



**In re Estate of Boaz Amunabi Asala (Deceased) (Succession Cause
51 of 2021) [2023] KEHC 26759 (KLR) (19 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26759 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
SUCCESSION CAUSE 51 OF 2021
JN KAMAU, J
DECEMBER 19, 2023**

BETWEEN

LIVINGSTONE ASALA AMULWANI 1ST PETITIONER

SERAH VIJEDI ANYANGA 2ND PETITIONER

AND

JARED AMUNABI AMULWANA OBJECTOR

RULING

Introduction

1. In his Summons for Revocation of Grant dated 27th June 2022 and filed on 29th June 2022, the Objector herein sought orders that the Letters of Administration that was issued to the Petitioners herein on 30th September 2009 and confirmed on 12th October 2020 be revoked.
2. He also sought that upon the said Grant being revoked, this honourable court direct the Land registrar to rectify the register by cancelling any title, subdivision, registration and/or dealing on L.R. No East Bunyore/Ebusamia/1813, L.R. No East Bunyore/Ebusamia/1885 and L.R. No East Bunyore/Ebusamia/2112 (hereinafter referred to as “the subject properties”) and that the same revert to the name of the deceased for distribution.
3. He further sought orders that the matter proceed by way of viva voce evidence.
4. He asserted that he was never involved in the process of obtaining the Grant of Letters of Administration and that he only came to learn of the that the Cause was filed secretly in 2004. He asserted that the said Grant was issued despite some beneficiaries not having signed the consent. He was emphatic that his sister, Edith Eteya, was not aware of the existence of the Cause and that the signature that was affixed on the Consent was not hers. He added that the Petitioners deliberately misrepresented to this court that his name was Jareb Amunabi Asala instead of Jared Amunabi Mulwana



5. He averred that the Certificate of Confirmation of Grant had included a stranger by the name of Josiah Asitwa Okumu who was given a share of the deceased's assets.
6. He pointed out that Musyoka J revoked the Certificate of Grant on 24th July 2020 and directed that fresh Summons for Confirmation of Grant be filed. It was his assertion that the titles were never cancelled.
7. He contended that the process herein was marred by misrepresentations, omissions or concealment of several facts rendering the proceedings defective and thus urged this court to revoke the Certificate of Grant that was issued to the Petitioners herein.
8. In response to the said application, the Petitioners herein swore a joint Replying Affidavit on 20th March 2023. The same was filed on even date.
9. They were emphatic that L.R. No East Bunyore/Ebusamia/1813 did not belong to the deceased. They further asserted that Josiah Asitwa Okumu was not a stranger but was their step brother. They stated that the Objector could do a DNA test as his own cost to disprove this fact.
10. They stated that they did not have a problem in the Objector who was their elder brother filing a fresh certificate of confirmation of grant and follow the deceased's footsteps on the mode of distribution as they had set out in their said Replying Affidavit.
11. They did not also have an objection to the Objector extracting the order of Musyoka J and serving it upon the Land Registrar for cancellation of the titles of the subject properties.
12. They also filed a second Replying Affidavit dated 5th April 2023 on 5th April 2023 reiterating the same issues.
13. In his Supplementary Affidavit that he swore on 4th September 2023 and filed on 12th September 2023, the Objector was emphatic that Josiah Asitwa Okumu was a stranger and not his step brother. He added that he was yet to be furnished with proof that Josiah Asitwa Opumbi and Respah Emiteche purchased land from the deceased in 1979. He pointed out that the Petitioners had conceded that they were unable to administer the deceased's estate.
14. The Objectors' Written Submissions were dated 5th September 2023 and filed on 12th September 2023 while those of the Petitioners were dated 16th October 2023 and filed on 19th October 2023. This Ruling herein is based on the said Written Submissions that both parties relied upon in their entirety.

Legal Analysis

15. The Objector relied on Section 76 of the *Law of Succession Act* that sets out the grounds under which a grant may be revoked. He also placed reliance on Rule 40 of the Probate & Administration Rules to argue that all beneficiaries to a deceased's estate had to sign a consent in Form 37.
16. It was his submission that persons who were beneficiaries to the deceased's estate did not execute the consent while strangers executed the same.
17. He pointed out that at one point, the said Josiah Asitwa Okumu was said to have been his step brother while at another point, he was said to have been a creditor. He referred this court to the case of *In Re Estate of Philip Iswekha Amulabu (deceased) [2020] eKLR* where it was held that a creditor needed to prove his debt unless the same was admitted by a deceased's family. He also questioned if Josiah Asitwa Okumu was one and the same person was Josiah Asitwa Opumbi.



