



In re Estate of Mariko Obonyo Otaa (Deceased) (Succession Cause 1243 of 2015) [2023] KEHC 25862 (KLR) (22 November 2023) (Judgment)

Neutral citation: [2023] KEHC 25862 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION CAUSE 1243 OF 2015
RE ABURILI, J
NOVEMBER 22, 2023
IN THE MATTER OF THE ESTATE OF MARIKO OBONYO OTAA
(DECEASED)
AND
IN THE MATTER OF AN APPLICATION FOR REVOCATION OR
ANNULMENT OF GRANT ISSUED TO CHARLES OTIENO OWIYO**

BETWEEN

AYUB ONYANGO OLOO APPLICANT

AND

CHARLES OTIENO OWIYO RESPONDENT

JUDGMENT

1. Before me for determination is a summons for the revocation/annulment of grant issued on the 19.5.2016 and confirmed on the 11.12.2017 brought vide an application dated 7th June 2022 by Ayub Onyango Oloo and filed on the even date against Charles Otiemo Owiyo the petitioner.
2. The application was anchored on the grounds therein as well as affidavit of Ayub Onyango Oloo sworn on the 7th June 2022.
3. It is the applicant's case that the aforementioned grant was obtained fraudulently by the making of false statement or by the concealment from the court of something material to the cause specifically that the petitioner concealed the fact that the deceased had numerous grandchildren including the applicant who were all dependent on him.
4. The applicant deposed that he was the legitimate grandson of the deceased and the right person to apply for Letters of Administration to the deceased's estate and that the petitioner took advantage of



his illness to succeed the applicant's grandfather without informing him. The applicant averred that the petitioner was the son to his sister and that the deceased died leaving the applicant's father as the only child living on the suit property.

5. It was the applicant's case that the petitioner has refused to come to court despite service and further has not even filed a response to the instant application.
6. There was no response to the Summons.
7. Revocation of grant is governed by section 76 of the *Law of Succession Act*. The grounds upon which the grant may be revoked are set out therein. The said section provides that revocation can either be at the instance of an applicant or can be by the court suo moto. However, it is a prerequisite that the conditions for revocation as set out under section 76 must be proved. In the case of *Jamleck Maina Njoroge v Mary Wanjiru Mwangi* (2015) eKLR the court discussed circumstances when a grant can be revoked. The court observed that:

“ 11. The circumstances that can lead to the revocation of grant have been set out in Section 76 Law of Succession. For a grant to be revoked either on the Application of an interested party or on the court's own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.”

8. The power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the court to invoke section 76 and order for revocation or annulment of a grant. And when a court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased's estate and ensure that the action taken will be for the interest of justice. Generally, the trial court has jurisdiction to revoke a grant if the conditions under section 76 are satisfied.
9. For avoidance of doubt, Section 76 of the *Law of Succession Act* provides as follows:

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“76. Revocation or annulment of grant

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.”

10. *In re Estate of Prisca Ong'ayo Nande (Deceased)* [2020] eKLR the court interpreted section 76 of the *Law of Succession Act* in the following terms:

“Under section 76, a court may revoke a grant so long as the grounds listed above are disclosed, either on its own motion or on the application of a party. A grant of letters of administration may be revoked on three general grounds. The first is where the process of obtaining the grant was attended by problems. The first would be where the process was defective, either because some mandatory procedural step was omitted, or the persons applying for representation was not competent or suitable for appointment, or the deceased died testate having made a valid will and then a grant or letters of administration intestate was made instead of a grant of probate, or vice versa. It could also be that the process was marred by fraud and misrepresentation or concealment of matter, such as where some survivors are not disclosed or the Applicant lies that he is a survivor when he is not, among other reasons. The second general ground is where the grant was obtained procedurally, but the administrator, thereafter, got into problems with the exercise of administration, such as where he fails to apply for confirmation of grant within the time allowed, or he fails to proceed diligently with administration, or fails to render accounts as and when required. The third general ground is where the grant has become useless and inoperative following subsequent circumstances, such as where a sole administrator dies leaving behind no administrator to carry on the exercise, or where the sole administrator loses the soundness of his mind for whatever reason or even becomes physically infirm to an extent of being unable to carry out his duties as administrator, or the sole administrator is adjudged bankrupt and, therefore, becomes unqualified to hold any office of trust.”

11. The applicant invited the court to revoke the grant of letters of administration for the reasons that the grant issued to the petitioner was obtained by fraud and concealment of material facts and further as the applicant had not consented to the petitioner making the application for grant.
12. The applicant asserted that the petitioner was not a son to the deceased despite allegations by the petitioner in the pleadings for petition of letters of administration but rather that the petitioner was a great grandchild. These averments by the applicant remained uncontroverted.
13. The other grounds for revocation of the grant was that the applicant was not involved in the succession proceedings. The law under Rule 26(a) and (2) of the *Probate and Administration Rules* provides as follows: -

“26.



- (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.”

14. From the reading of the above rule, it is mandatory for every applicant who wishes to be an administrator to an estate to give notice to every person entitled in the same degree as or in priority to the applicant. Further, such person of equal or lower priority must give consent or renunciation during filing of succession cause.

15. *In re Estate of Magangi Obuki (Deceased)* [2020] eKLR the court quoted the case of *Re Estate of Moses Wachira Kimotho (Deceased)* Succession Cause 122 of 2002 [2009] eKLR, the court pronounced itself on the importance of disclosing all material facts before a court of Law while seeking letters of administration and confirmation thereof and observed that:

“I am certain that had the applicants been made aware of the application for the confirmation of grant by being served they would have brought to the fore their aforesaid interest in the estate of the deceased and the resultant grant would have taken care of those interests. Further had the respondent been forthright and candid and included the applicants as beneficiaries of a portion of the estate of the deceased as purchasers for value, the court in confirming the grant would have taken into account their interest in the estate of the deceased. As it is therefore the grant was obtained fraudulently by making of a false statement and or concealment from court of something material to the cause. The respondent knew of the applicants’ interest in the estate of the deceased yet she chose to ignore them completely in her petition of letters of administration intestate. She also ignored them completely when she applied for the confirmation of the grant.”

16. I echo my brother Gikonyo J in *Re Estate of Julius Ndubi Javan* (2018) eKLR (Deceased) where he stated quite authoritatively that:

“...in any judicial proceedings, parties must make full disclosures to the court of all material facts to the case including succession cases.

...non-disclosure of material facts undermines justices and introduces festering waters into pure streams of justice; such must, immediately be subjected to serious reverse osmosis to purify the streams of justice, if society is to be accordingly regulated by law.”

17. I am satisfied that, there is ample evidence that the applicant did not give his consent for the petitioner to initiate the petition for grant proceedings. This reason is sufficient to hold that the applicant has demonstrated within the purview of Section 76 that the grant was obtained by concealment of material facts and misrepresentation.

18. The upshot of the above is that the grant issued on the 19.5.2016 and confirmed on the 11.12.2017 is hereby revoked and annulled. Parties to petition for a fresh grant and ensure that ll those who are



beneficially entitled to the estate of the late Mariko Obonyo Otaa are consulted and are involved in the process.

19. I make no orders as to costs.

20. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 22ND DAY OF NOVEMBER, 2023

R.E. ABURILI

JUDGE

