



In re Estate of Rodah Tipis also known as Rodah Saiton Tipis (Deceased) (Succession Cause 2665 of 2007) [2022] KEHC 184 (KLR) (Family) (28 February 2022) (Ruling)

Neutral citation: [2022] KEHC 184 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 2665 OF 2007
MW MUIGAI, J
FEBRUARY 28, 2022
IN THE MATTER OF THE ESTATE OF RODAH TIPIS
ALSO KNOWN AS RODAH SAITON TIPIS (DECEASED)

RULING

1. SUMMONS FOR REVOCATION DATED 7/11/2014

By a Summons for Revocation or Annulment of Grant dated and filed on 7th November, 2014, Umoja Development Limited the Applicant herein sought the following orders:-

1. THAT this application be certified urgent and the same be heard *ex parte* in the first instance and thereafter be listed for hearing *inter partes*.
2. THAT pending the hearing and determination of this application *inter partes* and with immediate effect a preservative order do issue directing the Respondent to preserve that property known as Land Reference Number 3734/240 and/or restraining the Respondents whether by themselves, employees, servants and/or agents or otherwise assigns and/or any person whatsoever acting on their behalf and/or under their mandate and/or instructions from alienating, advertising for sale, offering for sale, selling, taking possession of, leasing, transferring, charging or otherwise in any manner interfering with LAND REFERENCE NUMBER 3734/240.
3. THAT pending the hearing and final determination of this application a preservative order do issue directing the Respondents to preserve that property known as Land Reference Number 3734/240 and/or restraining the Respondents whether by themselves, employees, servants and/or agents or otherwise assigns and/or any person whatsoever acting on their behalf and/or under their mandate and/or instructions from alienating, advertising for sale, offering for sale, selling, taking possession of, leasing, transferring, charging or



otherwise in any manner interfering with LAND REFERENCE NUMBER 3734/240.

4. THAT the Grant of Letters of administration issued to ERIC TOIS LENGESANI, MICHAEL KANTET TIPIS, BERNARD KANTET TIPIS and SERAH SHILOO TIPIS on 29th May, 2008 and confirmed on 28th May, 2012 in this be revoked.
5. THAT the Respondents be immediately ordered to surrender the provisional certificate of Title Number I.R 1116 LAND REFERENCE NUMBER 3734/240 together with duly executed relevant documents for the transfer of the property to the Applicant and in default of execution of this Hon. Court do sign in their stead.
6. THAT the costs of the application be provided for.

2. The Chamber Summons is based on the following grounds:-

- a. That the proceedings to obtain the Grant were defective in substance since in the Affidavit in supporting of the Petition for Letters of Administration Intestate Land Reference Number 3734/240 is not listed as part of the Assets of the deceased yet in the Affidavit in support of Summons for Confirmation of Grant of the said property is listed as being part of the estate of the deceased and therein listed for distribution among the beneficiaries.
 - 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 as the Respondent knew and/or ought to have known that the deceased had already sold that property known as Land Reference Number 3734/240 to the Applicant and possession of the said property had already been given to the Applicant after payment of the entire purchase price. The Respondents further deliberately concealed to this Hon. Court that the Applicant had already registered a Caveat against Title Number I.R 11161 Land Reference Number 3734/240 claiming a purchaser's interest and that the said Caveat was in existence as at the time the grant was obtained and later confirmed.
 - c. That the grant was obtained by means of an untrue allegations of a fact essential in point of law to justify the grant.
 - d. That it is just and equitable that the orders sought be granted.
3. The Summons is supported by the affidavits of Prof. Nathan Kahara, a Director of the Applicant sworn on even date. According to the deponents, the Applicant had purchased Land Reference No. 3734/240 located at Olwashika Road, Lavington area from Rodah Tipis (Deceased) and paid full purchase price in the sum of Kshs. 18,000,000.00 and took possession of the parcel of land hence the parcel of land does not form part of the estate. According to the deponent, in any event a caveat had been lodged against the parcel of land hence the Respondent deliberately concealed to this Hon. Court the particulars of the caveat.
4. The summons is also supported by the affidavits Antony Wachira Wairimu, the Applicant's advocates practicing as such in the firm of M/s Wangai Nyuthe & Co. Advocates and Richard Kariuki practicing as such in the firm of M/s Harit Sheth Advocates instructed by Mrs. Rhodah Tipis (Deceased) whose averments the court has considered.



