June, 2019 and confirmed on 11th June, 2019 be revoked and/or annulled.
 - b. That alternatively and without prejudice to the prayer No. (a) above, the respondent do forthwith apply for a supplementary confirmation and/or rectification of the Grant to indicate all the beneficiaries and their respective shares in the estate be ascertained accordingly.



- c. That cost of these proceedings be provided for.
23. He prayed that the estate be distributed equally among the 7 siblings. On 15.8.2019, the 1st Appellant, together with the 2nd and 3rd Respondents, and the 2nd Appellant appointed Waweru Kiragu & Associates to act for them. A notice of the kind filed in the civil cases was filed. The firm of Gathara Mahinda Advocates was appointed on 20.8.2019 by the 1st, 2nd Appellants and the 4th Respondent. The 1st Respondent filed a lengthy affidavit of protest. He stated that the deceased died on 17.12.1979. According to him, parties agreed on the mode of distribution on 31.5.1987. He annexed some minutes to that effect. He continued that the 3 daughters were considered and given 0.7 acres to share among themselves, equally.
 24. It was stated further that the Applicant has a share in Karuthi and is trying to hide under the cover of his sister. He stated that the Kikuyu customary law applied, meaning elders were right in distributing the land as they did. He stated that the 4th Respondent was not omitted but was typographically omitted.
 25. There appears on record, another grant of letters of administration intestate dated 24.6.2019.
 26. James Muriuki Wang'ombe filed another lengthy affidavit, christened Further Affidavit. He stated that there were no meetings in 1989. Witness statements were filed in support or opposition to the application.
 27. Subsequent to the issuance of the letters to the 1st Appellant, he applied to confirm, alleging that 6 months were almost lapsing.
 28. The consent indicates that the daughters' shares were to be registered in the names of the 3rd Respondent to hold in trust for the 4 girls. A consent to confirmation was filed but not signed by the 1st Appellant. The 4th Respondent has an 'x' against her name.
 29. The court delivered a ruling dated 6.2.2020 dismissing summons for rectification or annulment of grant dated 1.8.2019. Immediately thereafter, the 4th Respondent filed another application for revocation or annulment. She withdrew the same soon thereafter. She changed her advocate to Karanja Maina & Company Advocate. The advocates agreed to have the 4th Respondent included. She withdrew the application and had the confirmation carried out. A new set of application for confirmation dated 4.9.2020 was filed on 9.9.2020.
 30. The same was not signed by the 1st Appellant. It was the very same distribution that was proposed way back in the 1990s. Of critical importance is that only the 4th Respondent changed advocates. The firm of Andrew Kariuki was appointed for the Appellants on 7.12.2020. They made the impugned application. The main *raison d'être* was that the deceased's children were not called before confirmation. The 1st Appellant opposed the same through an affidavit dated 17.2.2021. He stated that the matter was dealt with through the Ruling of 6.2.2020. This was a roundabout way to re-litigate the issues in the earlier application. They blamed the Appellants for being guilty of laches. The court dismissed the application dated 17.12.2021 with costs on 20.5.2021. This resulted in this appeal.
 31. The matter proceeded before me by way of written submissions. The court indicated that the parties participated by way of Advocates.
 32. The proceedings of 8.10.2010 are instructive. The parties proceeded as if there were 2 parties in the matter. The matter proceeded for hearing on 5.11.2019 with Ms. Mwikali for the Applicant and Mr. Karanja for the Respondent. There is no mention of AK Advocates or their client. I take judicial notice that he has since died. However, only two beneficiaries proceeded for hearing. They also consented between themselves. Though the 1st Appellant was vilified for the results of the grant issued on



1.6.2019, it cannot be so. The said grant was revoked on 30.7.2020. It is therefore, moot whether the 1st Appellant challenged the same.

33. Further, the proceedings were between the two parties to the total exclusion of the Appellants and some of the Respondents. The proceedings after 30.7.2020 are indefensible. After the grant was revoked, the parties had carte blanche on how to proceed. All beneficiaries were to be informed. The record is clear that there were no proceedings to confirm the grant.

