



REPUBLIC OF KENYA



In re Estate of the Late Simon Muse Masakha (Deceased) (Succession Cause 22 of 1998) [2024] KEHC 14988 (KLR) (29 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14988 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
SUCCESSION CAUSE 22 OF 1998**

DK KEMEL, J

NOVEMBER 29, 2024

BETWEEN

FRANCIS WEKESA MUSE APPLICANT

AND

BENSON WAFULA KHAEMBA 1ST RESPONDENT

HENRY WANYONYI MUSE 2ND RESPONDENT

MORRIS MASAKHA 3RD RESPONDENT

SUSAN NAKHUMICHA MUSE 4TH RESPONDENT

RULING

1. The Applicant herein filed a summons for revocation and or annulment of grant dated 12th November, 2021 and filed on 15th November, 2021 pursuant to Rule 44 and Rule 73 of the Probate and Administration Rules seeking for orders that:
 - a. The grant of letters of administration intestate made on 11th December 2001 and Certificate of Confirmation of Grant issued on 29th January 2002 and all consequential orders obtained pursuant thereto be revoked and annulled.
 - b. The sub-division of land parcel No. Bokoli/Chwele/750 that gave rise to title No. Bokoli/Chwele/1736 and Bokoli/Chwele/1737 be revoked and or cancelled so that the original title No. Bokoli/Chwele/750 to revert to the name of the deceased Simon Muse Masakha.
 - c. Costs of the application be provided for.
2. The summons were premised on the grounds on the face of it and the supporting affidavit of Francis Wekesa Muse, Applicant herein, sworn on 12th November 2021, wherein he averred that the grant was obtained secretly without the consent of the Applicant and other beneficiaries; that the Respondents



- did not disclose to the Court a full list of the beneficiaries to the estate of the deceased; that the procedure for issuance of the grant was defective in both form and substance.
3. According to him, the deceased herein was survived by 13 children, 7 sons and 6 daughters. He averred that two of the sons of the deceased are deceased and that upon the demise of his late father, the 2nd Respondent was given the responsibility of undertaking the succession process. He annexed a letter of the clan chairman confirming the same, marked as FWM-1.
 4. He averred that unknown to the beneficiaries of the estate of the deceased, the 2nd Respondent commenced succession proceedings in February, 1998, and that he omitted the names of some of the beneficiaries in the Petition documents. A grant was issued on 11th December 2001 to the four Respondents herein and that the assets of the deceased were distributed to the four Respondents to the exclusion of other beneficiaries.
 5. He averred that he has been threatened with eviction from his late father's land and that the Respondents have failed to administer the estate of the deceased herein.
 6. He urged this Court to revoke the grant issued on 11th December 2001.
 7. In further support of the summons, Knight Mueni Wanjala, swore an affidavit on 30th September 2022, wherein she averred that the deceased herein is her paternal grandfather and that she is a daughter to one of the sons of the deceased herein, Jamin Wanjala, who died in the year 2004.
 8. According to her, on 11th December 2011, the Court issued a grant in favour of the Respondents herein on the understanding that they would distribute the estate of the deceased to the four households as agreed. That the four Administrators/Respondents each got 9 acres which was to be held in trust for the other beneficiaries including their household but its now 20 years and that her late father's household is yet to receive their share.
 9. She averred that the 1st and 3rd Administrators/Respondents herein died and that the estate is currently under the administration of the 2nd and 4th Administrators/Respondents who have still failed in their role.
 10. She averred that due to the captured events it will be prudent for this Court to revoke the grant and all the titles arising courtesy of the said grant to be revoked and that the whole process to start afresh. She insisted that she is in support of the summons for revocation dated 12th November 2021.
 11. In opposition to the application, the 1st Respondent filed a replying affidavit sworn on 2nd October 2023, wherein he denies the allegations in the summons general. He averred that he is the son of Selina Nasipwondi who died on 18th March 2013 and vide limited grant of letters of administration Ad Litem dated 1st February 2023, he was appointed an administrator of her estate for purposes of prosecuting this cause. According to him, vide an application dated 22nd February 2023, he was substituted as the 1st Respondent in this matter and that the summons for revocation by the Applicant herein seek to set back the beneficiaries to the estate of the deceased years back.
 12. He averred that no name of the beneficiaries to the estate of the deceased was excluded and that each respective share as distributed was passed to the rightful heirs. He insisted that the sharing of the estate of the deceased is as per the mode of distribution.
 13. The summons were heard by way of viva voce evidence based on the affidavits filed by the parties.
 14. It was the evidence of OB-PW1 Morris Masakha Muse that he is the son of the deceased herein who had six wives and that his mother was the 6th wife. At his request this Court adopted his recorded statement