5. Antony Wachira Wairimu averred that the firm was instructed by Prof. Nathan Kahara to act for the Applicant in the sale on 23rd May, 2006 and the sale agreement was executed by parties on 29th May, 2006.
6. Richard Kariuki averred that their firm received instructions on or around 23rd May, 2006 from Rhodah Tipis (Deceased) herein to act in the sale of the parcel of land known as Land Reference No. 3734/240 to the Applicant herein. He deponed that the Applicant paid a purchase price of Kshs.18, 000,000/-.
7. The Summons is supported by the further affidavits of Antony Wachira Wairimu and Richard Mundia Kariuki sworn on 26th May, 2016 and 18th March, 2016 respectively whose averments the court has considered. The court has also considered their witness statements dated 25th November.

REPLYING AFFIDAVIT SWORN ON 2/2/2015

8. On behalf of the Respondents, Serah Shiloo Tipis swore a replying affidavit on 2nd February, 2015. According to the deponent, the proceedings to obtain grant were not defective in substance for not listing L.R No. 3734/240 since it may not be possible for a petitioner to know all the property that form part of the deceased's estate from the outset when applying for grant and such non-inclusion is not fatal in any way. According to the Respondent, the non-inclusion cannot amount to fraud and making false statement or concealment of material facts.
9. She deponed that at the time of filing the Petition and applying for confirmation of grant they were not aware of any allegations of sale of the parcel of land to Umoja Development Limited. According to the deponent, there was never any sale of L.R No. 3734/240 hence all the key documents used to support the sale are forgeries hence the caveat registered was irregularly made and can't support any claim. According to the deponent, they are the rightful owners of the parcel of land and have continued to pay property rates to the Nairobi City County Government. She further deponed that the continued occupation by the Applicant amounts to intermeddling with the deceased's property.
10. She averred at paragraph 15 of her affidavit that the Summons for Revocation of Grant is merely meant to forestall their pursuit of justice in ELC 1418 of 2014 where they have prayed for an eviction order and permanent injunction against the Applicant hence an abuse of the court process.
11. She urged the court to dismiss the Summons with costs.

WITNESS STATEMENT FILED ON 24/4/2018

12. According to Eric Lenleseni Tipis on 23rd June, 2008 through Succession Cause No. 2665 of 2007 himself together with Michael Kantet Tipis, Bernard Kantet Tipis and Serah Shiloo Tipis were granted the letters of administration to administer that estate of their mother Rhoda Saiton Tipis.
13. He stated that LR No.3734/240 situated in Nairobi Lavington Estate belongs to their late mother Rhoda Saiton Tipis. According to him, in the year 2008, March he was informed by her sister Serah Tipis that someone claimed ownership of LR No.3734/240 and had illegally taken possession. He stated that upon inquiry, he came to know the person as Nathan Kahara.
14. According to him, they sent a mutual friend to Nathan Kahara to inquire how the land had been acquired and Nathan Kahara stated that he had bought the land from their mother Rhoda Saiton Tipis before her death. He stated that they checked their mother's bank account at Kenya Commercial Bank to confirm whether Nathan Kahara had deposited the purchase price as claimed but there was no money hence they sought a civil remedy before the Environment and Land Court in ELC No.1418 of 2014 which is pending before Milimani High Court.



15. He stated that their family advocate R.M Kariuki of Harit Sheth & Company Advocates was in possession of the title deed for LR No.3734/240 but failed to give it to them.

FURTHER AFFIDAVIT SWORN ON 8/11/2018

16. In her further affidavit Serah Shiloo Tipis deposed that on 17th October, 2018 she wrote a letter to Nairobi Hospital requesting for a letter showing dates Rhodah Tipis (deceased) had been admitted at the hospital and on 7th November, 2018 she received a letter indicating the dates. The letter is dated 6th November, 2018.

