



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Estate of Mbaabu M'mweti alias Julius Mbaabu (Deceased) (Succession Cause 19 of 2017) [2024] KEHC 3592 (KLR) (20 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3592 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
SUCCESSION CAUSE 19 OF 2017**

**G MUTAI, J**

**MARCH 20, 2024**

**IN THE MATTER OF THE ESTATE OF MBAABU  
M'MWETI ALIAS JULIUS MBAABU (DECEASED)**

**MARIA WANJIKU NGAE**

**IRENE MAKENA MBAABU**

**FRIDAH KATHAMBI MBAABU**

**JACOB MWENDA MBAABU**

**CONSOLATA NJOKI MBAABU**

**ANTONY GIKUNDI MBAABU**

**CAROLINE WAMBUI MBAABU.....PROTESTORS/APPLICANTS**

**VERSUS**

**GITONGA DANIEL MBAABU.....PETITIONER/RESPONDENT**

**RULING**

1. Before this court is the Summons for Revocation of Grant dated 2<sup>nd</sup> November 2023, supported by the affidavit of 1<sup>st</sup>, 4<sup>th</sup> and 6<sup>th</sup> Applicants sworn on the said date.
2. The Applicants seek the revocation of the grant issued to the Respondent on the the 16<sup>th</sup> day of February 2018 on the grounds that, as an administrator, he has failed to apply for the confirmation of the grant since it was issued, that he has failed to diligently administer the estate of the deceased, to produce an inventory of the assets of the estate and to accounts of the administration of the estate as required by law. Further, he has locked out the beneficiaries from benefiting from the estate.
3. In their affidavit, the Applicants averred that the grant was supposed to have been confirmed within six months of its issuance. The passage of time notwithstanding, that hadn't happened due to failure on the part of the Respondent. They further averred that the Respondent has been collecting rental



- income from the estate's properties, which he has failed to distribute to the other beneficiaries. The Respondent had also failed to account for the said proceeds thus failing in his duties as an administrator.
4. They further stated that the Respondent, in his capacity as the Administrator of the Estate, had mismanaged the estate assets by not carrying out repairs, renovations, and maintenance of the rental houses, thus causing huge losses to the estate. He had also locked out some of the beneficiaries from occupying the rental houses and even demanded that they pay rent, whereas they had equal rights.
  5. The Applicants averred that the Respondent had also left out some properties in his Petition for Grant, including, but not limited to, a 4-acre parcel of land at Kimachia where the deceased is buried, Lee Njoka Farm located in Meru, a 13-room Swahili house located in Soweto, Likoni, Mombasa County, and a 12-room Swahili house in Kisauni, Mombasa County.
  6. Further, they stated that the estate risks being totally wasted if the grant is not revoked and a fresh grant is issued. They urged the court to revoke the subject grant.
  7. In response the Respondent filed Grounds of Opposition. In the said Grounds he averred that on 27<sup>th</sup> March 2017 the Applicants gave their consent to the making of the grant of representation; that the grant sought to be revoked was obtained lawfully and regularly and the proceedings which it was obtained were not defective in substance; that he did not make any false statement in the Petition; that after the limited grant was issued to him, he immediately filed a suit against Wambu Wainaina & Evans M. Maabi T/A Murphy Merchants Auctioneers in Environment & Land Court Case No.108 of 2017; Gitonga Daniel Mbaabu (Suing as the Administrator of the Estate of Julius Mbaabu M'Mwiti (Deceased) versus Wambu Wainana & Evans M Maabi T/A Murphy Merchants Auctioneers, which is pending before court; that the case pending in Mombasa before the ELC Court was filed upon the strength of the grant sought to be revoked ;that if the orders sought are granted ,the estate of the deceased shall suffer great loss and prejudice in that the case shall collapse because the plaintiff shall be divested of the legal capacity to prosecute it to its logical conclusion; that the respondent has demonstrated that the deceased 's bar guest house and rental houses are being operated and occupied the applicants and other beneficiaries; that the outcome of the pending case in the environment and land court will be crucial to the confirmation of grant because the business was part of the deceased's assets; that prior to filing of the instant summons, none of the applicants gave him any notice and/or required him to apply for the confirmation of grant; that the summons for revocation of grant has no merit and has been driven by malice on part of the applicants.
  8. The respondent also filed a replying affidavit. He reiterated his position in the grounds of opposition and stated that the 1<sup>st</sup> and 6<sup>th</sup> applicant have been solely operating and benefitting from the proceeds of Ganjoni Club information which they have concealed from the court. That the 2<sup>nd</sup> applicant occupies a double room in the eight roomed house in Soweto, likoni and also leases and collects rent for her own use. That he has been using rental income from the residential houses in Kongowea and Kisauni to pay advocates fee for litigation in Mombasa ELC Case No.108 of 2017. That he also uses the said rental income to cater for the tuition fees and upkeep for 3<sup>rd</sup> and 4<sup>th</sup> applicants at the Mount Kenya University, Nairobi.
  9. He further stated that Maria Wanjiku Ngae gave her consent voluntarily and that all assets to the estate of the deceased were listed in the assets schedule in the petition. Further he has not wasted any part of the deceased's estate and that the outcome of the ELC case is crucial to the confirmation of the grant as the business formed part of the deceased's estate.



