



In re Estate of Ismael Asoka Alendi (Deceased) (Succession Cause 11 of 2019) [2023] KEHC 26821 (KLR) (19 December 2023) (Ruling)

Neutral citation: [2023] KEHC 26821 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION CAUSE 11 OF 2019
RE ABURILI, J
DECEMBER 19, 2023
ISMAEL ASOKA ALENDI (DECEASED)**

BETWEEN

WILFRED ONDIMU ONYWERE PETITIONER

AND

MARY AWINJA ALENDI OBJECTOR

RULING

1. Before me for determination is summons for revocation of grant dated 21/03/2023 brought under section 76 of the *Law of Succession Act*. The objector/ protestor seeks for revocation of the grant issued to the petitioner herein on 20.01.2021.
2. The objector is the daughter in law of the deceased, being that she is the widow of the deceased son to the deceased Ismael Asoka Alendi while the petitioner has no blood relation with the deceased.
3. The objector claims that the petitioner obtained grant of letters of administration intestate without involving the objector and that the petitioner claimed that he was the only beneficiary of the said estate which was false and that by doing so, he was hell bent to disinherit the objector of the land parcel No. LR No. 9341/52 and 9341/143 which is the whole estate of the deceased.
4. She claims that the grant was obtained fraudulently by making of false statement or by concealment from the court of something material to the case. that the petitioner did not obtain consents from the dependants of the deceased.
5. The petitioner filed a replying affidavit vehemently denying the allegations levelled against him by the objector and giving the background to this matter while annexing documents to show the process that he went through before finally petitioning and obtaining the grant.



6. According to the petitioner, the objector's late husband encroached on the petitioner's parcel of land Plot 143 Maseno township and built on it illegal structures and this was discovered after a survey was conducted by Absalom and Associates, as shown by annexed survey plan and letter written by the Surveyor dated 24th June, 2003.
7. The petitioner deposes that upon discovery of the encroachment, he reported the matter to Kisumu County Council seeking for their intervention vide letter dated 10th March 2008 and the authorities wrote to the objector's late husband directing him to vacate from the encroached land by demolishing the illegally constructed structures within 60 days which the objector's husband ignored claiming that the land did not belong to him.
8. It is at that moment that the petitioner filed citation proceedings vide HCC Succession Cause No 50 of 2014, citing the objector's husband to take out letters of administration of his late father Ismael Asoka Alendi. Regrettably, the cite died before the proceedings were concluded hence the petitioner applied for substitution and the court dis substitute the objector herein in the place of her late husband, Stephen Alendi Asoka.
9. The objector was represented by an advocate in the said citation and substitution proceedings and the said advocate was duly served with the Notice of Motion for substitution dated 7/3/2017.
10. The petitioner deposes that on 15/11/2017, the objector convened a meeting and called the petitioner to attend and it was resolved that she would demolish the illegal structures from the petitioner's land after students break for holidays at the end of the December 2017 semester but she later reneged and hence the order of substitution was made by Cherere J on 11/1/2019.
11. That the substitution order was served on the objector's advocates herein and on 20/5/2019, the application for citation was heard and orders issued vide ruling dated 30th May, 2019, allowing the petitioner to petition for grant as citor and not as a beneficiary of the estate of the deceased Ismael Asako Alendi. That consequently, the petitioner did not owe the objector any duty to seek consent or inform her when petitioning for grant. That therefore the petitioner did not give any untrue facts or fail to disclose any material facts to the court when petitioning and that it is the objector who is dishonest and mean with the truth.
12. The parties counsel filed written submissions to canvass the summons for revocation of grant. The objector's submissions dated 6th October 2023 reiterates the grounds and affidavit in support and reproduces the provisions of sections 76 of the Law of Succession Act on the grounds for revocation of grant and relies on the case of In the Matter of the Estate of L.A.K(Deceased) [2014] eKLR where the above section was interpreted , urging this court to grant the prayers sought in the summons.
13. On the part of the petitioner, his counsel filed submissions dated 16th October, 2023 arguing that the objector had not demonstrated that she was entitled to the orders sought and citing the provisions of sections 66, and 7 of the Law of Succession Act as well as Rule 26 of the probate and Administration Rules. His counsel reiterated the factual depositions in the replying affidavit which had not been controverted. I have reproduced those facts in this ruling hence I need not repeat them here.