APPLICANT'S SUBMISSIONS

17. On behalf of the Applicant, it is submitted that the central issue for determination is whether L.R No. 3734/240 had been sold by Rhodah Tipis during her life time to the Applicant, Umoja Developers Limited and does not therefore constitute part of the estate.
18. It is submitted that the vendor's advocates, M/s Harit Sheth & Co. Advocates prepared a sale agreement in respect of the sale of the said land and the agreement was executed by parties herein on 29th May, 2006, a copy of the agreement is marked as "AW1" and annexed to the supporting affidavit sworn on 7th November, 2014 by Antony Wachira Wairimu Advocate.
19. According to the Applicant, through M/s Wangai Nyuthe & Co. Advocates a caveat was lodged for registration against the title of the said land and the Applicant paid the entire purchase price of Kshs.18,000,000/- to the vendor. It is submitted that the vendor's advocates forwarded to the Applicant's advocates the Original Certificate of Title, Rates Clearance Certificate for the year 2007 together with supporting receipts and bills and the Transfer form "AW5" in triplicate duly executed by the vendor to enable the Applicant's advocates proceed with stamping and registration.
20. In response to the Respondents averments that Rhoda Tipis did not sell the said land to the Applicant, it is submitted that it is false since the Petition for Grant of letters of administration intestate was filed on 4th October, 2007 and the Respondents herein appended their signatures to the Petition dates 14th September, 2007 when they were fully conscious and aware as to the extent of the deceased estate.
21. It is submitted that at paragraph 6 of the Affidavit in support of the Petition for letters of administration, all the deceased's assets were listed and L.R No.3734/240 was not among the listed assets but the parcel of land found itself in the Affidavit in support of the Confirmation of Grant filed on 16th April, 2012 by the Respondents herein which amounts to fraud, concealment of material facts and making of untrue allegations of facts since the Respondents were fully aware that the parcel of land had not been listed in the Petition.
22. According to the Applicant, at paragraph 6 of Serah Shiloo Tipis replying affidavit, she averred that at the time of applying for confirmation of Grant in 2012, they were not aware of the sale of the parcel of land yet at paragraph 8, she averred that the Applicant forcefully took possession of the premises by breaking through one of the perimeter walls shortly after the death of the deceased. According to the letters of administration issued on 29th May, 2008, the deceased died on 24th July, 2007. It submitted that the falsehood is further exposed in the witness statement of Eric Lenleseni Tipis filed on 24th April, 2018 where at paragraph 5 he alleges that in the year 2008, March he was informed by his sister Serah Tipis that there was someone claiming ownership of LR No.3734/240 and had illegally taken possession yet Serah Tipis in her replying averred that they were not aware of the sale of land.
23. It is submitted that the Respondent claim not to be aware of the payments made by the Applicant towards the purchase of the said land yet Serah Tipis in her further affidavit sworn on 8th November,



- 2018 annexed a bank statement of the deceased from Kenya Commercial Bank. According to the Applicant, the bank statement show deposit of monies to the deceased's account. It is submitted that there is ample evidence on record that the Applicant fully paid the purchase price, granted possession of the said land and the proceeds of the sale were utilized to purchase several assets for the deceased that were included in the Petition for distribution.
24. According to the Applicant, the forensic report by John Muinde is shallow as he relied on three documents as a source of the signature of the deceased, two of which documents had different signatures and did not a comparison chart in the report unlike the report of Antipas Nyanjwa who compared the signatures of Rhoda Tipis in the Sale Agreement dated 29th May,2006, the transfer of land document dated 2007 against her known and undisputed signatures on 14 documents listed at page 3 of his report. It is submitted that the report of John Muinde is a veil to attempt to cover the Respondents fraudulent act.
25. It is submitted that Prof. Nathan Kahara has never been interrogated by the police or the two advocates involved in the sale transaction. According to Applicant, possession was given by the deceased after completion of payment in 2007 hence a genuine sale. According to the Applicant, the Respondents fraudulently and illegally included the parcel of land LR No. 3734 in the Summons for Confirmation of Grant when the land had already been sold, full consideration paid and Applicant given possession of the same.
26. According to the Applicant, the Respondents have filed before the Environment and Land Court; NAIROBI ELC SUIT NO.1418 OF 2014 ERIC TIPIS LENGLESENI, MICHAEL KANTET TIPIS, BERNARD KANTET TIPIS AND SERAH SHILOO TIPIS (Suing as Personal Representative in respect of the Estate of RHODAH TIPIS (Deceased) vs. UMOJA DEVELOPERS LIMITED whose proceedings have been stayed by court to await the determination in this matter.
27. The Applicant urged the court to revoke the Grant confirmed on 28th May, 2012 and compel the Respondents to transfer the parcel of land LR No. 3734/240 to the Applicant. Reliance was placed on the case of *Jamleck Maina Njoroge vs. Mary Wanjiru Mwangi* [2015] eKLR where the court held that for a grant to be revoked there must be evidence that the proceedings were defective in substance or that the grant was obtained fraudulently by making 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.

