



**In re Estate of Zephania Asiachi Elisha (Deceased) (Succession Cause 7 of 2021) [2023] KEHC 25852 (KLR) (27 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 25852 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
SUCCESSION CAUSE 7 OF 2021**

**JN KAMAU, J**

**NOVEMBER 27, 2023**

**IN THE MATTER OF THE ESTATE OF ZEPHANIA ASIACHI ELISHA  
(DECEASED)**

**BETWEEN**

**PUBLIC TRUSTEE ..... 1<sup>ST</sup> PETITIONER**

**MARTHA ATUWO ASIACHI ..... 2<sup>ND</sup> PETITIONER**

**AND**

**JOSEPH ASIACHI BWABI ..... OBJECTOR**

**RULING**

1. In his Summons for Revocation of Grant dated 5<sup>th</sup> September 2018 and filed on 3<sup>rd</sup> October 2018, the Objector herein had sought for orders that the Letters of Administration that was issued to the 1<sup>st</sup> Petitioner herein on behalf of the 2<sup>nd</sup> Petitioner herein on 18<sup>th</sup> May 2007 and confirmed on 27<sup>th</sup> July 2012 be revoked and/or annulled. He also sought orders that the subsequent activities on LR no W/Bunyore/Emusire/1200 (hereinafter referred to as “the subject property”) be declared null and void all subsequent subdivision, transfer and registration relating to the said land be cancelled and/or annulled and that a fresh Grant be re-issued in his name and that of the 2<sup>nd</sup> Petitioner herein. He also sought prayed that the subject property be re-distributed to all the rightful and lawful heirs of the deceased herein.
2. He swore an Affidavit in support of the said Summons on 5<sup>th</sup> September 2018. He averred that he was the son to the deceased and that the deceased’s estate was to have been sub-divided between him and his mother, the 2<sup>nd</sup> Petitioner herein. It was his contention that as a survivor to the deceased, he was entitled to a share of the deceased’s property as provided by the law.



3. He asserted that the 2<sup>nd</sup> Petitioner transferred and registered property in her name and that they (sic) only became aware of this Cause herein when the 2<sup>nd</sup> Petitioner herein was selling the subject property. He averred that the subject property ought to be distributed to all the beneficiaries.
4. He also pointed out that there was no Chief's Letter showing all the beneficiaries to the deceased's estate. It was his contention that the 2<sup>nd</sup> Petitioner concealed material facts to the deceased's beneficiaries and that the 1<sup>st</sup> Petitioner filed the Succession Cause herein without the consent or knowledge of family members as a result of which was unfit to be an administrator of the deceased's estate.
5. In opposition to the said application, on 25<sup>th</sup> September 2023, James Kipruto Kenduiwo swore a Replying Affidavit on behalf of the 1<sup>st</sup> Petitioner herein. The same was filed on 27<sup>th</sup> September 2023.
6. The 1<sup>st</sup> Petitioner pointed out that the deceased had only one (1) widow, the 2<sup>nd</sup> Petitioner herein and no children as per the letter dated 9<sup>th</sup> September 2004 from Vihiga District Commissioner. It asserted that she was therefore the only beneficiary to the deceased's estate and denied having disinherited the Objector herein.
7. It termed the Objector's allegations as malicious. It annexed the necessary consent for its administration of the deceased's estate. It was its contention that it had administered the deceased's estate faithfully and as per the law by disclosing to this Honourable Court all the relevant material facts.
8. Both parties did not file their respective Written Submissions. The Ruling herein is therefore based on the Affidavit evidence that they both relied upon in their entirety.

### **Legal analysis**

9. Right at the outset, this court wished to state that there was a Mention notice for 2<sup>nd</sup> October 2023 that was sent to M/S Anziya & Co Advocates by way of registered mail. When the court called out the matter at 11.04 am, the said advocates were not online or physically in court. This court could have adjourned the matter as the postal address that was indicated in the EMS Shipment Waybill no 10912745 was P.O. Box 1232 Kakamega instead of 1288- 50100 that had been indicated in the Mention notice. However, the Objector informed this court that his advocate had confirmed that he would join the virtual proceedings. This was clear that his advocate was aware that the matter was coming up in court. As the present application had been pending in court for over five (5) years reserved, this court reserved its Ruling herein.
10. After retiring to write its decision, this court noted that there was need to have more clarity in this matter as regards the subject property. The Public Trustee's interest appeared to have been limited to the money it and Barclays Bank of Kenya had held.
11. The Objector's assertion that he was a step son to the deceased with a claim in the subject property was a matter of fact which ought to be proven. This could only be achieved by way of oral evidence being adduced in court. Indeed, a perusal of the proceedings showed that on 17<sup>th</sup> May 2021, Musyoka J directed that the Objector's present application would proceed by way of *viva voce* evidence based on the affidavits that had been filed.
12. 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.



13. 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.”

14. So as to prevent the abuse of the court process and for the ends of justice, this court found that there was need to give the Objector an opportunity to adduce his oral evidence and for it to order a *status quo* in respect of the subject property pending the hearing and determination of the Objector’s present Summons for Revocation and/or Annulment of Grant.

### **Disposition**

15. For the foregoing reasons, the upshot of this court’s decision was that the Objector’s Summons for Revocation and/or Annulment of Grant that was dated 5<sup>th</sup> September 2018 and filed on 22<sup>nd</sup> September 2018 will be heard by way of *viva voce* evidence as was first directed by Musyoka J on 17<sup>th</sup> May 2021.

16. This matter will be mentioned on 4<sup>th</sup> March 2024 with a view to fixing a hearing date of the said Objector’s Summons for Revocation and/or Annulment of Grant dated 5<sup>th</sup> September 2018 and filed on 22<sup>nd</sup> September 2018 and/or for further orders and/or directions.

17. In the meantime, the subject property shall not be sub-divided and/or transferred and/or further sub-divided and transferred to any third party from the date of this Ruling pending the hearing and determination of the Objector’s Summons for Revocation and/or Annulment of Grant dated 5<sup>th</sup> September 2018 and filed on 22<sup>nd</sup> September 2018.

18. For the avoidance of doubt, any entries that will be made in the Register at the Lands Office, Vihiga pursuant to transactions that will be done from the date of this Ruling will be null and void *ab initio*.

19. It is so ordered.

**DATED AND DELIVERED AT VIHIGA THIS 27<sup>TH</sup> DAY OF NOVEMBER 2023**

**J. KAMAU**

**JUDGE**

