



In re Estate of Stephen Omullo Kisalla alias Omulo Kisala (Deceased) (Succession Cause 750 of 2014) [2023] KEHC 22860 (KLR) (28 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22860 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION CAUSE 750 OF 2014
RE ABURILI, J
SEPTEMBER 28, 2023
IN THE MATTER OF APPLICATION FOR REVOCATION OF GRANT
LETTERS OF ADMINISTRATION**

BETWEEN

ANNE ACHIENG KISALA OBJECTOR

AND

MICHAEL OUMA OMULLO PETITIONER

JUDGMENT

1. This Judgment determines the summons for revocation of or annulment of certificate of grant of letters of administration issued on 28th October 2014 and confirmed on 25th May 2017 to Michael Ouma Omullo.
2. The Applicant/Objector is Anne Achieng Kisala whereas the Respondent/Administrator/Petitioner is Michael Ouma Omullo.
3. The applicant also seeks for a temporary injunction to issue restraining the Respondent from selling and or disposing off the parcel of land known as LR Kisumu/Nyalenda 'B'/606 until the summons are heard and determined. She also prayed for costs.
4. The summons are predicated on the grounds on the face of the summons and supported by an affidavit sworn by the Applicant Anne Achieng Kisala on 24th March 2022.
5. The gist of the summons for revocation of grant and certificate of confirmation is that the applicant is the second wife and widow to the deceased Stephen Omullo Kisalla alias Omullo Kisalla who died intestate on 16th August 1989 at Kisumu and that unknown to her, the Respondent nominated himself and applied for a grant of letters of administration and obtained such grant which was confirmed distributing the sole property of the estate namely Kisumu/Nyalenda 'B'/606.



6. The Applicant has listed the persons whom her deceased husband left behind among them is herself, her children, the Respondent and her co-wife Everlyne Okoth. She alleges in her grounds and affidavit in support that the Respondent nominated himself fraudulently, concealed from the court some material facts to the case which prompted the Land Registrar to write to the Deputy Registrar of the High Court on the same vide letter of 6th June 2017. It was deposed that the Respondent had subdivided the land and disposed it off to strangers leaving the applicant with no place to live.
7. Further, that the Respondent never distributed the land equally and that he left out the applicant and her daughter homeless.
8. The applicant laments that the proceedings to obtain the certificate of confirmation of grant were defective in substance for failure by the Respondent to notify the applicant and obtain her consent before filing for succession cause and processing of the consent of distribution. That the Respondent also concealed the fact that the applicant and her daughter were entitled to the estate of the deceased and that as the Respondent is already disposing off the property of the estate, the Applicant and her daughter shall be rendered homeless. She annexed copies of the certified copy of the Register, Chief's letter, death certificate No. 261205205 and the letter of the District Land Registrar dated 6th June 2017.
9. Opposing the summons for revocation or annulment of grant and certificate of confirmation of grant, the Petitioner/administrator Michael Ouma Omullo filed a detailed replying affidavit sworn on 24th June 2022. In the said affidavit, the Petitioner claims that he and his mother Everlyne Atieno Okoth were assisted by the Land Registrar a Mr. Joshua now retired, to file this Succession Cause he acknowledges.
10. That his late father Stephen Omullo Kisala died intestate and was survived by two (2) wives and four (4) children as per the annexed chief's letter. That before filing the petition, he tried to reach the Applicant herein and her children to help him finance the process of succession and to participate in the process but he could not trace them as they had vanished after burying the deceased.
11. That even after gazettelement of the succession cause, the Respondent and his mother tried to locate the applicant and her children for 2¹/₂ years to no avail until 2nd May 2017 when he filed for confirmation of the grant and that in his supporting affidavit, he did swear that he had been unable to trace his step family hence the distribution of the property in equal shares as per the certificate of confirmation of grant dated 25th May 2017.
12. That when he presented the certificate of confirmed grant to the Land's Registry for partition of the property of the estate the Land Registrar wrote to court seeking to confirm the authenticity of the said certificate of confirmed grant and upon the court confirming the same, the said land was subdivided and he sold 0.10Ha to Geoffrey Otieno Okoth who in turn sold it to Benard Alfred Aguko who has developed the same.
13. That ½ of the original land is reserved for the applicant and her children which measures 0.48Ha while 0.04 was taken by an access road.
14. That the only portion sold by the Respondent is Kisumu/Nyalenda 'B'/3183 measuring 0.1 Ha which portion belonged to him and his biological mother, and not the applicant's family.
15. The Respondent further deposed by way of a preliminary objection to the summons for revocation of grant that similar issues had been raised by the applicant's biological son Moses Otieno Kisala through summons for revocation of the same grant dated 15th September 2020 which summons were dismissed on 14th March 2022 as shown by the annexed copy of the Ruling.