RESPONDENT'S SUBMISSIONS

28. On behalf of the Respondents, it is submitted the Respondents shall rely on the forensic report of John Muinde dated 20th January, 2015. According to the Respondent, the parcel of land LR No. 3734/240 was registered in the name of Rhodah Tipis (Deceased) at the time of her death and the same has been transmitted to her beneficiaries who now have title to the said land.
29. According to the Respondents, it is not in dispute that the Respondents continue to pay land rates for the parcel of land and the Applicant has never paid any rates. It is submitted that it is not in dispute that at the material time of the alleged sale agreement dated 29th May, 2006, Rhodah Tipis (deceased) was admitted under Intensive Care Unit at Nairobi Hospital. It is admitted that there is no evidence that Kshs.18, 000,000/- was paid on or before 15th September, 2006 as indicated in the sale agreement. According to the Respondent, it is not in dispute that the Applicant forcefully took possession of the premises by breaking through one of the perimeter walls shortly after the death of the deceased.
30. According to the Respondents, this court lacks jurisdiction to order the surrender and transfer of LR. No.3734/240 to the Applicant. It is submitted that there is no suit filed before the Environment



and Land Court yet the Applicant is challenging and/or claiming ownership of the parcel of land. According to the Respondents, the Applicant is seeking an orders that the parcel of land be transferred into its name by the Respondents. It is submitted that this court has no jurisdiction to order the transfer of the parcel of land from the administrators and/or the deceased to the Applicant or determine ownership of the same. Reliance was placed on the case of *Nicholas Oduor Owuor vs. Maurice Oduor Nyataya* [2021] eKLR where the court espoused that the disputes concerning ownership of land, title to and occupation of the land falls within the jurisdiction of the Environment and Land Court as provided for under Article 162(2) (b) of *the Constitution* and Section 13(1) and (2) of the *Environment and Land Court Act* and in *Re Estate of Stone Kathuli Muinde(Deceased)* [2016] eKLR where Musyoka J held that it is not the function of the probate court to determine ownership of the assets alleged to be estate property but the jurisdiction lies elsewhere.

31. It is submitted that the estate of the deceased was distributed hence this court is functus officio. According to the Respondents, this court cannot revoke the grant when there is no suit filed before the Environment and Land Court challenging ownership of the title. Reliance was placed in *Re Estate of Joseph Mutiso Kithome (Deceased)* [2019] eKLR and in *Re Estate of GKK (Deceased)* [2017]eKLR on the jurisdiction of the probate court.
32. As to whether Rhodah Tipis (Deceased) entered into/signed the agreement dated 29th April, 2006 and undated transfer, it is submitted that at the material time the letter dated 6th November, 2008 from Nairobi Hospital, the deceased was admitted at the hospital for treatment under Intensive Care Unit hence not possible for her to have signed the agreement or had the mental state to enter into such an agreement as alleged by the Applicant.
33. Reliance was placed on the forensic document Examiner’s report from the Directorate of Criminal Investigation dated 20th January, 2015 prepared by John Muinde who concluded that the deceased could not have signed the agreement dated 29th May,2006 and the undated transfer. According to the Respondents, the Applicant’s private document examiner did not have the original and undisputed documents signed by the deceased. According to the Respondents, the private document admitted that without the undisputed signatures of the deceased, his report could not be said to be conclusive. It is submitted that the report of John Muinde is credible and corroborates the letter from Nairobi Hospital that the deceased did not sign the Agreement and the undated transfer.
34. It is submitted that there is no evidence that the Applicant paid the total purchase price of Kshs.18,000,000/- stated in then Agreement. According to the Respondents, the cheques were not from the Applicant but different entities and not issued to the deceased. The Respondents pointed out Clause 2 of the Agreement which show that the property being sold was free hold when the parcel of land LR. No. 3734/240 was a leasehold which the Respondents continued to pay land rates to City County of Nairobi.
35. As to whether this court has jurisdiction to revoke the grant of letters of administration and/or the Certificate of Confirmed Grant, it is submitted that the allegations of fraud and concealment have not been stated in the Summons for Revocation of Grant. It is submitted that the property has already been distributed and transmitted to its rightful beneficiaries of the deceased’s estate. According to the Applicant, it is well settled law that after confirmation of grant, the court has no jurisdiction to set aside the Certificate of Confirmation of Grant. Reliance was placed in *Re Estate of Prisca Ong’ayo Nande (Deceased)* [2020] eKLR.
36. According to the Respondents, the Applicant is seeking to revoke the Certificate of Confirmation of Grant yet the courts have held that the court has no jurisdiction to set aside the certificate. It is submitted that the court cannot revoke a grant that has already been acted upon in its entirety.



According to the Respondents, the Applicant is not interested in the other properties but parcel of land LR No.3734/240 yet it is trite law that after confirmation of grant the court lacks jurisdiction to separate the disputed property from distribution.

