



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Charles Mburu Shadrack (Deceased) (Succession Cause
1 of 2018) [2022] KEHC 3374 (KLR) (28 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 3374 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
SUCCESSION CAUSE 1 OF 2018
GWN MACHARIA, J
APRIL 28, 2022**

BETWEEN

**GRACE NJOKI AYUB APPLICANT
SUING ON BEHALF OF THE ESTATE OF MWANGI MACHARIA ALIAS AYUB
KIMANI**

AND

NAOMI WAMBUI MBURU RESPONDENT

RULING

The Application

1. The application for consideration is applicant's notice of motion dated the 16th day of December, 2021 brought under section 76 of the *Law of Succession Act* and Rules 44 & 76 of the *Probate and Administration Rules*. The Application seeks the following orders That:
 1. Spent.
 2. Pending the hearing and determination of this application, this honourable court be pleased to stay the application and/or use of the grant of letters of administration issued to the respondent.
 3. Pending the hearing and determination of this application, this honourable court be pleased to order that the properties forming part of the estate herein be preserved and that there be no dealings whatsoever relating to the said properties.
 4. The grant of letters of administration issued to the respondent be revoked.
 5. The honourable court do issue directions as to the administration of the estate.



2. The application is based on the grounds on the face of it and supported by the affidavit of Grace Njoki Kimani, dated the 16th day of December, 2021. The applicant later filed a further affidavit dated the 4th day of February, 2022 pursuant to leave granted on the on the 26th day of January, 2022 with orders that the same be filed and served within seven days. The said further affidavit was filed on the 7th day of February, 2022.
3. The Application was opposed by the respondent vide the replying affidavit sworn by Naomi Wambui Mburu on the 20th day of January, 2022. The application was canvassed by way of written submissions.

The Applicant's Case

4. The applicant commences by identifying as the widow of Mwangi Macharia alias Ayub Kimani.
5. It is the applicant's averment that the respondent obtained letters of administration of the estate of Charles Mburu Shadrack fraudulently and concealed material facts.
6. The applicant further avers that she is the sole beneficiary of the estate of the late Mwangi Macharia Alias Ayub Kimani thus who purchased land registration number Nyandarua/Turasha/444 from the late Charles Mburu Shadrack thus has locus to bring the present application.
7. The applicant intimates that pursuant to the said agreement for sale of land, the estate of the late Mwangi Macharia Alias Ayub Kimani became a beneficiary under the estate of Charles Mburu Shadrack.
8. The applicant accuses the respondent of initiation and taking out letters of administration with respect to the estate of Charles Mburu Shadrack while maliciously alienating the estate of Mwangi Macharia Alias Ayub Kimani and disinheriting the applicant in the process.
9. It is averred by the applicant that the respondent never at any point sought her consent while taking out the grant.
10. The applicant was apprehensive of the respondent's intentions to evict her from the premises in the name of the late Charles Mburu Shadrack.
11. The applicant further made averments that the respondent was privy to the fact that her late husband had disposed of land parcel number Nyandarua/Turasha/444 to the applicant's husband save that they had not realized the transfer of proprietorship. The said agreement for sale of land was subsequently followed by other agreements as well as surrender of the title deed to the applicant's late husband. The applicant states that the same is still in her custody.
12. The applicant further averred that her claim is not statutory barred as the grant herein was confirmed on the 22nd day of May, 2020.
13. The applicant also brought to the attention of the honourable court an application for orders of injunction against the respondent which said application was filed by Mwangi Macharia Alias Ayub Kimani prior to his death. The same was dismissed for want of prosecution an event the applicant attributes to the ill health of her late husband.
14. The applicant avers that the said application was not conclusively prosecuted by her as she was mourning her late husband thus not able to promptly follow up on the same.
15. Based on the foregoing, the applicant urges the honourable court to find that the grant was obtained by way of fraud and/or concealment of material facts as to the creditors of the instant estate.



