



REPUBLIC OF KENYA



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**In re Estate of Elijah Masinde Mwasame-Deceased (Succession Cause 41 of 2002) [2022] KEHC 13885 (KLR) (7 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 13885 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
SUCCESSION CAUSE 41 OF 2002**

**SN RIECHI, J**

**OCTOBER 7, 2022**

**IN THE MATTER OF THE ESTATE OF ELIJAH MASINDE MWASAME-DECEASED**

**BETWEEN**

**GLADYS NANJALA MASINDE ..... 1<sup>ST</sup> PETITIONER**

**MOSES MASINDE ..... 2<sup>ND</sup> PETITIONER**

**AND**

**RICHARD WAFULA MASINDE ..... OBJECTOR**

**AND**

**WANJALA WANGALO KABULE ..... INTERESTED PARTY**

**FRANCIS WANJALA MAKOKHA ..... INTERESTED PARTY**

**JUDGMENT**

1. By a summons of revocation of grant dated July 17, 2018, the objector sought the following prayers;
  1. The grant of letters of administration granted to the petitioner be revoked and or annulled.
  2. That in the alternative, the court be pleased to make orders that the objector be made a beneficiary in the estate of the deceased to wit land parcel Kimilili/Shikhendu/544.
  3. The court be pleased to issue a prohibitory order prohibiting the petitioner from alienating, sub-dividing, selling and or in any way dealing with land parcel Kimilili/Shikhendu or any other title that may be as a result of sub-division of the said parcel.
2. The application is premised on the grounds inter alia that the petitioner obtained the grant without naming all the beneficiaries, the objector did not consent to the filing of the cause until the same was produced in the environment and land court, that the objector had been allocated land in



- Kimilili/Shikhendu/632 yet his father had allocated him a portion in land parcel number Kimilili/Shikhendu/544. He states that his daughter's remains buried in the former were exhumed by members of Musambwa Church who claim to be beneficiaries of the estate. The application is further supported by the objector's sworn affidavit which is largely a reiteration of the above stated grounds.
3. The application is opposed through the affidavits of the 1<sup>st</sup> interested party sworn on August 8, 2018, Gladys Nanjala Masinde, the deceased's widow and also the objector's step mother and Moses Masinde, the deceased's son both sworn on November 2, 2018.
  4. The 1<sup>st</sup> interested party depones that he is one of the officials of Musambwa Church and the deceased's relative. That the estate has already been distributed and beneficiaries already settled on their respective parcels. He depones that the deceased had 2 parcels of land Kimilili/Shikhendu/544 and 632 where the objector was allocated the whole of the latter and his son Jacob Nyukuri given a portion measuring 1 acre out of the former. He depones that land parcel Kimilili/Shikhendu/544 is no longer in existence having been sub-divided to create Kimilili/shikhendu/1765 where the deceased was buried and is now a national monument.
  5. He depones that the deceased objector refused to move to his rightful share and even buried his daughter in plot number Kimilili/Shikhendu/1765 which was exhumed pursuant to court orders. He depones that land parcel Kimilili/Shikhendu/632 is not registered in the objector's name since he is a reckless individual who could have sold the entire parcel leaving his family destitute. That the deceased was a national figure and the distribution of his estate was a public issue involving clan elders and the local administration and therefore there if now the objector could not have heard about it.
  6. On her part, Gladys Nanjala depones that the objector is a deceptive and a dishonest person. That the application has come late in the day, the grant having been confirmed in the year 2004 without a protest. That prior to the filing and the distribution of the estate, several meetings were held where she participated as well as the objector.
  7. With regards to the distribution of the estate to Musambwa Church, she depones that the church was founded by the deceased and the entire family honoured him by allocating and parcel Kimilili/Shikhendu/1765 measuring 0.65 hectares.
  8. Moses Masinde on his part supported the petitioner's case.
  9. The objector testified as OW-1. He stated that he never participated in any meeting concerning his father's estate. That land parcel Kimilili/Shikhendu/632 was given to his father by his friend whose children later objected and blocked his father from accessing the land and the said children now occupy the land. He denied selling the aforesaid parcel to Cosmas Chaka. He stated that he does not want the land because it has ownership disputes.
  10. In cross examination, he stated that he did not know that his father had 2 parcels of land. Although his name was included in the grant, he had not gone to land parcel Kimilili/Shikhendu/632 which is registered in Cosmas Chaka's name (his cousin) and his wife Mary Nasimiyu. He confirmed that Jacob Nyukuri is his son.
  11. OW-2 Mary Nasimiyu Wafula stated that she is married to the objector. That her late father in-law had one parcel of land, Kimilili/Shikhendu/544 where he was buried. That she does not know the location of land parcel Kimilili/Shikhendu/632 as they have always lived on a portion measuring 10 acres comprised in land parcel Kimilili/Shikhendu/544 where her daughter was buried.
  12. In cross examination, she stated that land parcel Kimilili/Shikhendu/632 is registered in her name and that of Cosmas. She confirmed dini ya musambwa was founded by the deceased.