37. It is submitted that the Applicant has not provided any particulars of fraud alleged and neither has he provided any proof therefor of any facts material to the case that were not disclosed at the time of confirmation. According to Respondents, pursuant to Section 26 of the *Land Registration Act, 2012*, the courts are mandated to consider a title document as prima facie evidence of ownership to land and conclusive evidence of proprietorship to land that can only be challenged on grounds stipulated thereof.
38. It is submitted that the caveat was irregularly registered based on fake agreement for sale and undated transfer and at the time of its registration the grant had already been confirmed and transmission completed.
39. The Respondents urged the court to dismiss the Summons for Revocation of Grant herein and discharge the ex parte orders issued in favor of the Applicant.

DETERMINATION

PROCEDURAL BACKGROUND

This matter commenced on 10/11/2014 as the Family Court and commenced hearing on 8/3/2016 -30/7/2018 when the Court was transferred and served in Commercial & Tax Division.

On 4/2/2019 the Presiding Judge Family Division transferred to this Court to complete hearing and determination of the matter.

On 4/4/2019, the Presiding Judge reiterated order of 4/2/2019.

The matter was placed before this Court on 13/5/2019 and the directed that the parties and/or Counsel to be served to attend Court on any Friday to take direction on further hearing of the case.

The matter was placed before Presiding Judge Family Division on 1/3/2021 and was placed to be mentioned before this Court.

The matter was mentioned in this Court on 22/7/2021 and slated for interpartes mention on 13/9/2021, the matter was mentioned on 16/9/2021 and further hearing was scheduled on 28/9/2021 when the last witness was heard.

The Court proceeded on transfer to Machakos High Court and written submissions were filed by parties/Counsel and thereafter the Court file was referred to this Court on 26/10/2021 and judgment was scheduled on notice.

PLEADINGS

The deceased died on 24th July 2007.

The petition for letters of administration of the estate was filed on 4/10/2007 whereat the list of beneficiaries was outlined as children of the deceased and list of assets that comprised the deceased's estate and available for distribution of her estate and did not include the subject suit property; title number LR 3734/240 and also included liabilities of the estate.

The Grant of letters of administration were issued on 29th May 2009 to 4 of the beneficiaries.

Summons for Confirmation grant were filed on 15th April 2012 and included the subject suit property Title Number LR 3734/240 to be distributed amongst the beneficiaries equally.



The Confirmation of grant was on 30th March 2012.

The Applicant an interested party in these proceedings filed Certificate of Urgency /Summons for Revocation on 7/11/2014 and the confirmed grant be revoked.

On 10/11/2014, the Court granted preservation of the deceased's estate pending hearing and determination of the instant application.

HEARING

The evidence adduced with regard to revocation of grant application in a nutshell was as follows;

- (a) PW1 Mr. Richard Mundia Kariuki advocate from Messrs Harit Sheth Advocates relied on his Affidavits and Witness Statements of 7/11/2014, 25/11/2015 filed on 1/12/2015 & 18/3/2016 filed on 2016 and Applicant's Bundle of Documents filed on 15/10/2021. He was instructed verbally by late Rhodah Tipis on the sale of the subject suit property and attached Sale Agreement for Sale signed by the client. The full purchase of Title Number LR 3734/240 at Ksh 18million.
- (b) PW2 Mr Anthony Wachira advocate from Messrs Wangai Nyuthe Advocates relied on Supporting Affidavit of 7/11/2014 and Witness Statement of 25/11/2015 filed on 1/12/2015. He was instructed by the interested party, Prof. Nathan Kahara to buy the subject suit property Title Number LR 3734/240 at Ksh 18million. He relied on the Sale Agreement and the funds transferred to the vendor's advocate as confirmed by letter of 4th August 2014. The Vendor confirmed by correspondence receipt of Ksh 13,100,000/- vide letter of 31st January 2007; the Buyer's Advocate letter of 14/3/2007 enclosed banker's chq of Ksh 4,000,000/-; letter of 2nd April 2007 from Vendor's advocate seeking payment of Ksh 900,000/- in order to take possession of the suit property and a chq for the amount was enclosed in their letter of 5/4/2007. He annexed copies of Cheques marked A-1 to A-6 on payments of the purchase price.
- (c) PW3, Prof Nathan Kahara, Chairman of Umoja Developers relied on Supporting affidavit and stated that Mrs Rodah Tipis took him and showed him the suit property and she told him to contact Harit Sheth Advocates and he appointed Wangai Nyuthe Advocates to process the sale of the property; through the sister Companies in the joint venture Sigimo Enterprises and Villacare. He sold 4 Apartments and used the proceeds to purchase the suit property. He knew and contacted one of the beneficiaries the deceased's daughter who worked at Grand Regency and sought funds from him and he paid for Mrs Rodah Tipis medical expenses. After the Sale she gave him possession of the property.
- (d) PW4 Mr. Antipus Nyanjwa, the Document Examiner compared the signature of the Sale Agreement of 29/5/2006 and Transfer of 2007 and documents with known and undisputed signatures of the Deceased and upon examination he was of the opinion that the signatures were by the same hand. He produced his Report in Court.
- (e) DW1 Ms Serah Sililo Tipis daughter of the deceased and one of the Administrators of the deceased's estate, relied on Replying Affidavit of 17/2/2015 and Further Affidavit of 8/11/2018. She informed the Court that Title Number LR 3734/240 was registered in the deceased's name and part of assets that comprised of her estate and available for disposal.

