



REPUBLIC OF KENYA



**In re Estate of Levi Khamisi Trisuma (Deceased) (Succession Cause
49 of 2021) [2023] KEHC 22954 (KLR) (26 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22954 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
SUCCESSION CAUSE 49 OF 2021
JN KAMAU, J
SEPTEMBER 26, 2023**

BETWEEN

**DORRIS AYUMA KHAMISI 1ST PETITIONER
ANDREW TSIRUMA LUBANDA 2ND PETITIONER
JOSHUA ALUSIOLA 3RD PETITIONER**

AND

**CAROLINE LIONO KHAMISI 1ST OBJECTOR
EUNICE JETEYA KHAMISI 2ND OBJECTOR
JOHN AVUGWI KHAMISI 3RD OBJECTOR
EDWARD INGAVO KHAMISI 4TH OBJECTOR**

RULING

Introduction

1. In their Summons for Revocation of Grant dated 19th September 2022 and filed on 20th September 2022, the Objectors herein sought for orders that the Letters of Administration that was issued to the Petitioners herein be revoked and/or nullified and/or cancelled and a fresh Grant be issued to them.
2. The 1st Objector swore an Affidavit in support of the said Summons on her own behalf and on behalf of the 2nd, 3rd and 4th Objectors on 29th April 2021. The Objectors asserted that the Petitioners herein were issued with letters of administration in the deceased's estate on 16th October 2012, which letters were confirmed on 14th October 2013.
3. They averred that Levi Khamisi Tsiruma (hereinafter referred to as "the deceased") was their biological father and hence they were his dependants by virtue of Section 29 of the *Law of Succession Act* while the



- 1st Petitioner herein was their biological mother. They stated that the 1st Petitioner was elderly, illiterate and was not of sound memory and was misdirected by the 2nd and 3rd Petitioners herein.
4. They were emphatic that the 2nd and 3rd Petitioners were not the deceased's dependants and were therefore strangers to his estate. They pointed out that they became aware of the succession proceedings when their mother died.
 5. They added that there was concealment and/or material non-disclosure as other properties belonging to the deceased to wit Kakamega/Bulukhoba/423, Kakamega/ Bulukhoba/915 and Kakamega/Bulukhoba/822 (hereinafter referred to as "the subject properties"). It was their averment that this showed that the Petitioners secretly and hurriedly applied for the said grant so as to disinherit them.
 6. In response to the said Summons for Revocation of Grant, on 9th March 2023, the 2nd Petitioner herein swore a replying Affidavit on his own behalf and on behalf of the 3rd Petitioner herein. The same was filed on 10th March 2023.
 7. The 2nd and 3rd Petitioners who were brothers denied having been strangers or imposters to the deceased's estate on the ground that they were beneficiaries to his estate having purchased Kakamega/Bulukhoba/865 from him. They stated that the deceased called them, the 1st Petitioner and his children and gave them specific instructions concerning the said parcel Kakamega/Bulukhoba/865 that had been illegally occupied by Isikhi Primary School.
 8. They pointed out that Kakamega/Bulukhoba/865 had been partitioned and shared as follows:-
 - a. Kakamega/Bulukhoba/1660- 3rd Petitioner
 - b. Kakamega/Bulukhoba/1661- 2nd Petitioner
 - c. Kakamega/Bulukhoba/1662- 1st Petitioner
 9. They contended that when the 1st Petitioner was cited by Isikhi Primary School through its Chairman in Vihiga Succession Cause No 48 of 2012 to take out letters of administration, she approached them to jointly apply for the letters of administration. They explained that the subject properties were yet to be distributed to the deceased's dependants.
 10. They were categorical that the Objectors were aware of the existence of the succession proceedings because they had been arrested and prosecuted in a criminal case for the offence of forgery.
 11. They had no objection to the Objectors herein being allowed to participate in the proceedings herein and the subject properties being included as part of the deceased's estate. They asserted that the allegation of fraud could not stand as the subject properties were the deceased's estate and had been fraudulently transferred to them or any other party (sic).
 12. In her Supplementary Affidavit that she swore on 23rd March 2023 and filed on 24th March 2023 on her own behalf and on behalf of the 2nd, 3rd and 4th Objectors herein, the 1st Objector denied that the 1st Petitioner approached the 2nd and 3rd Objectors to jointly apply for the letters of administration as she was illiterate.
 13. They asserted that the 2nd and 3rd Petitioners' allegations that the deceased gave them specific instructions were an afterthought and pointed out that they ought to have filed a Will confirming those instructions. They were emphatic that the deceased did not make an oral will.
 14. They averred that the 2nd and 3rd Petitioners applied for the Letters of Administration so as to claim compensation from Isikhi Primary School as the said school never compensated the deceased. They



questioned why they transferred Kakamega/Bulukhoba/865 into their names nineteen (19) years after they purportedly purchased the said property and after the deceased had passed away. They expressed surprise how they could have purchased a property that had already been illegally occupied by a public school.

