



In re Estate of the Late Simon Ndungu Njoroge (Deceased) (Succession Cause 539 of 2001) [2024] KEHC 2088 (KLR) (28 February 2024) (Ruling)

Neutral citation: [2024] KEHC 2088 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 539 OF 2001
HM NYAGA, J
FEBRUARY 28, 2024
IN THE MATTER OF THE ESTATE OF THE
LATE SIMON NDUNGU NJOROGE (DECEASED)**

BETWEEN

**ESTHER WANGARI KING'ORI 1ST ADMINISTRATOR
ELIAS NJOROGE NDUNGU 2ND ADMINISTRATOR
JAMES KAMAU NDUNGU 3RD ADMINISTRATOR
AND
HARUN GATHUNGU PROTESTOR**

RULING

1. There are two Applications for the court's determination: Both applications have been filed by the Applicant. The 1st one is by a chamber summons dated 6th March, 2023 and second one is by Notice of Motion similarly dated 6th March, 2023.
2. The first application is brought pursuant to Section 76 of the *Law of Succession Act* and rule 44 of the *Probate and Administration Rules*. The Application seeks the following orders: -
 - i. This Honourable Court be pleased to issue orders for the administrators to furnish accounts in respect of all the properties to the estate.
 - ii. This Honourable Court do revoke the grant of letters of administration issued to Esther Wangari King'ori Alias Njoroge Ndungu, and James Kamau Ndungu on the 16th February, 2005 and substitute the administrators with Harun Gathungu & Pauline Wanjaa Ndung'u.



- iii. This Honourable Court be pleased to issue orders preserving the properties to the estate from any dealings, disposition, transfer, alienation, distribution and or any dealings pending the hearing and determination of this application.
- iv. Costs be provided for.
3. The Application is premised on grounds on its face and supported by an affidavit of the Applicant Harun Gathungu sworn on even date.
4. It is his case that the 2nd and 3rd administrators herein entered into a consent dated 10th May,2022 without the 1st administrator for apportionment of properties, Shawa/Rongai Block 1/260, Shawa/Rongai Block 1/261, & Elburgon/Elburgon Block 3/30 to the 1st Administrators without his input or the input of the other beneficiaries.
5. He avers that the aforesaid properties were meant to devolve to him and he has already entered in Shawa/Rongai Block 1/260 & Shawa/Rongai Block 1/261, fenced the same, put up developments and established an extensive agricultural farm, and that he resides in Elburgon/elburgon Block 3/30 and have made renovations on the same.
6. Additionally, he states that the said consent intends to have the monies in account no. xxxxxxxxxx at Standard Chartered Bank released to the 1st Administrator and her daughter, and he believes the monies have continuously been withdrawn from the estate accounts and the same continues to be wasted.
7. He avers that he is aware by consent of all parties and an order dated 15th June 2016 to withdraw Ksh. 2,500,000 which was to be utilized towards the medical bills of his late brother Geoffery Maina Ndungu and consent dated 7.8.2019 to withdraw Ksh. 200,000/- which was to be sent to her sister did not reach them.
8. He believes his late father did not sire any children with the 1st Administrator as at the time they got into a relationship, he was very ill and in need of palliative care and therefore Marion Wanja Ndungu should be subjected to a DNA test to ascertain her paternity.
9. He contends the consent dated 10th May, 2022 was entered into pursuant to concealment of facts and material non-disclosure on the part of the administrators, and that a decision to undertake partial distribution without the involvement of the beneficiaries is null and void.
10. The second application seeks the following orders: -
 - i. That this Honourable court be pleased to set aside and or review the consent dated 10th May,2022 entered into by Esther Wangari King'ori, Elias Njoroge Ndungu and James Kamau Ndungu the administrators of the estate.
 - ii. That this Honourable Court be pleased to stay and/or stop any and all dealings and distribution of properties forming part of the estate outlined in the above consent.
11. The Application is premised on grounds on its face and supported by an affidavit of the Applicant. In his supporting affidavit, he reiterated the averments contained in the supporting affidavit to the first application.
12. The 1st administrator Esther Wangari Kingori swore a replying affidavit in opposition to the first application on 23rd May,2023. It is her case that she was married to the Deceased as a second wife after the demise of the deceased's first wife.



13. In regards to the averments of paternity of her daughter Marion Wanja Ndungu, she contends that the same has been overtaken by events as the first and second administrator withdrew the consent seeking to conduct a DNA for her that was recorded on 2nd February,2021 on grounds that there was no issue to the relationship.
14. With respect to the consent dated 10th May,2022, she states that the applicant appointed his advocate on 5th October, 2022 who she believes upon receiving instructions came across the consent already recorded in court and therefore she faults the Applicant for taking too long to file the instant application without any explanation.
15. It is her further contention that they had a family meeting which resulted into the said consent and that save for the Applicant all other beneficiaries have no issue with the consent order.
16. It is her deposition that the monies withdrawn from the deceased's account with an order of the court and averments that the same was wasted is completely misplaced.
17. She prays that this Court disallows the Application.
18. The 3rd Administrator similarly swore a replying affidavit on his behalf and on behalf of the 2nd Administrator in opposition to both applications on 25th September,2023.
19. He corroborated the entire averments of the 1st Administrator. It is his averment that the consent in issue was entered with participation of all beneficiaries and that there was no concealment of facts as alleged by the Applicant.
20. He believes the applications before court are ridiculous, incompetent, bad in law, frivolous, and an abuse of the court processes and judicial time.
21. The Applications were canvassed through written submissions. Only the Applicant's submissions are on record.