After the demise of their mother she walked past the property in Lavington and found a wall and gate and when she checked she found PW3.



DW1 conducted investigations on the matter; she visited her lawyer and sought evidence of sale of the property and did not get any evidence. She conducted Search at Lands Office and found the property was registered in her mother's name but there was a caveat filed in 2007. She went to KCB Bank and sought her mother's bank statement from 2006 and there no funds of the purchase of the said land. The statement was attached to Further Affidavit. She approached the advocates Harit Sheth Advocates and requested details /evidence and proof that the deceased sold the said property for Ksh 18 million. She went and reported the matter to the Police to investigate, the investigations revealed that the caveat was not lodged by Lubullelah Advocates and disowned the signature. She produced medical documents to show that her mother was sick at this time and upto her death.

- (f) DW2 Mr John Muinde Snr Supt of Police;a Document Examiner at DCI Nbi who on 15/1/2015 received Copy of Sale Agreement-A-1,2, 4 & 6, Transfer Form A- 3, 5 & 7 and known signatures of Mrs Rodah Tipis B-1,2 & 3. Upon conducting forensic examination, he was of the opinion that the questioned signatures in the documents A1-A7 and B1-B3 were not by the same hand. He based his opinion by considering spread of the ink, slope of the pen, baseline alignment, initial and terminal strokes, curves and loops pen pressure patterns and speed of the pen and signatures did not resemble. He produced the Examiners Report as Defense Exhibit- 1. Strangely at the time by design or default the said Report was missing from the Court file.

The Court considered the pleadings and submissions filed by parties through learned Counsel and the issues that emerge for determination are;

- (a) This Court's jurisdiction over the Revocation of Grant application filed and the impugned sale of asset that is part of the deceased's estate.
- (b) Whether the subject suit property LR No.3734/240 was sold by the deceased Mrs Rhodah Tipis during her lifetime to the Applicant, Umoja Developers Ltd and therefore it is not part of the deceased's estate and not available for distribution.
- (c) Whether the grant issued on 29th May 2008 and confirmed on 28th May 2012 should be revoked or not ?

This Court's jurisdiction over the Revocation of Grant application filed and the impugned sale of asset that is part of the deceased's estate.

The Summons is premised on Section 76 of the [Law of Succession Act](#), Cap 160, Laws of Kenya provides;

“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.”

40. The Applicants contend that the grant herein was obtained fraudulently by the Respondents by making of a false statement or by the concealment from the court of something material to the case. According to the Applicant, the Respondents knew or ought to have known that LR. No. 3734/240 had been sold to the Applicant hence not an asset in the estate of Rhoda Tipis.

41. The question of this Court’s jurisdiction over the matter has been raised by the Respondents that this court is bereft of jurisdiction since ownership of LR. No.3734/240 is in contest. It is submitted that the duty of this court is to distribute the estate of the deceased and not to determine ownership of the asset alleged to be the estate property. According to the Respondents, the Applicant’s claim lies before the Environment and Land Court.

42. In Nyarangi JA’s in the case of *Owners of the Motor Vessel “Lillian S” vs. Caltex Oil (Kenya) Ltd* [1989] eKLR (Nyarangi, Masime & Kwach JJ A) stated:

“Jurisdiction is everything. Without it, a court has no power to make one more step..”

43. The Respondent submitted that Environment and Land Court is established under Article 162(2) of *the Constitution*, 2010 and its jurisdiction of the Environment and Land Court is provided for under Section 13 of the *Environment and Land Court Act* provides that:-

“ 13. Jurisdiction of the Court

- (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b)



of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

- (2) In exercise of its jurisdiction under Article 162(2) (b) of *the Constitution*, the Court shall have power to hear and determine disputes—
- (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (b) relating to compulsory acquisition of land;
 - (c) relating to land administration and management;
 - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - (e) any other dispute relating to environment and land.”

44. The Environment and Land Court under Subsection 2(a) has the jurisdiction to hear and determine disputes relating to title.

