



REPUBLIC OF KENYA



**In re Estate of Hurbai Hussein (Deceased) (Succession Cause 702 of 2019)
[2022] KEHC 15962 (KLR) (Family) (18 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15962 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY**

SUCCESSION CAUSE 702 OF 2019

MA ODERO, J

NOVEMBER 18, 2022

**IN THE MATTER OF
ARSHAD BEGUM SHAH (SUING AS THE ADMINISTRATRIX OF THE
ESTATE OF HURBAI HUSSEIN - DECEASED) PETITIONER**

JUDGMENT

1. Before this court is the summons for revocation of grant dated July 2, 2020 by which the objector Nuru Abdulla Ahmed seeks the revocation of the certificate of grant made to Arshad Begum Shah on September 27, 2019 and confirmed on January 21, 2020. The summons for revocation of grant is premised on the following grounds:-
 1. That the proceedings to obtain the grant were defective
 2. That the applicant herein Nuru Abdulla Ahmed has been in occupation of the said property for over 30 years and has filed for a claim the ownership by way of adverse possession.
 3. That the confirmed grant was obtained fraudulently and by material concealment of facts by the petitioner, Arshad Begum Shah.
 4. That the petitioner is highly likely to interfere with the applicant's occupation and quiet possession of the property if not restrained by this honourable court.
 5. That it is mete and just that the orders sought be granted."
2. The summons which was premised upon rule 44 and 49 of the *Probate and Administration Rules* and all other enabling provisions of the law was supported by the affidavit of even date sworn by the objector.



3. The respondent/administrator Arshad Begum Shah filed a replying affidavit dated October 13, 2020 in opposition to the summons. The matter was heard by way of *viva voce* evidence. Each side called one witness in support of their case.

Background

4. This succession cause relates to the estate of Hurbhai Hussien (hereinafter 'the deceased') who is said to have died intestate in Nairobi on June 17, 1985. According to a letter dated June 20, 2019 authored by the Chief of Eastleigh Division the deceased was survived by the following persons.
 - (i) Khadija Jamal Juma – Daughter (deceased)
 - (ii) Abudl Aziz Luhah son – (deceased)
 - (iii) Arshad Begum Shah – Granddaughter-in-law.
5. The estate of the deceased was said to comprise of only one asset being Title No LR 36/11/347, 8th Street Eastleigh (hereinafter 'the suit property') said to be valued at Kshs 10 million.
6. Following the demise of the deceased, the respondent filed a Petition dated June 6, 2019 seeking grant of letters of Administration Intestate. On November 12, 2019 grant of Administration was issued in the name of the respondent. Thereafter a certificate of confirmed grant was on January 21, 2020 issued to the respondent and the grant indicated that the suit property was to devolve entirely to the respondent. The objector then filed this summons seeking revocation of the grant issued to the respondent.

The Evidence

7. The objector testified on his own behalf. He stated that the grandson of the deceased one Abdulaziz Luhah who lived in the suit property with his two (2) wives and children invited him (the objector) to occupy one room in the premises in the year 1988. The objector states that he continued to reside in the suit property with the said Abdulaziz until the year 2000 when Abdulaziz and his family left the premises for an unknown destination.
8. The objector states that he continued to reside in the property until the year 2010 when he heard that Abdulaziz had died in Nairobi. That he managed to trace the family in Nairobi South 'C' where he met one Abdi Rashid who claimed to have purchased the suit property from Abdulaziz.
9. The objector filed a civil suit against this Abdi Rashid and obtained orders in his favour. He then built a mabati wall around the premises and is now waiting to see who will come and remove him from occupation of the suit property.
10. The objector states that he has been living undisturbed on the suit property for a period of thirty (30) years. He denies that the respondent is one of the wives of Abdulaziz. Further the objector alleges that the grant issued to the respondent was obtained fraudulently by concealment of material facts. He therefore urges this court to revoke the said grant.
11. On her part, the respondent asserts that she is the sole beneficiary of the estate of the deceased being Granddaughter-in-law of the deceased. That the said Abdulaziz who was the grandson of the deceased was her husband. The respondent concedes that Abdulaziz had two (2) wives but states that the first wife left before she was married. She states that she had no children with Abdulaziz.
12. The respondent insists that she obtained the grant lawfully as the sole beneficiary to the estate. That when she went to the suit property she met the objector who slapped her and ordered her to leave. That she has nowhere to live and is currently residing with friends.



