



REPUBLIC OF KENYA



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**In re Estate of Susan Wakonyo Kahiu alias Susan Nelson Ng'ethe (Deceased)
(Succession Cause 464 of 1998) [2024] KEHC 1176 (KLR) (9 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1176 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 464 OF 1998
SM MOHOCHI, J
FEBRUARY 9, 2024**

**IN THE MATTER OF ESTATE OF SUSAN WAKONYO
KAHIU ALIAS SUSAN NELSON NG'ETHE (DECEASED)**

BETWEEN

WINNIE MBAIRE APPLICANT

AND

ANDERSON NG'ETHE 1ST RESPONDENT

DAVID NGUYAI 2ND RESPONDENT

RULING

1. Before me is an Application dated 31st May 2023 a Summons for Revocation of grant filed pursuant to Section 76 {d}(i) and (e) of the [Law of Succession Act](#) and Rule 44 of the [Probate and Administration Rules](#) by Winnie Mbaire a beneficiary of the estate of the above-named Susan Wakonyo Kahiu (Deceased) who died on the 25th November 1997 seeking the following reliefs: -
 - a. This Court be pleased to revoke the Grant of Letters of Administration issued to Anderson Ngethe, David Nguyai and Jane Wangari on 3rd day of March 2008.
 - b. This Court be pleased to appoint Winnie Mbaire as an administrator along with Anderson Ngethe and David Nguyai and a fresh grant be issued.
 - c. This Court be pleased to Orders Anderson Ngethe and David Nguyai, the current administrators to furnish accounts of the estate.
 - d. This Court be pleased to issue orders preserving the properties of the estate from any dealings, disposition, transfer, alienation, distribution and/or any dealings pending hearing and determination of this application.



- e. Costs be provided for.
2. The Application is premised on the following grounds:
- i. That, the Applicant is the daughter of the deceased and one of the beneficiaries of the estate and her other siblings are, Jane Wangari, Mary Mukami, Anderson Ngethe, Monica Waneke and David Nguyai.
 - ii. That, Mary Mukami and Monicah Waneke reside abroad.
 - iii. That, through a petition for letters of administration dated 24th August 1998; the Court issued letters of administration and the Grant of Letters of Administration of the deceased's estate in favor of Anderson Ngethe, David Nguyai and Jane Wangari.
 - iv. That, the beneficiaries failed to agree on the mode of distribution of the estate prompting the Court to determine the same through its judgment delivered on 22nd April, 2005.
 - v. That, unfortunately one of the administrators, Jane Wangari, passed away on 22nd July, 2005 leaving the administration of the estate to the two residual administrators Anderson Ngethe and David Nguyai
 - vi. That, the confirmed grant was issued in tripartite to guarantee balance, equality and collegiality in administration of the estate thus Jane Wangari played a critical role in to this end.
 - vii. That, after the Court had issued its judgment, a consent was filed by two administrators, Anderson Ngethe and David Nguyai on 10th November 2008 and not adopted to set-aside the judgment of the Court and adopt an alternative mode of distribution.
 - viii. That, the consent proposed a mode of distribution which saw two administrators. That is Anderson Ngethe and David Nguyai be allocated a majority of the estate compared to their sisters, Jane Wangari, Mary Mukami and Monicah Waneke.
 - ix. That, the judgment of the Court has not been enforced since its delivery as the two residual administrators are keen on bulldozing the beneficiaries to adopt the inoperative impugned consent.
 - x. That, over period, the two administrators have declined to welcome any and all efforts to enforce the judgment while at the same time they continue dealing in the properties of the estate without input from the other beneficiaries.
 - xi. That, the administrators have failed without reasonable cause to proceed diligently with the administration of the estate.
 - xii. That, owing to the death of one of the administrators, Jane Wangari, the administration of the estate is at risk of being presided over unfairly, characterized by biasness towards the sisters.
 - xiii. That, being that the grant issued by the Court in tripartite was to guarantee balance, equality and collegiality in administration of the estate, the death of Jane Wangari renders the grant useless and inoperative through the subsequent circumstance of her death.
 - xiv. That, the two administrators, Anderson Ngethe and David Nguyai continue to deal in the estate without taking consideration to the wishes of the other beneficiaries, their Sisters.
 - xv. That, they further resist any efforts to enforce the judgment of 22nd April, 2005 which guaranteed equality in distribution of the estate.