13. OW-3 Esther Nasimiyu Elijah stated that her deceased father had six wives and one parcel of land namely Kimilili/Shikhendu/544. During his lifetime, he had allocated the objector 10 acres out of the parcel because he was the only son who had attained majority age.
14. In cross examination, she stated that during the sub-division, the objector was in prison. She doesn't know that her father owned land parcel Kimilili/Shikhendu/632.
15. For the petitioners, Gladys Nanjala testified as PW-1 stating that she is the deceased's 6<sup>th</sup> widow.
16. In cross examination, she stated that the objector's land is parcel Kimilili/Shikhendu/632 though she doesn't know whether it is owned by the deceased. That land parcel Kimilili/Shikhendu/544 has been sub-divided among many people including dini ya musambwa which has the largest share according to the deceased's wishes.
17. PW-2 Moses Masinde stated that he supports the petitioner's case.
18. In cross examination, he stated that he is the deceased's son and that land parcel Kimilili/Shikhendu/632 is owned by the objector but he sold. That he occupies 2 acres in land parcel Kimilili/shikhendu/544.
19. PW-3 Francis Wanjala Makokha stated that he supports the interested parties' case. In cross examination, he stated that he attended the meeting chaired by Patrick Chaka in 1989 which sub-divided the deceased's land. That parcel number Kimilili/Shikhendu/632 is registered in the name of Cosmas Chaka and Mary Wafula, the objector's wife. That land parcel Kimilili/Shikhendu/1765 is registered in the name of Musambwa Graveyard Trustees where the church's activities are done.
20. PW-4 Wanjala Kabule adopted his replying affidavit earlier alluded to in this judgement.
21. In cross examination, he stated that parcel number Kimilili/Shikhendu/1765 is registered in the church's name and is a graveyard where the objector was temporarily allowed to stay before moving to his parcel.
22. The parties later filed written submissions where only the objector complied and raised the following issues;
  1. Whether the process of obtaining the grant was done in accordance with the law.
  2. Whether the distribution of the estate was done in accordance with the law.
  3. Whether legal persons can be beneficiaries in intestate succession.
  4. Whether the objector was entitled to the estate of the deceased.
  5. Who should bear the costs of the application.
23. On the first issue, counsel submits that the deceased being polygamous, the administrator was mandated to obtain consent from all the surviving widows and other beneficiaries. That no minutes of the meetings held prior to filing the cause were availed in court. This point is buttressed by the provisions of rule 26 of the *Probate and Administration Rules* and the authorities in *Ngari Gatumbi alias James Ngari Gatumbi-deceased* succession cause No 783 of 1993-Nairobi and *Samuel Wafula Wasike v Hudson Simiyu Wafula* (1993)LLR.
24. On the second issue, it is submitted that the deceased having died intestate and considering his polygamous nature, the provisions of section 40 of cap 160 ought to apply as held in *Rono v Rono* (2005)1EA 363, *in the matter of the estate of Benson Ndirangu Mathenge (deceased)* Succ cause No 231



of 1998-Nakuru, *in the matter of the estate of Nelson Kimotho Mbiti*-cause No 169 of 2000 and *Re estate of Veronica Njoki Wakagoto(deceased)*(2013) eKLR.

