



**In re Estate of Mzee Omari (Deceased) (Succession Cause  
17 of 2018) [2023] KEHC 17747 (KLR) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17747 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT CHUKA  
SUCCESSION CAUSE 17 OF 2018**

**LW GITARI, J**

**MAY 25, 2023**

**IN THE MATTER OF THE ESTATE OF THE LATE MZEE OMARI (DECEASED)**

**BETWEEN**

**MIRIAM KARIMI KISAGA ..... 1<sup>ST</sup> INTERESTED PARTY  
ZAINA KISAGA ..... 2<sup>ND</sup> INTERESTED PARTY  
ALIMA KISAGA ..... 3<sup>RD</sup> INTERESTED PARTY  
KALISUM KISAGA ..... 4<sup>TH</sup> INTERESTED PARTY  
MWANAINDI KISAGA ..... 5<sup>TH</sup> INTERESTED PARTY  
MWANAISHA KISAGA ..... 6<sup>TH</sup> INTERESTED PARTY  
RIZIKI KISAGA ..... 7<sup>TH</sup> INTERESTED PARTY  
PAMELA GACHERI PATRISIO ..... 8<sup>TH</sup> INTERESTED PARTY  
PATRICK MBAKA NJERU ..... 9<sup>TH</sup> INTERESTED PARTY**

**AND**

**ABDALA MUTEMBEI KISAGA ..... 1<sup>ST</sup> ADMINISTRATOR  
HAMADI MURITHI KISAGA ..... 2<sup>ND</sup> ADMINISTRATOR**

**RULING**

**Background:**

1. This matter relates to the estate of Mzee Omari, (deceased) who died intestate on 10/11/1990. The succession of the estate has been filed in various courts including the Kadhis Court at Nyeri. The succession matters filed in the Estate are as follows: -



1. Succession Cause No. 94 of 1992 High Court Embu.
  2. Embu High Court Succession Cause No. 47/2011
  3. Kadhis Court Nyeri Succession Cause No.04/2017.
  4. Chief Magistrate's Court Embu Succession Cause No. 212/2017.
2. From the record, the Succession Cause was first filed in Embu High Court as Succession Cause No.94/1992 where the Petitioner was Omari Kamunde Kisaga. This Succession Cause was merged with Succession Cause No.47/2011 which was filed at High Court Embu and Succession Cause No.47/2014. Vide a Ruling dated 30/9/2015 in Succession Cause No.47/2014, the matter was transferred to the Kadhi's Court. Before that there was a grant which was confirmed by the High Court Embu. The matter then landed at the Kadhi's court Nyeri which gave a Judgment dated 8/3/2018. It was the opinion of the learned Kadhi that the Kadhi's Court had no jurisdiction as all the beneficiaries did not profess the Muslim faith. The matter was therefore dismissed. A summons for revocation of grant was filed in the Chief Magistrate's Court at Nyeri who held that she had no jurisdiction to revoke the grant which had been issued by the High Court and for want of territorial jurisdiction.
1. The matter came to this court firstly in Misc. Succession Cause No.40/2018 vide a summons for revocation of grant dated 11/10/2018. The applicant in the summons was Abdalla Mutembei Gisaga. The summons was seeking an order for the revocation of grant issued to the petitioner Omari Kamunde Kisaga on 13/4/1994. The applicant was also seeking an order of inhibition on Land Parcels No.Karingani/Ndagani/763Karingani/Mariani/3995Karingani/Mariani/4335Karingani/Mariani/1639Karingani/Mariani/1647Karingani/Mariani/4779Karingani/Mariani/4336Karingani/Mariani/3132Karingani/Mariani/1624Chuka Municipal stalls No.53 & 54 and any other resultant subdivisions until the cause is heard and determined.

The summons for revocation of grant was allowed by an order of Justice Limo dated 11/10/2018. The Judge went ahead and appointed Mutembei Gisaga and Ahamed Muriithi as joint administrators. The two moved the court with a summons for confirmation of grant and the grant was confirmed.

On 15/10/2019. The certificate of the confirmation of grant was issued on 24/10/2019. The estate of the deceased was distributed as follows:-

**KARINGANI/NDAGANI/716**

- a. Mariam Karimi Kisaga 1 acre
- b. Omari Kamundi Kisaga 2 acres
- c. Hamadi Muriithi Kisaga 2 acres
- d. Ali Kirimi Kisaga 2 acres

**KARINGANI/NDAGANI/763**

- a. Abdalla Mutembei Gisaga 4.60 acres

**KARINGANI/MARIANI/1624**

- (a) Mariam Karimi Kisaga 0.35 Ha (1acre)

**KARINGANI/MARIANI/1639**

- (b) Mariam Karimi Kisaga 1 acre



**KARINGANI/MARIANI/1674**

(c) Mariam Karimi Kisaga 1 acre

**KARINGANI/MARIANI/3132**

(d) Omari Kamundi Kisaga 1.924 Ha (4 acres)

**KARINGANI/MARIANI/4335**

(e) Abdalla Mutembei Gisaga & 2.86Ha(6.69 Acres)

