



**In re Estate of Andole Khamasi alias Andole S/O Khamasi (Deceased) (Succession Cause 223 of 1987) [2023] KEHC 22985 (KLR) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22985 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
SUCCESSION CAUSE 223 OF 1987  
SC CHIRCHIR, J  
SEPTEMBER 29, 2023**

**IN THE MATTER OF THE ESTATE OF THE LATE ANDOLE  
KHAMASI ALIAS ANDOLE S/O KHAMASI –( DECEASED)**

**BETWEEN**

**RUTH ANDOLE ..... PETITIONER**

**AND**

**WYCLIFFE MAKAMU ..... APPLICANT**

**AND**

**DOUGLAS SHISIALI ANDOLE ..... BENEFICIARY**

**RULING**

1. The summons dated August 31, 2022 seeks for the following prayers:
  - a). That Hamisi SRM succession cause No. 123/ 2020 be consolidated with the instant succession cause and to proceed as High court succession cause No. 223/1987 ( being this cause).
  - b). The Grant issued in succession case no. 223/1987 to the petitioner be revoked.
  - c). The Honorable court be pleased to appoint the Applicant and Respondent as joint administrators.
  - d). That's costs of this application be in the cause.
2. The summons have been brought by one Wycliffe Makamu ( The Applicant) who describes himself as the grandson of the Andole Khamasi alias Andole S/O khamasi ( The Deceased.) The Application is supported by the Affidavit of the Applicant.



### **The Applicant's case**

3. It is the applicant's case that at some time in January 2011 it came to his attention that all the property of the Estate have been registered in the Name of Ruth Andole, the petitioner; that upon this discovery, he carried out searches in respect of the Titles and found that Parcels Nos. kakamega/ cheptululu/438 and Kakamega/Serem 496, were in the names of the petitioner.
4. This prompted him to move the court by way of Kakamega HCC 53/2011 (OS), seeking for the cancellation of the said registration and reversion of the Titles of the said properties to the name of the Deceased. The court granted his prayers. The court further ordered for fresh succession to be undertaken in respect of the Deceased's Estate.
5. In compliance with the High court directions as aforesaid, the applicant then proceeded to file succession cause No. 123/2020 at the chief magistrate's court at Hamisi.
6. The Respondent herein responded by seeking for the dismissal of the Hamisi succession cause on grounds that this cause already exists. That is the time he came to know about this cause, prompting him present the current Application.
7. The respondent did not file any response to the application and having been satisfied that proper service was affected on the Respondent I will now proceed to determine the Application.

### **Background**

8. A brief background to this matter is necessary. On July 17, 1998, one Ruth Andole (now deceased) applied for letters of Administration in respect of the Estate of Andole Khamasi (deceased). A grant was issued in her favour and the same was confirmed on September 30, 1998. The above properties referred to by the Applicant as stated above, went to her wholly. The Applicant herein moved to the high court at Kakamega via civil suit No. 53 of 2011 (OS) seeking for the nullification of the registration of the properties in the name of the petitioner.
9. The court returned a verdict in favour of the Applicant herein and nullified the registration of the properties in the name of the petitioner, and ordered that the titles revert back to the deceased's name. Consequentially, the applicant filed Hamisi Chief Magistrate succession case no 123/2020 which cause was met with objection by the respondent herein as aforesaid. The objection was premised on the fact that the present cause do already exists.
10. It is upon this background that the present Application was filed.

### **Determination**

11. The following issues arise for determination:
  - a). Whether the Hamisi Chief Magistrate succession case No 123/202 should be consolidated with this cause
  - b). Whether the Grant of letters of Administration issued to Rose Andole should be revoked.
  - c). Whether the Applicant and Respondent herein should be appointed as co-administrators of the Estate herein.



## Consolidation

12. A reading of the record in Hamisi Chief Magistrate succession cause No. 123/2020, which record was availed to this court, show that the two cases relate to the Estate of the deceased herein. The proposed consolidation is also not challenged as the Respondent has not filed any response to the Application. Consolidation would prevent multiplicity of suits and is time -saving. The prayer for consolidation is warranted and the same is hereby allowed.