dated 9th November 2023, as his evidence in chief. He told the Court that two of the wives of the deceased had no children. According to him, in 1998 a case was lodged at the Land Disputes Tribunal over that land sub-division but he could not recall the verdict of the tribunal. He told the Court that he was not aware of the succession proceedings but that his name is captured in the documents. He told the Court that he was not aware of his appointment as an Administrator to the estate of the deceased and that he has not seen the Grant and that he never appeared before any land board. Also, he told the Court that he was not aware if the other Administrators appeared before any land board. He told the Court that the deceased left behind 36 acres and that he is in occupation of 2 ½ acres and that it was true that he did swear an affidavit at the Land Dispute Tribunal opposing the apportionment of land to any of the daughters of the deceased herein. He confirmed that the 1st Respondent herein was allocated 9 acres on ground and that the deceased had 18 children. He testified that he is not aware if the remaining 27 acres were shared out and that the same is registered in both his name and that of 2nd Respondent. He confirmed that he saw the letter by their clan vice chairman suggesting that the 36 acres belonging to the estate of the deceased be shared between the houses which have children and that he was unable to comment on whether the land was shared equally. He told the Court that the 9 acres issued to Selina is registered in her name and that of his three other sisters and that he did not know the names of the Administrators in the Certificate of Confirmation of Grant. He told the Court that he is opposed to the distribution of the 36 acres between the four houses and that he wants fresh succession proceedings and a different mode of distribution to be adopted. He confirmed that the Certificate of Confirmation of Grant failed to indicate the shares as distributed and that six male children of the deceased reside on the land and all should be apportioned 8 acres each.

15. OB-PW2 Paul Mukhwana Wanjala testified that he is the grandson of the deceased herein and that he was born in 1976. At his request, this Court adopted his recorded statement dated 9th November 2023, as his evidence in chief. According to him, his late father, Jamin Wanjala, was allocated six acres and that they reside of the said portion. He told the Court that his father died in 2002 and that he was not involved in the succession proceedings with regard to the estate of the deceased herein. He told the Court that he could not confirm if his father was listed as one of the Administrators and that land parcel No. Bokoli/Chwele/1736 as per the search certificate is registered in the names of his uncles, Henry and Morris, and that the land measures 27 acres. The land parcel No. Bokoli/Chwele/1737 measures 9 acres and that the same is registered in the name of Selina Nasipwondi Wekesa and her two other sisters. He confirmed that the 36 acres is to be divided amongst the four houses and that each house will get 9 acres. He told the Court that he was being harassed by Selina Nasipwondi and that his father's share is not captured in the grant
16. OB-PW3 Knight Mueni Wanjala testified that she is the granddaughter of the deceased herein. At her request this Court adopted her affidavit dated 30th September 2022 as her evidence in chief. She told the Court that the estate of the deceased herein was to be distributed amongst the four houses meaning that their house was to receive 9 acres. She told the Court that she wants the Grant to be revoked so that each household can get their rightful shares. She confirmed that the Administrators were to hold the portions in trust for the other members in the households and that Henry and Morris do hold 27 acres on behalf of three houses and that her family has a claim from the 27 acres. She told the Court that they have not been given any title deeds and that it will be prudent that the grant be revoked and that titles be prepared.
17. OB-PW4 Francis Wekesa Muse testified that he is the son of the deceased herein and at his request, this Court adopted his affidavit dated 9th November 2023 and the documents therein dated 9th November 2023, as his evidence in chief. He told the Court that he seeks to have land parcel No. Bokoli/Chwele/1736 and land parcel No. Bokoli/Chwele/1737 cancelled and that the same to revert to land



parcel No. Bokoli/Chwele/750 as they were not included in the succession proceedings. According to him, the deceased was married to six wives; five are dead and one is alive. He confirmed that two of the wives of the deceased did not bear any children and that the deceased's estate comprised on land parcel No. Bokoli/Chwele/750 which measured 36 acres. He insists that he was not aware of the succession proceedings and that in the year 1998 he was 20 years old as he was born in 1976. He told the Court that he was not at home when the succession proceedings commenced and that the 4th Respondent herein is his brother. He told the Court that land parcel No. Bokoli/Chwele/1736 is measuring 10.8 HA while land parcel No. Bokoli/Chwele/1737 is measuring 3.6 HA. He confirmed that he is currently occupying three acres and cannot attest to the sizes of the others. He told the Court that the deceased never distributed his land and that he only showed his wives where to till. He testified that he is not aware if the grant was confirmed and that those named in land parcel No. Bokoli/Chwele/1737 are from the same house and that he did not issue his consent to the proposed mode of distribution.