10. He averred that they have not been able to agree on the distribution of the estate of the deceased which forms the basis for confirmation of the grant. That prior to the filing of the summons herein none of the applicants gave him any notice to apply for confirmation of the grant as required by the law.
11. The summons was canvassed by way of written submissions.
12. The applicants through their advocates Gitahi Gathu & Co. Advocates filed their written submissions dated 5<sup>th</sup> February, 2024. Counsel submitted on two issues for determination namely; whether the grant was obtained regularly and whether the same should be revoked.
13. Counsel submitted that the grant was obtained irregularly as the beneficiaries did not their consent to the respondent to be the sole administrator. That their consent of 27<sup>th</sup> March, 2017 was the purposes of limited grant ad litem for the purposes of filing a suit on behalf of the suit being the ELC case stated earlier. Further the deceased left behind two houses and a total ten children and thus it's not fair to have only one child as the administrator at the exclusion of all the other beneficiaries. Thus the grant should be revoked for material non-disclosure and failure to obtain consent from the other beneficiaries.
14. On the second issue counsel relied on Section 76 of the Law of Succession Act and submitted that the respondent has failed to apply for confirmation of grant, to manage the assets of the estate of the deceased and to account for the proceeds collected from the assets of the estate. That he also failed to give full disclosure of the deceased's properties by leaving out several properties. That the respondent has breached his fiduciary duty to the other beneficiaries. They urged the court to revoke the grant.
15. The respondent on the other hand through his advocates Mogaka Omwenga & Mabeya Advocates filed his written submissions dated 12<sup>th</sup> February, 2024. Counsel submitted that the applicants consented to the petition for letters of administration and that the delay to have grant confirmed is not a ground for revocation.
16. Counsel submitted that the issue of irregularity in obtaining the grant was not pleaded and therefore the applicants cannot introduce the same at the submissions stage as parties are bound by their pleadings.
17. Counsel urged the court to dismiss the summons with costs.
18. Have considered the summons, the responses therein and the rival submissions by counsel and the issue that emerges for determination is whether the grant should be revoked.
19. Section 76 of the law of succession act provides for grounds under which a grant of confirmation can be revoked;

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.
20. The court in the case of *In re Estate of Magangi Obuki (Deceased)* [2020] eKLR in dealing with the issue of revocation stated,

“In the case of *Albert Imbuga Kisigwa v Recho Kavai Kisigwa*, Succession Cause No.158 OF 2000, Mwita J. made remarks on the guiding principles for the revocation of a grant. He stated;

“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.”