16. To buttress its case, the applicant filed its submissions on the 15th day of February, 2022 and identified the following issues for determination:
- a. Whether the applicant has locus standi to institute the Application for revocation of grant
 - b. Whether the applicant’s application meets the legal threshold for revocation of grant under section 76 of the *Law of Succession Act*.
 - c. Whether the applicant’s claim against the respondent is statutorily extinguished pursuant to the *Limitation of Actions Act*.
 - d. Whether the Application herein is merited
17. On the first issue, the applicant submitted that having obtained the letters of administration ad litem, it was properly authorized to move the honourable court. Reliance was placed on the case of *Ibrahim v Hassan & Charles Kimenyi Macharia, Interested Party* [2019] eKLR where the court cited *Otieno v Ougo* [1986-1989] EALR 468, the court rendered itself thus:
- “... An administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception.”
18. It is undisputed that the applicant was issued with letters of administration ad litem on the 1st day of December, 2021 vide Succession Cause Number 50 of 2021 filed at Engineer Magistrates Court.
19. On the second issue, it was submitted by the applicant that the Application was made within the armipits of section 76 of the *Law of Succession Act* which provides that:
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;
20. The applicant under this limb submits that the respondent conceal material facts which were within her knowledge as at the time of obtaining the grant and failed to consider the applicant as a creditor to the estate.
21. The applicant cited the authority of *In re Estate of Julius Ndubi Javan (Deceased)* [2018] eKLR where it was held:
- “Applying the test of law in section 76 of the *Law of Succession Act*, the fact that there was an agreement between the deceased and the Applicant for sale of the suit land is important to these proceedings. It seems also that consideration may have passed between the two



parties. I am aware that this court does not have jurisdiction to determine the validity or enforceability of the said agreement. Environment and Land Court does; it is the court which is constitutionally mandated to determine such matters. But of relevance in these proceedings is that such material facts were never disclosed to this court during confirmation of the grant so as to enable the court make an informed decision on distribution of the estate. Needless to state that, in any judicial proceeding, parties must make full disclosures to the court of all material facts to the case including succession cases. This general rule of law emphasizes utmost good faith (*uberimae fidei*) from parties who take out or are subject of the court proceedings. The said responsibility is part of justice itself. Accordingly, non-disclosure of material facts undermines justice and introduces festering waters into the 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...”

22. The applicant urged the honourable court to allow the Application with costs.

The Respondent's Case.

23. The respondents filed an affidavit sworn on the 20th day of January, 2022 in opposition of the Application. It sought to have the application dismissed with costs for being frivolous, fatally defective and incompetent.
24. It was the respondent's averment that the applicant had no locus standi to present the instant application.
25. The respondent averred that the applicant had not provided the honourable court with compelling reasons to revoke the grant issued as the conditions under section 76 of the *Law of Succession Act* had not been met.
26. It was the respondent's contention that she was not a party to and/or privy to the alleged contracts for sale of land by her late husband to the applicant's husband and the subject property formed their matrimonial home and could not have been sold.
27. The respondent attached the validity of the sale agreements sought to be relied on by the applicant and intimated that they do not constitute valid agreements.
28. The respondent was of the view that the Application dated February 9, 2018 was dismissed for want of prosecution and it is the applicant and her later spouse to blame for the indolence.
29. The respondent further averred that she never concealed any material facts with respect to the estate of her deceased husband and stood to suffer substantial loss in the event the honourable court proceeded to allow the instant application.
30. The respondent outlined four issues for determination by the court:
- i. Whether the applicant has locus standing to institute these proceedings
 - ii. Whether the application meets the threshold under section 76 of the *Law of Succession Act*.
 - iii. Whether the Application is merited
 - iv. Whether the applicant's claim is statutory extinguished
31. On the first issue, the respondent submits that despite the applicant having been issued with letters of administration ad litem, she does not have locus standing to bring the instant application as she is not a beneficiary pursuant to the provisions of section 66 of the *Law of succession Act*.