15. It was their contention that assuming the 2nd and 3rd Petitioners were purchasers of Kakamega/Bulukhoba/865, they could still not have been beneficiaries of the deceased's estate. They added that they filed and obtain Citation to proceed as petitioners herein. They thus asked this court to allow their said Summons for Revocation of Grant so that they could get their rightful share of the deceased's estate and administer his properties that were left out.
16. The Objectors' Written Submissions were dated 23rd March 2023 and filed on 24th March 2023 while those of the Petitioners were dated 13th April 2023 and filed on 14th April 2023. This Ruling herein is based on the said Written Submissions that both parties relied upon in their entirety.

Legal Analysis

17. The Objectors urged the court to adopt the thinking of the court in *In the matter of the Estate of Kabiga Mwachhi (deceased)* [2021] eKLR without disclosing what this thinking was. Suffice it to state that in the said case, the court found the omission of listing all the deceased's properties therein to have been evidence of non-disclosure and breach of legal duty as an administrator of the deceased's estate therein.
18. They also relied on Section 51(2)(h) and Section 51(2)(g) of the *Law of Succession Act* Cap 160 (Laws of Kenya) that provide that a full inventory of all the assets and liabilities of the deceased and surviving spouse, children, parents, brothers and sisters of the deceased respectively should be listed in an application for a grant. It was their submission that by failing to include them, the Petitioners misled the court to think that the deceased did not have any children.
19. On their part, the Petitioners admitted that the Objectors herein were not included but asserted that the same was due to an oversight that was occasioned by the Citation that only involved one (1) parcel of land, namely Kakamega/Bulukhoba/865. It was their submission that the allegation of fraud or concealment could not therefore stand.
20. Section 51(1) of the *Law of Succession Act* states as follows:-

“Every application for a grant of representation shall be made in such form as may be prescribed, signed by the applicant and witnessed in the prescribed manner.”
21. Section 51(2) (g) and (h) of the *Law of Succession* stipulates that:-
 - “g. in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;
 - h. a full inventory of all the assets and liabilities of the deceased.”
22. A perusal of the Petition of the Letters of Administration Intestate that was filed on 30th April 2012 showed the Petitioners as having survived the deceased herein. That was incorrect as only the 1st Petitioner survived him. The court did not see the Chief's Letter in the file to ascertain whether or not the Objectors herein had been listed therein. Notably, the Petition for Letters of Administration did not contain their names contrary to the provisions of Section 51(2)(g) of the *Law of Succession*



- Act. Going further, the Petitioner had also listed one property namely Kakamega/Bulukhoba/865 and omitted Kakamega/Bulukhoba/423, Kakamega/ Bulukhoba/915 and Kakamega/Bulukhoba/822.
23. The omission to list the Objectors and all the deceased's properties was not an oversight. It was intentional to benefit the 2nd and 3rd Objectors herein. Had it been disclosed that there were other properties and beneficiaries of the deceased, it was very unlikely that Chitembwe J could have issued the Grant of Letters of Administration Intestate on 16th October 2012 as the Petition for the Grant of Letters of Administration would not have complied with the provisions of Section 51(2)(g) and (h) of the Law of Succession Act.
24. Further, as the Objectors were not involved in the proceedings herein, the Petition for the Grant of Letters of Administration also fell afoul Rule 26 (1) and (2) of the Probate and Administration Rules which stipulates that:-
1. Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.
 2. An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.
25. It was therefore also highly unlikely that Dulu J could have confirmed the said Grant of Letters of Administration on 14th October 2013 as the Summons for Confirmation of Grant would not have complied with the provisions of Rule 26(1) and (2) of the Probate and Administration Rules.
26. The law is clear that before the grant is confirmed, a consent in Form 37 has to be executed by all the beneficiaries to the deceased's estate. Rule 40 (8) of the Probate and Administration Rules provides that:-
- “Where no affidavit of protest has been filed the summons and affidavit shall without delay be placed by the registrar before the court by which the grant was issued which may, on receipt of the consent in writing in Form 37 of all dependants or other persons who may be beneficially entitled, allow the application without the attendance of any person; but where an affidavit of protest has been filed or any of the persons beneficially entitled has not consented in writing the court shall order that the matter be set down as soon as may be for directions in chambers on notice in Form 74 to the applicant, the protester and to such other persons as the court thinks fit.”
27. It was evident that the Objectors herein never executed Forms 37 and 38 as required by the law. This omission rendered the entire probate proceedings defective. It was also clear to this court that the failure to disclose the deceased's assets and beneficiaries also rendered the entire succession proceedings a nullity. It was irrespective that the 1st Petitioner and/or the 2nd and 3rd Petitioners were not aware of this essential fact.
28. 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.”

