



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Estate of Muthungu Macharia (Deceased) (Succession Cause  
415 of 2010) [2025] KEHC 7381 (KLR) (28 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7381 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
SUCCESSION CAUSE 415 OF 2010  
DKN MAGARE, J  
MAY 28, 2025**

**BETWEEN**

**BEATRICE MUTHONI KAMOTHO ..... APPLICANT**

**AND**

**MARY WANGU MUTHUNGU (DECEASED) ..... RESPONDENT**

**AND**

**JOSEPH KAMOTHO MUTHUNGU ..... OBJECTOR**

**JUDGMENT**

1. This judgment is in respect of the Objection to the making of a grant dated 18.1.2023 and filed by the Objector. The objection was against the summons for confirmation of grant dated 12.1.2023.
2. The objection was supported by the Affidavit of Joseph Kamotho Muthungu sworn on 18.1.2023 and premised on the following grounds:
  - a. The Objector and other beneficiaries were not involved in the process of succession.
  - b. The Petitioner was not entitled to commence succession without the beneficiaries' consent.
  - c. The deceased was not father-in-law of the Petitioner and she lied to that effect.
  - d. The Petitioner's late husband was half-brother to the deceased born of same mother but different fathers.
  - e. The deceased allowed the Petitioner's husband, Geoffrey Kamotho Muteithia to construct on his (the deceased's) land with permission only to construct a living house but not own the land.
  - f. Therefore, the following true beneficiaries of the estate of the deceased were left out from the succession process:



- i. Joseph Kamotho Muthungu - son
- ii. Irene Wanjiku Mwangi - grand daughter
- iii. Agnes Wanjiku Muthungu - daughter
- iv. Charles Maina Muthungu - son
- v. Judy Gathigia Muthungu - daughter
- vi. Lucvy Wanjira Muthungu - daughter
- vii. Wangui Muthungu- daughter
- viii. Lucy Wachuka Muthungu - daughter
- ix. Joseph Murage Muthungu - son

### **Evidence**

3. Joseph Kamotho Muthungu testified for the Objector. It was his case that husband of the Petitioner and the deceased herein were half-brother. They shared the same mother but different fathers. He reiterated the details in his witness statement and affidavits in support of the protest. He testified that he had not refused to share the land equally.
4. On her part, the Petitioner testified as DW1. She stated that indeed her late husband was half-brother of the deceased. That the deceased died before she was married. That the deceased refused the land to be subdivided.
5. She also called Johnson Muita Muriuki as her witness. It was his case that the Petitioner's husband and the deceased were brothers of the same mother.

### **Submissions**

6. I have not had sight of the parties' submissions.

### **Analysis**

7. The issue before me for determination is whether there is any lawful ground on which to revoke the grant of letters of administration herein.
8. The grounds for revocation or annulment of grant of letters of administration are 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.
9. 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.

10. The main ground cited by the Applicant for seeking revocation of the grant herein is that confirmation of the grant was obtained through concealment of material facts, namely that the Objector and other beneficiaries were beneficiaries and dependants of the deceased.
11. On the other hand, the Petitioner did not dispute the fact that indeed the Objector and stated beneficiaries were not involved in the succession process from inception. The Chief's letter produced by the Petitioner indeed left out the objectors. The Petitioner appears to have proceeded on the basis that the land which she was doing succession was only the portion that her late husband occupied. In the case of *Jamleck Maina Njoroge v Mary Wanjiru Mwangi (2015) eKLR* the court discussed circumstances when a grant can be revoked. The court observed:

“ 11. 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.”

12. The power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. In the case of *Albert Imbuga Kisigwa v Recho Kawai Kisigwa, Succession Cause No.158 of 2000*, the Court stated as follows:

“(13) Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the court to invoke section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased's estate and ensure that the action taken will be for the interest of justice.”



13. Similarly, in animating the discretionary powers of the Court in the case of Ramakant Rai vs. Madan Rai, Cr LJ 2004 SC 36, the Supreme Court of India rendered itself thus on the issue of judicial discretion:

“Judicial discretion is canalized authority not arbitrary eccentricity. Cardozo, with elegant accuracy, has observed:

“The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to ‘the primordial necessity of order in the social life.’ Wide enough in all conscience is the field of discretion that remains.”

14. The Objectors maintain that they did not give their consent to the proceedings leading to the temporary grant sought to be confirmed and were not aware of these proceedings as they were not notified of the same. Rule 26 of the Probate and Administration Rules, states that;

- (1) 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.
- (2) 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.

