



REPUBLIC OF KENYA



**In re Estate of Daudi Gachonde (Deceased) (Succession Cause
236 of 2009) [2024] KEHC 8145 (KLR) (28 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 8145 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION CAUSE 236 OF 2009
FN MUCHEMI, J
JUNE 28, 2024
IN THE MATTER OF THE ESTATE OF DAUDI GACHONDE (DECEASED)**

BETWEEN

PAUL GACHAHI GACHONDE APPLICANT

AND

ROSEBELL NJERI MURIUKI 1ST RESPONDENT

EMILY WAMBUI MURIITHI 2ND RESPONDENT

EUDIA WANDIA GITAHU 3RD RESPONDENT

CATHERINE WANGUI WACHIRA 4TH RESPONDENT

RULING

Brief facts

1. This is a ruling on the application dated 28th June 2022 seeking for orders of review or setting aside of the orders and decree of 24th July 2020. In the alternative, the applicant asks the court to annul or revoke the grants made in this cause in appointing new administrators to carry on with the distribution and transmission of the deceased's estate. The applicant further seeks for orders of rendering of an account of the estate pursuant to section 83 of the *Law of Succession Act* so as to be appraised of the residue of the estate and enable the court determine and direct the respective shares as well as the living beneficiaries to allow proper transmission and conclusion of the cause.
2. In opposition of the said application, the respondents have filed a Replying Affidavit sworn on 26th October 2022.
3. The matter proceeded by viva voce evidence.



The Applicant's Case

4. PW1, the applicant relied on his affidavit to his application and testified that although the court declined to revoke the grant vide its ruling on 24/7/2020, the court found that he was a child of the deceased and therefore entitled to an equal share of the estate of the deceased. The applicant states that the grants in the matter were made and confirmed on 18/9/2009 to Rosebell Njeri Muriuki and Vincent Wanjohi Gachonde but the said Vincent Wanjohi Gachonde is deceased and the attempt to substitute her with Salome Muthoni Wanjohi vide application dated 15/1/2021 has not been followed up. The applicant argues that as it stands, the grants have become useless and inoperative. Furthermore, the applicant states that the 3rd respondent and Shelmith Wanja Daudi are also deceased and therefore it is not easy to ascertain how much of the administration and transmission has taken place and the cause calls for redistribution of the estate in accordance with the ruling of 24/10/2020 and also taking into consideration the living and the dead beneficiaries who should take after them.
5. The applicant states that he has noted a number of assets that are yet to be transmitted and from which he would stake a claim being LR Nos. Kirimukuyu/Kiria/598, Ruguru/Karuthi/404, Kirimukuyu/Mutathini/404, Konyu/Baricho/873, Plot No. B/169, Thaithi 10, Ragati 89, Ngaini 15, Mat/Ngunjiri/15, BI 136 & 153 and BI 144.
6. Pursuant to Section 83 of the *Law of Succession Act*, the administrators ought to render an account within 6 months of the administration to the court which the applicant states they have failed to do. The applicant further states that the administrators have declined to avail to him information regarding the estate to enable him take account of the estate with the view of taking up his beneficial interest.

The Respondents' Case

7. The 4th respondent in her replying affidavit dated 26th October 2022 deposed that a previous Summons for Revocation of grant dated 5th July 2016 was heard and determined by this court and dismissed by a ruling delivered on 24th July 2020. The witness further testified that no appeal was preferred against the said ruling and no justification has been given by the applicant why the orders of 24th July 2020 should be reviewed or set aside. The witness states that the applicant in seeking for an order to annul or revoke the grant confirmed on 18th September 2009 amounts to an abuse of the court process as similar prayers were denied on 24th July 2020.
8. The 4th respondent further stated that this court by its ruling dated 3rd February 2022 dismissed a further application by the same applicant dated 29th September 2021 in which he was seeking for reasonable provision as a dependant. Furthermore, the applicant lacks the legal capacity to seek the prayers sought as was determined by the ruling dated 3rd February 2022. The witness testified that the applicant did not approach any of the respondents to give him accounts of property in the estate. In any event, the witness states that they shared out the estate of the deceased as per the grant and most of them have already sold their assets.

The Applicant's Submissions

9. The applicant submits that following the judgment dated 24/7/2020, the court affirmed that he is a son of the deceased and he is therefore entitled to an equal share of the estate in accordance with section 38 of the *Law of Succession Act*. The applicant further submits that the grant has become useless and inoperative as one of the administrators is deceased and the 1st respondent as the surviving administrator has ambulatory challenges.



10. The applicant further submits that the estate appears to be in a state of flux and nevertheless the administrators have not bothered to comply with the law by filing an account and a schedule or inventory of the estate whether administered or transmitted.
11. The applicant states that none of his siblings are keen on availing to him information as concerns the estate of the deceased and he therefore seeks for the appointment as an administrator of the estate solely since the grant has become inoperative. The applicant submits that unless he is clothed with power as an administrator, he may never know what the unadministered assets are or will he be able to receive any bequest.

The Respondents' Submissions

12. The respondents submit that the current application is res judicata as the applicant filed a similar application dated 5th July 2016 which was dismissed by the court on 24/7/2020. Being aggrieved with the decision of the court, the applicant filed another application dated 29th September 2020 which the court dismissed on 3rd March 2022. The respondents argue that the applicant has not propounded any legal grounds upon which the court may be called upon to review and set aside the orders of 24th July 2020.
13. The respondents submit that the applicant has never approached them or made a request to any of them regards the estate of the deceased, a fact that the applicant admitted on cross examination.

