



In re Estate of Abdulrehman Mohamed Mohamed Hatimy (Deceased) (Succession Cause 124 of 1999) [2022] KEHC 14901 (KLR) (25 October 2022) (Ruling)

Neutral citation: [2022] KEHC 14901 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 124 OF 1999
JN ONYIEGO, J
OCTOBER 25, 2022**

BETWEEN

ABUBAKAR ABDULREHMAN MOHAMED 1ST APPLICANT

ABUBAKAR ABDULREHMAN MOHAMED 2ND APPLICANT

AND

UMIKULTHUM ABDULREHMAN MOHAMED 1ST RESPONDENT

ALAMIN MOHAMED ABDULREHMAN 2ND RESPONDENT

RULING

1. The deceased herein died intestate on 18th September 1998. A grant of letters of administration in this matter was made on 8th December, 1999 to Mohamed Abdulrehman Mohamed (Deceased) and Mohidin Abdulrehman Mohamed in their capacity as sons of the deceased. The deceased was said to have been survived by 16 dependants inclusive of the two petitioners. The estate was comprised of 12 assets located within Mombasa as well as money in 7 accounts in Hong Kong, Karachi and Thailand. The grant was subsequently confirmed on 11th September 2000 and a certificate of confirmation issued on 13th September, 2000. The estate was consequently distributed in accordance with Islamic Sharia Law.
2. On the 6th of March 2002, the 1st respondent who is a son of the deceased together with other beneficiaries applied for revocation of the said grant on grounds that it was obtained through fraud/ concealment of material facts and that the administrators had failed to diligently administer the estate. The court on 24th May, 2006 ruled that the estate was in danger of waste if the delay in distribution persisted and granted the order for revocation.
3. Thereafter, the respondents herein through the application date 7th July 2006 sought to be appointed as administrators of the estate of the deceased. Mohidin with 2 other beneficiaries objected to the



application by filing an objection to the grant on 27th, October, 2006. The grant was issued on 17th September, 2007 to the respondents.

4. The 1st respondent moved the court through a Notice of Motion application dated 8th Nov. 2007 seeking orders that; the former administrators be ordered to deposit in court all funds and monies belonging to the estate held in various foreign banks by them; the sureties known as Zubeir Mohamed Mohamed Al-Amin be summoned to show cause why they should not be ordered to make good the loss suffered by the estate as a result of former administrators' acts of breach of their role as administrators of the estate.
5. The court in its ruling of 28th June, 2013 directed the former administrator Mohidin to render to the court a full and detailed account of his administration of the estate of the deceased including any funds received and held on behalf of the estate.
6. Despite the express orders in the said ruling, no action was taken till 2021 when the applicants herein filed summons for revocation of grant dated 15th January, 2021 seeking the following orders;
 - a. Spent
 - b. That the grant of letters of administration intestate issued to the respondents on 17th September, 2007 be revoked.
 - c. That there be a temporary order of injunction against the respondents, their agents and/or assignees from collecting rent, disposing off and in any way dealing with plot numbers; Mombasa/Block/VI/1593, Mombasa/BlockVI/1589, Mombasa/BlockVI/1590, Mombasa/BLOCK VI/1590, Mombasa Block VI/1593, Mombasa /BlockVI/1587, Mombasa/Block VI/1590, MombasaBlock VI/1599, Mombasa/BlockVI/1600, Mombasa/BlockVI/1603, Mombasa/Block VI/1604, Mombasa/BlockVI/1605, Mombasa/Block VI/1606, Mombasa/BlockVI/1609, Mombasa/BlockVI/1611, Mombasa/BlockVI/1598, Mombasa/BlockVI/1597, Mombasa/Block/1595 situate in Magongo area within Mombasa county pending the hearing and determination of this application.
 - d. That this honourable court be pleased to issue any other order and/or further orders as it deems fit and just in the circumstances.
 - e. That the costs of this application be in cause.
7. The application is premised on the grounds therein and the supporting affidavit of Abubakar Abdulrehman Mohamed Hatim sworn on 15th January, 2021.
8. The applicant's case is that; he is a beneficiary of the deceased. That the respondents were appointed as administrators and granted letters of administration on 17th September, 2007 through misrepresentation of facts and made false statements through their affidavit in support of the petition for grant of letters of administration by informing the court that one Fatma Abdulrehaman was deceased while in fact she is alive; in applying for the grant of letters of administration they failed to provide guarantors as required under the *Law of Succession Act*.
9. It was deposed that they deliberately concealed and or failed to disclose to the court some of the properties which form part of the estate of the deceased which include; Mombasa/BlockVI/1593, Mombasa/BlockVI/1589, Mombasa/BlockVI/1590, Mombasa/Block VI/1590, MombasaBlockVI/1593, Mombasa /BlockVI/1587, Mombasa/BlockVI/1590, MombasaBlockVI/1599, Mombasa /BlockVI/1600, Mombasa/Block VI/1603, Mombasa/



