



In re Estate of Caleb Joseph Wadenya alias Caleb Wadenya Opiyo (Deceased) (Succession Cause 159 of 1999) [2024] KEHC 772 (KLR) (25 January 2024) (Judgment)

Neutral citation: [2024] KEHC 772 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION CAUSE 159 OF 1999
RE ABURILI, J
JANUARY 25, 2024**

BETWEEN

JAYNE AKINYI OKUMU 1ST APPLICANT

DANCUN OMONDI CALEB 2ND APPLICANT

AND

WILCHISTER ORWA WADENYA PETITIONER

AND

RUTH AWINO WADENYA BENEFICIARY

EUNICE ACHIENG OMEMA BENEFICIARY

JUDGMENT

1. The applicants/objectors herein moved this court vide summons dated 10th June 2021 in which they prayed that the grant of Letters of Administration intestate dated 17th January 2020 issued to the respondent herein Wilchister Orwa Wadenya be revoked on the grounds that the proceedings therein were defective in substance and/or were obtained fraudulently by the making of false statements and by the concealment from the court of something material to the cause.
2. The applicants sought further orders that consequent to the revocation sought, the transfer of all the suit properties listed in the Summons for Revocation into the respondent's name be cancelled and or nullified and reverted to the name of the deceased and that the grant of Letters of Administration intestate to administer the estate of the deceased be issued to the applicants jointly with the respondent.
3. It was further sought by the applicants that the respondent be compelled to render and/or tender accounts in respect of the deceased's estate thus far and that the respondent be compelled to indemnify the beneficiaries in case of any loss or wastage arising out of her carelessness.



4. It was the applicants' case that they were also the beneficiaries of the deceased's estate and that the respondent did not disclose their names as well as those of other beneficiaries when applying for the impugned grant and that further, the said petition for grant was made without any notice to the applicants or consent being sought from them by the respondent.
5. The applicants further averred that the respondent also concealed the true extent of the deceased's estate and left out several of the deceased's properties.
6. The objection proceedings were heard by way of viva voce evidence.
7. The 1st applicant testified as OBW1. She testified that her mother was suffering from dementia and had granted the 2nd beneficiary Power of Attorney which was initially revoked on the 19.2.2022 after which the 2nd beneficiary got another Power of Attorney on the 23.11.2022. She testified that the 2nd beneficiary was intermeddling with the deceased's estate as she had cut down the sugar cane which the applicants had planted.
8. OBW1 testified that for the past 24 years since their father Caleb Joseph Wadenya alias Caleb Wadenya Opiyo passed on, they had not been made aware of the contents of the Will left by their father. She further disputed the said Will stating that it was found lying in the house and That the signature on it was not the deceased's and further that it wa dated 2 weeks to the deceased's death whereas the deceased was unwell. It was her testimony that the Will only provided for the beneficiaries herein.
9. In cross-examination, OBW1 admitted that she had not produced the deceased's 'right' signature. She further stated that she was the one who discovered the Will while cleaning the respondent's house. She denied receiving any rent from the deceased's estate and stated that the rent was being banked in the respondent's account whereas the rent being collected by the 1st beneficiary was being used for the respondent's up keep.
10. In re-examination, it was her testimony that if the court revoked the grant, the family would sit and discuss the possible administrators as the respondent was 87 years old and had dementia. OBW1's testimony was corroborated by that of OBW2.
11. The 1st Beneficiary testified as BW1 relying on the Will dated 5.9.1998 which she referred to as her father's will and stated that she wanted the Will to be respected.
12. In cross-examination, she admitted that she was not involved in the succession proceedings herein. She further stated that they lost their siblings Daniel Odhiambo and Moses Opiyo who were survived by their families though she could not tell if they were beneficiaries in the current proceedings. It was her testimony in cross examination that she was present when the Will was being written by her father though she did not know the contents.
13. She further stated that she signed a consent on the mode of distribution of the estate early last year but that not all family members signed the consent. She stated that three properties Kisumu/Kabar 982 & 984 were not included in the Certificate of Confirmation of Grant but that they were purchased by the applicants though they formed part of the deceased's Will.