Issues for determination

14. The main issues for determination are:
 - a. Whether the orders made on 24th July 2020 ought to be set aside or reviewed;
 - b. Whether the application is res judicata.
 - c. Whether the applicant has legal capacity to remove a surviving administrator.

The Law

Whether the orders made on 24th July 2020 can be set aside or reviewed.

15. The power to set aside an order issued by the court calls for the court to exercise its discretion. This discretion is to be exercised to meet the ends of justice and should not be exercised capriciously or with a view to rewarding an indolent party. This principle was enunciated in the decision of *Patel v Cargo Handling Services Ltd* [1975] EA 75 where the court stated:-

The discretion is intended to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. In *Shah v Mbogo* [1967] EA 116, in exercising the discretion the court should consider among other things, the facts and circumstances both prior and subsequent, and all the respective parties. The question as to whether the affected party can reasonably be compensated by costs for any delay occasioned by setting aside the judgment should be considered and it should always be remembered that to deny a person a hearing should be the last resort of the court.



16. Similarly *In Re Estate of Kimayo s/o Shibeyi (Deceased)* [2020] eKLR the court stated:-

With regard to setting aside the order, the law is that an order is for setting aside where it was obtained in a process that did not involve all the parties, or where there was an error of some sort which could make the order untenable. The applicant has not demonstrated that the confirmation application was determined in a process that did not afford him a say. He has not shown that the court had made some errors in its final orders, which had the character of making its final orders untenable. The order is, for those reasons, not available for setting aside.

17. It is trite law as was held *In Re Estate of Kimaiyo* that in an application of this nature, the applicant must satisfy the court on the principles set out therein. The application dated 5th July 2016 which culminated in the ruling dated 24th July 2020 was filed by the applicant seeking orders for revocation of grant. The court dismissed the application on the premise that it was not convinced that the applicant was not aware of the succession proceedings filed about seven years earlier. The applicant has not demonstrated that the orders made by the court did not afford him a say or that the orders made by the court had some errors which would make the final orders untenable. In my view, the applicant has not shown on what grounds the orders made on 24th July 2020 should be set aside. The applicant has further not appealed the decision of the court but has brought two applications before the court which at a glance indicate that he is appealing on the decision of the court through the back door.

Whether the application is res judicata.

18. The applicant has further asked the court to revoke the grants herein as they have become inoperative and useless. The respondents argue that the issue on revocation is res judicata as the applicant filed a similar application dated 5th July 2016 which the court heard and determined on 24th July 2020.

19. The Supreme Court in *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others* [2021] eKLR comprehensively dealt with the different facets making up the doctrine of *res judicata* and provided the threshold for proving the applicability of the doctrine. The Court stated as follows:-

We restate the elements that must be proven before a court may arrive at the conclusion that a matter is res judicata. For res judicata to be invoked in a civil matter the following elements must be demonstrated:-

- a. There is a former judgment or order which is final;
- b. The judgment or order was on merit;
- c. The judgment or order was rendered by a court having jurisdiction over the subject matter; and
- d. There must be between the first and second action identical parties, subject matter and cause of action.

20. The background facts are that the applicant filed Summons for Revocation of grant dated 5th July 2016 seeking the revocation of the grant dated 18th September 2009. The court rendered its decision on 24th July 2020 dismissing the application. In the present application, the applicant has sought to have the same grant dated 18th September 2009 be revoked. It is evident that the parties in both instances are the same and final judgment was rendered by a court of competent jurisdiction. It was a judge of the High Court who decided this case on 24th July 2020.



21. The applicant in this application further seeks for orders to have the administrators removed and be replaced with himself for the reason that the grant has become useless and inoperative. The respondents argued that this matter was also *res judicata* as the court made its decision on the issue of revocation of the grant on 3rd March 2022. This court and that of judge Ngaah are of concurrent jurisdiction. The applicant ought to have appealed against the judgment and not to engage in a game of back and forth in an attempt to revoke have the grant revoked.
22. On perusal of the application dated 29th September 2020, the applicant sought for reasonable provision as a dependent of the deceased and for the removal of one of the beneficiaries from the grant confirmed on 18th September 2009. In rendering its ruling on 3rd March 2022, the court held that the grant of representation was issued to Rosebell Njeri Muriuki and Vincent Wanjohi Gachonde and as the personal representatives the two administrators were the only persons clothed with the legal capacity to institute any legal proceedings or causes of action which include bringing an application for substitution or redistribution of the estate. Thus it is evident that the issues raised by the applicant on the removal and appointment of administrators of the estate was dealt with in finality by this court. The court was candid in its ruling that the applicant was not possessed of the legal capacity to remove or add an administrator of the estate. From the foregoing, it is evident that this application is *res judicata*. The application is also incompetent and an abuse of the due process of the court.

Conclusion

23. It is therefore my considered view that the application dated 28th June 2022 is *res judicata* and it is hereby struck out.
24. Being a family matter, there shall be no order as to costs.
25. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 28TH DAY OF JUNE 2024.

F. MUCHEMI

JUDGE