BlockVI/1604,Mombasa /BLOCK VI/1605,Mombasa/BlockVI/1606,Mombasa/
BlockVI/1609.Mombasa/BlockVI/1611,Mombasa/BlockVI/1598,Mombasa/
BlockVI/1597,Mombasa/Block/1595 situate in Magongo area within Mombasa county.

10. The applicant stated that the respondents in their capacity as administrators had sold off and transferred some of the estate properties which include; Plot Number Mombasa/Block XXXXIV/103, Mombasa/BlockXXV/35, Mombasa/BlockXXXVI/6 without the knowledge, consent and concurrence of the beneficiaries. That as a result of the respondents' actions, the applicant and other beneficiaries were disinherited of their rightful share.
11. The applicant further stated that the respondents/administrators have failed to distribute the estate of the deceased according to the agreement of the distribution agreement dated 12th April, 2002 which was consented to by all beneficiaries. Further, the respondents had failed to produce to this honourable court a full and accurate inventory of the assets, liabilities and residue of the estate of the deceased.
12. The applicant deposed that unless the grant is revoked, the applicants will remain disinherited and a big proportion of the deceased's estate will waste away.
13. In response, the 1st respondent filed a replying affidavit sworn on 1st February,2021, thus stating that; the applicants' application lacks merit as it was based on unsubstantiated allegations and rumours without any tangible evidence; he has never indicated that Fatma Abdulrehman Hatimy was deceased and thus the allegations were unfounded; the applicants had no knowledge of the state of the estate of the deceased; the applicants have refused to consult or cooperate with him to conclude distribution of the same and; that the 1st applicant is not a beneficiary or heir of the estate thus a stranger to these proceedings.
14. Further, it was averred that the 2nd applicant is a resident of Canada holding a Canadian passport with different names after he denounced his Kenyan citizenship hence had no idea on the administration of the estate. He also denied having sold any properties as alleged by the applicant. He further stated that the applicants together with Mohidin Abdulrahman Mohamed called for a meeting of illegal occupiers and incited squatters in occupation of the land situated in Magongo against paying ground rent or dealing with him.
15. The 1st respondent averred that this application was instigated by Mohidin Abdulrahman Mohamed who has disobeyed all court orders requiring him to provide accounts and surrender to the estate a sum of Kshs 400,000,000 which he withdrew from the deceased's accounts in Thailand Pakistan, the united kingdom and Kenya when he was the administrator.
16. That Mohidin's failure to comply with the court orders issued against him has jeopardised his attempts to conclude the administration and distribution of the estate. Further, that the applicants and Mohidin do not want the estate distributed so that they can continue misappropriating funds and properties that they alienated from the estate to the detriment of the other beneficiaries.
17. He further averred that upon the demise of the 1st applicant's father (his brother), the 1st applicant unlawfully misappropriated over Kshs 6,650,000 worth of rental income that had been collected by his late father on behalf of the estate. That this application was meant to cripple the estate, cause mayhem and anarchy among the heirs who have fallen out due to the attempts by Mohidin and the 2nd applicant to disinherit them illegally.
18. He urged the court to direct Mohidin Abdulrehman to comply with all court orders issued against him forthwith and dismiss the application herein for being frivolous and a gross abuse of the court process.



