



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Mwinga Gunga Chea (Deceased) (Succession Cause
28 of 2021) [2024] KEHC 2678 (KLR) (26 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 2678 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 28 OF 2021**

G MUTAI, J

FEBRUARY 26, 2024

**IN THE MATTER OF THE ESTATE OF MWINGA GUNGA CHEA
(DECEASED)**

BETWEEN

BRENDA NANJALA SIMIYU 1ST PETITIONER

GUNGA NDURYA CHEA 2ND PETITIONER

AND

MOHAMED RASHID TIMBE APPLICANT

RULING

1. The application before the Court is a Chamber Summons dated 12th April 2023. Vide the said application the Interested Party/Applicant seeks the following orders:-
 - a. Spent;
 - b. That the applicant be joined herein as an Interested Party and this protest be deemed duly filed;
 - c. The grant of probate (letters of administration intestate) made herein to Brenda Nanjala Simiyu and Gunga Ndurya Chea confirmed on the 26th July 2022, be revoked /annulled;
 - d. The Hon.do (*sic*) make such further orders as it may deem fit and convenient to meet the end of justice;
 - e. That cost of this application be borne by the Respondent.
2. The application is premised on the grounds stated in the body of the Motion and also on the supporting affidavit of Mohamed Rashid Timbe sworn on 12th April 2023 in his capacity as one of the administrators and beneficiaries of the estate of James Charo Timbe.



3. He stated that the proceedings to obtain the grant issued to Brenda Nanjala Simiyu and Gunga Ndurya Chea were defective as the said grant was obtained fraudulently by concealment of material facts on liabilities of the estate from this court. He deposed that at the time of his death the deceased was acting as the vendor's advocate in sale of Title No. Roka/Uyombo/429 and that he received Kes.1,668,000/-, on behalf of the estate of James Charo Timbe. He unfortunately died before he could transfer the said amount to the administrators of the Vendor's estate. The said amount was thus a liability of his estate. The failure by the Petitioners/Respondents to disclose the same amounts to an omission. For that reason, the grant should be revoked.
4. In response, the Petitioners/Respondents filed a Replying Affidavit sworn by Brenda Nanjala Simiyu on 10 May 2023. She stated that after their appointment as personal representatives of the deceased, they traced bank accounts operated by him for purposes of his law practice to 3 accounts, namely, Account No. 011485777XXXX (Co-operative Bank, Nyali Mall Branch), Account No. 01143201135 (Co-operative Bank, Parliament Road Branch) and Account No. 0200156XXXX (Bank of Africa, Moi Avenue Branch). The 2nd and 3rd accounts had no funds, and thus, there was nothing to administer or distribute. The 1st account had 242,485.43 at the time of the deceased's death, which was withdrawn and utilised towards legal costs of the succession proceedings and payment of office liabilities. She further deposed that that the Interested Party/Applicant is a stranger to the estate of the deceased and that no sufficient grounds for revocation of grant been adduced as the Interested Party/Applicant is not a beneficiary nor a dependant of the deceased.
5. She further stated that the Interested Party/Applicant's claim is misconceived, bad in law, and should be dismissed.
6. The application was canvassed through oral evidence.
7. The Interested Party/Applicant was the first witness. He told the court that he relied on the Supporting Affidavit sworn on 12th April 2023 as his evidence in chief and also on the annexures therein.
8. He testified that he was seeking a share of the estate. He further testified that Title No. Roka/Uyombo/429 was sold but they were not paid and that they were to get money from Mr Mutubia, but this didn't materialise. The payments had been made by Mombasa Cement Ltd.
9. In cross-examination, it was his evidence that he was asking for the estate of James Charo Timbe (deceased) to be paid what was due to it. He deposed that they had only got partial payment.
10. The 2nd witness was Rehema Rashid Timbe. She, too, adopted her statement dated 12th June 2023 as her evidence in chief. She told the court that she reached out to the deceased's father so as to discuss their claim with his family, but her efforts bore no fruit. She was directed instead to the family's lawyer, who was of no assistance to them, leaving them with no option but to file the instant application.
11. It was her evidence that she was seeking to have the grant nullified as their liability was not included. The deceased had their debt, which debt was not included in the list of liabilities owed by the decedent and that they should be paid from his estate.
12. In cross-examination, she told the court that the deceased was paid Kes. 1,668,000. Her brother received Kes.120,000/- and Kes.150,000/-. The deceased was to distribute the money after the conclusion of the sale transaction.
13. The third witness was Khamis Rashid Timbe. Mr. Khamis also adopted his statement dated 12th June 2023 as his evidence in chief. He told the court that after the burial of the deceased, they went to the deceased's office, where they were directed to the Law Society of Kenya's offices in Mombasa. When



