



REPUBLIC OF KENYA



**In re Estate of Amos Muthui Theuri (Deceased) (Succession Cause
385 of 2005) [2025] KEHC 12774 (KLR) (17 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 12774 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION CAUSE 385 OF 2005
DKN MAGARE, J
SEPTEMBER 17, 2025
IN THE MATTER OF THE ESTATE OF AMOS MUTHUI
THEURI ALIAS MUTHUI THEURI (DECEASED)**

BETWEEN

JOSEPH GITUARA MUTHUI PETITIONER

AND

MAINA NDERITU MUTHUI APPLICANT

RULING

1. By the summons for revocation of grant dated 23.7.2025, the Objector sought for the following reliefs:
 - a. That the Grant of Letters of Administration issued to Joseph Gituara Muthui be revoked and upon revocation the same be issued to at least two other persons beneficiaries of the deceased Maina Nderitu and Washington Muchiri Muthui.
 - b. That the certificate of confirmation of grant issued on 13.7.2012 be set aside and the subsequent registration of parcel No. Nyeri/Mweiga/290 pursuant to the aforesaid grant be cancelled and the same to revert to the name of Amos Muthui Theuri alias Muthuri Theuri.
 - c. The costs be provided for.
2. The summons was supported by the affidavit of Maina Nderitu Muthui and Margaret Njeri Gachinu and was based on the following grounds:
 - i. The Objector is son of one Joseph Nderitu Muthui who was son of the deceased herein.
 - ii. Joseph Nderitu Muthui is now deceased.
 - iii. The grant was issued through concealment of material facts that there was a son of the deceased, Joseph Nderitu Muthui who was then alive but did not consent to the grant.



- iv. The Petitioner concealed the fact that the said Joseph Nderitu Muthui was also a beneficiary to the estate of the deceased in order to disinherit him.
 - v. The said Joseph Nderitu Muthui ought to have received a share out of Nyeri/Mweiga/290 as son of the deceased.
3. The Petitioner filed a Replying Affidavit dated 18.11.2021 by which it was deposed as follows:
- a. That Joseph Nderitu Muthui participated in the succession proceedings and did not object to the matters under disposition.
 - b. The Deceased had 2 houses and had laid boundaries in respect of the two houses 10 years prior to his demise which no one questioned.
 - c. Joseph Nderitu Muthui passed his interest out of the estate to his brothers namely John Gichuki Muthui and Michael Kimondo Muthui.
 - d. The Objector had not obtained authority to act on behalf of his deceased father.

Submissions

4. The Objector filed submissions dated 28.5.2024. This must be 2025 as the submissions were filed on 28.5.2025 following the directions of court dated 22.5.2025. It was submitted that the Objector had satisfied the grounds under Section 76 of the [Law of Succession Act](#).
5. The Petitioner on the other hand filed submissions dated 27.5.2025. It was submitted that the power of the court to revoke a grant was discretionary and must be exercised judiciously and not whimsically and capriciously. They cited *Albert Imbuga Kisigwa v Recho Kavai Kisigwa (2016) eKLR*. Based on this authority it was submitted that the Objector had not proved fraudulent misrepresentation or material concealment as required under Section 76 of the [Law of Succession Act](#).

Analysis

6. The Objector, the grandson of the deceased questioned the Grant as confirmed. The issue for determination is whether the summons for revocation should be allowed and the mode of distribution done by the Petitioner set aside. Section 51 of the [Law of Succession Act](#), requires a person seeking to administer the estate of a person who died in 1980 to comply with section 51(2)(g) of the [Law of Succession Act](#) and Rule 7(1)(e) of the [Probate and Administration Rules](#), which require disclosure of all the children of the deceased.
7. A perusal of the Summons for Confirmation of Grant dated 13.07.2012 reveals that the Objector's father, Joseph Nderitu Muthui (deceased), was not listed as a beneficiary of the estate. This omission has not been disputed by the Petitioner. The effect of failing to include a rightful heir or their estate in succession proceedings is that the confirmation process becomes defective, as it contravenes Section 71 of the [Law of Succession Act](#) which requires the court to be satisfied that all beneficiaries have been ascertained before confirming a grant. In *Samuel Wafula Wasike v Hudson Simiyu Wafula [1993] eKLR*, the Court of Appeal emphasized that failure to disclose all beneficiaries amounts to material non-disclosure, rendering the confirmation of grant liable to revocation under Section 76 of the [Act](#). This was equally enunciated by F. Gikonyo in the case of [In re Estate of Silas M'Itumwari Mukanagu \(Deceased\) \[2020\] KEHC 8501 \(KLR\)](#) as follows:
 17. A grant obtained through concealment of material facts or without consent from relevant persons or through false claims is a perfect candidate for revocation. See apt statement in the



case of *Samuel Wafula Wasike vs. Hudson Simiyu Wafula* CA No. 161 of 1993) (Kwach, Omolo and Tunoi JJA) that:

“A grant obtained on the strength of false claims, without obtaining the consent of persons who had prior right to the grant and on the basis of facts concealed from the court, is liable to revocation.