## whether the grant Issued to Rose Andole should be revoked.

13. Section 76 of the *Law Of Succession Act* (The Act) sets out the grounds upon which a grant may be revoked. It includes instances where 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 ( section 76 (b) of the Act )
14. The Applicant has informed the court that he was not made aware of, neither was he involved, in the filing of this cause notwithstanding the fact that he is a survivor of the deceased. Pursuant to the provision of section 39 of the Act the Applicant herein whose own father predeceased the Deceased is one of the survivors of the Estate. The applicant has further informed the court that the Ruth Andole , the then Appointed Administrator has since died , and the grant has become inoperative within the context of section 76(e)) of the *Law of Succession Act*.
15. I have seen the petition for Grant in this succession cause as well as the chief's letter issued on March 12, 2020. It is obvious that the Administrator had listed her own children and left out the children of her co-wife, and the Applicant herein in the list of beneficiaries. Failure to disclose heirs of the estate is non-disclosure of material fact to warrant revocation of Grant within the context of section 76 (b) of the *Act*. In the case of *Wabome Mwenje Ngonoro(Deceased)* (2016)e KLR it was held :

“It is trite Law that if a grant was obtained fraudulently by making of a false statement or by concealment from the court something material to the case ..... Such a Grant can be revoked or annulled.....The evidently deliberate failure by the Respondent to involve the Applicant at the time of filing these proceedings , failing to list them among the beneficiaries or seek their consent or renunciation ..... amounts to concealment of material facts.”

16. Further the applicant has annexed a burial permit showing that the Rose Andole has since died. Again, the death of an administration is a ground for revocation or annulment under section 76(e) in this regard. Again, it is trite law that the death of an Administrator is one of the circumstances that would make the Grant to be said to become useless and inoperative. ( see *Anrea Ruithibu R. Kanyiri vs Teresia Njoka Mbugu* (2016) e KLR
17. Am satisfied that the Applicant has placed sufficient material before this court to justify the annulment of the Grant herein.

## who should be appointed as Administrator(s) of the Deceased Estate?

18. The applicant described himself as the grandson of the deceased. He has deponed that his own father predeceased the Deceased herein. He has also submitted a letter from the Chief of Shamakhokho location as well as a consent signed by some, but not all the beneficiaries. The applicant has further told the court that the respondent is his paternal uncle/son of the deceased. The chief's letter also lists the respondent as one of the sons of the deceased. These facts have not been refuted by the Respondent as



he failed to file a response to the Application. I find support in the case of *Peter Nyakundi – vs Principal secretary state department of planning, ministry of Devolution & planning & Ano* (2016) eKLR, where Justice Odera held:

“The Respondents have failed to refute specifically the allegations in the petitioner’s sworn Affidavits in support. Failure to file a Reply Affidavit can only mean that those facts are admitted”

19. The entire Application is merited and consequentially make the following orders:

- a). This succession cause is hereby consolidated with Hamisi Chief Magistrate’s court succession cause no 123/2020 and the case file in this high court succession case shall be the lead file for purposes of filing of further pleadings and recording of proceedings.
- b). That the Grant of letters of Administration herein issued on February 4, 1998 to Ruth Andole and amended on April 26, 1989 is hereby revoked and the certificate of confirmation of grant issued on October 12, 1988 and rectified on December 8, 2009 is hereby set aside.
- c). Wycliffe Makamu and Douglas Shisiali Andole are hereby appointed as co-administrators of the estate of Andole Khamasi alias Andole S/O Khamasi (deceased) and a fresh grant to issue forthwith.
- d). The Administrators to file summons for confirmation of grant within 30 days from the date of this ruling.
- e). Each party to meet their own costs.

**DATED, SIGNED AND DELIVERED IN AN OPEN COURT AT KAKAMEGA, THIS 29<sup>TH</sup> DAY OF SEPTEMBER 2023.**

**S.CHIRCHIR**

**JUDGE**

In the Presence of :

E.Zalo- Court Assistant.

No appearance by the parties