18. OB-PW5 Florah Naliaka Muse testified that she is the 6th wife of the deceased herein and at her request, this Court adopted her recorded statement dated 9th November 2023, as her evidence in chief. She told the Court that she objected to the succession proceedings as she was not alerted of the same and that the deceased died prior to him distributing his land. She told the Court that she resides where the deceased showed her to establish her homestead and that the clan distributed that land after the demise of her husband and that all the children were catered for but that she has availed no document to substantiate the same. She told the Court that she is not aware of the size of land she occupies and that the children were each given three acres but the daughters were excluded as they were all married. She insisted that she was not involved in the Court matter and that the title deed is in the name of her children.
19. That marked the close of the Objector/Applicant's case.
20. PET-PW1 Benson Wafula Khaemba testified that he is the grandson of the deceased herein and at his request, this Court adopted his recorded statement dated 13th November 2018, as his evidence in chief. He confirmed before the Court that he lacked a consent document duly executed by the beneficiaries to the estate of the deceased consenting to the distribution of the estate of the deceased. He argued that the family members were involved in the succession proceedings and that there is nowhere showing Flora Musee, a widow of the deceased, signed to show her agreement with the proposed mode of distribution. He confirmed that the deceased had 36 acres and that his mother took 9 acres. He told the Court that he is aware that orders were issued giving each house 9 acres but he has no proof to that effect. He maintained that all widows of the deceased were involved in the succession proceedings but for those who had died their family members were uncooperative. He confirmed that his late grandfather had 36 acres and that the distribution of 9 acres among the four household was fair and that his mother's share in the 9 acres is catered for in the 1st house.
21. PET-PW2 Nelson Masakha at his request, this Court adopted his recorded statement dated 9th November 2023, as his evidence in chief. He testified that his family's share is catered for under land parcel No. Bokoli/Chwele/1737 and that at the time of filing this cause one of the daughters of his family was already deceased and that his house has four children. He told the Court that he had no evidence that they were involved in the succession proceedings. He told the Court that he refused to sign the consent to the proposed mode of distribution and that his mother was given his share, but his sisters renounced their claims to the estate of the deceased. He told the Court that there is nothing indicating that members were appointed to represent their houses. He told the Court that land parcel No. Bokoli/Chwele/1737 is in the names of the two sisters and that the 36 acres was to be shared equally amongst the four houses as two wives of the deceased did not bear any issues.
22. At the close of the Respondent's case, this Court directed parties to file and exchange their written submissions. Only the Applicant complied.



23. I have considered the application and the rival affidavits and the oral testimonies of the witnesses. The only issue for determination is whether the application has merit.

24. Section 76 of the *Law of Succession Act* gives the Court the powers to revoke a grant provided the conditions stipulated therein have been met. It states that:-

“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
 - iv. The grant has become useless and inoperative through subsequent circumstances.

25. The circumstances in which a grant can be revoked were discussed in the case of *In the Matter of the Estate of L.A.K. (Deceased)* [2014] eKLR :-

“Revocation of grants is governed by Section 76 of the *Law of Succession Act*. The relevant portions of Section 76 are paragraphs (a), (b) and (c) since the issues raised relate to the process of the making of a grant. A grant may be revoked where the proceedings leading up to its making were defective, or were attended by fraud and concealment of important matter, or was obtained by an untrue allegation of a fact essential to the point.”

26. Notably, the power to revoke or uphold a grant is a discretionary one. This principle was enunciated in the persuasive decision in *Albert Imbuga Kisigwa vs Recho Kawai Kisigwa Succession Cause No. 158 of 2000* where Mwita J 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.”