19. In his rejoinder to the 1st respondent's replying affidavit, the 2nd applicant filed a further affidavit sworn on 1st March, 2021, stating that the 1st respondent cannot disinherit the 1st applicant on account of his citizenship. That the 1st applicant is a legal heir and beneficiary of the estate of the deceased by virtue of being a son and the administrator of the estate of Mohamed Abdulrehman Mohamed Hatimy.
20. He further stated that the 1st respondent has never rendered any just and true accounts of the estate for 14 years and that the estate had been subjected to substantial wastage due to the respondent's mismanagement and unaccountability. That the respondents have deliberately failed to discharge their duties as administrators of the estate.
21. He denied the allegation that he had held a meeting with the squatters, occupiers, or tenants of the estate in the premises situated in Magongo. He further stated that the respondents have been collecting rent from the said tenants without proper accounts and that he had instituted this application on his own volition.
22. According to him, the respondents have intentionally failed and or refused to obtain confirmation of grant 14 years from the time they obtained the grant which was contrary to the law.
23. He averred that at the time of his death, the deceased had gifted most of his properties in Mombasa to his children except properties out of the country including funds in bank accounts in Hong Kong, Thailand, Pakistan and United Kingdom which the 1st applicant illegally misappropriated by transferring the same to his personal accounts in United Kingdom and Saudi Arabia.
24. The 1st applicant filed a further affidavit on 14th September, 2021 in response to the 1st respondent's affidavit filed on 13th May, 2021 and sworn on 11th May, 2021. He reiterated the position of the 2nd applicant in his affidavits and stated that the respondents omitted Plot No.8/XXXIV/Mombasa, 16 parcels of land situated in Magongo, a factory in Thailand and two houses in Thailand. That the omission of the said properties in the respondents' petition was meant to conceal material facts from the court.
25. On Plot No.46/XLIII he stated that the 1st respondent had fraudulently used the said property as security in the bank to borrow money for his personal use in the year 2000, 2004 and in 2005. On plot number 35/XXXVI he stated that the 1st respondent sold it to his son Abdulrehman Alamin Abdulrehman. He further stated that the respondents were not people of integrity and should not be entrusted to carry out the work as administrators in the estate of the deceased.
26. On Plot No.103 /XXXIV it was his position that the same was part of the estate of the deceased and the 1st respondent had admitted the same when he filed a caveat.
27. Mohidin Abdulrehman Mohamed who is a former administrator of the estate of the deceased filed his affidavit sworn on 15th June, 2021 thus stating that he was appointed an administrator together with the late Mohamed Abdulrehman Mohamed with whom he administered the estate from 1999 to 2006. That together they were able to collect a gross income of Kshs 22,538,531 of which Kshs 5,574,381 was spent in the course of the administration.
28. He stated that despite the passing on of his co-administrator in January, 2002, he managed to distribute the following properties;
 - a. Mombasa Block XXIX/31 and XXXV.13-Abubakar.A Hatimy
 - b. Mombasa Block XLI/1-Ahmed A.Hatimy
 - c. Mombasa Block XLI/6 & Xxxvi/6-Mohamed A.M Hatimy



- d. Mombasa Block XLIII/46 and Iv/109-Muhidin A.M Hatimy
 - e. Mombasa Block XLII/47- Umikulthum & Rukiya A.M.Hatimy
 - f. Mombasa XXXVI/35 –Al Amin A.M Hatimy
 - g. Mombasa Block XXX/57 & Xliii/46-Munira A.M.Hatimy
 - h. Mombasa XXXV/13 –Zulfat.A.M Hatimy
 - i. Mombasa XXXIV/8 Fatma A.M. Hatimy
 - j. Mombasa IV/09 and XLIII 46 –Sheikh Nurein A.M.Hatimy
29. According to him, he was unable to complete registration process of the said assets due to the passing on of his co-administrator. That the allocations were made pursuant to the distribution agreement. He also stated that Al Amin Abdulrehman Mohamed,Umikulthum,Rukiya Hatimy, Sheikh A.Hatimy ,Munira Hatimy,Zulfat Hatimy and Muhamad Abdulrehman Mohamed have interfered with the said allocations.
 30. He further stated that he was removed as an administrator on 24th May, 2006 hence the past failures cannot be revisited to justify the current administrators’ underperformance. That he was in support of the application and appointment of the applicants as administrators of the estate as the current administrators have completely failed to perform their duty as required by the law.
 31. He averred that the allegation that some properties did not form part of the estate was not true as their late father through their late brother Mohamed Abdulrehman Mohamed had allowed his properties to be registered in the names of his children as he was residing in Thailand. That the properties of the estate were distributed according to the Islamic law which was also the wish of their father in a family meeting held after the demise of their father.
 32. Amir A.Swaleh a former advocate of the beneficiaries filed an affidavit sworn on 30th November, 2021 and stated that on 12th April, 2002 the beneficiaries and heirs of the estate of the deceased herein signed the distribution agreement dated 12th April, 2002 except Abubakar Abdulrehman Mohamed, Munira Abdulrehman Mohamed who were both out of the country in Canada and united kingdom respectively. That they were however made aware of the same which they later signed at different dates. That Mohamed Abdulrehman Hatimy signed for himself and his mother Nina Aptanaburi.
 33. He further stated that all the parties agreed that though the properties were registered in different names of the children, all the distributed assets formed part of the estate of the deceased, hence some received properties registered under the names of other beneficiaries which was done as per the wishes of the deceased. That he attested the execution of the document in his chambers on 12th April, 2002. That what was pending was the registration of the distribution agreement at the land registry and effecting transfers according to the said agreement.
 34. He stated that the family of the late Mohamed Abdulrehman Mohamed Hatimy deposited the keys towards the house on Plot No.13/XXXV which they were occupying before distribution and the same was handed over to Zulfa Abdulrehman Mohamed who was allocated the upper flat of the said property as per the distribution agreement.
 35. Parties agreed to dispose of the matter by way of written submissions.