In re-examination, BW1 testified that they were all made aware of the Will and that nobody challenged or contested the said Will.
14. BW2 reiterated BW1's testimony and further testified that she was not involved in the succession proceedings that the respondent filed but that all the siblings save for Daniel were provided for in the Will. It was her testimony that the applicants stayed with the respondent and that they had denied BW2 the opportunity to see her mother, the respondent. She denied managing the deceased's estate



and stated that it was the applicants', the respondent and 1st beneficiary who were managing the said estate.

Analysis & Determination

15. Revocation of grants is provided for under section 76 of the *Law of Succession Act*. The grounds upon which the grant may be revoked are well spelt out therein. The said section provides that revocation can either be at the instance of an applicant or can be by the court suo moto. However, it is a prerequisite that the conditions for revocation as set out under section 76 must be proved. 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.”

16. The 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 for revocation or annulment of 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. Generally, the trial court has jurisdiction to revoke a grant if the conditions under section 76 are satisfied.

17. For avoidance of doubt, Section 76 of the *Law of Succession Act* provides as follows:

“76. Revocation or annulment of grant

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.”

18. Section 76 was expounded on by the court *In re Estate of Prisca Ong'ayo Nande (Deceased)* [2020] eKLR where it was stated that:

“Under section 76, a court may revoke a grant so long as the grounds listed above are disclosed, either on its own motion or on the application of a party. 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 he 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 to carry on the exercise, or where the sole 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.”

19. In the instant case, there is no doubt that the respondent obtained the Grant of Letters of Administration intestate to the estate of the deceased Caleb Joseph Wadenya alias Caleb Wadenya Opiyo without involving the applicants or the beneficiaries. Further, as is evident from the testimony of the applicants and beneficiaries herein, the respondent failed to list them as beneficiaries of the deceased's estate as is evident from the P & A 5 Affidavit in support of the petition for letters of administration intestate. It is thus clear that the proceedings to obtain the grant were defective in substance.

20. Furthermore, when the respondent applied for confirmation of grant and the grant was confirmed, the schedule of distribution of the estate places her as the sole beneficiary of the entire estate of the deceased. Again, that is not true because the deceased was survived by children who are the applicants and beneficiaries hereto among others. The applicants also claimed on oath that there are other assets of the estate which were left out of the petition and there is no affidavit controverting that deposition.



21. Besides, this Court notes that the deceased in this case died leaving behind a Will dated 5th September, 1998 and that Will is filed in this file at page 113 to 117. This was the testimony of the beneficiaries herein and though the applicants attempted to fault the Will, these are not the right proceedings in which the Will can be faulted as the proceedings are fatally defective and from the onset, any orders including the grant as issued and conformed is null and void ab initio and must be set aside and vacated and annulled. Accordingly, then, in addition to the non disclosures and the defects in the petition which never listed all beneficiaries and assets of the deceased, I find and hold that the grant issued to the respondent on 26th June 2000 stands annulled and revoked on the other ground that 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.
22. It is also not lost on this court that all the parties herein have testified to the respondent's failing health as a result of her advanced age and as such, is incapable of performing her duties as an administratrix. She has never appeared in court since I took over this file and her children who are the applicants and beneficiaries hereto confirmed that she was of very poor health and mental status could allow her to attend court.
23. The upshot of the above is that the applicants have satisfied the conditions to warrant the revocation of the Grant of Letters of Administration intestate issued on 17th January 2000 and confirmed on 26th June, 2000.
24. In view of the above situation, I order that all the immovable landed properties transferred to the respondent herein Wilchister Orwa Wadenya and to any other persons, all such registrations are hereby cancelled annulled and the titles to the said parcels of land shall now revert back to the deceased's names Caleb Joseph Wadenya alias Caleb Wadenya Opiyo until proper succession proceedings are undertaken by the beneficiaries.
25. I make no orders as to costs this being a family matter between close family members.
26. I so order.
27. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 25TH DAY OF JANUARY, 2024

R.E. ABURILI

JUDGE

