



**In re Estate of Zahara Zulfikar Adam (Deceased) (Succession Cause 31 of 2019) [2022] KEHC 12122 (KLR) (31 March 2022) (Ruling)**

Neutral citation: [2022] KEHC 12122 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
SUCCESSION CAUSE 31 OF 2019  
JO NYARANGI, J  
MARCH 31, 2022  
IN THE MATTER OF THE ESTATE OF THE  
LATE ZAHARA ZULFIKAR ADAM (DECEASED)**

**BETWEEN**

**PETER MBOGHO MWANG'OMBE ..... APPLICANT**

**AND**

**ZULFIKAR TAJDIN ADMA ..... 1<sup>ST</sup> RESPONDENT**

**SHAHINOOR ZULFIKAR ADAM ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Vide ELC case no 105 of 2011 Mombasa, Peter Mbogho Mwang'ombe filed a suit against one Zahara Adam(deceased) for breach of contract and an order for specific performance in respect of the purchase of L.R 1956/20/IV Voi township in which the said Peter paid Kshs800,000 but the deceased failed to transfer the property. In the alternative, he prayed for the refund of the said amount plus interest at Kshs 28,375.
2. Consequently, on 1<sup>st</sup> August, 2014, the court ordered Zahara Adam to refund the said amount (Kshs 800,000) plus interest making a total of Kshs 8,028,374. Subsequently, Sahara Adam died intestate on 14<sup>th</sup> August, 2017 leaving Zulfikar Tajdin Adam (father) and Shahinoor Zulfikar Adma her niece (sister's daughter) as survivors. On 26<sup>th</sup> June, 2019, the two survivors filed an application for a grant of representation.
3. Among the assets listed as comprising the estate are;
  - a. One third (1/3 share interest in sub -division number (1620 Original Number 416/29) of Section 1, Mainland North (Cr 43815)



- b. 1/3 share interest in Subdivision No 16121 (original No. 416/30) section 1, Mainland North (C.R 43816)
  - c. 1/3 share interest in subdivision No 16122 (Original no. 416/31) section 1, Mainland North (C. R43817)
  - d. 1/3 share interest in subdivision No 16123 (Original No. 416/32) section1, Mainland North (C. R43818)
  - e. 1/3 share interest in subdivision No 16124 (Original No. 416/33) section1, Mainland North (C. R43819)
  - f. 1/3 share interest in subdivision No 16125 (Original No. 416/34) section1, Mainland North (C. R43820)
  - g. 1/3 share interest of the deceased in Plot No. 12913/1 MN
  - h. Monies in Diamond Trust Bank Kenya Limited account No. xxxx
  - i. Monies in Diamond Trust Bank Kenya Limited account No. xxxx
4. A grant of letters of administration intestate was issued on 24<sup>th</sup> January, 2020. The same was confirmed on 9<sup>th</sup> October, 2020 and the estate shared out equally between the petitioners.
5. Through a Chamber Summons dated 26<sup>th</sup> February, 2021 and then amended on 14<sup>th</sup> April, 2021, Peter Mbogho (hereafter the applicant) sought revocation of the grant under Section 76 of the Law of Succession Act and rules 49 and 59 of the P&A rules seeking;
- a. That this application be certified urgent and service in the first instance be dispensed with.
  - b. That this honourable court be pleased to issue a mandatory injunction restraining the respondents whether by themselves, their agents, servants, employees or representatives and / or any other person whatsoever from causing any form of registration and/or any dealings whatsoever with the estate of the late Zahara Zulfikar Adam (deceased)
  - c. That the grant of letters of administration to the respondents made to Zulfikar Tajdin Adam and Shahinoor Zulfikar Adam, confirmed on 28<sup>th</sup> of September, 2020 and certificate of confirmation of grant dated 9<sup>th</sup> October, 2020 be revoked and/or annulled thereof.
  - d. That the judgment entered in favour of the applicant Peter Mbogho Mwang'ombe in ELC No. 105 of 2011 being a sum of Kshs 8,000,000 and Ksh 28,374 with interest, and costs at Ksh 341,128 be included in the petition for grant of letters of administration and /or grant as part of the debts and/or liabilities of the estate of the deceased to be paid out of the deceased's estate by the administrators before any legacy.
  - e. That costs of the application be provided for.
6. The application is based on grounds that, vide ELC no 105 of 2011, the applicant was awarded ksh 8,000,000 plus interest of kshs 28,374 which money should be treated as a debt owed to him by the estate as a creditor. In his affidavit in support of the application filed on 14<sup>th</sup> April 2012, the applicant claimed that the respondents obtained the grant in question fraudulently and through concealment of material facts by stating that the estate had no liabilities (debt). That as a creditor, he was entitled to his refund being money owed to him by the deceased before he died.



7. In response, Zulfikar Tajdin Adam (1<sup>st</sup> administrator) filed a response through a replying affidavit sworn on 4<sup>th</sup> May, 2021 with authority from the second administrator opposing the application. He averred that the application is an afterthought as there was no objection filed after gazettement of the estate. That there was no proof of any element of fraud nor concealment of material facts. He further stated that the applicant has a recourse under order 37 of the Civil Procedure Rules hence this court lacks jurisdiction to entertain the application and that there is no proof of any of the grounds under Section 76 of the Law of Succession.
8. When the matter came up for hearing, Parties agreed to file submissions in disposing the application.