Applicants' submissions

36. The applicants through their advocates Gikandi and company advocates filed written submissions dated 25th February, 2022. On whether the grant of letters of administration should be revoked, Mr. Gikandi submitted that the applicants had met the threshold under Section 76 of the [Law of Succession Act](#). That the actual consent of the beneficiaries which is part of annexure C of the petition had omitted several beneficiaries namely; Ahmed Abdulrehman Mohamed Hatimy (Son), Mohidin Abdulrehman Mohamed Hatimy (Son), Abubakar Abdulrehman Mohamed Hatimy (Son), Nina Apnataburi (Wife), Mohamed Abdulrehman Mohamed Hatimy (Son) Deceased, and Fatuma Mohamed Ali (Wife) (Deceased).
37. That the omitted beneficiaries are also not part of the seven people who signed the consent. That Fatima Abdulrehman Mohamed Hatimy (daughter) and Sheikh Nurein Abdulrehman Mohamed Hatimy (son) who had consented to the application, on 27th October, 2006 filed an objection to making of the grant to the respondents. That the omission amounted to misrepresentation of facts thus rendering the proceedings to obtain the grant defective. Counsel relied on rule 26(1) of the [probate and administration rules](#) and the case of *In re Estate of Festo Lugadiru Abukira (Deceased)* [2019] eKLR on the requirement of a petitioner to notify all persons with equal rights who have not petitioned who then signify the same by either renunciation of their right to administration or by signing consent forms 38 or 39 depending on whether the deceased died testate or intestate.
38. On the declaration by the respondents that one Fatma Abdulrehman Mohamed Hatimy was deceased while she is still alive, counsel relied on the case of [Jamleck Maina Njoroge v Mary Wanjiru Mwangi](#) (2015) eKLR on the grounds in which a grant can be revoked where the court held that a grant can be revoked on the ground of giving false information.
39. On whether the grant was obtained fraudulently by making false statement or concealment of material facts, counsel submitted that the respondents had failed to make the court aware of the distribution agreement entered into on 12th April, 2002 and also the omission of some beneficiaries who included Nina Apnataburi a wife to the deceased. Counsel relied on the case of [Ibrahim v Hassan & Charles Kimenyi Macharia, Interested Party](#) [2019] eKLR where the court revoked a grant due to exclusion of two beneficiaries from the list of beneficiaries. Counsel also relied on the case of [Re Estate of Moses Kimotho \(Deceased\)](#) [2009] eKLR to lay emphasis on the importance of disclosure of all material facts when applying for a grant.
40. It was counsel' contention that the respondents have not given reasons why they have failed to apply for confirmation of the grant for a period of more than 15 years. That they have also failed to produce to the court ,within the time prescribed ,any such inventory or account of administration as required by the provisions of paragraphs (e) and (g) of section 83 of the [Law of Succession Act](#) and also as per the orders of this court of 10th March, 2021. To buttress that position, Counsel relied on the case of [Re Estate of Daniel Omari Ongori \(Deceased\)](#) [2021] eKLR.
41. Counsel submitted that none of the beneficiaries including the respondents were opposed to the appointment of the applicants as administrators of the estate. That if the same is not granted, the estate will remain in limbo to the detriment of the beneficiaries. That if the same is opposed, the public trustee be appointed as the administrator of the estate.

Respondents' submissions

42. The respondents through their advocates Sherman Nyongesa & Mutubia Advocates filed their written submissions dated 15th March, 2022 thus reiterating the content of various affidavits in opposition to