18. He asserted that had he been aware of the proceedings, he would have objected to the same. In this regard, he placed reliance on the case of *In Re: Estate of Evans Ngugi Wanjau (deceased)* 2020 eKLR where the court was satisfied that the petitioners concealed the filing of the proceedings from the applicant therein and revoked the grant therein because he did not sign the consent.
19. It was his submission that once the grant was revoked, all dealings/distribution were rendered null and void and that they same ought to be cancelled. He averred that in the Affidavit of 30th September 2023, Josiah Asitwa Okumu, Respha Isedi Emiteche and Avitone Mwahindu Amunabi had confirmed that the titles were still in their names. He relied on the case of *Macloy vs United Africa Co Ltd* [1961] 3 All ER 1169 where it was held that once an act was void, then in law, it was a nullity.
20. It was also his submission that under Rule 40(8) of the Probate & Administration Rules, where a protest had been filed, the matter had to be set down for hearing.
21. On their part, the Petitioners submitted that the Objector's Summons for Revocation of Grant had not reached the threshold for revocation of grant under Section 76 of the *Law of Succession Act* as the Grant was not obtained fraudulently as they proceeded with his blessings. They were emphatic that the inclusion of Josiah Asitwa Okumu and Respah Isedi Emiteche was after consideration of the evidence that they adduced.
22. In this regard, they relied on the case of *In the matter of the Estate of L.A.K. (deceased)* [2014] eKLR, *In Re Estate of Juma Shitseswa Linani (deceased)* [2021] eKLR amongst several other cases which set out the circumstances under which a grant could be revoked.
23. They further submitted that they filed a fresh Summons for Confirmation of Grant as was directed by Musyoka J and complied with the provisions of the law. They pointed out that there was need to expeditiously conclude this matter that was filed in 2004.
24. They urged this court to award them costs in line with the principle that costs follow the event as was held in the case of *Hussein Janmohamed & Sons vs Twentsche Overseas Trading Co Ltd* (1967) EA 287, 179.
25. Right at the outset, this court found that the Petitioners' Replying Affidavit that was sworn on 5th April 2023 and filed on 6th April 2023 was not procedural as they had already filed a Replying Affidavit in response to the present Summons for Revocation of Grant on 20th March 2023. There was also no indication from the court file that they had been granted leave to file a second Replying Affidavit.
26. It was also not clear to which application the Replying Affidavit that was filed on 6th April 2023 was in response to. Indeed, there were several applications that were pending hearing and determination.
27. This court did not therefore consider the said Replying Affidavit to regularise the procedure of filing pleadings and for the sake of good order. Notably, this court found and held that declining to consider the same while determining the present Summons for Revocation of Grant did not prejudice them as it contained similar averments as those that were contained in the joint Replying Affidavit that they swore and filed on 20th March 2023.
28. A perusal of the proceedings showed that on 20th July 2010, Kimaru J (as he then was) issued a Certificate of Confirmation of Grant. In an application that was filed at the instance of Edith Ateya on behalf of the deceased's daughter, on 24th July 2020, Musyoka J revoked the said Certificate of Confirmation of Grant. He directed that the Petitioners file a fresh Summons for Confirmation of Grant listing all the children of the deceased irrespective of their sex and added that any beneficiaries who were unhappy with the proposed distribution were at liberty to file an affidavit(s) of protest.



29. The Petitioner filed a Summons for Confirmation of Grant dated 13th August 2020. The same was not stamped to show when the same was filed. Be that as it may, Musyoka J allowed the same and issued a Certificate of Confirmation of Grant on 12th October 2020. It was this Certificate of Confirmation that instigated several applications amongst them the present Summons for Revocation of Grant.
30. The Objector, Samson Anyonyi Amunabi and Samson Anyonyi Amunabi did not execute the Consent (Form 37) that was attached to the said Summons for Confirmation.
31. A perusal of the proceedings showed that after delivery of his Ruling on 24th July 2020, Musyoka J directed that the matter be mentioned on 5th October 2020. On the said date, Serah Vijedi Anyanga, Eva Khasaya Wafula and Beverlyne Buyanzi Amunabi attended court and confirmed that they were agreeable with the mode of proposed distribution of the deceased's assets.
32. The 1st Petitioner informed the court that he had already informed the deceased's sons and that the Objector and Samson Anyonyi already had their titles. He added that Mauel Amulwani Amunabi was unwell and that he took care of him. Nothing was said of Tafrosa Iminza and Edith Eteya.
33. This court did not see any Affidavit of Service that was filed to demonstrate that all the deceased's beneficiaries were aware of the said Mention date of 5th October 2020. Indeed, on 24th July 2020, only Serah Vijedi Anyanga and the 1st Petitioner were present when Musyoka J delivered his Ruling.
34. There was also no indication that the Objector herein and the other beneficiaries were aware that if any of them were not happy with the proposed mode of distribution, they could file an affidavit(s) of protest for consideration. This is because there was no evidence that the Petitioners extracted the order from the said Ruling of 24th July 2020 and served it upon the beneficiaries of the deceased's estate for the noting and action, if any.
35. 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.”
36. It was evident that the Objector herein and Samson Anyonyi never executed Form 37 as was required by the law. In lieu of the consent, the beneficiaries who were objecting to the mode of proposed distribution were required to file an affidavit of protest. This was not done.
37. This court therefore proceeded to determine whether or not the Objector had demonstrated that there was merit to revoke the Certificate of Confirmation of Grant that was issued on 5th October 2020 and filed on 12th October 2020.



