



**In re Estate of Japheth Kisaka Ayuya (Deceased) (Succession Cause
3 of 2022) [2023] KEHC 21211 (KLR) (25 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21211 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
SUCCESSION CAUSE 3 OF 2022
JN KAMAU, J
JULY 25, 2023**

BETWEEN

IN THE MATTER OF RECHAL IYALI LUDITIO PETITIONER

AND

NEWTON AYUYA OBJECTOR

AND

SOLOMON MUHANJI KIVISHA INTERESTED PARTY

RULING

Introduction

1. In his Summons for Revocation of Grant dated April 29, 2021 and filed on May 13, 2021, the Objector sought for orders that the Letters of Administration that was issued to the Petitioner herein on July 6, 2005 (sic) be nullified and a fresh Grant therein be issued to him.
2. He swore an Affidavit in support of the said Summons on April 29, 2021. His case was that he was the biological son of Elphase Bwonya (deceased) who died in 1990 and that his father was a son to Japheth Kisaka Ayuya (hereinafter referred to as “the deceased herein”). Together with his sister, Carolyne Iminza Bwonya, they were therefore grandchildren to the deceased herein who died on June 10, 1999.
3. He explained that the deceased also had three (3) other children, the Petitioner herein, Tiriza Kavusa Kisaka and another child who was now deceased. The Petitioner and the said Tiriza Kavusa Kisaka were married and stayed at their homes.
4. He asserted that the Petitioner did not disclose to court that the deceased had a son with children who ought to have benefited from the share of their late father in land Kakamega/Budaywa/259 (hereinafter referred to as the “subject property”) that was registered in the deceased’s name. They stated that their



- late father did not have any other land or home to reside in and they were thus likely to be rendered destitute.
5. He pointed out that the Petitioner's intentional non-disclosure of the aforesaid material facts rendered her unsuitable to administer the deceased's estate. He added that since the Grant that was issued by this court was obtained fraudulently, the same ought to be nullified
 6. The Petitioner did not file any response to the Objector's Summons for Revocation of Grant. He did not also file any Written Submissions herein.
 7. On his part, the Interested Party swore a Replying Affidavit on March 9, 2022 in opposition to the said Summons. The same was filed on March 10, 2022.
 8. His contention was that he was the registered owner of land parcels registration numbers North/Maragoli/Bugina/1371 and 1372 having bought them from the Petitioner and her sister vide sale of land agreements made on October 14, 2020. He asserted that that they informed him that they would buy an alternative parcel of land for one Wycliffe Mugalavai Asava and that they indeed purchased parcel of land North/Wanga/Khalaba/1607 vide an agreement made on January 16, 2021 from the proceeds of the sale.
 9. He pointed out that prior to the purchase, he conducted an official search on the said two (2) parcels of land and established that they arose from the subject property and that they were registered in the names of the beneficiaries after confirmation of the Grant on July 6, 2005.
 10. He was emphatic that having purchased the parcels of land that had been registered to the persons named in the Grant that was confirmed in 2005 through transmission, the court was now functus officio.
 11. He asserted that the subject property was no longer in existence upon being sub-divided in two (2) plots and that as the Petitioner and her sister obtained the title in the year 2020, it was unfair for the Objector to claim interest in the land more than fifteen (15) years after the Grant was confirmed yet he had all the time to demonstrate his interests.
 12. It was his contention that he was a bona fide purchaser for value having carried out due diligence before purchasing the said parcels and as such he should be allowed to enjoy the fruits of his labour.
 13. He was categorical that since the deceased's estate had since changed hands, this court had no jurisdiction to entertain this objection pursuant to Article 162 (2) (b) of *the Constitution* of Kenya, Section 2 of the *Land Registration Act* and Section 2 and 130 of the *Land Act*. He added that the said statutes conferred the jurisdiction of land registered by transmission or otherwise to the Environment and Land Court (ELC).
 14. He termed the Objector's Summons for Revocation of Grant as bad in law, lacking merit and urged this court to dismiss the same with costs.
 15. The Objector swore a Further Affidavit on September 16, 2022. The same was filed on September 21, 2022. He denied that the deceased disposed part of the subject property to one Wycliffe Mugalavai Asava and averred that having been neighbours, the Interested Party did not conduct due diligence as he had always known that he was the son of one Elphase Bwonya(deceased) who was a legal beneficiary of the deceased's estate.
 16. He pointed out that the Interested Party had demolished structures on the subject property. He was categorical that the Interested Party together with the Petitioner had fraudulently disinherited him and his sister and pointed out that the distribution of the estate did not render this court as functus officio as



the Grant could be revoked or annulled. He was emphatic that this court had jurisdiction to entertain the suit and that none of the cited provisions of law by the Interested Party were applicable in this case.