- the revocation application, the previous pleadings and court orders to show that the application herein was part of the numerous attempts by the previous administrators and the applicants to scuttle and frustrate their efforts to have the estate distributed.
43. On the summons for revocation, counsel submitted that the applicants had not sought consent of the other beneficiaries to file the application herein. That the 2nd applicant is a Canadian citizen and currently bedridden and thus unfit to be appointed as an administrator. That the 1st applicant has no locus before this court as he is not a beneficiary of the estate as stated earlier in the respondents affidavits.
 44. On the allegation of Fatma Abdulrehman Mohamed being alive counsel submitted that the applicants had not produced any evidence or affidavit by the said Fatma either protesting her exclusion or confirming she is still alive. Counsel referred the court to paragraph 4 of the affidavit in support of the petition sworn on 7th July, 2006 on the two similar names.
 45. On the assets of the estate, counsel submitted that the inclusion of the properties set out under paragraph 8 of the affidavit in support of the petition filed on 27th July, 2006 by the respondents was a clear error and illegality under the law. That there was no dispute that all the said properties are registered and owned by the persons whose names appear on the titles prior to the demise of the deceased.
 46. That the attempts to introduce the consent to distribute such properties is against the orders of the court issued on 24th May, 2006 where the court declared the distribution agreement invalid. That the said decision having not been appealed against is not applicable in this case.
 47. On Plot No.1593 /VI/MN, Counsel submitted that the same does not belong to the estate and any dispute on the same would be between the owner and the 1st respondent and cannot be adjudicated upon by this court in these proceedings.
 48. On Nina Apnataburi not being listed as a widow of the deceased by the previous administrators' counsel submitted that it is due to the fact that she was not a Kenyan and the deceased had made sufficient provision for her by gifting her properties in Thailand including a factory. That she has never filed any objection to the distribution of the estate of the deceased thus the attempt by the applicants to use her name were intended to mislead the court.
 49. Counsel submitted that the respondents had filed numerous applications and obtained several orders seeking to have the previous administrator held accountable for fleecing the estate. That they could not apply for a second confirmation of grant when they had no access to the funds that were illegally transferred by Mohdin to his personal accounts. That the affidavit of Umi Kulthum referred to by the applicants was found to be a forgery filed to delay the matter by this court and that the said Umi had disowned the same and confirmed that she was available as a co-administrator.
 50. Counsel contended that despite the respondents opposing the application herein, they proposed to have the estate administered by a neutral party namely Hamad Mohamed Kassim a former Chief Kadhi, a proposal which was rejected by the applicants. In conclusion, counsel submitted that revocation of the grant without ensuring compliance of the numerous court orders on record will not solve anything rather it will prolong the matter to the detriment of the other beneficiaries. Counsel urged the court to dismiss the summons application with costs.



Determination

51. I have considered the summons herein, responses thereto and rival submissions of both counsel. My simple task is to determine whether the 1st applicant has locus standi to bring the application herein and; whether the grant issued on 17th September, 2007 should be revoked.
52. On the question whether the 1st applicant has locus standi, I wish to seek guidance from the wisdom displayed in the case of *Ibrahim v Hassan & Charles Kimenyi Macharia, Interested Party* [2019] eKLR where the court stated as follows;

“Locus standi is basically the right to appear or be heard in court or other proceedings. That means if one alleges the lack of the same in certain court proceedings, he means that party cannot be heard, despite whether or not he has a case worth listening. The issue herein is whether the Applicant lacks the requisite locus standi to seek relief from the court to revoke the grant in question issued to the Respondent. In my view, issues as regards locus standi are critical preliminary issues which must be dealt with and settled before dwelling into other substantive issues.

The position in law as regards locus standi in succession matters is well settled. A litigant is clothed with locus standi upon obtaining a limited or a full grant of letters of administration in cases of intestate succession. In *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.”

53. The respondents have argued that the 1st applicant has no locus before this court as he is not a beneficiary of the estate of the deceased. It's not in dispute that the 1st applicant is the heir of the estate of Mohamed Abdulrehman Mohamed Hatimy (deceased) who is a former administrator of the estate of the deceased and a son of the deceased herein. He is also an administrator of the estate of his father Mohamed Abdulrehman Mohamed Hatimy (deceased) as per the certificate of confirmation issued on 15th October, 2003. My understanding is that the 1st applicant is before this court on behalf of his father's estate who was heir or beneficiary of the estate of the deceased. Further, Section 76 of the *Law of Succession Act* allows any interested party to apply for revocation of grant and thus it's my view that the 1st applicant has locus standi before this court.
54. On whether the grant issued on 17th September, 2007 should be revoked, Section 76 of the *law of succession act* provides for grounds under which a grant of confirmation can be revoked as follows;
- 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.
55. The court in the case of *In re Estate of Magangi Obuki (Deceased)* [2020] eKLR in dealing with the issue of revocation had this to say;
- “In the case of *Albert Imbuga Kisigwa v Recho Kawai Kisigwa*, Succession Cause No.158 of 2000, Mwita J. made remarks on the guiding principles for the revocation of a grant. He stated;
- “[13] Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the court to invoke section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased’s estate and ensure that the action taken will be for the interest of justice.”
56. The applicants argued that the respondents misled the court by stating that one Fatima Abdulrahman Mohamed was deceased while she was still alive. They produced a copy of receipt of hospital bill dated 31st October, 2020 paid to Mombasa hospital on behalf of Fatima Abdulrahman Mohamed to support their argument that she was alive. The respondents disputed the allegations and referred the court to the list of survivors of the deceased in their affidavit in support of the petition.
57. The respondents in their affidavit in support of the petition listed the following persons as the survivors of the estate of the deceased;
- a. Halima Mohamed Al-Min-Wife
 - b. Mohidin Abdulrehman Mohamed-Son
 - c. Ahmed Abdulrehman Mohamed-Son
 - d. Abubakar Abdulrehman Mohamed –Son
 - e. Al-Amin Abdulrehaman Mohamed-Son
 - f. Fatima Abdulrehman Mohamed Hatimy-Daughter
 - g. Umikulthum Abdulrehman Mohamed Hatimy-Daughter
 - h. Munira Abdulrehman Mohamed Hatimy-Daughter
 - i. Rukiya Abdulrehman Mohamed Hatimy-Daughter
 - j. Sheiknurein Abdulrehman Mohamed Hatimy-Son