- xvi. That, to avoid wastage of the estate, the dictatorial disposition of the two administrators in administration of the estate, and to guarantee equal representation and fairness, it is in the best interests of all beneficiaries that the initial grant be revoked and Winnie Mbaire be appointed as an administrator.
3. This Court on the 7th July 2023 directed that the Application shall be heard and disposed-off by way of written submissions and parties complied as follows;
- a. Applicant's Written Submission filed on the 18th August 2023;
 - b. Applicant's Supplementary Affidavit filed on the 18th August 2023;
 - c. The 2nd Administrator'/Respondent Replying Affidavit filed on 31st July 2023;
 - d. The 1st Administrator'/Respondent Replying Affidavit filed on 31st July 2023; and
 - e. The Respondents Written Submissions filed on 29th September 2023;
4. Without using too much ink to regurgitate what has been said in support or opposition in the lengthy pleadings it is important to all recall where we are coming from.
- a. Final Judgment was entered on 22nd April 2005 by Hon Justice Muga Apondi.
 - b. An Appeal Civil Appeal No 207 of 2014 was preferred and before its hearing and disposal, the entire family held a consultation that resulted in a formal consent.
 - c. The consent dated 31st October 2008 was filed in Court on the 10th November 2008;
 - d. The Court is privy to Previous attempts by the Applicant at setting aside the aforesaid consent on the 15th October 2010;
5. The Applicant Swore an Affidavit with authority of her sisters Monica Waneke, and Mary Mukami who are domiciled outside the country to act on their behalf.
6. That, her other siblings are, Jane Wangari, Mary Mukami, Anderson Ngethe, Monicah Waneke and David Nguyai.
7. That, through a petition for letters of administration dated 24th August 1998; the Court issued letters of administration of the deceased's estate in favor of Anderson Ngethe, David Nguyai and Jane Wangari.
8. That, a grant of letters of administration was subsequently issued on 29th March 1999 but the beneficiaries failed to agree on the mode of distribution of the estate prompting the Court to determine the same through its judgment delivered on 22nd April, 2005 to which a decree was taken out.
9. That, unfortunately one of the administrators, Jane Wangari, passed away on 22nd July. 2005 leaving the administration of the estate to the two residual administrators Anderson Ngethe and David Nguyai.
10. That, on 3rd March, 2008, it was the Courts direction that the Grant of Letters of Administration issued on 29th March 1999 be confirmed pursuant to the orders on the judgment.
11. That, the confirmed grant was Issued in tripartite to guarantee balance, equality and collegiality in administration of the estate thus Jane Wangari played a critical role in to this end.
12. That, consequent to the death of Jane Wangari a rectification of Grant was done to substitute her with her daughter Sussannel Konyo Ngethe as a beneficiary to the estate



13. That, after the Court had issued its judgment, two administrators, Anderson Ngethe and David Nguyai filed a consent, on 10th November 2008 to set aside the judgment of the Court and adopt an alternative mode of distribution.
14. That, the said consent was procured through coercion and deception by the two administrators.
15. That, she was made to sign the consent on the mode of distribution on behalf of her sisters who are outside the country yet she did not have instructions from her sisters giving her authority.
16. That, counsel representing the 1st Administrator Anderson Ngethe assured her that it was okay to sign for them despite not having authority and instructions.
17. That, the consent proposed a mode of distribution saw Anderson Ngethe and David Nguyai be allocated a majority of the estate compared to us, their sisters, Jane Wangari, Mary Mukami and Monica Waneke.
18. That, the judgment of the Court has not been enforced since its delivery as the two residual administrators are keen on bulldozing the rest of us to adopt the inoperative impugned consent, to the expense of the judgment of the Court.
19. That, over period, the two administrators have declined to welcome any and all efforts to enforce the judgment while at the same time they continue dealing in the properties of the estate without input from them.
20. That, the administrators have failed without reasonable cause to proceed diligently with the administration of the estate.
21. That, owing to the death of one of the administrators, Jane Wangari, the administration of the estate is at risk of being presided over unfairly, characterized by biasness towards us, the sisters.
22. That, being that the grant issued by the Court in tripartite to guarantee balance, equality and collegiality in administration of the estate, the death of Jane Wangari renders the grant useless and inoperative through the subsequent circumstance of her death.
23. That, the two administrators, Anderson Ngethe and David Nguyai continue to deal in the estate without taking consideration to the wishes of the other beneficiaries for instance transferring motor Vehicle KAB 808L Nissan Pickup which forms part of the estate to the 2nd Administrator David Nguyai.
24. That, the two administrators further continue to handle properties subject to the estate in isolation like cultivating and leasing out land without the sisters being considered in the monetary income.
25. That, further, one of the administrators, David Nguyai has already sold part of the land forming the estate to one Gabriel Mungai. Who has fenced it off, erected a residential house, and is carrying out commercial farming activities on the land
26. That, additionally, the administrator, David Nguyai is using the homestead which forms part of the estate as a guesthouse and restaurant and has erected buildings for this business despite the Court allocating the same to the sisters.
27. That, consequently, none the three of them sisters, occupy land subject to the estate as the two administrators have kicked us out.
28. That, the same administrator David Nguyai, has also erected a residential house and other buildings on another piece of land forming part of the estate.