17. His Written Submissions were dated October 12, 2021 and filed on October 22, 2021 while those of the Interested Party were dated September 14, 2022 and filed on September 16, 2022. This Ruling herein is therefore based on the Objector's and Interested Party's Written Submissions only.

Legal Analysis

18. In his Written Submissions, the Objector reiterated the averments in his Supporting and Further Affidavits and asserted that the action by the Petitioner was actuated by malice and was aimed at disinheriting him and his sister despite being legally entitled to the share of their deceased's father.
19. On his part, the Interested Party also reiterated the contentions in his Replying Affidavit and submitted that the Objector's application was an afterthought and did not disclose any proof of fraud as alleged and/or as provided by law.
20. According to Section 76 of the [Law of Succession Act](#) Cap 160 (Laws of Kenya):-

“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.”

21. An order for revocation of the grant can thus only be given if the aforesaid grounds for revocation have been satisfied. A similar finding was arrived at [In the Matter of the Estate of L A K – \(Deceased\)](#) [2014] eKLR.

22. Notably, the Petitioner did not file any response to the Objector's Summons for Revocation of Grant herein. Save for the Interested Party's contention, the same was as good as unopposed.



23. It is trite law that a grandchild is a direct heir to the estate of the grandparent where the parent predeceased the grandparent. The grandchildren get into the shoes of their deceased parents and take the parent's share in the estate of the grandparents as was enunciated in the case of *Re Estate of Wabome Njoki Wakagoto* [2013] eKLR where it was held that the only time grandchildren inherited directly from their grandparents was when their own parents had died and they stepped into the shoes of their parents and took the share that ought to have gone to their parents.
24. A perusal of the Petition for Grant of Letters of Administration Intestate that was filed on May 24, 2002 showed that the Petitioner did not make any reference to Elphase Bwonya who was a son of the deceased and predeceased the deceased in 1990. Most importantly, considering that the said Elphase Bwonya died almost twelve (12) years before the said Petition for Grant of Letters of Administration Intestate herein was lodged, she did not name his children namely, the Objector herein and his sister in the P & A 5 Form.
25. Notably, she did not challenge the Birth Certificates produced by the Objector which indicated that he together with his sister, were the children of the late Elphase Bwonya. The Objector's evidence that he and his sister were the grandchild to the deceased herein thus remained un rebutted and/or uncontroverted.
26. The Chief's letter dated April 8, 2002 that she relied upon in obtaining the Grant of Letters of Administration Intestate herein that was issued on January 14, 2003 and subsequently confirmed on June 9, 2005, which resultantly disinherited the Objector herein, was immaterial as she failed to disclose that the Objector and his sister were indeed beneficiaries of the deceased's estate after the death of their father, the late Elphase Bwonya.
27. Whether the omission in the said Chief's letter was intentional or inadvertent was irrelevant as it failed to disclose material facts. Indeed, the court could not have issued a Certificate of Confirmation of Grant on June 6, 2005 in the absence of consents for confirmation of grant and consent as to the mode of distribution of the deceased's assets that were duly executed by the Objector herein and his sister as they would have been named as the beneficiaries of the deceased's estate in the said Chief's letter.
28. After carefully considering the Objector's affidavit evidence, which was uncontroverted and his Written Submissions, this court was persuaded to find and hold that there were false statements concerning the petitioning for the Grant of Letters of Administration Intestate herein and conclude the Grant of Letters of Administration Intestate that was issued on January 14, 2003 was obtained fraudulently by virtue of concealment of a material fact to the detriment of the Objector herein.
29. In addition, the proceedings of obtaining the said Grant of letters of administration were defective as stipulated in Section 76(a) of the Law of Succession for want of the Objector's and his sister's consent which was to be expressed in Form 38.
30. The Objector thus demonstrated that there was merit in revoking and/or annulling the Grant of Letters of Administration Intestate that was issued to the Petitioner herein in line with in Section 76(a), (b) and (c) of the *Law of Succession Act*.
31. The next question that arose was, what was the fate of the Interested Party's interest in the parcels of land that were sub-divided from the subject property which was transferred after the issuance of the Certificate of Confirmation of Grant?



