



In re Estate of Jonathan Kharakhara Khakina (Deceased) (Succession Cause 11 of 2023) [2024] KEHC 11420 (KLR) (30 September 2024) (Ruling)

Neutral citation: [2024] KEHC 11420 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
SUCCESSION CAUSE 11 OF 2023
DK KEMEL, J
SEPTEMBER 30, 2024
IN THE MATTER OF THE ESTATE OF JONATHAN
KHARAKHARA KHAKINA (DECEASED)**

BETWEEN

ERIC WAMOTO KHARAKHARA PETITIONER

AND

JACOB WAFULA MUSAMIA 1ST OBJECTOR

OBADIAH SIMIYU MUSAMIA 2ND OBJECTOR

RULING

1. The Objectors herein filed summons for revocation of grant dated 21st April 2021 and filed in Court on 17th November 2021 seeking for orders of revocation of grant issued on 4th November 2003 in favour of the Petitioners on grounds that the same was fraudulently obtained as the Petitioners concealed material facts concerning the claim of their deceased father on land parcel Bokoli/Bok despite them being aware of Bungoma Misc. Application No. 173 of 2002 thus the omission to list their deceased father as a creditor to the estate of the deceased herein.
2. The application was supported by the supporting affidavit sworn on 20th April 2021 by the 1st and 2nd Objectors herein. They averred that they are the sons of the deceased Morris Wekesa Musamia and that prior to his demise he had purchased five acres of land out of land parcel Bokoli/Bok from the deceased herein as per the annexed and marked JWM-1 sale agreement dated 8th January 1977. They averred that their father used the suit land until 26th March 2000 when he was stopped by the 1st Petitioner from ploughing. They relied on the agreement annexed and marked JWM-2 dated 26th March 2000. They averred that their deceased father instituted a land dispute case number 4 of 2000 wherein the Tribunal ordered the Petitioner to transfer the five acres to their deceased father as per the annexed Tribunal award marked JWM-3. They deponed that the exclusion of their father's name as a creditor



of the estate of the deceased herein indicates that the Petitioners cannot be trusted to cater for their interests and administer the estate of the deceased properly.

3. In response to the summons for revocation, the Petitioner filed his grounds of opposition dated 18th January 2022, wherein they contended that this Court has no jurisdiction to entertain this suit that is being entertained in a different Court. According to him, the issue of land was dealt with vide Bungoma Misc. Application No. 246 of 2001 in which orders of stay of execution was granted on the award from Webuye RM Misc. Application. No, 23 of 2001 in respect to the said land parcel Bokoli/Bok between the deceased and father of the Objectors. It was further contended that the Applicants are not beneficiaries of the deceased's estate to agitate any nullification of grant for them to be enjoined as beneficiaries. It was finally contended that the application is sub-judice and res-judicata and that it should be struck out with costs.

4. The summons for revocation of grant was canvassed via viva voce evidence. OB-PW1 was Jacob Wafula Musamia, who told the Court that he wished to rely on his statement dated 19th October 2023 and his annexed documents marked OB.EXH.1-5 as his evidence in chief. According to him, his father purchased land from the deceased in 19777 and that they need the Court to give them the five acres so purchased plus costs of this suit. He told the Court that his late father could not obtain consent to the transaction as the title was kept as security for a loan and that they started using the land in 1978 and that there are boundaries to it. He told the Court that in the year 2000 the Petitioners kicked them out of the land.

On cross-examination, he testified that he is the son of the deceased Morris Wekesa Musamia and that he did not witness the transaction. He stated that his father never obtained a consent from the land board. According to him, the tribunal ordered that his father be given the five acres and that he is also aware of the order from the High Court Bungoma dated 23rd November 2001 vide Misc.246/2001. He stated that he has not seen the discharge of charge and that his father did not obtain consent from the land control board. He insisted that his deceased father ought to be given the five acres as per the sale agreement.

5. OB-PW2 Obadiah Simiyu Musamia is the second objector who reiterated the averments of the 1st Objector who is his brother.

6. PET-PW1 was Eric Wamoto Kharakhara, who told the Court that he wished to adopt his recorded statement dated 22nd February 2024 as his evidence in chief as well as his availed documents. According to him, his family is not willing to give out the land to the Objectors and that the sale agreement and letter in possession of the Objectors are unknown to him and his family.