29. That, they further resist any efforts to enforce the judgment of 22nd April, 2005 which guaranteed equality in distribution of the estate.
30. That, to avoid wastage of the estate, the dictatorial approach of the two administrators in administration of the estate, and to guarantee equal representation and fairness, it is in the best interests of all beneficiaries that the initial grant be revoked.

Analysis and Determination

31. This Court will state that from the onset that the technical practice of attacking pleadings in form to obtain striking-off orders, is outdated, draconian and is on the death bed and should be discouraged. All technical argument on striking-off an affidavit are duly noted, in the wider interest this Court views the anomaly as curable and need not state further.
32. The sole issue that presents itself for determination herein is whether the Applicant's application meets the threshold for the revocation of a grant within the meaning of Section 76 of the *Law of Succession Act*.
33. For avoidance of doubt, Section 76 of the *Law of Succession Act* states as follows:

“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.”

34. Section 76 was clearly expounded on *In re Estate of Prisca Ong'ayo Nande (Deceased)* [2020] eKLR where it was stated that:

“Under section 76, a Court may revoke a grant so long as the grounds listed above are disclosed, either on its own motion or on the application of a party. A grant of letters of administration may be revoked on three general grounds. The first is where the process of obtaining the grant was attended by problems. The first would be 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 is a survivor when he is not, among other reasons. The second general ground is where the grant was obtained procedurally, but the administrator, thereafter, got into problems with the exercise of administration, such as where he fails to apply for confirmation of grant within the time allowed, or he fails to proceed diligently with administration, or fails to render accounts as and when required. The third general ground is 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 duties as administrator, or the sole administrator is adjudged bankrupt and, therefore, becomes unqualified to hold any office of trust.”

35. Revocation of grant is an ultimate tool where it is apparently demonstrated that the Administrators can no longer be allowed to be. This Court can, even where a Revocation would be allowed, give directions to conclude distribution as a catalyst of conclusion.

36. The jurisdiction to review of decisions of a probate Court is governed by Rule 63 of the *Probate and Administration Rules*, which provides as follows: -

“63. Application of Civil Procedure Rules and High Court (Practice and Procedure) Rules

- (1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the Court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.
- (2) Subject to the provisions of the Act and of these Rules and of any amendments thereto the practice and procedure in all matters arising thereunder in relation to intestate and testamentary succession and the administration of estates of deceased persons



shall be those existing and in force immediately prior to the coming into operation of these Rules.”

37. In the case of *John Mundia Njoroge & 9 Others v Cecilia Muthoni Njoroge & Another* [2016] eKLR, the Court had this to say with regards to Rule 63 of the *Probate and Administration Rules*:

“As stated above, the only provisions of the Civil Procedure Rules imported to the Law of Succession Act are orders dealing with service of summons, interrogatories, discoveries, inspection, consolidation of suits, summoning and attending witnesses, affidavits, review and computation of time. Clearly, *Order 45* relating to review is one of the Civil Procedure Rules imported into succession practice by rule 63 of the Probate and Administration Rules. An application for review in succession proceedings can be brought by a party to the proceedings, a beneficiary to the estate or any interested party. However, the application must meet the substantive requirements of an application brought for review set out in *Order 45 of the Civil Procedure Rules*.”

38. A party seeking review of orders, in a probate and succession matter, is bound by the provisions of Order 45 (1) of the *Civil Procedure Rules* which provides that;

“1. Any person considering himself aggrieved—
(1) (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the Court which passed the decree or made the order without unreasonable delay”

39. Order 45 provides for three circumstances in which an order for review can successfully be made, the Applicant must satisfy and show-case to the Court any of the three circumstances;

- i. There has been discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed. A party may successfully apply for review,
- ii. Secondly, if he can demonstrate to the Court that there has been some mistake or error apparent on the face of the record.
- iii. The third ground for review is worded broadly: an application for review can be made for any other sufficient reason.