45. This Court takes the following view; the Courts jurisdiction emanates from *the Constitution* and/or subsidiary legislation. In the instant case, this Court sitting as Court of Family Division of the High Court derived its jurisdiction from Article 165 (3) (a) CoK 2010 and Succession Act; Sections 71 & 76 of the Succession Act.

Section 71. Confirmation of grants

- (1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets

Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares

This Court sitting as Family Court has requisite jurisdiction to hear and determine the Revocation of grant filed on 7/11/2014 The Court cannot speculate and/or anticipate the substance of the revocation of grant without hearing and determination as took place in the instant matter.

The following facts emerged during the hearing; that the title to the subject matter suit property was/ is registered in the name of Rodah Tipis the deceased herein. Being the legal owner/Proprietor on her demise she bequeathed the beneficial interest to the beneficiaries of her estate and hence the grant of confirmation of grant was on 30th March 2012 and the said suit property was distributed equally amongst the beneficiaries. A beneficial interest is an interest that creates an interest in the economic benefit of the property. It is the transmission of the beneficial interest over the suit property to the beneficiaries that is challenged in the Summons for revocation of grant.



46. The Applicant has sought the revocation of the grant issued to the Respondents as administrators in the estate Rhoda Tipis for causing LR No. 3734/240 to be included as an asset in the estate. According to the Applicant LR. No.3734/240 was not listed as an asset in the affidavit in support of the Petition for the letters of administration but the parcel of land was listed as an asset of Rhoda Tipis in the affidavit support of the Summons for confirmation of grant. A proprietary interest on the other hand, is a property right; an interest held by a property owner together with all appurtenant rights. According to the Applicant LR. No.3734/240 ought not to have been listed as an asset comprising of the estate of Rhoda Tipis and available for distribution, since the Applicant had bought the land from Rhoda before her death. The Applicant contend that it has ownership over LR. No.3734/240 following purchase of the suit property during the lifetime of the deceased. The transfer was not completed and the title document to aid transfer, was declared lost. From the above outline, this Court had/has requisite legal jurisdiction to hear the Revocation of Grant Application and it did so as borne out by the Court record.

Whether the subject suit property LR No.3734/240 was sold by the deceased Mrs Rhodah Tipis during her lifetime to the Applicant, Umoja Developers Ltd and therefore it is not part of the deceased's estate and not available for distribution.

47. It has emerged from the evidence on record that the transmission of beneficial interest from the deceased to the beneficiaries of the asset LR. No. 3734/240 is contested by the interested party's / Applicant claim of proprietary right over the suit property through a sale/purchase of the suit property at Ksh 18 million. The Court's jurisdiction as Family Court is to distribute the estate of the deceased's estate, transmit the beneficial interest in the deceased's estate but not to transfer proprietary interest of the suit property. As elucidated above it is at this point that once in the list of assets that comprise of the deceased's estate any asset is vitiated by proprietary interest and ownership of the asset is contested, then the Family Court cannot legally distribute or transmit the beneficial interest in the asset as it is not available for distribution. At this stage the legal interest and ownership of the suit property ought to be determined first. The jurisdiction to hear and determine the proprietary right in the suit property is vested by Article 162 (2) (b) CoK 2010 and Section 13 of the Environment & Land Act 2011 to the Environment & Land Court.

48. In *re Estate of Alice Mumbua Mutua (Deceased)* Succession Cause No. 3142 of 2003 [2017] eKLR where Musyoka J. held;

“Clearly, disputes as between the estate and third parties need not be determined within the succession cause. The legal infrastructure in place provides for resolution elsewhere, and upon a determination being made by the civil court, the decree or order is then made available to the probate court for implementation. In the mean-time the property in question is removed from the distribution table. The presumption is that such disputes arise before the distribution of the estate, or the confirmation of the grant. Where they arise after confirmation, then they ought strictly to be determined outside of the probate suit, for the probate court would in most cases be functus officio so far as the property in question is concerned. The primary mandate of the probate court is distribution of the estate and once an order is made distributing the estate, the court's work would be complete.



See also *Re Estate of Stone Kathuli Muinde(Deceased)* [2016]eKLR Re Estate of GKK (Deceased) [2017]eKLR. & Joel Ngugi J. In *Joseph Koori Ngugi & another vs. Stephen Ndichu J. Mukima* [2017] eKLR observed;

25. In addition, in my view, prudential reasons militate in favour of these kinds of disputes being heard at the ELC or at least in a separate suit. While I agree that the *Law of Succession Act* envisages a class of people beyond “traditional” beneficiaries to bring proceedings for revocation or annulment of a grant of representation in a probate cause, cases which present a straightforward challenge to the ownership of property by the Deceased present a separate question and not a probate matter. To attempt to resolve such issues of contested ownership in the context of a probate case could obfuscate the real issues and lead a Court to reach wrong or compromised conclusions. This is in part because probate proceedings are not designed for parties to be able to effectively litigate complex issues of ownership. In a separate suit, parties are better able to plead their case, go through discovery process and a fully-fledged hearing where evidence can be properly presented, contested, examined and veracity tested...”