38. 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.”
39. 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.
40. Having considered the circumstances of the case herein, this court was not persuaded that the Certificate of Grant that was confirmed on 5th October 2020 and issued on 12th October 2020 was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case or that the confirmed 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 provided in Section 76(b) and (c) of the *Law of Succession Act*. Rather, it found and held that the proceedings to obtain the confirmed grant herein were defective in substance as set out in Section 76(a) of the *Law of Succession Act*.
41. This court was thus satisfied that the Objector had demonstrated that the proceedings herein to obtain the confirmed Grant of Letters of Administration were defective in substance and there was merit in revoking the Certificate of Confirmation of Grant that was issued on 12th October 2023.
42. Going further, Section 51(2)(h) and Section 51(2)(g) of the *Law of Succession Act* provides 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.
43. 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.”



44. Further, Section 51(2)(g) of the *Law of Succession Act* which stipulates that:-

“An application shall include information as to-

- 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;

45. Notably, the issue of whether or not Josiah Asitwa Okumu was the deceased’s son and/or creditor was highly contested. The question as to whether or not L.R. No East Bunyore/Ebusamia/1813 formed part of the deceased’s estate was a pertinent one. Further, the question of whether Respah Isedi Emiteche was a creditor and/or purchaser of the deceased’s estate could only be resolved by way of evidence.

46. This court noted the Petitioners’ sentiments that it was necessary to expedite this matter as the same had been pending since 2004 but also took cognisance of the fact that the process had to strictly comply with the law to avoid the same being tainted and bringing the proceedings under the purview of Section 76(a) of the *Law of Succession Act*. It was therefore necessary to ascertain who the deceased’s beneficiaries and what his assets were with a view to distributing the same to the beneficiaries and purchasers, if at all.

47. 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.

48. 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.”

49. 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 were best safeguarded by revoking and/or annulling the Certificate of Confirmation of Grant that were issued on confirmed on 12th October 2020 as the proceedings of obtaining the same were defective ab initio.

50. This court could not issue any precipitate orders against L.R. No Bunyore/Ebusamia/1813 and L.R. No East Bunyore/Ebusamia/1885 without first hearing the evidence from the parties. Musyoka J had in his Ruling of 3rd December 2018 pronounced himself on the cancellation of the title to L.R. No East Bunyore/Ebusamia/2112. This court was of equal and competent jurisdiction to him and hence it could not say more regarding the said property.

Disposition

51. For the foregoing reasons, the upshot of this court’s decision was that the Objectors’ Summons for Revocation of Grant dated 27th June 2022 and filed on 29th June 2022 was merited and the same be and is hereby allowed in terms of Prayer No (b) therein. As this was a family matter, this court deviated from the general principle that costs follow the events and directs that each party will bear its own costs.



52. It is hereby directed that the Petitioners filed a fresh Summons for Confirmation of Grant that complies with the directions of Musyoka J in his Ruling of 24th July 2020 by 31st January 2024.
53. It is also directed that if any party will be dissatisfied with the mode of proposed of distribution in the said Summons for Confirmation of Grant, he or she shall file an Affidavit of Protest by 29th February 2024.
54. It is hereby directed that this matter will be mentioned on 18th March 2024 to confirm compliance and/or for further orders and/or directions.
55. In the meantime, there shall be no or sub-division and/or transfer and/or registration and/or any form of dealing with L.R. No East Bunyore/Ebusamia/1813 and L.R. No East Bunyore/Ebusamia/1885 pending the hearing and determination of the Summons for Confirmation of Grant to be filed by 31st January 2024 and/or until further orders and/or directions by the court.
56. It is further hereby directed that the Objector herein shall extract this order for service upon all the beneficiaries of the deceased's estate and any person that has been mentioned in the Certificate of Grant that was confirmed on 5th October 2020 and issued on 12th October 2020 for their further action, if need be.
57. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 19TH DAY OF DECEMBER, 2023.

J. KAMAU

JUDGE