40. It is trite law that an application for review should be made without unreasonable delay. I am of the view that, the Application fails on that front, as no reason whatsoever has been offered, as to why the Applicants who have all along been available never moved Court in a timely manner for the last Sixteen (16) years. The delay is apparent and would thus require persuasive ventilation.



41. In *Stephen Gathua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers* [2016] eKLR, the Court had occasion to deal with cases of apparent long delay in seeking review, by holding that:

“One thing is clear in this application. The delay of one year has not been explained. Perhaps, it’s important to recall the last sentence of Order 45 Rule 1 (1) (b) which reads “... may apply for review of judgement to the Court which passed the decree or made the order without unreasonable delay.”

The logical question that follows is, was the present application made without unreasonable delay” Or is a delay of one year reasonable. The issue for determination is whether or not the applicant has unreasonably delayed in filing the present application. Under normal circumstances it should not take an applicant one year to file an application in Court. It would require sufficient explanation to justify a delay of one year. To my mind this is a long period, and indeed an unreasonable delay.

Such a long delay must be sufficiently explained.”

42. The proceedings herein have not been stayed by the Court of Appeal and It is apparent that the Applicants other sisters feel that the distribution was unfair to them, that the distribution transfers have never occurred and that they have been evicted and denied access to the estate.
43. The transgressions by any of the administrators can be cured when the final distribution is being undertaken. The alleged sale of part of the land forming the estate by David Nguyai to one Gabriel Mungai if found to be without authority, shall be nullified and any such title may be revoked accordingly. The onus remains on the Administrators to bring such issues subsisting to the attention of the Court for appropriate directions
44. The filed consent does not need to have been adopted as an order of the Court for parties to defer to it. The only question is if the parties exercised their voluntary agency in executing the same. If they did, unless the party seeking to avoid the consent outcome is making the claim that, the settlement reached by the consent is, in any way disproportionate, irrational or violative of human rights or the Bill of Rights or that in there was procedural impropriety in reaching the consent, which she voluntarily subjected herself to or that, the consent outcome is constitutionally disproportionate, then consent is binding on her.
45. Bottom line is, absence of evidence that, the process giving rise to the Consent which the Applicant and her sisters willingly, and in the exercise of their own agency, participated in, was procedurally suspect or disproportionate, then the party is bound by the consent outcome or settlement whether it had earlier been adopted by the Court or not.
46. This Court shall not review, set-aside or disturb the consent entered post judgment dated 31st October 2008, as the Application mischievously attempt to invite the Court to revoke the grant thereby disturb a consent entered into Sixteen (16) years Ago.
47. The said Consent dated 31st October 2008 settled matters then pending before the Court of Appeal and its adoption accordingly modified the distribution in judgment and that the same is binding on the parties.
48. No evidence has been evidenced or laid on the deception and or coercion allegedly committed on the Applicant in execution of the consent either by the 1st and 2nd Administrators or the Advocates.



49. This Court takes a dim view on the rational of disturbing a grant of probate of letters of administration intestate, confirmed sixteen (16) years earlier to add a new personal representative only on the basis of a prior personal representative and nominee of her family being deceased.
50. This Court is of the view that the Succession is at the tail-end and where an administrator is hell bent on frustrating any other beneficiaries or co-administrators, in conclusion, then the Court is clothed with sufficient powers to intervene to ensure distribution occurs.
51. This Court is of the view that the Authority bestowed on the administrators is derived from the law and donated to the Administrators by the appointment by this succession Court and that it is an appointment of responsibility that should be beyond personal interest. This Court notes the advanced ages of all parties herein and shall prioritise concluding the distribution over disturbing the grant to add new personal representatives.
52. This Court in exercise of its inherent Jurisdiction necessary for the ends of justice or to prevent abuse of the process of the Court hereby issues the resultant orders:
- i. The Administrators are to file within the next fourteen (14) days, a detailed “return” of administration and distribution of the estate, undertaken since 8th July 2019 up to now.
 - ii. The Summons for revocation of grant dated 31st May 2023, is found to be lacking in merit and is accordingly dismissed.
 - iii. The Applicants are granted Forty-Five (45) day leave to Appeal this ruling.
 - iv. This being a family matter, parties shall bear their respective costs.

It is So Ordered

DATED, SIGNED AND DELIVERED AT NAKURU ON THIS DAY OF 9TH DAY OF FEBRUARY 2024.

S. MOHOCHI

JUDGE

