



**In re Estate of Patrick Wafula Ndinyo (Deceased) (Succession Cause
22 of 2012) [2024] KEHC 6250 (KLR) (30 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6250 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
SUCCESSION CAUSE 22 OF 2012**

DK KEMEL, J

MAY 30, 2024

BETWEEN

FEDRICK SIMIYU NDINYO 1ST PETITIONER

ELECTINE NASAMBU MASENGELI 2ND PETITIONER

AND

JOSPEH SUDI NDINYO INTERESTED PARTY

RULING

1. Vide a notice of motion application dated 27th July 2020, the 2nd Petitioner requests this Court to review and/or vary its judgement entered on 23rd November 2017. The application is premised under section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules*. The application is premised on the grounds on the face of the application and the annexed supporting affidavit of the 2nd Petitioner as follows:
 - i. That the deceased is the bona fide owner of land parcel East Bukusu/North/Nalondo/1686 which was information not within her knowledge;
 - ii. While implementing the judgement of the Court entered on 23rd November 2017, her co-administrator raised the issue with regard to land parcel East Bukusu/North/Nalondo/1686;
 - iii. The deceased had sold land parcel East Bukusu/North/Nalondo/1686;
 - iv. The judgement failed to capture the two buyers who purchased portions from the suit land parcel East Bukusu/North/Nalondo/1686 from the deceased namely Julius Kingoro Barasa and Justus Siende;
 - v. That the court failed to identify the land parcel to be shared which is land parcel East Bukusu/North/Nalondo/1685;



- vi. The court excluded the innocent buyers from the distribution schedule and that one Juma Ndinyo who is entitled to 5.375 acres has not been catered for as the said land is ancestral and it belonged to the Petitioner's grandfather;
 - vii. That the land parcel East Bukusu/North/Nalondo/1686 be registered in the joint names of the Petitioners in trust for the bona fide purchasers and that there is an error on the face of the record.
2. Subsequently, on 2nd December 2021, Interested Party/Applicant lodged an application dated 30th November 2021, premised under the provisions of section 47 of the *Law of Succession Act* and Rule 73 of the *Probate and Administration Rules*. The Applicant seeks the following:
- i. Spent;
 - ii. Spent;
 - iii. An annulment and/or revocation of the grant issued to the Petitioners herein; and
 - iv. That the Applicant herein be appointed as the Administrator of the estate of the deceased.
3. The application is premised on the grounds that;
- i. The Applicant is the biological son of the deceased and thus a beneficiary.
 - ii. The Petitioners did not obtain consent of the entire beneficiaries/children of the deceased as well as widows during the confirmation process of the grant of letters of administration.
 - iii. The Petitioners misled the court on the mode of distribution.
 - iv. Failure by the Petitioners to capture all the deceased's assets under form P&A5.
 - v. The Petitioners have failed to administer the estate of the deceased despite issuance of notices.
 - vi. The grant issued has become useless and inoperative.
 - vii. The grant was confirmed by means of untrue allegations on the mode of distribution.
 - viii. The petitioners failed to include the liabilities in the estate of the deceased.
4. The application is supported by the grounds on the face of the application and by a supporting affidavit of the Applicant which is a reiteration of the supporting grounds herein.
5. Vide a replying affidavit dated 14th December 2021 and filed on even date, the 1st Petitioner opposed the application dated 30th November 2021. According to the 1st Petitioner, since the Judgement of the Court entered on 23rd November 2017, things have stalled with regard to the administration of the estate of the deceased herein. He averred that there is no synergy between himself and the 2nd Petitioner as co-administrator of the estate of the deceased and that the same is to the detriment of the beneficiaries. He averred that it was true that the Interested Party/Applicant herein was not present when the court entered its judgement with regard to the mode of distribution on 23rd November 2017.
6. Vide a replying affidavit dated 23rd January 2024, the 2nd Petitioner opposed the Interested Party's application dated 30th November 2021, wherein she averred that the judgement delivered on 23rd November 2017 settled the issues with regard to distribution of the estate of the deceased and thus the Interested Party's averment of failure to consider the clan's leadership when making the application for grant is baseless. According to her, if the Interested Party was aggrieved by the decision of the court entered on 23rd November 2017, he ought to have appealed before the lapse of the set time. She averred