21. The applicants herein have sought the revocation of grant issued to the respondent herein on 16<sup>th</sup> February,2018 on the grounds that he has failed to apply for confirmation of grant for about five years since the issuance of the grant, that he has failed to diligently administer the estate of the deceased and to produce inventory of the assets of the estate and accounts of the administration of the estate as required by law and further he has locked out the beneficiaries from benefiting from the estate.
22. Section 83 of the *Law of Succession Act* to administer the estate of a deceased person
- Personal representatives shall have the following duties—
- a. to provide and pay out of the estate of the deceased, the expenses of a reasonable funeral for him;
  - b. to get in all free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death;
  - c. to pay, out of the estate of the deceased, all expenses of obtaining their grant of representation, and all other reasonable expenses of administration (including estate duty, if any);
  - d. to ascertain and pay, out of the estate of the deceased, all his debts;
  - e. within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;
  - f. subject to section 55, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of



this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be;

- g. within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration;
  - h. to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;
  - i. to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration.
23. The court in the case of *In re Estate of Julius Mimano (Deceased)* in dealing with Section 83 of the [Law of Succession Act](#) stated,
- “Section 83 of the Act imposes duties on personal representatives to pay for the expense of the disposal of the remains of the deceased, to get in or gather or collect the assets of the estate, to pay for the expenses of the administration of the estate, to ascertain and pay out all debts and liabilities, and eventually to distribute the assets amongst the persons beneficially entitled.”
24. Further the court in the case of [In re Estate of Joseph Odinde Odongo \(Deceased\)](#) [2021] eKLR stated,
- “Indeed, failure to distribute a deceased’s estate is a ground for revocation of a grant for letters of administration as provided under Section 76 (d) of the Law of Succession. However, such revocation is not automatic. It is conditional. It is dependent on the applicant demonstrating that notice has been issued to the person who has applied for the grant and that person has failed: -
- a. To apply for confirmation of the grant within a year from the date of such notice or such time fixed and/or prescribed by the court; or
  - b. To administer the deceased’s estate; or
  - c. To produce an inventory or account of administration as required by the law within a time prescribed by the court.
25. The grant in question was issued on 16<sup>th</sup> February, 2018 and the same has not been confirmed to date neither is there a pending application for confirmation. The reason given for failure to move the court for confirmation as stated by the respondent being that there is a pending case at the ELC Court Case No.108 of 2017 in respect of Paradise Lodge a business that belonged to the deceased and that the outcome of the said case will affect the confirmation of the grant. The said business is listed as no.1 in the list of assets in the affidavit in support of the petition for letters of administration. He has also argued that no one served him with a notice to apply for confirmation.
26. It’s my view that the reasons given by the respondent for his failures as an administrator are not sufficient and therefore do find that he has failed in his duties as an administrator as provided for under



the law and therefore this matters falls for revocation under section 76(d). However, I have also noted that he was not served with any notice prior to the filing of this application.

27. The applicants have also argued they did not consent to the respondent applying for grant of letters of administration as a sole administrator and that the consent they signed was for the limited grant ad litem for purposes of filing the ELC case.
28. Have considered the consent dated 27<sup>th</sup> March,2017 and it's evident that it was for the grant of letters of administration to be issued to the respondent and not for limited grant. None of the applicants has disputed the signatures therein and therefore it's my finding that they all gave consent voluntarily.
29. In the upshot, it is my view that despite the fact that the respondent has failed in his duties it would not be in the interest of justice to revoke the grant issued on 16<sup>th</sup> February,2018. I do hereby direct the respondent to file full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account.to move the court for confirmation of grant within 30 days.
30. This being a family matter, the parties shall bear their own costs.
31. Orders accordingly.

**DATED AND SIGNED AT MOMBASA THIS 20<sup>TH</sup> DAY OF MARCH 2024.**

**GREGORY MUTAI**

**JUDGE**

In the presence of: -

Mr Gitahi Gathu for the Applicant;

Mr Abaja for the Respondent; and

Arthur – Court Assistant.

