



In re Estate of Sheldon Washington Sakwa Muchilwa (Deceased) (Succession Cause 220 of 2023) [2024] KEHC 1786 (KLR) (28 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1786 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
SUCCESSION CAUSE 220 OF 2023**

AC MRIMA, J

FEBRUARY 28, 2024

**IN THE MATTER OF THE ESTATE OF SHELDON
WASHINGTON SAKWA MUCHILWA (DECEASED)**

BETWEEN

FLORA INDIASI MUCHILWA 1ST PETITIONER

DAVID AMUKHUMA MUCHILWA 2ND PETITIONER

AND

BARBARA NIVAH MUCHILWA 1ST APPLICANT

APOLLO OTEMO MUCHILWA 2ND APPLICANT

RULING

Introduction:

1. Sheldon Washington Sakwa Muchilwa, the deceased in this cause, was a renowned politician from the Western region of Kenya. He died on 10th May 2010 having served as the Member of Parliament for Emuhaya Constituency and as an Assistant Minister. This Cause relates to his estate.
2. The instant ruling is a composite one in respect of two applications. They are the Summons for Revocation of Grant dated 30th March 2022 and Summons for Appointment as an Additional Administrator dated 13th June 2022.
3. The former was instituted by Barbara Nivah Muchilwa (hereinafter referred to as ‘Barbara’). It is supported by her Affidavit deposed to on 14th June 2022. The later was lodged by Apollo Otemo Muchilwa (hereinafter referred to as ‘Apollo’) and is supported by his Affidavit deposed to on 13th June 2022.



4. David Amukhuma Muchilwa, the 2nd Petitioner/Co-Administrator opposed the application by Barbara. He did not, however, oppose the application by Apollo.
5. A look at the applications now follow.

The Applications:

Summons for Revocation of Grant:

6. The Summons for confirmation of Grant sought the following Orders: -
 1. That the grant of Letters of Administration issued and confirmed to Flora Indiasi Muchilwa and David Muchilwa made on 2nd June 2021 be revoked and or annulled.
 2. That leave of court be granted for a hearing date to be granted for the Objection filed on 10th December 2020.
 3. That an inhibition be registered on L. R No. 1602 (Miwani- Kisumu)
 4. Cost be provided for.
7. The grounds in support for the revocation mirror the depositions of Barbara in her supporting Affidavit.
8. It was Barbara's case that the Grant was obtained by concealment of material fact including the fact that she did not sign the family agreement on distribution that was filed in support of the application for confirmation of the Grant.
9. It was her case that she neither issued consent to the grant proceeding as drafted and as such it was obtained by untrue allegations of fact.
10. She further stated that the grant failed to disclose other members of the family entitled to benefit from the estate of the deceased and, therefore, the distribution is vitiated by forgery of the Respondents' ill-attempt of depriving other beneficiaries.
11. She pleaded that the Deed of Family Agreement does not mention cows and woodlots and does not propose pro-rata physical asset devolution for some major assets and that no valuation has been done to help obtain equity.
12. It was further her case that in the preliminary distribution of land, the sons of the deceased were allocated between 9 to 11 acres whereas the daughters were allocated about 5.2 acres each. She asserted that the deficit was to be made good during the remaining land distribution but the Deed of Agreement made no mention of the fact that daughters of the deceased inherited less.
13. Further to the foregoing, she claimed that her Mother, June Muchilwa, was not provided for in the Deed of Family distribution Agreement. She stated that the Deed allocated major assets to the three wives as matrimonial property and it does not cater for former wives who were not adequately provided for during termination of the marriage between themselves and the deceased.
14. In support of the application for revocation of the grant, Barbara filed written submissions dated 29th May 2023. She did not oppose the application for appointment of Apollo as an additional Administrator.



15. In advancing her claim for revocation, Barbara submitted that under Section 76 of the [Law of Succession Act](#), a grant of representation whether confirmed, may at any time be revoked or annulled on an application by a party or by the Court on its own motion.
16. Barbara referred to [Re Estate of Eston Nyaga Ndirangu \(deceased\)](#) (2021) eKLR to buttress the fact that a person applying for Grant of Letters of Administration must get consent from persons equal or lower priority than him.
17. As regards the contention that Barbara's mother, June Muchilwa, was not catered for in the Deed of Family Distribution, it was her case that Section 29 of the [Law of Succession Act](#) defines the wife, wives or former wife or wives of the children of the deceased as dependants.
18. In sum, Barbara proffered that the Grant confirmed on 30th October 2020 be revoked for failing to ensure all beneficiaries signed and consented to the mode of distribution.