- that the Petitioner’s application dated 27th July 2020 will enable the Petitioners to rectify the omissions that were made unknowingly and innocently whereby they excluded the deceased’s asset land parcel No. East Bukusu/North Nalondo/1686 and his liabilities.
7. Directions were issued to the effect that the two applications dated 27.7.2020 and 30.11.2021 be canvassed by way of written submissions. Hereunder is a summary of their respective submissions.
 8. With regard to the application dated 27th July 2020, the 2nd Petitioner in a nutshell submits that the land parcel number East Bukusu/North Nalondo/1686 is registered in the name of the deceased herein and that although at the time of confirmation of grant the 2nd Petitioner’s proposed mode of distribution included the two bona fide purchasers: Julius Kingoro Barasa and Justus Siendo and her uncle Juma Ndinyo, the three were never captured in the sharing and thus not captured in the judgement of the court making it a challenge for the Land Registrar to effect the judgement. According to Counsel, the 2nd Petitioner was not aware that their neighbours land was the land parcel number East Bukusu/North Nalondo/1686 and that it was registered in the deceased’s name thus she did not include the same in the deceased’s estate. It was submitted that this is a ground for review as there was an error apparent on the face of the record and that the judgement failed to capture the land title number to be shared and thus it is impossible for the Land Registrar to effect the same. Counsel relied on the case of *Stephen Wanyoike Kinuthia (Suing on behalf of John Kinuthia Marega (deceased) versus Kariuki Marega (2004)* TLR 218.
 9. With regard to the application dated 30th November 2021, the 2nd Petitioner submitted that the grant herein was obtained vide the right procedures and that all the beneficiaries were duly involved. Counsel submitted that the allegations of the exclusion of parts of the deceased’s assets and liabilities is true but that the same were not deliberate since when it came to the attention of the Petitioners, an application for review of judgement was duly filed but yet to be determined. Counsel urged this court to dismiss the application for revocation of grant herein as it is misconceived and a waste of the court’s time.
 10. I will start by dealing with the Petitioners application dated 27th July 2020. The *Probate and Administration Rules* provide at Rule 73:-

“Nothing in these Rules shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”
 11. These rules give a party a leeway to file an application which is not otherwise provided for under the rules and affirms the inherent jurisdiction of the courts to make such orders as may be necessary for the ends of justice. In this matter, the administrators are seeking to amend the grant to include properties and liabilities which were omitted by error.
 12. As stated by this court in *In re Estate of Kanyingi Gatwe (Deceased)* [2018] eKLR

“where property is discovered after confirmation, the parties have a window to go back to court with an application for review for the confirmation of the grant to be reconsidered within the same cause.”
 13. It is clear from the court record that the 2nd Petitioner is a co-administrator in the estate of the deceased and a beneficiary. It is also certain that she is not the only beneficiary.
 14. I have perused the judgment of this court, although differently constituted, that was delivered on 23rd, November 2017. I have also perused the search certificate for the land parcel LR. No. East Bukusu/North Nalondo/1686 which is annexed to the application. I also note that the 2nd Petitioner/Applicant



has now moved this court through the proper approach which is that of an application for review. In my view, the 2nd Petitioner/Applicant has demonstrated to this court that the said land parcel belongs to the deceased's estate and should therefore be included therein at this point in time. Even though the 1st administrator appears somewhat lukewarm or ambivalent over the need for review of the court's judgement in that on the one hand he is opposed to the request by his co-administrator while on the other hand, he is in favour. I find no prejudice will be suffered by the administrators or the interested party if the application is allowed since the new property will be distributed to the intended beneficiaries. Further, it is one of the reasons why the interested party filed his application dated 30.11.2021 when he averred that some assets had been left out by the administrators. Hence, the 2nd petitioner's application for review has taken care of such concerns.

15. As regards the application dated 30th November 2021, it is noted that the summons for revocation is predicated on section 76 of the [Law of Succession Act](#), Cap 160, Laws of Kenya and Rule 44 of the [Probate and Administration Rules](#), which provides that

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“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.”

16. Under section 76, a court may revoke a grant based on the grounds listed above. The revocation can also be on court's own motion or on the application of a party. Generally, there are three grounds upon which a grant may be revoked:

- I. 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 or she is a survivor when he/she is not, among other reasons. The above ground has been used by courts to revoke grant in a litany of cases including *Mwathi v Mwathi & Another* 1 EA 229, *In the Matter of the Estate of Mwaura Mutungu alias Mwaura Gichingo Mbura alias Mwaura Mbura* Nairobi High Court Succession Cause Number 935 of 2003 and *Musa v Musa*, 2002 1 EA 182.