### **Applicant's submissions**

9. Through the firm of Otieno B and associates, the applicant filed his submissions on 15<sup>th</sup> July, 2021. It was submitted that there was non-disclosure of material facts in the sense that the respondents were aware of the existence of the money decree (debt) to support the fact that he had a stake or interest in the estate as a creditor. To support that position, counsel relied on the holding in the case of the *Estate of Tabitha Waitthera Kamau (deceased)* (2019) eKLR where the court found that a person with interest on land forming part of the estate is an objector under rule 2 of the Probate & Administration rules.
10. On whether the grant can be revoked, counsel opined that failure to disclose existence of a liability accruing to the estate is a ground for revocation under section 76 of the *Law of Succession Act* and that the legal administrators are liable under Section 38 of the Civil Procedure Rules for attachment of the property of the estate to recover a debt incurred and due from the deceased during his life time and that equity demands that the personal representative do honour the debt.
11. To support the position that the legal representatives are liable in this case, the court was referred to the holding in the case of *In re- estate of Julius Ndubi Javan (deceased)* (2018) eKLR.

### **Respondents' submissions**

12. Mr Obonyo appearing for the respondents filed his submissions on 7<sup>th</sup> September, 2021 thus adopting averments contained in the replying affidavit. Counsel submitted on two issues.
  - a. Whether the grant was obtained fraudulent by the making of a false statement or concealment from the court of something material to the case
  - b. Whether the grant was obtained by means of an untrue allegations of a point essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or deliberately.
13. It was Mr Obonyo's further submission that a grant can be revoked upon proof of various grounds inter alia; if it is obtained through a fraudulent process thus omitting some stages; failure by the applicant to have the grant confirmed or, the grant being rendered useless or inoperative. To buttress this submission, the court was referred to the holding in the matter of the *estate of LAK (deceased)* (2014) eKLR Where the court emphasized on proof of grounds for revocation as per the elements set out under section 76 of the Law of Succession of Kenya.
14. Mr Obonyo contended that a party seeking revocation of a grant must prove his entitlement in the estate. That the applicant is not a beneficiary but an interested party hence not an objector in the strict sense of rule 2 of the P&A rules. Further, learned counsel opined that the applicant has no role in litigating his civil claim in a succession case.



15. Learned counsel submitted that the application has not been filed within reasonable time. Mr Obonyo further contended that the applicant as a creditor has a recourse under O 37 rule 1 of the civil procedure rules for money recovery. Counsel asserted that the applicants had no knowledge of the alleged debt by the time they filed the petition for a grant of representation.

#### **Determination.**

16. I have considered the application herein and the response thereto. The only issue that emerge for determination is whether the applicant has met the threshold for revocation of the grant herein.

17. Before me is an application for revocation of the grant issued herein on grounds that it was obtained fraudulently and through concealment of material information. The claim is anchored on the allegation that the estate is indebted to the applicant as a creditor as a result of a money decree arising out of an ELC case No 1051/2011 in which judgment for refund of a sum of Kshs 80,283.74 was entered against the deceased during his life time.

18. Before a court could exercise its discretion to revoke or a null a grant, the person in whose favour such order is sought must prove the salient elements stipulated under section 76 of the Law of Succession which provides;

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 paragraph (e) and (g) of the 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.

19. In the case of *Jesse Karaya Gatimu Vs Mary Wanjiku Githinji* (2014) e KLR, and *Matheka and another Vs Matheka* (2005) KLR 455 both courts emphasized that a litigant seeking revocation of a grant or revocation orders must prove conditions set out under section 76 of the *Law of Succession Act*.

20. However, a court has wide discretionary powers to grant or not to grant revocation orders either on its own motion or upon being moved by any interested party. See *Musa Nyaribari Gekone and others Vs Peter Mijienda and another* ( 2015) eKLR in support of the proposition that a court has wide powers to revoke or a null a grant whether confirmed or not and that a grant obtained on false claims is available to revocation.



21. In the instant case, there is no dispute that the deceased had entered into a non-performing contract for the sale of land to the applicant. It is also an admitted fact that the contract could not be effected hence a refund of the purchase price to the applicant (buyer). Subsequently, the seller died hence the debt remained recoverable from the personal representatives by way of execution of the decree.
22. By the ELC ordering for a refund of the purchase price, the applicant's interest on the estate property was vitiated hence no interest can lie as against any of the properties. The only remedy then available for the applicant is to institute execution process against the respondents in the ELC where orders for refund of the purchase price were made. To file another application for injunction even before seeking leave to be enjoined as an interest party is akin to commencing a full civil suit for recovery of the debt through a probate court hence double litigation as the execution process by way of attachment had at some point commenced before the ELC.
23. In the case of *re estate of Alice Mumbua Mutua (deceased)* (2017) eKLR the court had this to state ;

“Disputes of course do arise in the process. The provisions of the *law of succession Act* and the probate and administration rules are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, the beneficiaries and dependants. However, claims by and against third parties, meaning persons who are either survivors of the deceased nor beneficiaries, are for resolution outside of the frame work set out in the *law of succession Act* and probate and administration rules. Such have to be resolved through the structures created by the *civil procedure Act* and rules which are elaborate rules on suits by and against executors and administrators.”
24. In view of the wisdom derived from the above cited case law, I am in agreement with Mr Obonyo that the applicant's remedy lies in the civil court under the relevant Civil Procedure rules among them order 21 and 37 of the *Civil Procedure Rules* and not the probate court. To that extent, the respondents had no duty to seek consent from the applicant before petitioning for the grant hence there was no fraud committed nor concealment of material facts as the respondents were aware that the outstanding debt was a subject of a different litigation or suit.
25. For the above reasons stated, I do not find any merit in the application for revocation nor annulment of the grant. Accordingly, the application is dismissed with no order as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 31<sup>ST</sup> DAY OF MARCH, 2022**

**J. N. ONYIEGO**  
**JUDGE**