8. Similar sentiments were postulated in the case of *In re Estate of G.K.K. (Deceased)* [2017] KEHC 5664 (KLR), where D K Musyoka J, held that exclusion of a beneficiary vitiates the grant as it undermines the principle of equitable distribution. Accordingly, the non-inclusion of the Objector’s father is a material defect that goes to the root of the proceedings. He stated as follows:

From the above provision it should be clear that confirmation is not just limited to distribution, granted though that it paves way for distribution. The confirmation process is about the holders of the grant being confirmed on account of having been properly appointed and of having properly administered the estate of the deceased. The confirmation of the proposed distribution should only follow thereafter. The requirement that the court confirms the holder of the grant, of necessity, means that the said grant holder must seek to demonstrate to the court that he was properly appointed and upon being appointed went about properly managing the estate. No doubt this should give him an opportunity to account for his administration from the date of his appointment to the time he moves the court for confirmation of his grant. It also means that where such grant holder fails to address matters touching on his appointment and his administration of the estate, the persons beneficially entitled to the estate would be entitled to challenge his appointment and his administration of the estates in the course of the confirmation process.

9. The deceased is also said to have left two houses which fact is not disputed. The Court of Appeal, in *Elizabeth Chepkoech Salat v Josephine Chesang Chepkwony Salat* [2015] eKLR, held that: -

“From the consideration of sections 35, 40 and 42 of the *Act*, the broad principle of law which emerges is that where an intestate was polygamous, the estate, in the first instance, should be divided among the houses according to the number of children in each house adding a surviving wife as an additional unit taking into account any previous benefit to any house. Thereafter the estate devolving on any house is, subject to her life interest distributed by the surviving spouse in exercise of her power of appointment to each beneficiary taking into account previous benefit, if any, to any beneficiary. However, in the event that the life interest is terminated either by remarriage or death, then the net interstate estate devolves upon a house is divided among the surviving beneficiaries equally subject to any previous benefit to any beneficiary.

[30] Section 40 of the *Act* does not give discretion to a court to deviate from the general principles therein enunciated. Where a matter is contentious and the parties have not reached a consent judgment, the court is bound to apply the statutory provisions. More specifically, the court has no power to substitute the statutory principles for its own notion of what is an equitable or just decision. However, court has a limited residuary discretion within the statutory provisions to adjust the share of each house or of a beneficiary where, for instance, the deceased had during his lifetime settled any property to a house or beneficiary or to decide which property should be disposed of to pay



liabilities of the estate or to determine which properties should be retained by each house or several houses in trust."

10. The Petitioner sought to justify the exclusion of the late Joseph Nderitu Muthui, a son of the deceased, by alleging that he had passed his interest in the estate to his brother. This Court finds no merit in that contention. Having acknowledged that Joseph Nderitu Muthui was indeed a son of the deceased, the Petitioner cannot in the same breath deny that he was entitled to a share as a beneficiary. The suggestion that he renounced his entitlement is unsupported by any evidence. No document, affidavit of renunciation, or consent under Rule 40(8) of the *Probate and Administration Rules* was produced to prove that Joseph Nderitu Muthui had formally surrendered his share. In the absence of such proof, this Court must decline the Petitioner's argument and affirm that the exclusion of Joseph Nderitu Muthui from the list of beneficiaries was irregular.
11. The law on persons who may qualify to apply for representation in intestacy is Section 66 of the *Law of Succession Act*. This law sets out the order of preference with regard to who ought to apply and be appointed administrator in intestacy. Priority is given to surviving spouses, followed by the children of the deceased.
12. Rule 7(7) of the *Probate and Administration Rules* requires that a person with a lesser right to administration ought to obtain the consent of the person or persons with a greater priority to administration, or get that person or persons to renounce their right to administration or cause citations to issue on them requiring them to either apply for representation in the estate or to renounce their right to so apply. For avoidance of doubt, these provisions state as follows:

"66. Preference to be given to certain persons to administer where deceased died intestate

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—

- (a) surviving spouse or spouses, with or without association of other beneficiaries;
- (b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;
- (c) the Public Trustee; and
- (d) creditors ..."

and

"7(7). Where a person who is not a person in the order of preference set out in section 66 of the Act seeks a grant of administration intestate he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise its discretion under that section and shall also satisfy the court that every person having a prior preference to a grant by virtue of that section has –

- (a) renounced his right generally to apply for grant; or



- (b) consented in writing to the making of the grant to the applicant;
or
- (c) been issued with a citation calling upon him to renounce such right or to apply for a grant."

13. There is also Rule 26 of the [Probate and Administration Rules](#), which states as doth:

26.