16. Further, that the said Ruling cured the perceived mischief by apportioning the original parcel of land between the two houses hence the portion belonging to the applicant and her children is still intact. That he is holding the said portion in trust for the applicant and her children and is ready to transfer the same to them.
17. That the applicant herein was actively involved in the previous summons for revocation of grant filed by his son which was dismissed hence she had the opportunity to raise her issues in those closed proceedings.
18. Finally, the Respondent deposed that he spent over Kshs.200,000/= on the succession process and lost his employment as a driver during Corona period and that if the summons are allowed, it will serve no purpose as the same process will be repeated which is a waste of resources. He urged this court to dismiss the applicant's summons for revocation of grant dated 24th March 2022.
19. The Applicant swore a further affidavit on 28th November 2022 deposing that to the best of her knowledge, succession of her late husband's estate had been done and completed much earlier vide Nairobi HC Succession Cause No. 1929 of 1999, Public Trustee Administration Cause No. 105 of 1992 as shown by the annexed documents.
20. That in fact, the Respondent had lied to this court when petitioning by stating that title deed to the estate property Kisumu/Nyalenda 'B'/606 was lost when the same was available and deposited with the Trustees.
21. He therefore asserted that the certificate of death used by the Respondent in petition for grant of letters of administration of the estate of the deceased was obtained through fraud as the original certificate of death shows that the deceased died on 26th February 1991 and the original death certificate issued to her on 10th April 1991.
22. That the purported Chief's letter was obtained through fraud as the original letter was issued by the office of the District Commissioner to the Trustees, bearing the names of the beneficiaries and the same was used for obtaining letters of administration much earlier before the petitioner connived with his mother to manufacture documents for the said parcel of land.
23. That the Petitioner and his mother were never known to the Applicant until later and that they manufactured documents for purposes of succession yet succession had already been conducted.

Submissions

24. The summons for revocation of grant were canvassed by way of written submissions. The Applicant filed her submission on 14th March 2022 while the Respondent filed his submissions on 4th May 2022.
25. The Applicant's counsel reiterated her grounds and depositions contained in her affidavit in support and the further affidavit which I have reproduced in the judgment herein above.
26. In her counsel's legal analysis, reliance was placed on Section 76 of the *Law of Succession Act* on revocation of grant and several decisions where the Section has been interpreted among others:- In Re estate of late Epharus Nyambura Nuati [2021] eKLR. Counsel reproduced the deposition by his client as his submissions.
27. Further reliance was placed in Re estate of Moses Wachira Kimotho Succession Cause No. 122 of 2002 [2009] eKLR on the importance of disclosing all material facts before a court of law while seeking letters of administration and confirmation. The position was also restated in Morris Mwiti Mburungu vs Denis Kimathi M'mbungu [2016] eKLR and Re estate of the late Epharus Nyambura (supra).