- II. Where the grant was obtained procedurally, but the administrator, thereafter, got into problems with the exercise of administration, such as where he or she fails to apply for confirmation of grant within the time allowed, or he or she fails to proceed diligently with administration, or fails to render accounts as and when required. For example, In the Matter of the Estate of Mohamed Musa, Mombasa High Court Succession Cause No.9 of 1997, the court revoked grant because the administrators had not kept any records of account of their administration.
 - III. 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 or her duties as administrator, or the sole administrator is adjudged bankrupt and, therefore, becomes unqualified to hold any office of trust.
17. A court therefore faced with an application for revocation of grant may make such orders as it deems fit and just, given the circumstances of the case. *In the Matter of the Estate of Esther Wanjiru Mucheru (deceased)*, Nairobi High Court Succession Cause No.1996 of 1999, the court noted that section 76 of the [Law of Succession Act](#) is discretionary in that it gives the court discretion whether to revoke or annul a grant.
 18. Moreover, it is the duty of the applicant to prove that any of the grounds set out under section 76 has been satisfied before the court can revoke a grant already issued. This position was adopted by the court in [Kennedy Opiche Olela v William Ogida Ochuodho & another](#) [2014] eKLR.
 19. In the instant case, the application for revocation is predicated on the ground that the Respondents fraudulently concealed from the court material facts, being, that no consent was obtained from the beneficiaries on the mode of distribution in the confirmed grant and the exclusion of some assets and liabilities during the petitioning and confirmation process of the grant.
 20. Vide judgement of the court entered on 23rd November 2017, this court issued its orders allowing the 2nd Petitioner's proposed mode of distribution as the parties approached this court when there was a deadlock between the petitioners herein during the confirmation process of the grant that had been issued. This simply means that the court was critically analysing the proposed mode of distribution by both parties and arriving at its own independent conclusion on which mode was fair and reasonable enough to be adopted. After an engaging viva voce hearing between the petitioners herein, Justice Abida Ali Aroni (as she then was) issued her judgement in favour of the 2nd Petitioner's proposed mode of distribution. The interested party herein is noted from the proposed mode to have been catered for as a beneficiary and allocated 1 acre of land just like the rest of the beneficiaries. It is noted that the interested party has not talked about whether he is satisfied by the said portion of land. It seems he is only out to have the petitioners kicked out and he be made the administrator to run the show.



21. Vide application dated 27th July 2020, the 2nd Petitioner rightly approached this court seeking to have the court's judgement issued on 23rd July 2017 to reflect the deceased's assets and liabilities that were left out and argued that the administrators only learnt about the existence of these facts after the confirmation of the grant. Further, she wanted the court to be explicit and clear by capturing the details of the already recognised beneficiaries e.g. those left out such as an uncle and two bonafide purchasers indicating their exact shares as distributed in the estate of the deceased.
22. All these in totality demonstrates that the Interested Party/Applicant has failed to establish that indeed there was material concealment as it is clear that both the administrators were not privy to the information with regard to the deceased's land parcel number East Bukusu/North Nalondo/1686 and the respective liabilities of the estate of the deceased. The interested party was catered for with 1 acre of land just like the rest of the beneficiaries. He has not indicated whether he is not satisfied with the 1 care of land given to him. It is obvious that he has not objected to the same because he is satisfied with the same and that his only quest is to wrestle the role of administration from the petitioners and conduct it himself. His notice to the petitioners has already been addressed by the petitioners vide the application for review which has sought for the inclusion of the new asset. Further, he has not availed searches of any new assets he seeks to be included. If the review application is allowed, then his concerns will have been taken care of as the distribution of the estate is at the tail end and it will resolve any burning issues raised by the interested party herein. Revoking the grant and starting the process again will cause prejudice to the beneficiaries and delay the conclusion of this old matter. I find the interested party's application dated 30.11.2021 lacking in merit while the one filed by the 2nd petitioner dated 27.7.2020 meritorious.
23. In view of the foregoing observations, I issue the following orders:
- i. The application dated 30th November, 2021 lacks merit and is dismissed.
 - ii. The application dated 27th July, 2020 has merit and is allowed as prayed.
 - iii. The certificate of confirmation of grant dated 21st December 2017 is cancelled and a rectified one shall issue as proposed by the 2nd Petitioner vide paragraph 14 of her supporting affidavit.
 - iv. East Bukusu/North Nalondo/1686 be registered in the joint names of the petitioners herein Fredrick Simiyu Ndinyo and Electine Nasambu Masengeli to hold in trust for the bonafide purchaser.
 - v. Each party to bear its costs.

DATED AND DELIVERED AT BUNGOMA THIS 30TH DAY OF MAY 2024.

D. KEMEI

JUDGE

In the presence of:

Wamalwa for Wanyonyi for 1st Petitioner

Natwati for Alubala for 2nd Petitioner

Wamalwa R for Interested Party

Kizito Court Assistant