- (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 equally or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.

14. There was no prove of renunciation. The power to revoke the grant was addressed in the case of [Albert Imbuga Kisigwa v Recho Kawai Kisigwa](#), Succession Cause No. 158 of 2000, where the Court stated as follows:

"(13) 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."

15. This matter relates to an intestate estate of a polygamous man. In respect of the distribution of the deceased's estate, this court is guided by Sections 40(1) and 42 of the [Law of Succession Act](#), Cap 160 Laws of Kenya. Section 40(1) of the [Law of Succession Act](#) provides that:

"Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children."

16. Consequently, this Court must consider whether a basis has been established to warrant revocation of the grant and interference with the mode of distribution proposed in the Certificate of Confirmation of Grant, as urged by the Applicants. The grounds upon which a grant of letters of administration may be revoked or annulled are provided under Section 76 of the [Law of Succession Act](#) (Cap 160, Laws of Kenya), which states:

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.
17. The summons for confirmation of grant listed the beneficiaries and the shares to the beneficiaries. It is the proven case of the Objector that his father, Joseph Nderitu Muthui (deceased) was disinherited. The bounds and mounts of the estate of the deceased were not well defined and I find basis in revoking the grant. The law governing applications for confirmation of grant is Section 71 of the *Law of Succession Act* and Rules 40 and 41 of the *Probate and Administration Rules*. The proviso to section 71, as read together with Rule 40(4), is that the administrator applying for distribution must satisfy the court that they have properly ascertained the persons beneficially entitled to a share in the estate and have properly ascertained the shares due to such beneficiaries.
18. The effect of it is that the court then incurs a duty to be satisfied, before it confirms the grant, that the administrator asking for confirmation, has properly ascertained the persons beneficially entitled to a share in the estate and the shares due to such beneficiaries. The Court of Appeal, in *Elizabeth Chepkoech Salat v Josephine Chesang Chepkwony Salat* [2015] eKLR, held that: -
- “From the consideration of sections 35, 40 and 42 of the *Act*, the broad principle of law which emerges is that where an intestate was polygamous, the estate, in the first instance, should be divided among the houses according to the number of children in each house adding a surviving wife as an additional unit taking into account any previous benefit to any house. Thereafter the estate devolving on any house is, subject to her life interest distributed by the surviving spouse in exercise of her power of appointment to each beneficiary taking into account previous benefit, if any, to any beneficiary. However, in the event that the life interest is terminated either by remarriage or death, then the net interstate estate devolves upon a house is divided among the surviving beneficiates equally subject to any previous benefit to any beneficiary.
- [30] Section 40 of the *Act* does not give discretion to a court to deviate from the general principles therein enunciated. Where a matter is contentious and the parties have not reached a consent judgment, the court is bound to apply the statutory provisions. More specifically, the court has no power to substitute the statutory principles for its own notion of what is an equitable or just decision. However, court has a limited residuary discretion within the statutory provisions to adjust the share of each house or of a beneficiary where, for instance, the deceased had during his lifetime settled any property to a house or beneficiary or to decide which property should be disposed of to pay



liabilities of the estate or to determine which properties should be retained by each house or several houses in trust."

19. To cater for the interest of the two houses, I appoint the Objector as co-administrator and direct the process of the conformation of the grant to commence afresh taking into consideration the polygamous nature of the deceased, his beneficiaries and property.
20. Based on the above disposition, the summons for revocation of grant is merited. On the question of costs, the Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others*, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -
 - “(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.
21. In the circumstances, given the matter is a family matter, costs shall be in the cause. The parties shall agree on another co-administrator, other than the petitioner after delivery of the Ruling, failing which the court shall appoint suo moto.

Determination

22. In the upshot, I make the following orders:
 - a. The Grant of Letters of Administration issued to Joseph Gituara Muthui is revoked.
 - b. A fresh grant is hereby issued to a beneficiary other than Joseph Gituara Muthui with Maina Nderitu as a co-administrator of the estate of the deceased Amos Muthui Theuri.
 - c. That the certificate of confirmation of grant issued on 13.7.2012 is set aside.
 - d. The registration of parcel No Nyeri/Mweiga/290 pursuant to the aforesaid Grant is hereby cancelled and the same to revert to the name of the deceased Amos Muthui Theuri alias Muthui Theuri.
 - e. The joint Administrators shall within 60 days hereof file fresh summons for confirmation of the grant naming all properties and beneficiaries of the deceased with their respective shares taking also into regard the two houses of the deceased.
 - f. Directions on 6/11/2025 to confirm progress and appointment of Co-Administrator.



- g. The subdivisions titles be filed with the Land Registrar.
- h. Costs in the cause.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 17TH DAY OF SEPTEMBER, 2025.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of: -

Ms. Ndirangu for the Petitioner/Respondent

No appearance for the Objector/Applicant

Court Assistant – Michael