Shaban Murimi Mutembei

**KARINGANI/MARIANI/4336**

(f) Hamadi Muriithi Kisaga 1.56 Ha (4 acres)

**KARINGANI/MARIANI/4779**

(g) Ali Kiriimi Kisaga 2.90 Ha (7 Acres)

**KARINGANI/MARIANI/3995**

(h) Abdalla Mutembei Gisaga 1.98 Ha (4.10 acres)

**PLOT NO. 053 - Chuka Town**

(a) Miriam Karimi Kisaga

**PLOT NO. Karingani/Ndagani/759/11 - Ndagani Market**

(b) Abdalla Mutembei Gisaga

**PLOT NO. 054 - Chuka Town**

(c) Hamadi Muriithi Kisaga

**PLOT NO. 52 - Chuka Town**

(d) Omari Kamundi Kisaga

**PLOT NO. 57 - Chuka Town**

(e) Ali Kiriimi Kisaga

**PLOT NO. - (Gaturi/Matakari/T117) - Embu Town**

(f) Abdalla Mutembei Gisaga

**BANK SHARES AND DIVIDENDS**

KCB A/C NO.09xxxx

KCB A/C NO.00007xxxx

KCB A/C NO.M009xxxx To Abdalla Mutembei Gisaga

BARCLAYS BANK A/C NO. 002xxxx

2. Before this the court is the Summons for Revocation of Grant dated October 31, 2019 by the 1<sup>st</sup> to 8<sup>th</sup> interested parties herein. The main prayer is an for order the Revocation of the Certificate of Confirmation of Grant issued herein to Abdala Mutembei Gisaga and Hamadi Murithi Kisaga.



3. The said application is based on the following grounds:
  - a. That the 1<sup>st</sup> to 8<sup>th</sup> interested parties are beneficiaries to the estate of the deceased herein.
  - b. That the proceedings to obtain the Certificate of Confirmation of Grant by the Administrator were defective in substance.
  - c. That the grant was obtained fraudulently by the making of a false statement and concealment from the court of material information to the cause.
  - d. That the grant was obtained by means of untrue allegation of a fact essential in point of law to justify the grant.

The application is supported by the joint affidavit of the applicants shown on 1/11/2019.

The 1<sup>st</sup> administrator depones that summons for revocation of grant is riddled with falsehoods. That 8<sup>th</sup> interested party is not a wife of his late brother. It was the contention by the 1<sup>st</sup> administrator that the consent of the Interested Parties was sought and they signed the consent. That the properties which the applicant allege that do not belong to the estate were registered in the name of the deceased at the time of his death but were transferred pursuant to a grant issued in Succession Cause No.94/1992. It is also his contention that the mothers of the beneficiaries were to hold land in trust for the daughters. The 1<sup>st</sup> administrator further depones that the applicant who had been represented by counsel never challenged the mode of distribution and failed to file protests in 2019 when they were given an opportunity to do so and have not come to court with clean hands.

The 9<sup>th</sup> interested party swore an affidavit stating that he is claiming two acres out of Land Parcel No. Karingani/Ndagani/716. The matter proceeded by way of written submissions.

4. The Application is opposed by the replying affidavit sworn by the 1<sup>st</sup> Administrator on 20/11/2019.
5. It was submitted for the interested parties and the 2<sup>nd</sup> Administrator that the signatures of the 1<sup>st</sup> – 7<sup>th</sup> interested parties and that of the 2<sup>nd</sup> Administrator were forged. Further, that the consent of the 8<sup>th</sup> interested party was never obtained despite her being the wife and legal administrator of her deceased son, Swale Kisaga, who was the son of the deceased herein.
6. In addition, it is contended that despite the 1<sup>st</sup> administrator recognizing the daughters of the deceased as beneficiaries of the estate, none of them have been given a share in the distribution proposed by the administrator. That some of the properties distributed do not form part of the estate of the deceased and that the claim by the Respondent that he holds certain properties in trust of his shares and late brother has not been reflected in the certificate of confirmation of grant.
7. It is thus the applicants' contention that the process leading to the confirmation of grant was riddled with irregularities brought about by fraud and concealment of material information from the court. The applicants relied on the authorities of *Re Estate of Kiragara Bagiri (Deceased)* [2017] eKLR; *Re Estate of M'Imwitha M'Ithanga (deceased)* [2021] eKLR; *Re Estate of Joseph Kilonzo Musyoka (Deceased)* [2018] eKLR; *Re Estate of Julius Mwai Wabome (Deceased)* [2020] eKLR; and *Re Estate of Magangi Obuki (Deceased)* [2020] eKLR.
8. It is the submission by the 9<sup>th</sup> interested party that he has legitimate interest in the deceased's estate as a creditor of the estate. That he is entitled to a share of the estate that equates to two (2) acres, which interest lies on parcel no. L.R. No. Karingani/Ndagani/716. That he has been in actual possession and occupation of the said share of land and undertaken vast developments therein since 1997 but the