- k. Muhammad Abdulrehman Mohamed Hatimy-Son
 - l. Zulfat Abdulrehman Mohamed Hatimy-Son
 - m. Estate of Fatuma Mohamed Ali-Wife
 - n. Estate of Mohamed Abdulrehman Mohamed Hatimy-Son
 - o. Estate of Zeinab Abdulrehman Mohamed Hatimy-Daughter
58. From the above list it's clear that she was included in the list of beneficiaries and no evidence of the respondents declaring her as deceased. Further, it is also evident that Fatma Abdurehman Hatimy signed the consent to the petition. Thus it's my view that the allegations by the applicant that the respondents made false statements by informing the court that Fatma Abdulrehman was deceased are not true.
59. The applicants further maintained that the grant should be revoked on grounds that the applicant failed to disclose some of the properties that form part of the estate. This allegation was based on the ground that the respondents have sold off and transferred some of the estate properties including Mombasa/BlockXXXIV/103, Mombasa/BlockXXV/35 and Mombasa/BlockXXXVI/6 without the knowledge and consent of the other beneficiaries.
60. The 1st respondent in his affidavit sworn on 11th May,2021 paragraph 2 listed down the list of properties listed in the first petition filed on 10th August ,1999 and in relation to the same in paragraph 5 of the said affidavit stated,
- “ That we made a similar error in the amended petition filed on 7th July, 2006 and included in the petition properties that did not belong to the estate as follows;
- MombasaXXIX/31 & XXXV/15-Abubakar A.hatimy
- Mombasa/BlockXLI/1-AHMED A.M Hatimy
- Mombasa/BlockXLI/6 & XXXVI/6 –Mohamed A.m Hatimy
- Mombasa/BlockXLIII/46 & IV/109-Muhidin A.m Hatimy
- Mombasa/BlockXLII/47-Ummikulthum & Rukiya A.M Hatimy
- Mombasa/BlockXXXVI/35-AL AMIN A.M Hatimy
- Mombasa/BlockXXX/57 & XLIII/46 –MUNIRA A.M HATIMY
- Mombasa/BlockXXXV/13-ZulfatA.M Hatimy
- Mombasa/BlockXXXVI/35-AL Amin A.M.Hatimy
- Mombasa/BlockXXXIV/8 –FatmaA.M Hatimy
- Mombasa BlockIV/109 & XLIII/46 –Sheikh NureiA.M Hatimy”
61. The respondent argued that these properties do not form part of the estate of the deceased. He also stated that the former administrators never handed over any documents relating to the assets or liabilities to him to enable carry him carry out his duties as an administrator.
62. The respondents in their petition for grant listed the following assets as the assets of the estate of the deceased;
- Mombasa/BlockXXIX/31



Mombasa/BlockXLI/1
Mombasa/BlocK XLI/6
Mombasa/BlockXLIII/46
Mombasa/BlocK XLIII/47
Mombasa/BlockXXVI/35
Mombasa/BlockXXXVI/8
Mombasa/BlockXXXIV/103
Mombasa/BlockXXXVI/6
Mombasa/BlockIX/109
Mombasa/BlockXXX/57
Mombasa/BlockXXXV/13
Plot No.1713

And several bank accounts.