29. 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.
30. This court was thus satisfied that the Objectors had demonstrated that the proceedings herein to obtain the Grant of Letters of Administration were defective in substance, 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 and 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 as set out in Section 76 (a), (b) and (c) of the [*Law of Successions Act*](#).
31. On the question of who could apply for letters of administration intestate, the Petitioners further argued that the eligibility of the administration of a deceased’s estate did not place the burden solely on the deceased’s immediate family members but that any other person could carry out the administrative responsibilities as long as the same was done as was the case herein.
32. This could not have been further from the truth. A stranger could not apply for letters of administration intestate of a deceased’s estate when the deceased’s beneficiaries were alive and had not denounced their right to take out the said letters.
33. Indeed, Section 39(1) and (2) of the [*Law of Succession Act*](#) further states that:-
1. Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority-
 - a. father; or if dead
 - b. mother; or if dead
 - c. brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none



- d. half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none
 - e. the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.
2. Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1), the net intestate estate shall devolve upon the State, and be paid into the Consolidated Fund.
34. As it was clear from Rule 26(1) and (2) of the [Probate and Administration Rules](#) that letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant unless that person renounced their right, the 2nd and 3rd Petitioners could not purport to administer the deceased's estate as they were strangers. The fact that they were purchasers of the deceased's property did not entitle them to be administrators of the deceased's estate irrespective of how well they thought they had run his estate and had not interfered with his estate.
35. As their acquisition of Kakamega/Bulukhoba/865 was shrouded in mystery, there having been no Agreement for Sale that was presented as evidence herein, this court was enjoined to do justice to the deceased's estate and his beneficiaries.
36. Notably, 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. 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 16th October 2012 and 14th October 2013 respectively as they were obtained fraudulently, through concealment of material facts and the proceedings were defective *ab initio*.
39. The Objectors' interests would be best safeguarded by them being made administrators of the deceased's estate and cancellation of the title to Kakamega/Bulukhoba/1660, Kakamega/Bulukhoba/1661 and Kakamega/Bulukhoba/1662 that were distributed to the 3rd, 2nd and 1st Petitioners herein respectively.

Disposition

40. For the foregoing reasons, the upshot of this court's decision was that the Objectors' Summons for Revocation of Grant dated 19th September 2022 and filed on 20th September 2022 was merited and the same be and is hereby allowed in terms of Prayer No (1) therein with their costs to be borne by the 2nd and 3rd Petitioners herein.
41. It is hereby directed that the Grant of Letters of Administration issued herein on 16th October 2013 and the Certificate of Confirmation of Grant that was issued on 14th October 2013 respectively be and are



hereby revoked forthwith and amended to reflect the change to the effect that the 2nd and 3rd Petitioners be and are hereby removed from being administrators of the deceased's estate and replaced by the Objectors herein who shall henceforth be co-administrators of the deceased's estate and be known as administrators of his estate.

42. It is also hereby further directed that the titles to land parcels Kakamega/Bulukhoba/1660, Kakamega/Bulukhoba/1661 and Kakamega/Bulukhoba/1662 be and are hereby cancelled and are declared null and void and shall revert to the original title of Kakamega/Bulukhoba/865 in the name of Levi Khamisi Tsriuma (deceased) for re-distribution to the deceased's beneficiaries.
43. The Objectors herein be and are hereby directed to file a Summons for Confirmation of Grant, which shall include all the deceased's beneficiaries, by 30th October 2023.
44. This matter will be mentioned on 13th November 2023 to confirm compliance and/or for further orders and/or directions.
45. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 26TH DAY OF SEPTEMBER 2023.

J. KAMAU

JUDGE