28. Counsel for the Applicant invoked Article 159 of *the Constitution* urging this court to invoke its inherent powers and revoke the grant as issued and confirmed in favour of the Respondent.
29. On the part of the Respondent, Petitioner, it was submitted that the applicant had not come to court with clean hands, that her summons for revocation of the confirmed grant are full of untruths and contradictions which were highlighted as emanating from her affidavit in support and further affidavit. Examples of such alleged untruths and contradictions were cited as – denial in her further affidavit that she knew the Petitioner and his mother yet in her supporting affidavit she deposed that was the second wife, a fact which was supported by the chief's letter that the deceased was survived by two wives and children who were listed; and her own deposition that the Respondent and his mother survived the deceased.
30. Secondly, that whereas the Applicant deposed in her supporting affidavit that her husband died on 16th August 1989 and even annexed copy of death certificate which was also used by the Respondent herein to petition for the impugned grant, she changes the tune and deposes in her further affidavit that the deceased died on 26th February 1991 and goes ahead to produce copy of a totally different death certificate which was used by her to lodge a petition before Public Trustee, Nairobi, to apply for succession of the deceased's estate.
31. The Respondent's counsel submitted in contention that the summons for revocation of grant were made in bad faith and with ill intentions to disinherit the 1st house.
32. The Respondent's counsel further submitted that the summons for revocation of the confirmed grant are res judicata the previous summons for revocation of grant filed by the Applicant's son Moses Otieno Kisala, which summons dated 15th September 2020 raised the same issues as those raised by the applicant herein and which issues were determined conclusively vide a Ruling delivered on 14th March 2022 by F. A. Ochieng J, after which the Applicant herein filed her similar summons seeking the same orders.
33. Reliance was placed on Section 7 of the *Civil Procedure Act* and the decision in John Florence Maritime Services Ltd & Another vs Cabinet Secretary, Transport & Infrastructure & 3 Others Petition No. 17 of 2015 (2021) KESC KLR on the rationale behind the doctrine of res judicata which is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. The Supreme Court further stated that res judicata ensures the economic use of court's limited resources and timely termination of cases.
34. On the question of revocation of the confirmed grant, counsel for the Respondent submitted that as was stated by F. A. Ochieng J, in the Ruling of 14th March 2022, the portion of land sold to Geoffrey Okoth and Benard Alfred Aguko could not be undone and that as the Applicant has not raised any issue with the said Benard who is an interested party who was not enjoined to these proceedings, then the applicant is in no way prejudiced by the sale. Further, that to revoke the grant without hearing the Interested Party will be condemning the latter unheard.
35. Further submission was that the power to revoke the grant is discretionary, which must be exercised judiciously and only on sound and proved grounds as was held in Albert Imbuga Kisigwa vs Recho Karai Kisigwa (2016) eKLR.
36. On allegations of fraud in obtaining the confirmed grant, it was submitted, defining what fraud is that there were no particulars of fraud or forgeries proved as was held in Vijay Morjana Namsingh Madhusingh Darbar & Another (2000) eLKR; that fraudulent conduct must be distinctly alleged and distinctly proved and that it is not allowable to leave fraud to be inferred from the facts.