Applicant's Submissions

22. On prayer for revocation of grant, the Applicant submitted that the consent in question was entered without the concurrence of all beneficiaries. He argued that the administrators of an estate do not have superior powers than the rest of the beneficiaries and as such the administrators cannot enter into a consent for apportionment of property to the 1st Administrator and withdrawal of the affidavit of protest against her without the consent of other beneficiaries to the estate.
23. He contended that it is clear from the consent that the administrators embarked on distributing the estate before confirmation of grant and without a mode of distribution being agreed to by all beneficiaries.
24. In buttressing his submissions, he relied on Section 76 of the *Law of Succession Act* and the cases *In re Estate of Des Raj Gandhi (Deceased)* [2021] eKLR, *In Re of Estate of Gulam Mohammed Bahdur – Deceased* [2021] eKLR & *In re Estate of George Waiganjo Mburu (Deceased)* [2021] eKLR.
25. The applicant posited that the very act of entering into a consent without the consent of other beneficiaries questions the trust of the administrators in continuing to diligently administer over the estate of the deceased. He therefore prayed that he and Pauline Wanja Ndungu be appointed administrators for the sake of fairness and sanity in administration. To bolster his submissions, he relied on rule 73 of the *Probate and Administration Rules* and the cases of *Eric John Mutemi & another*



vs Agnes Mumbanu Kinako [2016] eKLR & In re Estate of Adam Haji Ali Talib (Deceased) [2021] eKLR.

26. In light of the above, the Applicant also urged this court to set aside the consent.
27. On preservation of the estate, the applicant contended that the administrators have failed in their primary role under Section 83 of the Law of Succession Act and should not be allowed to continue to preside over the affairs of the estate without preservatory orders in place. In this regard, he relied on section 47 of the Law of Succession act and the cases of In re Estate of Kitur Chepsungulgei (Deceased) [2021] eKLR and Japhet Kaimenyi M'ndatbo v M'ndatbo M'mbwiria [2012] eKLR.
28. He prayed that injunctive orders do issue for all dealings in properties known as Shawa/Rongai Block 1/260 & 1/261, & Elburgon/Elburgon Block 3/30.

Analysis & Determination

29. Having considered the application and the affidavits on record, I am of the view that two issues arise for determination;
 - a. Whether the consent dated 10th May, 2022 was entered into by consent of all the beneficiaries.
 - b. Whether the orders sought should issue.

Issue No.1

30. It is the Applicant's case that the consent dated 10th May, 2022 was entered into without the consent of all beneficiaries.
31. The said consent is in the following terms: -

“By consent

 - a. That Esther Wangari King'ori (the 1st Administrator herein) and her daughter Marion Wanja Ndung'u do take properties known as title no. Shawa/Rongai Block 1/260, Shawa/Rongai Block 1/261 and title No. Elburgon/Elburgon Block 3/30.
 - b. That Esther Wangari King'ori and her daughter do take Ksh. 1,500,000/= from A/c No. 4494479700 Standard Chartered Bank.
 - c. That upon compliance with (a) and (b) Esther Wangari King'ori and her daughter shall not have any other claim in the estate.
 - d. That summons for confirmation of grant dated 20th February, 2017, the affidavit of protest filed on 22nd May,2019 and any other affidavit filed concerning the protest be deemed as withdrawn.
 - e. That a partial certificate of grant be issued for the properties there above distributed.”
32. On 26th May, 2022, the above consent was adopted as an order of the court. The court thereafter directed that summons for partial confirmation to be filed within 14 days.



33. The standard of proof in civil cases is on a balance of probability. In the instant case, the applicant annexed the said consent and on the face of it is clear it was signed by the 1st Administrator, her advocate and the advocate for the 2nd and 3rd Administrators only.
34. The administrators on their part contend that the consent was entered into with participation of all beneficiaries as they held a meeting that resulted into the same. They have however not attached either minutes of the purported meeting or the consent of other beneficiaries who are not opposed to the consent in question.
35. The court *In re Estate of Des Raj Gandhi (Deceased)* in regards to consent order that was entered without the consent of other beneficiaries stated as follows: -

“The administrator has not indicated how and from who he obtained the consent to sell estate property, and there is no evidence that there was an order of Court allowing him to sell. The beneficiaries on record have all indicated that they did not consent to the sale of the property. The administrator himself conceded that he sold the property to recover expenses he personally incurred in the administration of the estate. In any case it was irresponsible for the Administrator to manage an estate worth Kshs. 140 million at a cost of Ksh. 125 million. The sale of the property without the consent of the beneficiaries or order of the Court was therefore illegal.”