On cross-examination, he told the Court that he is not aware of the sale transaction and that he went through the tribunal proceedings wherein his late mum stated that the late Musamia purchased land from her deceased husband. He also told the Court that during "lufu" ceremony the late Musamia claimed land but did not avail any sale documents. He insisted that he has never seen the Objectors come to till the land and that he can confirm that their land was used to secure a loan with Industrial Credit and Development Corporation and that the deceased could not transfer the land to a buyer. He also stated that he does not doubt the statement made by his mother before the Land Dispute Tribunal. He also added that he has not been informed of any action brought by his family against the objectors over fraudulent documents regarding their claim onto the deceased's land.

On re-examination, he told the Court that his late brother and mother were not administrators during the land dispute tribunal proceedings and that he was not aware if the Objectors family were farming on the land.



7. At the close of the evidence by the parties, learned counsels for the parties duly filed and exchanged submissions.
8. I have considered the application herein, the responses thereto and rival submissions by both counsels. I find the issue that arises for determination is whether the grant of letters of administration made on the 4th November 2003 and re-issued to the Petitioner herein on 20th June, 2023 should be revoked.
9. The applicable law is the *Law of Succession Act* Section 76 which provides:

“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.
10. In the case of In *re Estate of Magangi Obuki (Deceased)* [2020] eKLR the Court quoted the authority in the case of *Albert Imbuga Kisigwa v Recho Kavai Kisigwa*, Succession Cause No.158 of 2000, Mwita J. made remarks on the guiding principles for the revocation of a grant. He stated;

(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.
11. If a grant was obtained fraudulently by making of a false statement or by the concealment from the Court of something material to the case; or that the grant was obtained by means of untrue allegation of fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently, such a grant can be revoked or annulled. The law permits the Court to revoke a grant on its own motion or on application by an interested person.



12. The first question is who can apply for revocation of a grant? The answer to this question is found in the nomenclature deployed in Section 76 of the [Law of Succession Act](#). The section reads: - A grant may be revoked either by application by an interested party or by the Court on its own motion. The first question is whether the applicant(s) is "an interested party" within the meaning of Section 76 and if so, whether they have the legal capacity to bring the application now under determination. It is important to bear in mind the provisions of Section 47 of the [Law of Succession Act](#) which enjoins the High Court to entertain any application and determine any dispute under the Act and pronounce such decrees and make such orders therein as may be expedient. Further, under Rule 73 of the Probate and Administration Rules it is provided that "Nothing in these Rules shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."
13. An "Interested person" or "person interested in an estate" includes, but is not limited to, the incumbent fiduciary; an heir, devisee, child, spouse, creditor, and beneficiary and any other person that has a property right in or claim against a trust estate or the estate of a decedent, ward, or protected individual or a person that has priority for appointment as personal representative; and a fiduciary representing an interested person.
14. The Objectors have annexed to their application a copy of sale agreements between their deceased father and the deceased herein. Also, it is clear that orders of stay were issued by the High Court at Bungoma against the award of the land dispute tribunal. This simply means that this Court will not proceed to entertain the application for revocation of the grant issued on 4th November 2003 and re-issued on 20th June, 2023 until the conclusion of the land dispute. The moment the High Court issued the order of stay of the execution of the award, then that matter remained so until it was finally determined. It is clear that the issue of the award by the Land Dispute Tribunal is yet to be resolved by the parties in the Environment and Land Court since the dispute relates to a claim over land and which ought to be determined by the ELC. In that regard, this court lacks jurisdiction to determine the land dispute. Parties should proceed to canvass the status of the orders of stay in Bungoma Hc Misc App. No. 246 of 2001 and that the outcome of the same will direct the parties on the course of action to take. Further, it is noted that the grant herein is yet to be confirmed and as such, the Objector still have an opportunity to file a protest if any against the proposed mode of distribution by the Petitioner.
15. Accordingly, for purposes of Section 76 of the [Law of Succession Act](#) and the application before the Court, such sale cannot be used as a basis for revocation of grant by a purchaser especially where the purpose is to exclude the property from the estate of the deceased or to confer proprietary interest on such person. Those are matters for another forum but not a probate Court.
16. In the upshot, the application for revocation dated 21st April, 2021 lacks merit. The same is dismissed with no orders as to costs.

Orders accordingly.

DATED AND DELIVERED AT BUNGOMA THIS 30TH DAY OF SEPTEMBER 2024.

D. KEMEI

JUDGE

In the presence of :

Shikhu for Wanyonyi for Objectors

Oriko for Kituyi for Petitioner