Whether the grant issued on 29th May 2008 and confirmed on 28th May 2012 should be revoked or not? Section 47 of LSA on Jurisdiction of High Court provides;

The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient:

It is submitted that Rhoda Tipis (deceased) and the Applicant executed a sale agreement on 29th May, 2006 for the sale of LR. No.3734/240. A copy of the agreement is annexed and marked as “AW1” to confirm the sale. In the sale transaction, Mr.Richard Kariuki from the firm of Harit Sheth Advocates averred at paragraph 2 of his affidavit sworn on 7th November,2014 that they received instructions to act for Mrs. Rhoda Tipis(deceased).

The claim by the Applicant is in respect of LR. No.3734/240, a parcel of land which the Respondents contend is an asset of the estate of Rhoda Tipis.

Eric Lenleseni Tipis and Serah Shiloo Tipis, the Respondents/administrators averred that they had filed ELC 1418 of 2014 seeking eviction orders and permanent injunction against the Applicant in respect of LR No. 3734/240. The Applicant admitted to this fact but indicated that the proceedings were halted pending hearing and determination of the instant Application.

In light of the compelling and competing arguments made out by parties through learned Counsel of the title and ownership of LR No. 3734/240 there are both beneficial and proprietary rights claimed over the same property. To leave the matter as is a recipe for disaster as each party shall descend to impose and/or protect its right. Since the issue of title /ownership is to be determined in the ELC Court it is prudent to hive off the suit property LR No. 3734/240 from the Confirmed Grant of 30th March 2012 as it is not yet available for distribution due to the ongoing tussle and shall be distributed upon the determination by ELC Court in pending ELC 1418 of 2014 as this Court is not satisfied that in light of the contest of ownership the property is available for distribution by beneficiaries.

This position is fortified by Rule 41(3) as read with Rule 42(2) of the *Probate and Administration Rules* See In *Re Estate of Joseph Mutiso Kithome (Deceased)* [2019]eKLR and in *Re Estate of Tumbo*



Lavu(Deceased) [2019]eKLR that the property in dispute can only be separated from the Estate of the deceased before confirmation of grant as follows;

“Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the Court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and Set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may Thereupon, subject to the Proviso to section 71 (2) of the Act, proceed to confirm the grant”.

The Respondents left out the suit property LR No. 3734/240 while listing assets of the deceased’s estate in Petition for letters of administration. Thereafter in the Supporting Affidavit to Summons for Confirmation of Grant the said property was included, this shows that the Administrators had not gathered and collected the asset as one available for distribution and ought at the confirmation hearing been hived off. At this stage, distribution of all the assets is hampered by the preservation order granted by this Court in November 2014 which cannot remain in force ad infinitum. It is clear from the evidence, that the suit property was/is not available for distribution until the contested title / ownership of the suit property is resolved. The Environment & Land Court lacks jurisdiction to revoke the confirmed grant or hive off the contested suit property whose title /ownership is not determined and that is why proceedings of ELC 1418 of 2014 was halted for the Summons for revocation of Confirmed Grant be heard and determined first. Therefore, the justice of the case by virtue of Section 47 of LSA LR No. 3734/240 is hived off and is not available for distribution pending hearing and determination by Environment & Land Court and the distribution of the rest of the estate continues unabated.

DISPOSITION

1. This Court has jurisdiction to hear and determine the Summons for Revocation of Grant.
2. The Environment & Land Court has jurisdiction and shall hear and determine the title/ ownership of LR No. 3734/240; whether the alleged sale/purchase of LR No. 3734/240 is valid and legal ELC 1418 of 2014.
3. The grant issued on 29th May 2008 and confirmed on 30th march 2012 shall remain valid, legal and regular grant and the estate of the deceased shall be distributed accordingly save for suit property LR No. 3734/240 that is hereby hived off and distribution withheld until the hearing and determination of the title and ownership by Environment & Land Court.
4. The Summons for Revocation of Grant dated 7th November, 2014 partly succeeds and partly fails
5. Each party meet their own costs.

It is so ordered.

DELIVERED SIGNED & DATED IN OPEN COURT ON 28TH FEBRUARY 2022. (VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE

In the Presence of;



Githinji Mwangi Advocates for Applicant
Murage Juma& Co Advocates For Respondents