32. Further, the Respondent is of the assertion that the Applicant does not qualify as a creditor pursuant to the alleged sale agreements and in any case, she would have a rightful forum in a court other than the probate court.
33. The applicant referred to the position held in the case of *Kennedy Opiche Olela v William Ogida Ochuodho & another* [2014] eKLR where Justice Majanja cited the case of *Ireri Nyaga v Karani Ngari & another* Embu HC Succ. No. 68 of 2007 [2010] eKLR it was held that:
- “... a buyer or purchaser cannot cause an otherwise valid grant to be revoked for the only reason that he was not recognized in the proceedings. As stated earlier in my ruling, his recourse lies in suing whoever sold the property to him and if such person be dead, then he can only sue the administrator of the deceased’s estate.”
34. On the second issue, it was the submissions of the respondent that a mere perusal of the documents in support of the purchase does not indicate which parcel was sold to the applicant’s late spouse by the Respondent’s spouse. The documents do not support that the dealings were with respect to the aforementioned land parcel.
35. On whether the application is merited, the respondent submitted that the applicant ought to have first obtained a decision in its favour before the Environment and Land Court so as to be certified as a creditor of the instant estate and bring in an application under section 76 of the *Law of Succession Act*.
36. The respondent made reference to the case of *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 meantime 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. The proposition therefore is that not every dispute over property of a dead person ought to be pushed to the probate court. The interventions by that court are limited to what I have stated above.”
37. The respondent further invited the court to consider the position *In re Estate of Prisca Ong’ayo Nande (Deceased)* [2020] eKLR where it was held that:
- “Was the applicant a bona fide purchaser of property from the deceased to warrant being treated as a creditor of the estate, who ought to be catered for from the estate? Documents were placed on record, to demonstrate that there were agreements of sale and that money changed hands. However, I have no jurisdiction to make a finding one way or the other, with regard to whether the alleged sales were valid and resulted in the applicant acquiring a stake in the estate. That is a matter which revolves around title to land. Under articles 162(2) and 165(5) of the Constitution, I have no jurisdiction over that question. The parties are better off placing the issue before another forum for determination of the question. I shall not



pronounce as to whether the applicant was a bona fide creditor of the estate, entitled to be allocated shares in the estate, he shall have to prove his entitlement to the property he claims he bought from the deceased by commencing suits against the estate at the appropriate forum.”

38. The respondent urged the honourable court that it lacked the jurisdiction to adjudicate on the land issues raised by the applicant thus the said application lacked merit and ought to be dismissed.
39. On the issue of the Application being statutory barred, the Respondent submitted that the Applicant sought to recover land was barred by section 7 of the Limitation of Actions Act and allowing the Application defeat the maxim that equity would not grant its remedy if such order will be in vain.

Analysis and Determination

40. I have carefully considered applicant’s application, the affidavit in support, the replying affidavit in response to the application, the further affidavit and the rival submissions.
41. I note the issues for determination by the court flowing from the pleadings filed and arguments fronted are:
- i. whether the respondent had the locus standi to seek revocation of the grant and if so;
 - ii. whether the application was time barred and if not;
 - iii. whether the application for revocation was merited.
42. On the issue of *locus standi*, I find that the applicant has the *locus standi* to bring the instant application as letters of grant *ad litem* had been obtained prior to filing the Application. I am guided by the decision of the Court of Appeal in Rajesh Pranjivan Chudasama vs Sailesh Pranjivan Chudasama (2014)eKLR, where the Court addressed itself on the issue of locus standi in succession matters as follows:-

“... But in our view the position in law as regards locus standi in succession matter is well settled. A litigant is clothed with locus standi upon obtaining a limited grant or a full grant of Letters of Administration in cases of Intestate succession. In *Otieno v Ougo (supra)* this court differently constituted rendered itself thus;

‘.....an administrator is not entitled to bring any action as administrator before he has taken out Letters of Administration. If he does, the action is incompetent as of the date of inception.’

43. Further, I am in agreement with the authority cited by the applicant in *Ansazi Gambo Tinga & another v Nicholas Patrice Tabuche* [2019] eKLR where the Court of Appeal held:

“[17] As stated by this Court above and as rightly pointed out in *Re Estate of Shongo Omedo* [2018] eKLR; persons with *locus standi* to seek revocation of grant includes any person with a right or expectancy to the estate. It therefore follows that an ‘interested person’ under section 76 does not only envision the heirs enumerated under Section 66 of the Act; rather, it includes a person who can show an interest in the estate. Consequently,



the allegation that the respondent lacked the *locus standi* to seek revocation of grant herein, fails.”