32. The rights of a purchaser of a property belonging to a deceased person is protected by Section 93 of the [Law of Succession Act](#) Cap 160 (Laws of Kenya). The said Section 93 of the [Law of Succession Act](#) provides as follows:-
- “ All transfers of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.”
33. Having said so, two (2) decisions of the Court of Appeal deal with the interpretation and application of the aforesaid provision. [In Jane Gachoki Gatbecha vs Priscilla Nyawira Gitungu & Another](#) [2008] eKLR, the Court of Appeal took the view that a purchaser was not protected when the procedure used to acquire the grant was fraudulent. It held that there was a fallacy in invoking and applying the provisions of section 93(1) of the [Law of Succession Act](#) because the said Section was only applicable where there was interest. It found that a thief acquired no right or interest in stolen property and hence found that any such transaction would be void ab initio and the property was traceable.
34. In the case of [Musa Nyaribari Gekone & 2 others vs Peter Mijienda & Another](#) [2015] eKLR, the Court of Appeal upheld the learned Judge’s decision that Section 93 of the [Law of Succession Act](#) did not afford the 3rd appellant therein protection having found evidence of fraud with regard to the representation in the application for grant and subsequent confirmation.
35. While this court was not certain if the Interested Party that the Petitioner and her sister acquired title to the subject property fraudulently, the decisions of the Court of Appeal cited above were clear that his title was not protected by Section 93 of the [Law of Succession Act](#) as the Petitioner and her sister did not acquire good title to the subject property and could not therefore also pass good title to him.
36. The Interest Party’s arguments that this court lacked jurisdiction to hear and pronounce itself regarding the deceased’s subject property on the ground that this was a matter that was under the jurisdiction of the ELC pursuant to Article 162(2) of the [Constitution](#) of Kenya, 2010 which prohibits the High Court from hearing and determining matters relating to land and environment was neither here nor there and was rendered moot. This is because the High Court has inherent powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process under Rule 73 of the Probate and Administration Rules, 1990.
37. Notably, the said Rule 73 of the [Probate and Administration Rules](#) provides 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.”
38. So as to prevent the abuse of the court process and for the ends of justice, this court could therefore issue orders to safeguard the interests of the estate of the deceased and those of his or her beneficiaries. In this case, the interests of the deceased’s estate could be safeguarded by revoking and/or annulling the Grant of Letters of Administration Intestate and the Certificate of Confirmation of Grant that were issued on January 14, 2003 and July 6, 2005 respectively as they were obtained fraudulently and through concealment of material facts. The Objector’s interests would be best safeguarded by him being made as an administrator of the deceased’s estate.



Disposition

39. For the foregoing reasons, the upshot of this court's decision was that the Objector's Summons for Revocation of Grant dated April 29, 2021 and filed on May 13, 2021 was merited and the same be and is hereby allowed in terms of Prayer No (1) therein.
40. It is hereby directed that the Grant of Letters of Administration issued herein on January 14, 2003 and the Certificate of Confirmation of Grant that was issued on July 6, 2005 be and are hereby revoked forthwith and amended to reflect the change to the effect that the Objector herein has been enjoined as a co-administrator of the deceased's estate together with the Petitioner herein forthwith.
41. It is also hereby further directed that the titles to land parcels No North/ Maragoli/Bugina/1371 and 1372 be and are hereby cancelled and are declared null and void and shall revert to the original title of North/ Maragoli/Bugina/259 in the name of Japheth Kisaka Ayuya (deceased) for re-distribution to the deceased's beneficiaries.
42. The Petitioner and Objector herein be and are hereby directed to file a Summons for Confirmation of Grant, which shall include all the deceased's beneficiaries, by September 29, 2023.
43. In the event, they shall not have been able to file one (1) Summons for Confirmation of Grant, either of them will be at liberty to file a Summons for Confirmation of Grant by October 6, 2023.
44. In the event that the Petitioner and Objector shall fail to file a Summons for Confirmation of Grant by October 6, 2023, this court will be at liberty to initiate the process for revoking the Grant of Letters of Administration Intestate to be issued to them pursuant to this Ruling, on its own motion.
45. This matter will be mentioned on October 16, 2023 to confirm compliance and/or for further orders and/or directions.
46. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 25TH DAY OF JULY 2023.

J. KAMAU

JUDGE