34. Therefore, the proceedings for obtaining the confirmed grant are a nullity. It is irrelevant to the procedure of the parties challenging the confirmed grant. Once it came to the court's notice that parties were not involved, she ought to have set aside the grant. Even if this court agreed with her that the advocates sufficed, the third advocate, Andrew Kariuki was not involved. The court did not expressly direct that the matter proceeds ex parte since she was satisfied with service. Such proceedings are a nullity. In *Macfoy vs. United Africa Co. Ltd* [1961] 3 All E.R. 1169, Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

35. The court does not wish to deal with the application's merit, having found that the proceedings were a nullity. Further, having noted that the ruling of 6.2.2020 was overtaken by events, it is not necessary to address the remainder of the issues.

36. The court has the jurisdiction to set aside, even suo motto, orders issued without hearing other parties. In the case of *Bonaventure Tours and Travel Ltd V Rose Chebet and Others* [2007] eKLR, K. H. Rawal as then she was posited as follows:

Obviously, the said order was made ex parte without the support of a statute and thus makes it devoid of principles of natural justice and jurisdiction. The issue thus before me is the one which could be determined by way of preliminary objection. In the premises, this court is also not sitting over an appeal against an order of the court of concurrent jurisdiction. This court is only exercising its jurisdiction under inherent powers which has been conferred on it by *the constitution*. In the premises, I do not agree to the submissions made by Mr. Omino that only remedy for the Defendant is to apply for review before the court which has granted the order and that this court has no jurisdiction to hear the Preliminary Objections.

I would stress that this court can suo moto set aside the orders which merit the said order ex debito justitiae.

37. The decision of 20.5.2021 is thus unsupportable. It was based on a nullity for failure to hear the beneficiaries. The court did not also interrogate the provisions of sections 35-40 to have any deviation justified. The court proceeded on the wrong premise that the ruling of 6.2.2020 was in situ when the subject of the ruling was already set aside.

38. Consequently, the Appeal is for allowing. The question only relates to costs. Parties have been involved in subterfuge and skulduggery despite the matter involving siblings.

39. Before I leave the matter, it came out in the proceedings that the 3rd Respondent was appointed to be registered as the owner of a share for the daughters of the deceased. None of them is under disability.



There is no continuing trust created; there is thus no basis for the son of the deceased to hold the girls' property in trust for them. The confirmation for a single administrator was equally a nullity. Section 76 of the law of succession provides as follows:

- (2) Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may—
 - (a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering and will administer, the estate according to law, confirm the grant; or
 - (b) if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 of this Act, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be unadministered; or
 - (c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control, or
 - (d) postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case:

Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed, such grant shall specify all such persons and their respective shares.

- (2A) Where a continuing trust arises and there is only one surviving administrator, if the court confirms the grant, it shall, subject to section 66, appoint as administrators jointly with the surviving administrator not less than one or more than three persons as proposed by the surviving administrator which failing as chosen by the court of its own motion.

40. Therefore, another administrator was necessary once a need for continuing trust was seen. Secondly, the sisters were feme soles capable of owning property in their names. Being intestacy, there can be no trust that could be implied from the deceased's conduct or agreement of parties except where the parties expressly agree. When the matter is to be heard, each of the adult parties must have their share of property without any trust.

41. Costs should follow the event, ordinarily. The issue of costs is governed by Section 27 of the [Civil procedure Act](#), which provides as follows:

- (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
- (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.



42. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others*, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

“(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

43. The linchpin of the application was proved. The Appellant were, however not vigilant. The matter being one involving family members, I shall order that each party bears their own costs.

Determination

44. In the upshot, I make the following orders:

- i. The Appeal is allowed, and the Certificate of Confirmation of Grant issued on 8.10.2020 is set aside for being a nullity.
- ii. The matter is remitted to the lower court for a proper hearing of the summons for confirmation of the grant and distribution of the estate.
- iii. This being a succession dispute, each party shall bear their own costs in the appeal.
- iv. There is no provision for one adult to hold an estate in trust for others in a succession cause, in the absence of disability or continuing trust for the entire estate or property.
- v. An order preserving the entire estate is hereby issued pending confirmation of confirmation.
- vi. The matter in the lower court is fixed for directions before the chief Magistrate’s court.
- vii. This file is closed.

**DELIVERED, DATED, AND SIGNED AT NYERI, ON THIS 29TH DAY OF JANUARY, 2025.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of: -

No appearance for the Appellants

Ms. Muthoni for the Respondents