27. It is imperative to note that this Court through D. Onyancha J. entertained a similar application wherein Selina Nasipwondi Petitioned for Grant of Letters of Administration Intestate with regard to the estate of the deceased herein and upon Objections being filed by her respective brothers, the learned judge, as a compromise, appointed three other Petitioners namely 2nd to 4th Respondents herein and that on 10th November 1998, they were allowed to go home and agree on the mode of distribution after which they were to apply for confirmation of the Grant. According to the said Judge, a consensus was reached and on 11th December 2001, the Court vide Hon. Kasanga Mulwa J. confirmed the Grant of Letters Administration.
28. From the above, this simply means that both OB-PW1 and OB-PW5 then aware of the succession proceedings as instituted by Selina Nasipwondi proceeded to register their displeasure and as a compromise the Court vide Hon. D. Onyancha J noted that as a compromise, he appointed the three brothers, 2nd to 4th Respondents as administrators. This simply means that the aspect of revocation of the Grant based on the concealment of material facts was remedied by the Court when it appointed the three brothers as Petitioners to co-administrate the estate of the deceased with Selina Nasipwondi prior to the filing of summons for confirmation of grant. This simply means that the summons for revocation of grant are res judicata
29. The law pertaining to the doctrine of res judicata is captured under the provisions of Section 7 of the Civil Procedure Act Cap 21 (Laws of Kenya) which states that:-
- “No court shall try any suit in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”
30. It is clear from the application dated 12th November 2023, the Applicant and his witnesses are not satisfied with the mode of distribution. OB-PW1 and PW5 claim that they did not consent to the mode of distribution adopted by the Court with OB-PW1 making it clear that daughters of the deceased are not entitled to a claim from the estate. For situations where a party is aggrieved with distribution of the estate, it was his view that the party has the option of review or appeal, seeing as the Court that issued the certificate of confirmation of grant has at this point become functus officio. Section 76 makes no mention of revocation of certificates of confirmation of grants. The only reference to confirmation of a grant is in Section 76(d)(i), and it is about the failure to apply for confirmation of the grant within the time allowed in law. That means that a grant-holder who fails to apply for confirmation of his grant in accordance with Sections 71 and 73 of the Law of Succession Act exposes their grant to revocation. There is nothing in Section 76 about a certificate of confirmation of grant being revoked because there were problems with the process of the confirmation of grant. Neither does section 76 permit the making of orders on a summons for revocation of grant founded on grounds to do with a party being unhappy with the confirmation provision, and that the process gives the Court no discretion to cancel certificates of confirmation of grant. The ideal situation, where a person is unhappy with the process of confirmation of grant, as it would appear that that is what the applicant herein is aggrieved about, is not to move the Court under Section 76 for revocation of grant. What such a person should do instead, is to file an appeal against the orders made by the Court on distribution. The Court confirming a grant largely becomes functus officio so far as confirmation of the grant is concerned, and cannot revisit the matter unless upon review.



31. The summons for revocation as crafted by the Applicant, challenge the distribution of the estate as the process of issuing the grant of representation itself was curated by the appointment of the three brothers as co-administrators to the estate of the deceased after the brothers of Selina Nasipwondi filed their objections against her filing the succession proceedings to their exclusion.
32. I am also guided by the case of *In re Estate of Prisca Ong'ayo Nande (Deceased)* (2020) eKLR, the Court found that:
- “I have very closely perused through the provisions of the *Law of Succession Act*, and I have not come across any provision that provides a remedy to a person who is aggrieved by confirmation orders. Sections 71, 72 and 73 of the *Law of Succession Act*, which deal with confirmation of grants, do not address the question of redress for parties who are unhappy with the confirmation process, nor do they deal generally with flaws in the confirmation process. As stated above, section 76 has nothing to do with the confirmation process, and provides no relief at all to any person unhappy with the confirmation process. In the absence of any provision in the *Law of Succession Act*, for relief or redress for persons aggrieved by such orders, the aggrieved parties have only two recourses under general civil law, that is to say appeal and review, to the extent that the same is permissible under the *Law of Succession Act*. I would believe that one can also apply for the setting aside or vacating of confirmation orders, where the same are obtained through abuse of procedure.”
33. A Certificate of Confirmation of Grant is an order of the Court emanating from the substantive grant of representation, in this case a grant of letters of administration, which is what may be revoked on the grounds set under Section 76 of the *Law of Succession Act*. The certificate of confirmation of grant cannot be revoked but rather, set aside. Being an order of the Court, it may be the subject of a review or an appeal for purposes of redistribution of the estate only and not removal or appointment of an administrator. It is clear that the Objector is out to intimate and checkmate the Administrators yet the shares had already been distributed per household and therefore should agitate his grievances within his household and not to interfere with the other households' affairs.
34. In view of the foregoing observations, it is my finding that the summons for revocation of grant dated 12th November 2021 herein lacks merit and is hereby dismissed. Each party to bear their own costs since they are members of the same family. The Applicant is hereby advised to either appeal or review the decision of the Court on the confirmed grant dated 29th January 2002.

Orders accordingly.

DATED AND DELIVERED AT SIAYA THIS 29TH DAY OF NOVEMBER, 2024.

D. KEMEI

JUDGE

In the presence of:

N/A for Wanjalafor Applicant

Mabengeli..... for Respondents

Mutungu for Masinde for one of the beneficiaries Jamia Wanjala.

Kizito/Ogendo.....Court Assistant

