



REPUBLIC OF KENYA



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**In re Estate of the Late Ernest Songa Atila (Deceased) (Succession Cause
485 of 2010) [2023] KEHC 21481 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21481 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 485 OF 2010**

SC CHIRCHIR, J

JULY 28, 2023

**IN THE MATTER OF THE ESTATE OF THE LATE ERNEST SONGA
ATILA (DECEASED)**

BETWEEN

NANCY NJERI MWANGI 1ST PETITIONER

FATUMA JUMA ABDALLA 2ND PETITIONER

AND

SOFIA NDOMBI OBJECTOR

JUDGMENT

1. What comes up for determination are the summons dated 24th February 2021. It seeks for the following orders
 - a). Spent
 - b). That the certificate of confirmation of grant dated 13/11/2013 be revoked / reviewed.
 - c). That this Honourable court do allow the objector Sofia Ndombi to participate in the succession cause of the Estate of the deceased Ernest Songa Atila.
 - d). That the honourable court do and hereby orders that there will be no transfer, sub division, sale or leasing of the estate of the deceased more so land parcel number Butso/ Shikoti/ 4890 And Butso/ Bukura/1155 pending the hearing and determination of the succession cause herein.
 - e). That the 1st petitioner be ordered to produce a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the



ruling of the court on this issue and to render the account in such times as the court shall stipulate.

2. The hearing proceeded by way of Affidavit and viva voce Evidence

The Objector's case

3. The Application is supported by the Affidavit of the Applicant sworn on 1st march 2021 and another by the 2nd petitioner, Fatuma Juma Abdalla sworn on the same date.
4. The Applicant argues that the Grant needs to be revoked on grounds the following grounds:
 - a). There is a burial site set aside for the family within one of the Estate properties, and which burial grounds need to be alienated for that purpose.
 - b). That the 1st petitioner forcefully evicted the 2nd petitioner from her matrimonial home which she has rented out and is benefitting from the proceeds of the rent
 - c). That the other beneficiaries who are her step- brothers have begun the process of implementing the order in the certificate of confirmation of grant and/ or distribution of the Estate of the deceased.
5. During the hearing, the Applicant informed the court that she resides in her grandmother's house which is in parcel No. Butoso/ Bukura/1155 (parcel 1155) and wishes to retain it that way; that her mother the 2nd Administrator was chased away from her matrimonial home in parcel No. Butoso/ Shikoti/4890 (parcel 4890) by the 1st Administrator; that the 1st Administrator has been collecting rent from parcel No. 4890 since the year 2010 without accounting for it. She proposes that parcel No. 4890 be sold, her mother's portion of the rent be paid from the proceeds of the said sale, and the balance be shared between the beneficiaries.
6. On cross- examination, she admitted that the certificate of confirmation contains the names of all beneficiaries and the properties of the deceased; That she understands what the concept of life interest entails. She admitted that her mother was in Saudi Arabia when her father died; she also admitted that she was living the house that belonged to her grandmother and that she wants to keep the said house, the presence of the family graves notwithstanding. She further told the court that the reason why she is in court was because her mother was evicted from her house. She denied that the suggestion that the deceased sold the 1st Administrator's house in order to buy the 2nd Administrator a house. She also admitted that her mother has not done anything towards the maintenance of the house located in parcel No. 4890
7. In re-examination she told the court that she and her mother occupied her grandmother's house following the conclusion of the succession proceedings herein.

The 1st petitioner's case.

8. The Application is opposed by the 1st Administrator through her affidavit sworn on 9th April 2021
9. In response to the application, the respondent relied on her Replying affidavit and gave oral testimony. She told the court that she is the 1st Administrator and the first wife of the Deceased, and the 2nd Administrator is her co- wife.
10. That the mode of distribution that had been done by this court (Dulu J) on 28th November 2013 was fair and just, and should be maintained. That the interest of the Applicant, who was a minor during the succession proceedings was well represented by the 2nd Administrator and was given a share of the



estate like the rest of the beneficiaries. She further stated that parcel No. 1155 has not been distributed but each of her two sons have been shown where to put up a house; that the Applicant inherited a 3- bedroomed permanent house which she found furnished and well maintained, and that she has benefitted more as she need not incur any money to put up a house unlike the other two children. That the graves that the Applicant are complaining about are grandparents' graves; that the deceased herein was buried in the portion of the land that one of her sons occupy and the son is not complaining.