25. On the third issue, land parcel number Kimilili/Shikhendu/632 is owned by third parties. At the time of confirmation of grant, the same was registered in the name of Cosmas Chaka and Mary Wafula does not therefore form part of the estate whereas he had lived in land parcel Kimilili/Shikhendu/544. He disputed the allocation of a share of the estate to Cosmas since he is not the deceased's dependant.
26. On the fourth issue, counsel contends that the allocation of the largest portion of the estate to Musambwa Graveyard violates the rules of intestacy since the entity is not related to the deceased by blood. That if the deceased had intended to gift the church, he would have expressly done so through a will.
27. On the issue of costs, the objector submits that the petitioners and the interested parties ought to meet the costs of the application.
28. It is not in dispute that the deceased died intestate leaving behind six widows and a number of children as well as the fact that the objector is the deceased's son. The grant was confirmed on July 26, 2004 and as matters stand, the estate has been sub-divided and title deeds issued to respective beneficiaries. The objection herein is based on material non-disclosure to the extent that the objector was not involved in the succession process leading up to the issuance and the subsequent confirmation of the grant. The objector laments about him being allocated land parcel Kimilili/Shikhendu/632 when at the time, the same did not form part of the estate.
29. Having reviewed the evidence, the following issues arise for determination.
  1. Whether the objector has met the criteria for revocation of a grant under section 76 of the *Law of Succession Act*.
  2. Whether the objector's son and wife can inherit from the estate.
  3. Whether the objection is barred by time.
  4. Whether Dini ya Musambwa is a beneficiary to the deceased's estate.
  5. The appropriate orders.

#### **Whether the objector has met the criteria for revocation of a grant under section 76 of the Law of Succession**

30. It is trite law that a party seeking to revoke a grant must prove the ingredients contained under section 76 of the *Law of Succession* which provides;
31. 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 has ordered or allowed; 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. The objector's borne of contention in this matter are that he was not involved in the process leading up to the issue of the grant and that the petitioners have failed to disclose material facts to wit that the deceased had 6 widows and several children as well as that he had settled in plot number Kimilili/Shikhendu/544 whereas the petitioners allocated him plot number Kimilili/Shikhendu/632 which does not form part of the estate.
33. During the hearing, parties alluded to minutes taken of a meeting which appointed the administrator as well as the mode of distribution though none of the minutes were presented in court.
34. I have perused the chief's letter dated December 5, 2001 introducing the deceased petitioner to be the administrator and the same does not indicate the list of the deceased's children. In the affidavit in support of petition for letters of administration (P & A 12), the objector is listed therein as a beneficiary. In a similar vein, the consent (P & A 38) was not filed.
35. The court in such circumstances is duty bound to examine whether the grant was obtained without material disclosure as provided by rule 26 of the *Probate and Administration Rules* which states that:-
- 1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.
  - 2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.
36. The consent to the distribution of the estate dated December 23, 2003 was not signed by the objector and it is indiscernible whether the objector consented to the allocation or not however looking at all the circumstances of the matter, the court is satisfied that the same was obtained procedurally.

### **Whether the objector's son and wife can inherit from the estate**

37. Land parcel No Kimilili/Shikhendu/632 is jointly registered in the names of Cosmas Chaka and Mary Wafula, the objector's cousin and wife respectively. The petitioners explained the registration as that the objector is an irresponsible person and they feared that he would sell off the parcel to the detriment of his children and therefore the registration in other people's name was a safeguard against the objector's irresponsibility. The petitioners and the interested party also alleged that the objector sold off the parcel to a third party.
38. It was also confirmed that the objector lived in parcel number Kimilili/Shikhendu/544 and had not moved to land parcel Kimilili/Shikhendu/632 thus the body of his daughter was exhumed by Dini ya Musambwa followers on orders of the court.