36. In view of the foregoing, it is my opinion that there is no cogent evidence to show that the other beneficiaries of the estate supported the impugned consent dated 10th May,2022. The said consent therefore is null and void.

Issue No.2

37. The Applicant has urged this Court to revoke the grant that was issued to the Administrators on 16th February,2005 and substitute the administrators with Pauline Wanjaa Ndung'u and him.
38. Revocation of a grant is provided for under Section 76 of the *Law of Succession Act*. The said section 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.”

39. Section 76 was clearly 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.”

40. In the instant case the applicant submitted that the impugned consent was entered into without the consent of all the beneficiaries and with concealment of material facts. The administrators did not bring to the attention of the court whether or not all the beneficiaries were aware and in concurrence with the impugned consent before they proceeded to record the same.

41. The powers and duties of personal representatives of the estate of a deceased person are set out in Sections 82 and 83 of the Act. The role of a personal representative as bestowed by the law and the Court, is fiduciary in nature. A personal representative is appointed by the Court, to collect in and



- manage the assets of the estate of a deceased person as trustee, for the benefit of its beneficiaries in accordance with the law and ultimate distribution to the beneficiaries.
42. The administrators herein did not act in the best interest of all beneficiaries when they entered into a consent without their participation. They therefore concealed a material fact from the court. I note however that there is no evidence of distribution of the estate by the Administrators.
 43. In view of the above, I find that there are sufficient grounds to revoke the grant. However, in the interest of expediting this matter, I will not revoke the grant as prayed. This will leave the estate without an administrator and thus at risk of wastage. Under Section 56 (1) (b) of the *Succession Act*, a court can appoint up to a maximum of 4 Administrators to administer an estate.
 44. Therefore, instead, I will also appoint the Applicant herein as one of the Administrators of the estate of the deceased. Thus the grant herein is to be rectified and a fresh one to issue in the name of the three existing administrators and the applicant herein.
 45. The Applicant also wants the administrators to furnish accounts in respect of all properties of the estate. Section 83(g) of the Act mandates administrators of an estate to, within six months of confirmation of grant or longer period as the court may allow, complete the administration of the estate, and to produce to the court a full and accurate account of the complete administration.
 46. In the instant case, the 2nd and 3rd Administrators averred that the properties in issue were left under the care of the 1st Administrator and she has been collecting rent for her maintenance. It is thus prudent that the administrators render accounts of their administration of the estate for the duration that they have been administrators.
 47. Section 47 of the *Law of Succession Act* provides that:

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.”
 48. Rule 73 of the *Probate and Administration Rules* gives this court inherent powers to make such orders as may be necessary to meet the ends of justice, or to prevent abuse of the court process
 49. Having already found that the impugned consent was illegal and Applying the powers bestowed on this court by Section 47 of the *Law of Succession Act* and the inherent powers conferred by Rule 73 of the Probate and Administration rules, it is in the wider interest of justice that the same be set aside and there be preservation of title Nos. Shawa/Rongai Block 1/260, Shawa/Rongai Block 1/261 & Elburgon/Elburgon Block 3/30 and Elburgon/Elburgon Block 1/21 Kamirithu awaiting confirmation of grant.
 50. In conclusion, I find the two applications dated 6th March, 2023 merited and I allow them in the following terms: -
 - a. The Consent dated 10th May, 2022 is declared as null and void and it is hereby nullified and set aside.
 - b. There shall be preservation of title Nos. Shawa/Rongai Block 1/260, Shawa/Rongai Block 1/261 & Elburgon/Elburgon Block 3/30 and Elburgon/Elburgon Block 1/21 Kamirithu awaiting confirmation of grant.
 - c. I hereby appoint Harun Gathungu as one of the Administrators of the estate of the deceased herein in addition to the three administrators.



- d. That the administrators shall file for confirmation of their grant within ninety (90) days of the date of this order, in default of which the grant made to them may be revoked.
- e. That in the event the 4 administrators cannot agree on the confirmation, either of them is at liberty to apply for confirmation, and the other administrators and the beneficiaries shall have liberty, upon service, to file affidavits of protest should they not agree with the proposals made in the application.
- f. That the three administrators i.e Esther Wangari Kingori, Elias Njoroge Ndungu & James Kamau Ndungu, are hereby directed, within 60 days, in affidavit form, supported by appropriate documentation, to render accounts, either jointly or severally, of their administration of the estate for the duration that they have been administrators, covering an inventory of the assets, the rents collected, the expenditures incurred, among others.
- g. There shall be no order as to costs.
- h. The matter shall be mentioned for compliance and further directions.
- i. Orders accordingly.

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

H. M. NYAGA,

JUDGE.

In the presence of;

C/A Oleperon

Mr. Aziz for Applicant

Ms Wangari for 2nd and 3rd Administrators/Respondents