The Response:

19. David Muchilwa, the 2nd Petitioner/Co-Administrator herein responded to the Summons for Revocation through the Replying Affidavit he deposed to on 4th November 2022.
20. It was his case that there was no demonstration on how the proceedings to obtain the grant were fraudulent or defective. He referred to the Affidavit in support of the Summons on distribution and the family agreement that was signed by most of the family members.
21. He deposed that family members who did not sign the agreement were involved in family negotiations and discussions and that it was only Barbara who objected to the family agreement yet all beneficiaries including those who did not sign agreed with the proposed distribution.
22. It was his case that the family agreement showed the assets that were transmitted to Barbara.
23. He deposed that on 2nd June 2021, the day scheduled for hearing of Barbara's objection, despite service, neither she nor her Advocate attended Court and in exercise of its discretion, the Court confirmed the grant in terms of the family agreement.
24. It was his case that no appeal was preferred against the Confirmation Order of 2nd June 2021 and as such the instant Summons is a backdoor attempt to revert to the position before 2nd June 2021 yet Barbara had an opportunity to be heard but failed to utilize it.
25. In conclusion it was his case that Barbara's displeasure on the mode of distribution cannot justify the revocation of the grant and that she ought to have preferred an appeal against the order of confirmation.
26. David filed written submissions dated 4th April 2021. It was his case that the grant of letters of Administration were issued to the 2nd Petitioner on 15th February 2011 and to that end, the Petition complied with the requirements of Section 51(2)(g) of the [Law of Succession Act](#).
27. It was submitted that there is no claim that any beneficiary was left out or that the two Petitioners were not qualified as Administrators.
28. In addition to reiterating the deposition in his Affidavit, the 2nd Petitioner submitted that the Revocation application ought to have been served against all the beneficiaries since the Confirmation had been perfected and the estate distributed to the beneficiaries.
29. The decisions in Kakamega Succession Cause no. 549 of 2016 In the matter of the Estate of Seth Namiba Ashuma (deceased) and the one in Nairobi high Court Succession Cause No. 864 of 1997,



the Matter of the Estate of Mbai Wainaina (deceased) were relied on to demonstrate that the failure to serve the application upon the beneficiaries is reason enough dismiss it.

30. In conclusion, the 2nd Petitioner stated the application had not attained the threshold for revocation of the grant.

The Summons for Appointment of Additional Administrator:

31. The Summons for the appointment of Apollo as an additional Administrator sought the following Orders;
1. That this honourable Court be pleased to appoint the Applicant as a joint Administrator with David Amukhuma Muchilwa.
 2. That cost of the Application be provided for.
32. As stated elsewhere above, the application was not opposed.

Analysis:

33. Having carefully considered the two applications, the main issue for determination is whether the applications be allowed.
34. Since the application for joinder of an additional administrator was not opposed, this Court will interrogate the other application on the question whether the proceedings that gave rise to the impugned confirmation were defective in substance and or were obtained through fraud.
35. Section 76 of the *Law of Succession Act* is the relevant provision of the law that governs revocation of grants. It 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.

36. Rule 44 of the *Probate and Administration Rules* provides as follows: -

44. Revocation or annulment of grant

- (1) Where any person interested in the estate of the deceased seeks pursuant to the provisions of section 76 of the Act to have a grant revoked or annulled he shall, save where the court otherwise directs, apply to the High Court for such relief by summons in Form 107 and, where the grant was issued through the High Court, such application shall be made through the registry to which and in the cause in which the grant was issued or, where the grant was issued by a resident magistrate, through the High Court registry situated nearest to that resident magistrate's registry.
- (2) There shall be filed with the summons an affidavit of the applicant in Form 14 for revocation or annulment identifying the cause and the grant and containing the following particulars so far as they are known to him—
 - (a) whether the applicant seeks to have the grant revoked or annulled and the grounds and facts upon which the application is based; and
 - (b) the extent to which the estate of the deceased has been or is believed to have been administered or to remain un-administered, together with any other material information.
- (3) The summons and affidavit shall without delay be placed by the registrar before the High Court on notice in Form 70 to the applicant for the giving of directions as to what persons (if any) shall be served by the applicant with a copy of the summons and affidavit and as to the manner of effecting service; and the applicant, upon the giving of directions, shall serve each of the persons so directed to be served with a notice in Form 68, and every person so served may file an affidavit stating whether he supports or opposes the application and his grounds therefor.
- (4) When the persons (if any) so directed to be served (or such of them as the applicant has been able to serve) have been served with a copy of the proceedings, the matter shall be placed before the High Court on notice by the court to the applicant and to every person so served, and the court may either proceed to determine the application or make such other order as it sees fit.
- (5) Where the High Court requires that notice shall be given to any person of its intention of its own motion to revoke or annul a grant on any of the grounds set out in section 76 of the Act the notice shall be in Form 69 and shall be served on such persons as the court may direct.

37. The Court In *Re Estate of Prisca Ong'ayo Nande (Deceased)* [2020] eKLR, in looking at the import of Section 76 of the *Law of Succession Act* observed as follows: -

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.