11. The respondent has further told the court that parcel No.1155 and the house was her husband's inheritance from his parents and she believes that the present Application has been filed at the instigation of deceased's siblings who would want take over the said house. She further states that when the deceased died, the 1st Administrator was in Saudi Arabia and when she came back she never showed any interest in parcel No. 4890. That she is unable to account for rent proceeds from 4890 as it has the occupation by tenants has been erratic and the rents are in arrears. That the said house is currently empty.
12. During the oral hearing, she told the court that the deceased used to live in 4890 before he left for Nairobi and after he left, the house help occupied the house; That she was not given any house by the deceased. That the Applicant was given her grandmother's house in parcel no. 1150, which she is currently occupying and therefore she is well taken care of .
13. On cross- examination, she told the court that there was no opportunity to grant access to the house in 4890 to the 1st Administrator as they have not been on talking terms.; that each of the beneficiaries has a house in parcel No. 1155 save the 2nd Administrator. That the house she used to occupy in milimani with her husband was sold during the life time of her husband. That the house in parcel No. 4890 is vacant as it has no tenant; that the last tenant was paying ksh. 10,000 per month.
14. On re-examination, she stated that if parcel no. 1155 is shared out, she will reside in her son's portion of the land. That she has been maintaining the house in 4890 and incurring costs as the 2nd Administrator has not shown any interest in maintaining the property.

Applicant's submission's

15. The Applicant/ objector submits that at the time of the applying of the grant, she was a minor aged 16 years and that she did not participate in the succession proceedings.
16. She stated that the certificate of confirmation of the grant needed to be revoked since part of the estate of the deceased was the burial site of the family and that it needed to be considered during the distribution. She averred that the 1st petitioner forcefully evicted the 2nd petitioner from her matrimonial home in parcel No. 4890 and she rented out the houses and is benefitting from the proceeds of the rent.
17. The applicant claims that the other beneficiaries who are her step brothers had started implementing the order of distribution made on 28th November 2013. She prayed that the 1st petitioner be ordered to produce a full and accurate inventory of the assets and liabilities of the deceased estate.

1st Petitioner's submissions

18. It is the Respondent's submission that the two widows had life interest in the estate of the deceased and that the two assets were to be distributed equally among the three children.
19. She further submits that the 1st and the 2nd Administrators conducted the succession together and distribution was later determined by the court.



20. She further submits that she has a life interest in the property and is not accountable to the children during her time on how she spends that money. She never the less that she has fairly accounted for the money.
21. It is also her contention that since the two windows have a life interest then the property cannot be sold without their consent.
22. It is the respondent final submission that the Applicant has not satisfied that there is any ground for revocation of the grant.

Issues for Determination

23. The following issues lend themselves for determination:
 - a. Whether the court should revoke the grant issued to the 1st and 2nd petitioner
 - b. Whether the 1st petitioner should submit accounts for the estate
24. Section 76 of the *Law of Succession Act* states that
 - 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 untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
25. It is the duty of the Applicant to demonstrate that any of the grounds set out under Section 76 do exist before the court can revoke a Grant .
26. The court in the case of Jamleck Maina Njoroge –vs- Mary Wanjiru Mwangi (2015) eKLR reiterated the provisions of section 76 of the *law of succession Act*. It stated as follows: -

“The circumstances that can lead to the revocation of grant have been set out in Section 76 Law of Succession. For a grant to be revoked either on the Application of an interested party or on the court’s own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.”
27. Also In the case of Jesse Karaya Gatimu Mary Wanjiku Githinji [2014] eKLR, the court was of the view that -

‘The grounds upon which a grant may be revoked or annulled are thus statutory and it is incumbent upon any party making an application for revocation or annulment of grant to demonstrate the existence of any, some or all of these grounds, whatever the case may be.’. See also Kennedy Opiche vs William Ogida& Ano (2014)e KLR