- mode of distribution proposed by the 1<sup>st</sup> administrator neither recognized him or provided for him. That for those reasons, he is not opposed to present application being allowed.
9. To buttress his position, the 9<sup>th</sup> interested party has relied on the provisions of section 76 and 93 of the *Law of Succession Act*; Rule 43 of the *Probate and Administration Rules*; articles 40 of the *Constitution*. He further cited the cases of *RE Diplock v Wintle* [1984] Ch 485 and the Uganda Court of Appeal case of *Katende v Haridar & Company Ltd* cited with approval in the Kenya High Court Case of *Lawrence Mukiri v Attorney General & 4 others* [2013] eKLR.
  10. The application is opposed by the 1<sup>st</sup> Administrator who submitted that the applicants motive is purely to drag this matter with frivolous applications one after another to ensure that the beneficiaries of the deceased's estate are denied the right of enjoying their rightful shares. He gave the chronology of this cause submitted that by the present application, the applicants are moving this court to make a review of its own judgment which is asking the court to sit as an appellate court. He thus urged this court to dismiss the present application.
  11. The law on revocation of a grant is provided for under section 76 of the Act and Rule 44 of the *Probate and Administration Rules*. Section 76 of the Act provides as follows:

“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 court of something material to the case.
    - c. that the grant was obtained by means of an untrue allegation of the fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.
    - d. ...
    - e. ...”
  12. For the court to order revocation of grant, a party must prove that:
    - a. Proceedings to obtain the grant were defective in substance;
    - b. The grant was obtained fraudulently by the making of a false statement or concealment from court of something material to the case;
    - c. That the grant was obtained by means of untrue allegations.
  13. The aforesaid Abdala Mutembei Gisaga and Hamadi Murithi Kisaga were appointed as joint administrators on June 6, 2019. Consequently, the said grant was confirmed and a Certificate of Confirmation of a Grant was issued on October 24, 2019.
  14. Although the present application dated October 31, 2019 is headed ‘Summons for Revocation of Grant,’ and is founded on section 76 of the *Law of Succession Act*, cap 160, Laws of Kenya, it does not seek revocation of the grant made herein on June 6, 2019. Instead, it seeks for the revocation of the Certificate issued on October 24, 2019 following the confirmation of the grant.



15. In the persuasive case of *In Re Estate of Joel Cheruiyot Ronoh* [2016] eKLR, Musyoka J. had the following to say in this regard:

“

“2. A certificate of confirmation of a grant is not a grant representation, but a certificate to the effect that the grant had been confirmed by the court. The discretion given to the court by the provisions in section 76 of the *Law of Succession Act* is for revocation of grants of representation, not certificates that confirm those grants. There is therefore no power in those provisions for the court to revoke a certificate of confirmation of grant. As can be seen from the outset, the said application stands on shaky ground.

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4. I am being invited to revoke a certificate of confirmation of grant. The certificate is not an order of the court. A certificate is not a judicial order. It is an extract from a court order made in the confirmation proceedings. The certificate is generated from the court order. It is important for the parties to differentiate between the character of a grant of representation and a certificate of confirmation of the grant. A grant is a court order; it is a judicial pronouncement to the effect that some person has been appointed as administrator and granted the power to act as such. The certificate of confirmation of grant on the other side merely certifies that orders have been made to confirm the grant. The certificate of confirmation of grant is not the order itself.”

16. In the above case, the court was of the view that no purpose will be served by revoking the certificate without touching the orders that gave rise to the certificate. That another certificate may be generated from the orders of the court issued by the court confirming the grant as those the revocation would leave those orders intact.
17. However, the applicants herein have invoked the provisions of Rule 73 of the *Probate and Administration Rules* which empowers this Court to invoke its inherent powers if such power is saved to meet the ends of justice or to prevent abuse of the process of court. The applicants are essentially inviting this Court to revoke confirmation orders that gave rise to the certificate of confirmation of grant issued on October 24, 2019.
18. I have considered the grounds raised by the applicants in the present application. The Administrators while identifying the rightful beneficiaries of the deceased's estate, failed to distribute any share of the estate to any of the daughters of the deceased. Furthermore, the interests of the 8<sup>th</sup> interested party who is the legal Representative of the estate of Swaleh Kisaga, a son of the deceased, were also not considered. It is now clear in law that the rights of every beneficiary should be considered irrespective of their gender.

It is also apparent that the 1<sup>st</sup> administrator distributed himself a property Karingani/Mariani/3995. The applicant has also demonstrated that some of the properties had already been distributed in a previous grant and did not belong to the deceased. Rule 73 of the *Probate & Administration Rules* gives this court discretion to make such orders as may be necessary to meet the ends of justice. This is buttressed by section 47 of the *Law of Succession Act* which provides:-



“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient: Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.”

I find that the certificate of the confirmation cannot be made to stand when it has failed to cater for some rightful beneficiaries of the deceased and other irregularities which I have pointed out in this Ruling.

For these reasons I find that the application has merits. I therefore order as follows:-

1. The certificate of the confirmation of grant issued on 24/10/2019 is revoked.
2. The administrators to move the court to have the grant confirmed. The issues raised in this ruling be factored in.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 25<sup>TH</sup> DAY OF MAY 2023.**

**L.W. GITARI**

**JUDGE**