44. On the second issue, the Respondents contend that pursuant to section 7 of the *Limitation of Actions Act*, the Applicant’s application is time barred. Section 7 of the *Limitation of actions Act* states as follows:

“ Actions to recover land

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person”

45. I note that the instant application by the applicant seeks to revoke the grant issued to the respondent and does not seek to obtain the validation and/or enforcement of the sale agreements relied on by the applicant to demonstrate their interest in the estate herein. Since the Application is not seeking to recover the subject property fails to fall under the ambit of section 7 of the *Limitation of Actions Act*.
46. In view of the foregoing, I subsequently consider whether the Application is merited or not. The respondent contests the existence, validity and enforceability of the documents relied on by the applicant to demonstrate the existence of transaction and vehemently opposes the claim that she concealed material information that she was privy to in obtaining the grant. Further, she contends that even in the unlikely event there existed such a transaction; the said documents do not specifically identify the subject property.
47. The subject property in the instant application is Nyandarua/Turasha/444. The Applicant in the agreements presented before court has the subject property being referred to as “land measuring 15 Acres, Land Number 444” and on another occasion “land measuring 15 Acres, Land Number 444 Tarusha”.
48. The Respondent having denied that the Applicant was referring to the same property, this would have called for substantive adjudication on the validity and enforceability of the agreements so as to cement the Applicant’s position as a creditor to the estate. In this instance, the Applicant is yet to pursue that route successfully.
49. *In the Estate of Prisca Ong’ayo Nande* (supra), the court held that:

“26. The applicant herein lays claim to Butsotso/Indangalasia/337, not as an inheritor from the estate of the deceased herein, but by alleging that portions of that property was sold to him by the estate. The sales are contested by the administrator. That would mean the court has to decide a question of ownership of the said property as between the estate and the applicant. Sale of property is about conveyance of title from the seller to the buyer. The dispute, therefore, is at the heart of title and ownership. Ownership or proprietorship of a property revolves about title, and that clearly places the matter squarely under article 162(2) of the Constitution.

27. The property in question is registered land. Registration of property and transfers are governed by land legislation, to be specific the Land Registration Act, No 3 of 2012, and the Land Act, No 6 of 2012. The two pieces of land legislation have elaborate provisions of sale of registered land, and transfer and registration thereof. A determination of the question as to whether there was a



valid sale of the registered land in accordance with the relevant land legislation, is an issue that is well outside the jurisdiction of the High Court. Both statutes carry provisions which state the jurisdiction of the court with regard to the application and interpretation of the two statutes. These provisions are to be found in sections 2 and 101 of the Land Registration Act and sections 2 and 150 of the Land Act.”

50. Further, the Court of Appeal when faced with similar circumstances held in *Ansazi Gambo Tinga & another v Nicholas Patrice Tabuche* –Nairobi Civil Appeal No. 74 of 2018 held that:

“(24) We are cognizant that a P&A court under Rule 73 of the Rules is given powers to issue orders as it deems fit in the interest of justice. This is why this Court would be cautious to set aside any orders made to that effect but what worried us in this matter is the fact that the grant was issued to the widow and the son of the deceased. The respondent was claiming to be a purchaser of what appeared to be a different parcel of land; should he not first prove his claim and after it is authenticated perhaps by a lawful order that indeed he was a purchaser then he can claim to be a creditor. As matters stood and by the Judge ordering the summoning of the Land Registrar, lends credence to the appellants’ contention that the Judge was aiding the respondent to gather evidence to advance his own claim in a Probate court.”

51. Section 76 of the *Law of Succession Act* sets out the factors that a court should consider in an application for annulment of a grant. I duplicate it as under:

“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.”

52. For the reasons stated herein above, it follows that the Applicant has failed to meet the threshold of this provision. She has failed to demonstrate the existence, validity and enforceability of the documents referred to, to demonstrate the existence of the transaction. She has thus failed to demonstrate that the Respondent concealed material information that she was privy to in obtaining the grant. Furthermore, the documents do not specifically identify the subject property that is subject of the succession cause. This is not a case that is merited for annulment of the grant.

53. In view of the foregoing, I am of the considered view that the application is not merited.

Disposition

54. For all the foregoing reasons, I am satisfied that the Application dated the 16th day of December, 2021 lacks merit and dismiss the same with costs to Respondent.

55. It is so ordered.

DATED AND DELIVERED AT NAIVASHA THIS 28TH DAY OF APRIL, 2022.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. Miss Kinyanjui for the Applicant.
2. Mr. Mundui Murai for the Respondent- absent.