38. This Court has carefully perused the pleadings and the proceedings that culminated with the issuance and confirmation of the Grant of Letters of Administration and the Certificate of confirmation thereof.
39. From the time the Petition for Letters of Administration was lodged in Court, Barbara was included as a beneficiary in the deceased's estate.
40. In the Summons for Confirmation of Grant dated 8th October 2020, there is attached Family Agreement on distribution. Whereas Barbara was included as one of the beneficiaries, it is notable that she, and five other beneficiaries, did not append their signatures to that agreement.
41. Consequently, Barbara then lodged Grounds of Objection of Family Agreement on Distribution. It is dated 10th December 2020. She contended that the Agreement on distribution did not include some cows and woodlots and that there was no asset valuation to help in fair distribution. It also was her contention that girls were not getting equal shares as compared to boys.
42. A careful perusal of the record indicates that Barbara did not take any steps to prosecute the Objection dated 10th December 2020 which she filed against the confirmation of the grant.
43. The record indicates that on 15th December 2020, the Court directed that the Objection be served upon the Counsel for the Administrators herein and matter fixed for hearing on 19th April 2021.
44. Subsequently, on 19th April 2021, there was no appearance by parties or their respective Counsel. The matter was taken back to the registry for dates to be taken.
45. The Objection was never moved forward from that point.
46. On 23rd April 2021 the Court directed that the Summons for Confirmation of Grant be heard on 2nd June 2021.
47. On the said date, Barbara neither attended Court nor her Advocate. Upon confirming the she was duly served; the Court made the following remarks and Orders.

Since the Objector was served and failed to attend Court, the Application for confirmation of grant dated 8th October 2020 is hereby allowed. Distribution of the Estate of the deceased shall be in accordance with family agreement on distribution dated 8th October 2020.



48. It is on the foregoing backdrop that Barbara instituted the Summons for Revocation of Grant pursuant to Section 76 of the *Law of Succession Act* as read alongside Rule 44 of the *Probate and Administration Rules*.
49. Going back to the inception of this Cause, it is evident, from the contents of Form 38 of the Probate and Administration Rules, that Barbara gave consent to the have the Administrators herein be issued with the Grant of Representation.
50. Having gone to the root of this matter, it is this Court's finding that there is neither defect nor fraud that can be attributed to the Petitioners or the procedure that led to the issuance of the Grant of Letters of Administration. The first prayer of the application, therefore, fails.
51. Barbara also prayed for the leave of the Court that her objection be heard. Although she did not expressly state as such, the effect of the prayer is to review and set-aside the confirmation proceedings undertaken on 2nd June 2021.
52. The Court satisfied itself that Barbara was duly served for the confirmation proceedings and allowed the Summons for confirmation. Without impugning the Court's satisfaction, the objection filed by Barbara is still on record since there is no order disposing it in any manner.
53. Having given a careful consideration of the application by Barbara and in the wider interest of the estate, this Court is alive to the fact that there is indeed a hanging disharmony within the deceased's family in respect to the distribution of the estate. If this Court is to do substantive justice and to possibly bring the matter to rest as required of Article 159(2)(d) of the *Constitution*, then the issues raised in the objection ought to be dealt with.
54. Section 47 of the *Law of Succession Act* accords this Court the power to entertain any application and to determine any dispute under the *Law of Succession Act* and to pronounce such decrees and make such orders therein as may be expedient. The Court finds that the objection ought to be expeditiously dealt with. Further, the Court notes that despite the confirmation of the grant, the transfer of the estate by way of transmission to the beneficiaries is yet to be undertaken.
55. This Court, therefore, finds favour with the Objector's prayer that her objection be heard.

Disposition:

56. Deriving from the above discussion, the Summonses dated 13th June 2022 and 30th June 2022 are hereby determined as follows:
 - a. The Summons for Appointment of Additional Administrator dated 13th June 2022 is hereby allowed. Flora Indasi Muchilwa who was the 1st Administratrix and who died on 8th January, 2022 is hereby removed from the administration of the estate herein.
 - b. Apollo Otemo Muchilwa is hereby appointed as the 2nd Administrator of the estate herein whereas David Amukhuma Muchilwa shall become the 1st Administrator.
 - c. The confirmation proceedings undertaken on the 2nd June 2021 are hereby set-aside. The Objection dated 10th December 2020 and the Summons for Confirmation of the Grant dated 8th October 2020 shall forthwith be heard.
 - d. Parties shall on a date to issue today take directions on the hearing of the Summons for Confirmation of the Grant and the Objection.
 - e. Since the dispute herein is still current, costs of both applications shall be in cause.



57 Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 28TH DAY OF FEBRUARY, 2024.

A. C. MRIMA

JUDGE

Ruling No. 1 virtually delivered in the presence of:

Miss. Were for Mr. Balala, Learned Counsel for Barbara N. Muchilwa, the Objector/Applicant.

Mr. Kiarie, Learned Counsel for the Administrators.

Chemosop/Duke – Court Assistants.