- they visited the said offices, they were directed to the Petitioner/Respondents' advocate, who informed them that he was not aware of their claim. Later, the said advocate informed them that he had obtained a written letter of authority to access the deceased's bank account. The advocate later informed them that the accounts had no money and he couldn't do anything.
14. It was his evidence that the liabilities claimed were well within the knowledge of the deceased's family and the administrators.
 15. He urged the court to revoke the grant issued to the administrators.
 16. Upon cross-examination, he stated that he was the one who dealt with the deceased. The deceased would not deal with the others in his absence. He admitted to having taken only Kes.20,000 from the deceased.
 17. It was his evidence that they were to be paid after the transfer and that he couldn't remember how much was paid to the deceased and how much he received. He testified that they finalised the succession for their father's estate in 2020.
 18. The Petitioners/Respondents called one witness, Brenda Nanjala Simiyu. Ms. Simiyu relied on her affidavit sworn on 10th May 2023 as her evidence in chief together with the annexures therein.
 19. When cross-examined she told the court that Kes.834,000/- was deposited into the deceased account at Co-operative Bank Nyali Branch on 13th December 2019 and on 30th December 2019 a further sum of Kes.1,000,000/- was deposited.
 20. It was her evidence that she was aware of the Applicant's demand for Kes.1,600,000/-, in respect of the payments made to the deceased, but that she did not include the said amount in the list of liabilities as she didn't have money to pay as the accounts had zero balances. She requested the court for time to look for money to pay.
 21. In re-examination, she stated that the money was paid into the deceased's office account. The same was received by the deceased in his capacity as an advocate. She testified that she lacked the knowledge to run a law firm and that she learnt of the debt later after the Petition for grant of letters of administration intestate in respect of her husband's estate was filed.
 22. The Applicant, through his advocates John Magiya & Co. Advocates, filed written submissions dated 7th November 2023.
 23. Counsel submitted that it is not in dispute that the monies alleged herein were deposited vide two cheques of Kes.834,000/- each, being cheque numbers 037393 and 037394, Prime Bank and deposited in account number 011485777XXXX Co-operative Bank belonging to the deceased's law firm, Gunga & Company Advocates. He submitted that the Petitioners/Respondents were aware of the liabilities of the deceased's estate, as is evident from the testimony of Khamis Rashid Timbe, who stated that the applicant's family had advanced their grievances to the family of the deceased after his burial but were advised that the lawyer involved would advise on the way forward. No reasonable grounds were advanced as to why the applicant's liabilities were not provided from the estate. Thus, failure to include the same offends Section 51 (1) of the *Law of Succession Act*.
 24. Counsel further submitted that the certificate of confirmation does not indicate how the subject liability shall be settled and the administrators having shared the entire estate, the grant ought to be revoked and re-administered again to make provision for the Applicant's claim. It was urged that the estate has to be accountable for the settlement of the said liability. To support his submissions, counsel



relied on the case of *In Re Estate of Epharus Nyambura Nduati (Deceased)* [2021]eKLR and *In re estate of Moses Wachira Kimotho (Deceased)* [2009]eKLR.