39. After the evidence in this matter, it is clear that the objector lives in parcel number Kimilili/Shikhendu/544 and has never lived in parcel number Kimilili/Shikhendu/632. There is no evidence the objector sold the parcel to third parties as confirmed by the fact that one of the registered owners is his wife. On the contrary, the court finds that the allocation of latter parcel to the objector was done without his knowledge.
40. On the issue that individuals other than the deceased's children inherited from his estate, it was held in *In the Matter of the Estate of Joshua Orwa Ojode (deceased)* (2014)eKLR that:-
- Going by the above provision, where a deceased person is survived by a spouse and child or children, the other relatives are not entitled to a share in the intestate estate of such person. The spouse and child are entitled to the estate to the exclusion of all the other relatives. The excluded relatives include the parents of the deceased. Parents are only entitled where there is no surviving spouse or child.
41. Similarly, it was held in *In the Matter of the estate of Veronica Njoki Wakagoto (deceased)* [2013] eKLR
42. Under part v, grandchildren have not right to inherit their grandparents who die intestate after July 1, 1981. The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents' indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren's own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents.
43. On the contention that parcel number Kimilili/Shikhendu/632 did not form part of the estate, I have perused the certificate of official search dated December 4, 2001 and an extract of the green card and the same indicates that the land was registered in the deceased's name in 1966 long before his demise. This therefore means that at the time of the deceased's death on June 8, 1987, the property did form part of the estate.
44. In concluding the issue, I find the distribution of the estate and the subsequent registration of the objector's wife and son in as beneficiaries of the estate was safeguard against the objectors' irresponsibility. The same did not contravene the law.

### **Whether The Application Is Time Barred**

45. The petitioner's contention on the issue is premised on the argument that the application was preferred late in the day when title deeds have already been issued and owners taken possession of their respective portions. The question then is whether by bringing the application at such a time constitutes a total bar.
46. The grounds for revocation and or annulment of grant are stated in section 76 of *Cap 160* reproduced above and there is no mention of a specific time frame to bring forth the application. This has been held to be the case.
47. In *Patrick Mwangemi Wanjala & 3 others v Jackson Ngoda Jumwa* (2016) eKLR the court held as follows-
48. There is therefore no limitation as to the time for filing summons for revocation of grant. The law does not even provide that a party must explain any delay in seeking revocation of a grant. Consequently, this court makes nothing of the fact that the summons herein was filed 8 years after the grant was issued



49. Similarly in *Jane Wambui Wabuga & 4 others v Ruth Njoki Mwangi* [2016] eKLR, it was stated-

The said section states that a grant of representation, whether confirmed or not, may at any time be revoked by the court if it was obtained by fraud, or concealment. It may also be revoked if the proceedings were defective in substance and/or it was obtained by means of untrue allegation of facts essential in point of law to justify the grant. An application for revocation of grant cannot therefore be claimed to be time barred. Thus, the applicants' grounds for revocation of grant as set out in the summons for the revocation or annulment of the grant cannot be dismissed based only on the ground of limitation. The court has an obligation to determine the application on the basis of the provisions of the law.

50. Having so said, the court finds that the defence of effluxion of time is no defence in matters of administration of estates especially a grant is sought to be revoked as in the present application. The law governing revocation of grants has not placed any time frame within which to prefer such an application. The court does find that the application is not bad on account of time.

### **Whether Dini Ya Musambwa is a Beneficiary To The Deceased's Estate**

51. It is common ground that the deceased died intestate and that he died polygamous leaving behind widows and a number of children. As such, the provisions of section 40 of Cap 160 are applicable in the distribution of the estate.

52. Section 29 of the *Law Of Succession Act* provides who dependants are. It provides;

- (a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
- (b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and
- (c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.

53. A perusal of the certificate of confirmation of grant shows that Dini ya Musambwa is the single-largest beneficiary of the estate which allocation is challenged by the objector. It is not in dispute that the deceased was the founder of the church and had therefore made provision for the church.

54. In light of the preceding analysis, the following are the findings of the court; there is evidence that the objector was provided for and his portion registered in the names of his wife and son and secondly, Dini ya Musambwa sect was founded by the deceased and during his life time, provided his land for the activities of the sect and a sacred burial ground.

55. After considering all the evidence on record, I find no merit in this objection by Richard Wafula Masinde and the same is hereby dismissed.

**DATED AT BUNGOMA THIS 7<sup>TH</sup> DAY OF OCTOBER, 2022.**

**S.N. RIECHI**

**JUDGE**