63. From the documents annexed to the application, the proprietor for Plot No.103 is indicated as “letter of administration in favour of Khamis Bin Shafy as representative of Mwana Mwanga Binti Khamis, deceased”. The entry was registered on 16th May, 1986. It was later on 10th July,1986 registered in the names of the beneficiaries of the estate of Mwana Mwanga Binti namely Mohamed Shafi,Salima Shafi,Saida,Aziza Ali Shafi,Hawaa Ali Shafi,Swafiya Abdalla,Ummi Abdalla,Mohamed Khamis Shafi, Salizo Khamis Shafi, Abdi Bakri Khamis Shafi, Fatuma Khamis Shafi, Kulthum Khamis Shafi, Khadija Khamis Shafi,Shaffa Khamis Shafi,Swafiya Suleiman and Maryam Mabruk Ali. On 24th October, 1991 it was then registered in the name of Mohamed Abdulrehman Mohamed as custodian of Muhammed Abdulrehman Mohamed (a minor). In 2007 the title deed was registered in the name of Noor Faraj Hassan as the proprietor.
64. On Plot No.35 the documents on record indicate several entries of the registered proprietors on diverse dates namely; on 11th March, 1977 registered to Saleh Abed Abdulsheikh, 4th September, 2012 registerd in the name of Abdulrehman Mohamed Mohamed Hatimy in favour of a charge of Kshs 270,006. The property was also registered in the names of Al-Amin Abdulrehman Hatimy and Umikulthum Abdulrehman Mohamed Hatimy as administrators.
65. Plot No.6 also has several entries entered from 1966 to 2020.On 21st August, 1991 the registered proprietor was Mohamed Abdulrahman Mohamed as guardian of Mohamed Abdurahman. On 13, September 1991, registration was done in the name of Ashraf Hassan Awadh. On 5th June, 2007 registration was done in the name of Mohamed Abdulrehman Mohamed and a title deed issued. The last entry was on 28th September, 2020 in the name of Ibrahim Hassan Yusuf at a consideration of Kshs 9 million and a title deed issued. Before then there are three registrations from the registration of 5th June, 2007.
66. Plot No.46 also has several entries. However, the entry in the name of Abdulrehman Mohamed Hatimy made on 24th October 1968 was cancelled.
67. None of the parties has produced any document and or evidence that shows that most of the subject properties belonged to the deceased for them to be declared assets of the estate.



68. The 2nd applicant in his further affidavit sworn on 1st March,2021 annexed undated lease agreement between the 1st respondent and Alexander Kainga leasing a portion of Plot No.1593 /VI/M.N registered in the name of Muhidin Bin Omar ,for purposes of building a permanent house in consideration of Kshs 1,000,000. He has annexed the same to show that the respondents have illegally sold, disposed of and leased some portions of the estate. He has not attached any ownership document in respect to the said property and thus this court is unable to establish whether the said property forms part of the assets of the estate or not. Literally speaking, the estate has been interfered with thus causing total confusion on the current status of the estate assets.
69. Accordingly, it's my finding that the present status of most of the subject properties cannot be established. This court in its ruling of 24th May, 2006 held a similar position on the same issues. For that reason, there is need to reorganize the mess caused in the course of administering the estate.
70. The applicants submitted that the grant should be revoked for reasons that the respondents as administrators of the estate of the deceased failed to file for confirmation of grant and to produce an inventory or account of administration as required by law.
71. The respondents in opposing these allegations submitted that the former administrator was frustrating their efforts to administer the estate as required. That they could not apply for a grant of confirmation without access to the funds illegally transferred by the former administrator to his personal account.
72. The court in the case of *In re Estate of Agwang Wasiro (Deceased) [2020]* eKLR in dealing with the issue of revocation on the ground of failure to apply for confirmation of grant as follows;

“Both applicants raised issue with failure by the administrator to apply for confirmation of grant within the period allowed in law. Confirmation of grants is provided for in section 71 of the *Law of Succession Act*, the relevant portion says as follows:

“Confirmation of Grants

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.”

Under section 71, an administrator is enjoined to apply for confirmation of his grant after expiration of six months from the date the grant was made to him. The provision is in mandatory terms...

So what is the consequence of failing to apply for confirmation of grant with the period prescribed by section 71(1) of the Act? The applicants have asked me to revoke the grant as a consequence. One of them appears to premise his case on section 76, while the other has brought his application under Rule 73 of the Probate and Administration Rules. It would appear, under section 76(d), that a revocation founded on the third ground would only apply where the administrator has been given due notice but fails without reasonable cause to apply for confirmation of grant



or to proceed with diligence or to render accounts, as the case may be. It would appear that failure to apply for confirmation of grant generally, without a notice having been issued to the administrator, would not suffice as a ground to revoke a grant. I believe section 76(d) should be read together with section 73 of the [Law of Succession Act](#), which provides:

“

“73. Duty of court to give notice to holder of grant to apply for confirmation

The court shall within one year from the date of any grant of representation, give notice to the holder of the grant to apply for confirmation thereof.”