15. The respective identities and shares of all persons beneficially entitled to the estate were clearly not stated in the petition for letters of administration and this was in error. In the case of Charles Mutua M’anyoro vs. Maria Gatiria [2009] eKLR it was held that:

“...in mandatory language, the proviso to section 71 of the *Law of Succession Act* enjoins the court, in case of intestacy, to confirm the grant only if it is satisfied as to the respective identities and shares of all persons beneficially entitled to the estate. Another safeguard in ensuring that only the deceased person’s dependants benefit from the estate is in Rule 40(3) of the Probate and Administration Rules which requires that before a grant can be confirmed the particulars of the dependants must be disclosed...It is imperative under the rules that all the dependants be in attendance during the hearing of the application for confirmation save where the dependants have signed a consent in writing. See Rule 40(8).”

16. The participation of the objectors in the succession process was thus germane to the validity thereof, without which this court shall set aside the grant. The same position was restated In re Estate of Abdulkarim Chatur Popat (Deceased) [2019] eKLR where the Court pronounced itself as follows:

“Having found that the applicants therein were beneficiaries of the estate of the deceased, their consent was necessary as was their participation in the confirmation proceedings.”

17. It therefore follows that the consent of all the beneficiaries to the confirmation of grant is required before the grant can be confirmed. In this case, Gabriel Mithamo Ndunyu was deceased. The survivors of the said deceased persons were clearly not parties to the consent. However, the court in deciding whether or not to revoke a grant must take into account all the relevant facts including the prejudice, if



any, that was occasioned by the failure to comply with Section 76 of the Act. It therefore follows that the mere fact that the conditions under Section 76 of the Act exist, it does not necessarily follow that the grant must be revoked.

18. It is my considered view that the Petitioner, in her testimony did not make any rebuttal on the allegation of not involving the Objectors in the succession from inception. This pointed to her wrong doing. As held by Mwita, J, *Albert Imbuga Kisigwa vs. Recho Kawai Kisigwa*, Succession Cause No.158 of 2000:

“Power to revoke a grant is discretionary power that must be exercised judiciously and only on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the court to invoke section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account interests of the beneficiaries entitled to the deceased’s estate and ensure that the action taken will be for the interests of justice.”

19. The net effect of the foregoing is that I find basis to revoke the grant made on 30.5.2022. For this reason, the process of obtaining the impugned grant was defective and was attended by misrepresentation and concealment of matters from the court

20. Both estates are entitled to share the property of the deceased. In the circumstances, given all facts in the file, I direct that the sole property of the estate be shared as follows:

The children of the late Muthungu Macharia to share one half of land parcel number equally among the following in respect of their position.

- a. Joseph Kamotho Muthungu - son
- b. Irene Wanjiku Mwangi - grand daughter
- c. Agnes Wanjiku Muthungu - daughter
- d. Charles Maina Muthungu - son
- e. Judy Gathigia Muthungu - daughter
- f. Lucvy Wanjira Muthungu - daughter
- g. Wangui Muthungu - daughter
- h. Lucy Wachuka Muthungu - daughter
- i. Joseph Murage Muthungu - son

21. The beneficiaries of the estate of the late Geoffrey Kamotho Muteithia to share the half they occupy.

### **Determination**

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

- a. The Objection dated 18.1.2023 is merited and is allowed.
- b. The grant dated 30.5.2022 is hereby revoked.
- c. A fresh grant shall forthwith issue naming the Petitioner, Beatrice Muthoni Kamotho and the Objector, Joseph Kamotho Muthungu as co-administrators.
- d. The parties to share the suit land, Iriani/Gatundu/89 as follows:



- i. The beneficiaries of children and the widow of Geoffrey Kamotho Muteithia to share 1.4 acres. The said parcel be registered in the names of Beatrice Muthoni Kamotho to hold in trust for herself and her children equally.
- ii. Children and the widow of the late Muthungu Macharia (deceased) to share 1.4 acres. The same to be registered in the names of at most 4 beneficiaries in trust for the rest. The names to be supplied to the court.
  - a. The administration be completed by 26.11.2025.
  - b. The file is closed.
  - c. Each party shall bear own costs.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 28<sup>TH</sup> DAY OF MAY, 2025.**

**JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

In the presence of: -

Mr. Kamunya for the Protestor

No appearance for Kebuka Wachira

Court Assistant – Michael

