



**In re Estate of Khamis Juma Kiriba (Deceased) (Succession Cause 296 of 2012) [2023] KEHC 401 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 401 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
SUCCESSION CAUSE 296 OF 2012  
JN ONYIEGO, J  
JANUARY 26, 2023**

**IN THE MATTER OF THE ESTATE OF KHAMIS JUMA KIRIBA (DECEASED)**

**BETWEEN**

**ABUDULRAHMAN MOHAMED OMAR ..... INTERESTED PARTY**

**AND**

**AZIZA KHAMIS JUMA ..... PETITIONER**

**RULING**

1. The deceased in respect of whom these proceedings relate died intestate on 24<sup>th</sup> November 1996 while domiciled in Kenya. He was survived by several survivors; namely; Aziza, Ali, Salim Khamis, Zeinab, Abdilllah, Hassan, Omar, Swaleh, Abdullah, Rabii, Salim Mohamed, Asha Mwanaidi, Mwanangemi, Mwananasiti.
2. On 20<sup>th</sup> July 2012, Aziza Khamisi Juma and Ali Khamisi Juma petitioned for a grant of representation. The only asset listed as constituting the estate was one quarter (1/4) of an acre to be extracted from subdivision No. 4379 (ORIGINAL NO. 862) Section 1 main land North. Subsequently, a grant of letters of administration intestate was made on 28<sup>th</sup> November 2012 and issued on 3<sup>rd</sup> December 2012. The same was confirmed on 6<sup>th</sup> October 2014, and the estate distributed equally amongst the beneficiaries in accordance with Islamic law.
3. Later, *vide* a notice of motion dated 23<sup>rd</sup> May 2022, Abdulrahman Mohamed Omar in his capacity as the interested party (hereafter the applicant) moved this court seeking orders that; he be admitted as an interested party for purposes of arguing the application herein; confirmation order issued herein be set aside, vacated or revoked; certification of the confirmation of grant issued on 6<sup>th</sup> October 2014 be annulled and all the sub-divisions made on the subject land herein and the consequent distribution be revoked.



4. The application is anchored on grounds stated on the face of it and an affidavit sworn by the applicant on 23<sup>rd</sup> May 2022 thus stating that at the time the grant was issued and subsequently confirmed, the subject property was registered in the name of the applicant and his mother one Salma Abdullah. To prove the allegation, a copy of certificate of title (marked annexure AM-2) and search certificate (annexture AM-3) were attached thus reflecting Salma and the applicant as the registered owners each holding ½ share as at 4<sup>th</sup> March 2020.
5. That the grant was therefore obtained through fraud, misrepresentation and concealment of material facts and that the distribution of the estate was unlawful as the deceased did not own the said property. They claimed that the deceased was a mere tenant to them and that the estate was in rent arrears to the tune of Kshs 36,000.
6. In response, the respondents filed a replying affidavit sworn on 5<sup>th</sup> July 2022 stating that the property in question was sold to the deceased by one Ali Bin Ahmed Bin Saleh the original owner vide a sale agreement dated 6<sup>th</sup> October 1976. A copy of the said agreement was attached and marked as annexure-AKJ-1. They further averred that the premises erected on the said property are still held in the interest and for the benefit of the deceased's estate. They denied the claim that they obtained the grant through fraud and misrepresentation of material facts and that the deceased was a tenant to the applicants.
7. It was further stated that during the pendency of these proceedings, the applicants filed ELC case number 60 of 2022 claiming ownership of the said property against them. They dismissed the application as lacking in merit and filed in bad faith.
8. In their rejoinder, the applicants filed a supplementary affidavit on 5<sup>th</sup> October 2022 dismissing the respondent's claim of ownership using a sale agreement indicating that the deceased had bought the property. That the respondents did not attach any title deed to show that the deceased was the owner of the property in question. That ownership of a house without land is no longer applicable since Registration of Titles Act came to force.
9. When the matter came up for directions, parties agreed to file submissions to dispose of the matter.
10. Through the firm of Martin Tindi and company Advocates, the applicants filed their submissions on 6<sup>th</sup> October 2022 thus reiterating wholly the content contained in the affidavit in support of the application.
11. In response, the respondents filed their submissions through the firm of Abdallah and company advocates who also adopted the content contained in the affidavit in reply. Learned counsel submitted that since the deceased had purchased the premises thereon and that the family of the deceased has been in occupation of the premises for 46 years, it will be prudent to declare the respondents as the owners on grounds of adverse possession or a wait the decision of ELC where similar issues have been raised.
12. I have considered the application herein, response thereof and rival submissions by both counsel. The only issue which germinates for determination is whether the applicant has met the threshold for revocation of the grant.
13. The law governing revocation of a grant is clearly set out under Section 76 of the *law of succession Act* which provides 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
- e. That the grant has become useless and inoperative through subsequent circumstances”.

14. In the instant case, there is no dispute that the grant was issued properly to the rightful beneficiaries being the children of the deceased. Before a grant can be revoked, the applicant must be able to show that the ingredients set out under section 76 of the *law of succession Act* or any of them have or has been established. See *Jesse Karaya Gatimu V Mary Wanjiku Gitthinji* (2014) eKLR and *Matbeka and another v Matbeka* (2005) KLR 455.

15. The applicant’s contention is that he and his mother are the registered owners of the property in question. The respondents do not deny the fact that the property is registered in the applicants’ names. They are however claiming beneficial interest based on the allegation that their father(deceased) had bought the premises erected thereon and that they have been in occupation for the last 46 years.

16. From the evidence on record, I do not find any fraud in obtaining the grant. However, there was material non-disclosure that the deceased was a beneficial owner of a house without land and not the entire property as it were including land without a house. With this conclusion, the confirmation of the grant was anchored on misrepresentation of facts. The whole dispute is anchored on land ownership which can properly be resolved through ELC and not the probate court. See H.C. Succession cause No.864 of 1996(2015) e KLR where the court held that;

”...the mandate of the probate court under the law of succession Act is limited. It does not extend to determining issues of ownership of property and declaration of trusts...”

17. In view of the above finding, it would be prudent to restrain any further transactions or dealings relating to further disposition or sale of the said property thereby maintaining the statusquo pending the outcome of the pending ELC case No. 60 of 2022. Should the ELC find that the applicants are the rightful owners, then the applicants shall move this court seeking exclusion of the property from the list of assets for distribution and the certificate of confirmation shall be amended accordingly. Should



the ELC find in favour of the respondents/administrators, then, the restraining orders herein imposed shall be lifted to enable completion of the administration of the estate.

18. At this stage therefore and using this court's discretion in issuing or revoking a grant, the circumstances of this case and the need to uphold substantive justice will demand that I don't revoke the grant nor annul the certificate of confirmation of the grant pending the outcome of the ELC case aforesaid.
19. Accordingly, the application is allowed only to the extent of holding or suspending further execution of the confirmed grant herein pending the outcome of the ELC case number 60 of 2022.

**Dated, signed and delivered virtually at Mombasa this 26<sup>th</sup> Day of January 2023**

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**J.N. ONYIEGO**

**JUDGE**