37. Regarding the letter dated 6th June 2017 by the Land Registrar to the Deputy Registrar of this court, it was submitted that it was misinterpreted by the applicant as the same was written pursuant to resolution of the Court Users Committee that certificates of confirmation of grant must be verified by the court for authenticity before the Land Registrar can act on the same.
38. On the allegation by the Applicant in her further affidavit that the Respondent fraudulently obtained the deceased death certificate, it was submitted that it was the same applicant who swore a supporting affidavit annexing the death certificate which shows that the deceased was her husband and that he died on 16th August 1989 hence she is not honest.
39. Further, that the allegation that the chief's letter was obtained through fraud was not without substance as the names of beneficiaries contained therein are the same as given by the applicant in her supporting affidavit.
40. Further reliance on proof of fraud was placed on Central Bank of Kenya Ltd vs Trust Bank Ltd & 4 Others (1996) eKLR.
41. On whether the impugned confirmed grant was obtained by concealment of facts, it was submitted that this was an untrue statement as the chief's letter lists all herself and her four children as the beneficiaries of the estate and that her daughter is included. Further, that the certificate of confirmation confirms the deceased's estate property as equally divided between the two houses, the applicant being the 2nd house and that the share for second house is held by the Respondent in trust for them and he is ready and willing to transfer the same to the second house as soon as they are ready.
42. Reliance was placed on the decision of F. A. Ochieng J of 14th March 2022 who found that the Respondent had made provision for all the beneficiaries of the second house by giving them half of the estate property on the allegations that the Respondent never disclosed that there was an earlier succession.
43. It was submitted that the Respondent is a stranger to the allegations of any succession and that if there was any other succession, then it was done fraudulently and in secrecy. That no copy of confirmed grant or gazette Notice and a search on Kenya Law website has not elicited any succession cause. Further that the documents filed in the further affidavit show that it is the applicant who is intent to disinheriting the Respondent and his mother as they were not parties to the alleged succession cause in Nairobi and neither were they notified of the process.
44. On the whole, it was submitted that the applicant had not discharged the burden of proof as contemplated in Section 107 of the Evident Act, on all allegations hence her summons for revocation of grant should be dismissed with costs to the Respondent.

Determination

45. I have carefully considered the summons for revocation of grant as confirmed, the grounds, deposition for and against as well as the written submissions and authorities relied on.
46. None of the parties hereto have disclosed to this court that one of the beneficiaries of the estate of the late Stephen Omulo Kisala is deceased, as per the funeral announcement in the internet on clicking onto the deceased's name, which details Fredrick Omondi Kisala to be the son of the late Stephen Omulo Kisala and Anne Achieng Kisala.
47. The other undisputed fact is that the applicant's son filed a similar application for revocation of grant which application was dismissed by the court of concurrent jurisdiction determining that despite the sale of part of the property by the Respondent, the Respondent had considered the interests of the



- 2nd house by sharing out to them ½ of the property and that the sold portion would form part of the share for the 1st house.
48. That order was so substantive that it touched on the distribution of the estate of the deceased and as no application for review of the said order or appeal has been lodged to the Court of Appeal, for this court to overturn that decision would be tantamount to sitting on appeal in a judgment of a court of concurrent competent jurisdiction.
49. For that reason, I find that this court has no jurisdiction to deal with issues which were substantially in issue and determined fully in the Ruling of 14th March 2022.
50. The other aspect of this matter that I must highlight is that whereas the Applicant laments that the Respondent acted fraudulently and failed to disclose to this court material facts of the existence of the 2nd house and all the children, it is indeed disturbing to note that that is not the case. The Respondent right from the commencement of these proceedings obtained a chief's letter introducing to court the family of the deceased who was polygamous. Both wives are listed in the said letter and so does the P&A 5 and which ORIGINAL LETTER is now halfway torn but a clearer copy was filed in court. In addition, albeit the applicant laments that the Respondent failed to inform her household of the succession process, it is now clear that she is the person who first filed for succession secretly without involving the 1st house. She did so in Nairobi while the land is situate in Kisumu. There is no reason why she did not involve the 1st house. Further, she did not deny the deposition oath by the respondent that she left the home after burying her deceased husband and that she could not be traced.
51. It is now clear that the applicant went under cover to petition for a grant in Nairobi high Court and in that Petition, she excluded the respondent herein and the entire first house. Thus, unlike the respondent who included her in the present Petition and even registered the land in his names in trust for the household of the applicant, had the applicant succeeded in obtaining a certificate of confirmation of grant from the Nairobi high Court, she would have benefitted with her children to the exclusion of the 1st house. She has not told this court why she never included the 1st house in her succession proceedings yet she deposes that she is the 2nd wife to the deceased.
52. The applicant has not come to this court with clean hands. Despite the submission that the Respondent acted fraudulently, in essence no particulars of fraud were pleaded or disclosed. Furthermore, it is the Applicant herein who has a totally different death certificate for the deceased which she used to apply to the Public Trustee to administer the estate of the deceased. She used the District Commissioner's letter to list the beneficiaries of the deceased. It is not clear why she did not get a letter from the chief since chiefs are closer to family members at the grass roots than District Commissioner.
53. The Applicant's son objected to these proceedings but never disclosed to the Respondent and his mother or even to this court that his mother had filed for succession of the same estate through the Public Trustee and that she has a grant which was confirmed. The applicant Ofcourse, from her own affidavit, she never listed the Respondent and his mother as beneficiaries for the estate of the deceased and had she progressed to the level of distributing the estate, it would be another different dispute all together.
54. Summatively, there is no dispute that the Respondent is the deceased's son and only child from the 1st house of Everlyne Adhiambo while the applicant is the 2nd wife meaning the deceased was undoubtedly polygamous.