Determination

14. I have considered the Summons for revocation of grant, the grounds in support and the affidavits sworn for and against the Summons. I have also considered the written submissions and the applicable statutory and case law cited.



15. The issues for determination are whether the Summons for revocation of grant are merited and what orders should this court make.
16. Section 76 of the *Law of Succession Act* provides for grounds upon which a grant can be revoked.
17. Rule 26 of the *Probate and Administration Rules* bars any person from obtaining a grant without first notifying every beneficiary or any other person entitled to in the same degree or in priority to the applicant or petitioner.
18. In this case, the estate belongs to the father in law of the objector. The question is, how did the petitioner come to be the person applying for a grant in an estate where he is not even related to the deceased by affinity or consanguinity?
19. The objector claims that the grant was obtained fraudulently and without consent of other beneficiaries of the estate and that the petitioner failed to disclose to the court material facts relevant to the matter. The petitioner on the other hand has given the chronology of the events leading to his obtaining the impugned grant.
20. I have perused the petition for letters of administration along side the allegations by the objector and the responses by the petitioner. I observe that the petitioner annexed an order issued by Cherere J dated 30th May 2019 which orders granted the petitioner and Milly Bogere Bikumbi leave to commence succession proceedings in respect of the estate of Ismael Asoka Alendi.
21. That order has never been set aside or appealed against. In addition, the petitioner disclosed to the court that he was presenting the petition in his capacity as the Citor and pursuant to the order made on 30th May 2019. The Succession cause as gazetted on 7/2/2020 vide gazette Notice No. 979 shows that all persons beneficially interested in the estate of the deceased were put on Notice to object to the grant being issued. The Notices issued by the Deputy Registrar to the Principal Registrar and the Government Press all show that the petitioner was the Citor.
22. Subsequently, the grant was issued on 20th January 2021 by F.A. Ochieng J.
23. The documents annexed to the petition and to the replying affidavit also show that the objector herein and her late husband were properly cited and or substituted in the Citation proceedings and that was the best opportunity for the objector to accept to take out letters of administration to administer the estate of the deceased. That being the case, the objector cannot turn around and claim that beneficiaries did not give consent or that the grant was obtained fraudulently or that material facts were not disclosed to the court.
24. I find no fraud or nondisclosure on the part of the petitioner herein. Instead, I see dishonesty and lies and deceit perpetuated by the objector who, in my view, is hell bound to obstruct the course of justice. She has come to court with unclean hands. Indeed, she wants to have her cake and eat it.
25. The citation was filed against the objector's husband who died before the final orders were made upon which the objector was made the substitute and hence, the order made by this court which have never been set aside are valid. I find no evidence of fraud or misrepresentation or concealment of material facts. The Petitioner's interest in the estate of the deceased is only one, to have his portion which was allegedly encroached on by the objector's husband, and not to grab the estate of the deceased from the family of the deceased.
26. The petitioner cannot be expected to sit idly and wait as what he believes is his land is encroached on by trespassers. he was expected to take legal steps which I find are in order.



27. I therefore find that the Objector has failed to establish the grounds for revocation of the grant issued to the petitioner herein. the Summons for revocation of grant dated is hereby found to be devoid of any merit and is hereby dismissed.
28. However, as the petitioner is not interested in the whole estate of the deceased but to have those he believes to be trespassers evicted from the land allegedly encroached on by the objector's husband, and as this court has no jurisdiction to determine the issue of ownership and trespass to land, the best it can do for the petitioner is to direct him to file his claim before the Environment and Land Court for determination of the issues of ownership and trespass to land by the objector's husband and only after such determination as to his entitlement that he can have the grant issued to him herein confirmed and the estate of the deceased distributed. I say so because the interest of the petitioner is not distribution of the estate of the deceased but eviction of trespassers on the suit parcels of land listed in the petition for grant.
29. Accordingly, the Summons for confirmation of grant as filed cannot be considered by this court and the estate of the deceased cannot be distributed until the Environment and Land Court pronounces itself on the ownership and trespass issues raised by the petitioner.
30. This file is therefore closed and may only be reopened with the judgment of the ELC.
31. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 19TH DAY OF DECEMBER, 2023

R.E. ABURILI

JUDGE