Read together, these provisions would mean that a grant is not liable for revocation only because the administrator has not applied for its confirmation within the period prescribed under section 71(1), it must be demonstrated that in addition, the court had discharged its duty under section 73, whether suo moto or on application by the parties, of giving notice to the administrator who has failed to apply for confirmation of their grant, and the administrator had failed to harken to that notice. It would appear that it is only then that the provisions of section 76(d) would kick in. It has not been demonstrated that any notice was ever issued on the administrator under section 73, and, therefore, section 76(d) cannot be invoked at this stage.”

73. From the above citation, it's evident that a notice has to be issued to the administrators before invoking this ground. Unfortunately, in this case there is no evidence that a notice was issued. However, the duty to apply for confirmation does not shift to the court. The administrators slept on their mandate for 15 years without applying for confirmation. This is quite inordinate hence no amount of excuse can justify the delay. The only just remedy is to revoke the grant which I hereby do.
74. From the court record, this honourable court on 28th June, 2013 issued orders directing the former administrators Mohidin Abdulrehman Mohamed to submit to the court a full and detailed account of their administration of the deceased's estate including any funds received and held on behalf of the estate which he did not comply with. In his affidavit sworn on 15th June, 2021, he annexed a copy of income and expenditure statement of the estate marked as “MAM-1” and a copy of undated distribution agreement which he claims he used to distribute the estate.
75. The issue of the distribution agreement referred to by the former administrator was addressed by this honourable court in its ruling of 24th May, 2006 where it noted the same was not signed by some beneficiaries and that some assets distributed to beneficiaries were registered in the name of other beneficiaries. That position still stands to date hence it is not relevant nor applicable.
76. I must note that this matter has been in court since 1999 and the bone of contention is the distribution of the estate of the deceased. It is highly contested with the beneficiaries accusing each other of wasting



- the estate of the deceased. It is unlikely that the parties herein will ever agree to resolve their differences and mistrust. Thus for the interest of justice, it's my view that the best person to distribute the estate is a neutral party. Parties have also failed to agree on a neutral party to be the administrator of the estate.
77. Having revoked the grant issued on 17th September 2007, I will exercise this court's discretionary powers under Section 47 & 66 of the *law of succession Act* to appoint the Public Trustee as the administrator of the estate of the deceased. The public trustee therefore shall take charge of the estate with immediate effect until completion of the administration exercise.
78. Under the power conferred upon this court by Section 47 of the *law of succession Act* and rule 73 of the P and A rules, I wish to confirm the grant and distribute the estate as per the list of assets in the original petition under the Islamic law in conformity with the certificate of confirmation issued on 13th September 2000.
79. Any arrangements on distribution of the estate using a gentleman's agreement known as a deed of agreement of the year 2002 contrary to the confirmed grant is a nullity. It is trite that if an act is void, then it is in law a nullity hence it is not only bad but incurably bad. See *Mcfoy v United African Company LMT (1961) 3 ALL E.R 1169*. Therefore, the public trustee will not be bound by the deed of settlement or agreement referred to by the applicant.
80. Regarding the list of beneficiaries, the same shall be as per the list contained in the original petition which was not contested and consequently reflected in the certificate of confirmation of 13th September 2000.
81. The public trustee shall however take into account and consider any distribution done in accordance with the earlier confirmed grant. The original administrators and their successors are hereby given 60 days to submit an inventory and statement of accounts in respect of the estate for the period they were in charge.
82. Further, the public trustee shall be at liberty to; apply for review of the confirmed grant if need be for exclusion of any of the assets which may have been wrongly listed and also for inclusion of any of the wrongly excluded property; appoint estate agents to collect rent from all assets of the deceased and deposit the same in an account approved by the public trustee; ensure completion of the administration of the estate within six months from the date of this ruling.
83. Failure by the administrators to account for the estate will attract severe sanctions including forfeiture of their share at the value equivalent to the value of the unaccounted for part of the estate. Regarding costs, each shall bear own costs. Mention on 24th January 2023.

DATED, SIGNED AND DELIVERED IN MOMBASA THIS 25TH DAY OF OCTOBER, 2022.

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J.N.ONYIEGO
JUDGE