55. This is clear from the chief's letter as well as the applicant's own supporting affidavit which she swore despite her purported turnaround in her further affidavit to claim that she did not know the 1st house and were only introduced to her as beneficiaries.
56. The other undisputed fact is that the 1st house family lived in Kisumu whereas the 2nd house family resided in Nairobi and from my own research on the internet, the 2nd widow's son, one Fredrick Omondi Kisala who was born in 1978 died in 2017 and was buried at Langata Cementry on 2nd June 2017. His wife Phoeby Adhiambo had died earlier and was survived by children as named in the funeral announcement.
57. The Respondent in the petition herein disclosed the beneficiaries of the estate who include the applicant and her children. He is also holding the titles following subdivision of the land, in trust for the 2nd house. As earlier stated, in the absence of an application for review or appeal against the ruling of 14th March 2022, this court cannot overturn the decision of the court on distribution.
58. The applicant has indeed approached this court with tainted hands as she was the first to undertake succession immediately following the deceased's demise but failed to disclose to the Respondent and his mother and she did not even list them as beneficiaries. She cannot therefore throw stones at the Respondent who filed for succession and listed the second house as beneficiaries. He then went ahead and completed the transmission process and even made provision for the 2nd house as was found by F. A. Ochieng J.
59. In my view, the applicant's application is an afterthought. I say so because when her son Moses applied for annulment of the grant, and he knew that he was a beneficiary in the Nairobi Succession Cause, he never disclosed to this court that there were succession proceedings which were concluded in Nairobi.
60. Had the disclosure been made, the learned Judge would have given appropriate directions in the Ruling which he rendered and which was never appealed against.
61. In my humble view, it will not save the interest of justice to reopen the Succession Cause herein as the applicant has not demonstrated which prejudice she will suffer or has suffered by the near completed succession process where herself and her children have their share of the estate held in trust by the Respondent and if they were dissatisfied with the mode of distribution, they would have said so in the application subject of the Ruling of 14th March 2022.
62. In addition, there is no evidence adduced to support the deposition by the applicant that the Respondent was disinheriting the applicant and her household or selling off the land. To the contrary, the Respondent deposes that he is ready and willing to transfer the subdivided land which he is holding in their trust to them to share as they may so wish. The issue of sold portion was also settled by Ochieng J as that formed part of the 1st house share.
63. Finally, as there is no evidence that the succession cause in Nairobi was used to distribute the estate of the deceased which was still intact as at the time this cause was filed, grant issued and confirmed, I find that the Nairobi Succession Cause which was intended to disinherit the Respondent and his mother should be brought to this court for appropriate directions as to closure.
64. In the end, I find no merit in the summons for revocation/annulment of grant as confirmed. The Summons dated 24th March 2022 is hereby dismissed. As the parties contesting are family members, I order that each party bear their own costs of these proceedings.
65. This file closed as the process of transfer of the land held in trust for the Applicant and her children does not require the participation of this court. Save for compliance with section 83 of the [law of](#)



Succession Act as to the filing of true and accurate accounts on the administration of the estate by the administrator within six months of today.

66. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 28TH DAY OF SEPTEMBER, 2023

R. E. ABURILI

JUDGE