25. The Petitioners/Respondents, through their advocates, Sherman Nyongesa & Mutubia Advocates, filed their written submissions dated 15th November 2023.
26. Counsel submitted that the Applicant was a creditor whose claim had not been established and who retain their right to bring an action for recovery against the estate but do not have locus standi to seek for revocation of the grant on grounds of concealment or fraud. Counsel invited the court to take judicial notice that matters concerning advocate client are confidential and the Petitioners/Respondents would not have been expected to have known about the same upon the demise of the deceased. that failure by the Petitioners/Respondents to list or disclose the Applicant's claim cannot amount to fraud or intentional concealment of the said claim to warrant revocation of the grant as sought.
27. Counsel further submitted that revocation of the grant would leave the deceased's estate un-administered, yet, it comprised of other assets, besides those claimed by the Applicant. The estate was also for the benefit of the deceased's children, two of whom are minors, who require the court's protection through administration.
28. In conclusion counsel relied on Section 71 of the *Law of Succession Act* and submitted that the court has discretion to allow the administration and or distribution of the uncontested part of the estate and direct the applicants to establish their claim by way of proceedings under Order 37 Rule 1 of the *Civil Procedure Rules*.
29. Counsel relied on the case of *In re Estate of Mukhobi Namonya [Deceased]* (2020)eKLR and submitted that the Applicant failed to utilise the opportunity granted to them under Rule 40 (6), (7) and (8) of the *Probate and Administration Rules* by not filing an objection before confirmation. Further, the applicants do not fall under Section 93 or Section 29 of the *Law of Succession Act* since their claim has not been proved or established under Order 37, Rule 1 of the *Civil Procedure Rules*.
30. I have considered the application, the response thereto, the oral evidence and the rival submissions by both counsels. In my view, the issue coming for determination is whether the grant made to the two administrators on 28th July 2021 and confirmed on 26th July 2022 should be revoked.
31. Section 76 of the *Law of Succession Act* provides:-
 - “ 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.
32. On the court's power to revoke a grant, the court, in the case of *In re Albert Imbuga Kisigwa* [2016]eKLR stated:-
- “(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 wrongdoing 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 the interests of all beneficiaries entitled to the deceased's estate and ensure that the action taken will be for the interest of justice.”
33. The Applicant's case is that the deceased received the subject monies on behalf of the estate of James Charo Timbe (deceased), but unfortunately, he died before transferring the same to the administrators of the said estate. The Petitioners/Respondents petitioned the court for grant of letters of administration but failed to disclose the same in their petition as the subject monies had become a liability of the estate of the deceased herein thus amounting to an omission that warrants revocation of the grant. The failure to include the liability in their petition amounted to concealment of material facts from the court, which is grounds for revocation of the grant. On the other hand, the Petitioners/ Respondents testified that they were not aware of the said liability until later when they had already petitioned the court for grant of letters of administration.
34. On concealment or non-disclosure of material facts, the court in the case of *In re Estate of Julius Ndubi Javan (Deceased)* [2018] eKLR stated:-
- “Needless to state that, in any judicial proceeding, parties must make full disclosures to the court of all material facts to the case, including succession cases. This general rule of law emphasises utmost good faith (*uberimae fidei*) from parties who take out or are subject of the court proceedings. The said responsibility is part of justice itself. Accordingly, non-disclosure of material facts undermines justice and introduces festering waters into the pure streams of justice; such must, immediately be subjected to serious reverse osmosis to purify the streams of justice, if society is to be accordingly regulated by law.”
35. In this case, it is not in dispute that the money was received by the deceased during his lifetime. He acted for the estate of James Charo Timbe (deceased) and received some money on his behalf. The said debt was not disclosed in the Petition. Further, it is not in dispute that the deceased herein handled the sale transaction as an advocate, thus forming a client relationship between him and the applicants.
36. Upon considering how law firms are run and the nature of the advocate-client relationship, it would have been impossible for the Petitioners/Respondents, being laymen, to know any liabilities or debts owed to clients by the deceased's law firm. It is also my view that the Petitioners/Respondents notified



prospective claimants against the estate of the deceased through a notice in the Kenya Gazette, to wit, Kenya Gazette Notice No.7151 of 16th July 2021. In the circumstances, the allegation that the Petitioners/Respondents omitted the said liability from their list of liabilities knowingly cannot stand.

37. The upshot of the foregoing is that I have not found merit in the application dated 12th April 2023. The same is thus dismissed.
38. This being a family matter each party shall bear own costs.
39. Orders accordingly.

DATED AND SIGNED AT KWALE THIS 26TH DAY OF FEBRUARY 2024.

GREGORY MUTAI

JUDGE