28. Having perused the succession proceedings and the ruling delivered on 28th November 2013, by Justice Dulu, I have not detected any defect in the form and procedure used in the confirmation of the grant. All the beneficiaries were disclosed in the petition as well as the certificate of confirmation of the grant. The three children of the deceased were given equal share of the Estate properties while the mothers were given life interest.
29. In the instant case, the application for revocation is based on the ground that the objector did not participate in the succession cause but according to proceedings leading to the issuance of the Grant the Applicant was at the time aged 16 years and was therefore minor. The 2nd petitioner who is her mother participated fully in the proceedings. The “participation” of a minor beneficiary in succession proceedings is that of the Administrators ensuring that minor has gotten her fair share of the Estate. This was done.
30. Any other participation, whatever she conceives it to be, could not have been tenable because of her then legal incapacitation. To ask the court to revoke the grant so that she can now “participate because she now has the legal capacity” has no basis in law.
31. In a nutshell, the Applicant has not laid any basis for the revocation of grant and this prayer is dismissed
32. The Applicant has also argued that parcel No. 4890 should be sold and the proceeds be shared between the parties. Now Justice Dulu in his ruling gave the Applicant and, her half- brothers equal shares of the Estate, but their mothers, were given life interest.
33. On life interest, Section 35 (1) of the *law of succession Act* provides as follows: “subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to-
- a). the personal and household effects of the deceased absolutely;
 - b). and a life interest in the whole residue of the net intestate estate:
- Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person”.
34. Life interest” is not defined in the *Law of succession Act* but Black’s Law Dictionary(10th edition) defines it as “an interest in real or personal property measured by the duration of the holders or another person’s life.
35. While expounding on this concept of life interest Musyoka J in the case of *Tau Katungi vs Margrethe Thorning Katungi & Ano*,(2014)e KLR had this to say:
- “In context of section 35 it is an interest held by the surviving spouse during their life time of the residue of the net estate. Its effect is that the surviving spouse first enjoys rights over the property and at his or her death the property passes to other persons”
36. The learned Judge in the above case then went on to explain the effect and rationale of section 35 as follows:
- “The effect of Section 35 (1) is that the children of the deceased are not entitled to access the net intestate estate so long as there is a surviving spouse. The children’s right to the property crystallizes upon the determination of the life interest following the death of the life interest holder or her remarriage. Prior to that, the widow would be entitled to exclusive right over the net estate. This means that if the net estate is generating income she would be the person entitled exclusively to the income so generated.



The device is designed to safeguard the position of the surviving spouse. The ultimate destination of the net intestate estate where there are surviving children is the children. It is the children who are entitled of right to the property of their deceased parent. However, if the property passes directly to the children, in cases where there is a surviving spouse, he or she is likely to be exposed to destitution. This would particularly be the case where the surviving spouse was wholly dependent on the departed spouse. She would be left without any means of sustenance. The other aspect is that life interest ties up with the concept of matrimonial property; the said property would in most cases be part of property acquired during marriage and with the contribution of the surviving spouse. Direct devolution of such property to the children would deny the surviving spouse of enjoyment of their own property”

37. In answer to the Applicant’s submission that the parcel No. 4890 should be sold and distributed, the court In the Estate of Jolly Jimmy Githieya (2013) e KLR addressed such request as follows:

“The provision is very clear (sec 35(1) of the *Law of succession Act*). The estate is not to be divided amongst the children while the surviving spouse is still alive. Distribution among the children should only happen upon her re-marriage or death. Neither of that has happened in this case and therefore the surviving spouse is entitled to continue enjoying life interest”

38. In short, the Estate does not lend itself for sale or distribution by the widows unless they willingly opt to share out the property (see section 37 of the Act). The Applicant’s prayer for sale of parcel 4890 and distribution of the proceeds goes against the aforesaid provisions of the *Law of succession Act* and it cannot be allowed.

39. The Applicant had further sought for a restraining order barring the respondent from transferring, selling or in any manner disposing of the two properties of the Estate. However, there was no evidence at all that the properties were at risk of being disposed of. It is as though the Applicant was making the allegation for the sake of it, as she never made any effort to prove that the property was at risk of being alienated. Court orders are issued purposefully, they are not issued in vain. This prayer is equally dismissed.

40. Finally, the Respondent may be liable to give an account of the assets and liabilities of the Estate but the Applicant has no legal capacity to demand for such accounting from a holder of a life interest, like the Respondent herein. This prayer is therefore equally dismissed.

In conclusion the entire Application has no merit. It is hereby dismissed.

This being a family claim, each party will meet their own costs.

DATED , SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 28TH DAY OF JULY 2023 .

S. CHIRCHIR

JUDGE.

In the presence of:

Ms. Mburu for the Respondent

No appearance by the Applicant.