13. The respondent totally denies the objectors claim that he was invited and occupied the house together with the family of Abdulaziz. She denies that the objector has any legal or valid claim to the suit property. The respondent submits that in any event, any claim the objector may lay to the suit property cannot be determined by this probate court. She therefore prays that the summons be dismissed in its entirety.
14. Upon conclusion of viva voce evidence parties were invited to file written submissions. The objector filed the written submissions dated June 16, 2022 whilst the respondent relied upon her submissions dated October 12, 2021.

Analysis and Determination

15. I have carefully considered the summons before this court, the replying affidavit filed by the respondent, the evidence on record as well as the written submissions filed by both parties.
16. It is common ground that the deceased in this matter passed away on June 17, 1985. A copy of the death certificate serial number xxxx is annexed to the petition for grant of letters of administration intestate. It is also not in dispute that a confirmed grant in respect of the estate was on January 21, 2020 issued to the respondent as sole beneficiary to the estate. A copy of the confirmed grant forms part of the record. (Annexure ABS-‘1’ to the replying affidavit dated October 13, 2020).
17. The only asset left behind by the deceased was the property known as LR No 36/11/347, 8th Street Eastleigh. The objector himself does not dispute this fact. A copy of the title document is annexed to the petition dated June 6, 2019 filed by the respondent.
18. The objector seeks to have the grant issued to the respondent revoked on grounds that said grant was obtained fraudulently by concealment of material facts.
19. Section 76 of the *Law of Succession Act*, Cap 160 Laws of Kenya sets out the grounds upon which a grant may be revoked as follows:-

“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.”
20. Therefore in order to satisfy the court that the grant issued to the respondent ought to be revoked the objector must set out with specificity the fraud perpetrated by the objector in obtaining the grant and/or what facts were concealed by the respondent.
 21. The objector insists that the respondent who appeared in court is not one of the wives of Abdulaziz. The objector told the court that he resided in this suit property with Abdulaziz and his family. Under re-examination by his Advocate, the objector confirms that Abdulaziz was the grandson of Hurbai Hussein (the deceased in this cause). The objector stated that Abdulaziz had two (2) wives. That one named Fatuma had children whilst the other wife whose name he gives as Arshad had no child.
 22. Despite confirming that one of the wives of Abdulaziz was named Arshad and notwithstanding the fact that the respondent herein is called Arshad Begum Shah, the objector vehemently insists that the respondent who testified in this matter is not the wife of Abdulaziz. The objector therefore implies that the respondent obtained the grant by falsely misrepresenting herself to the probate court as the wife of Abdulaziz and the granddaughter-in-law to the deceased.
 23. The respondent on her part categorically denies that the objector ever resided with her family in the suit property. The respondent asserts that she is Arshad wife of Abdulaziz and asserts that she has a genuine claim as the sole beneficiary of the deceased. She denies having obtained the grant by way of fraud and states that it is the objector who is a stranger to the estate.
 24. The respondent did annex to the petition a copy of her National Identify card No xxxx in the name Arshad Begum Shah.
 25. The respondent also produced in court a copy of her marriage certificate serial no xxxx. It indicates that the respondent got married to Abdulaziz Luhar on February 10, 1985 under Islamic Sharia Law. Finally the Chiefs letter dated June 20, 2019 names the respondent Arshad Begum Shah as the only surviving beneficiary to the estate of the deceased.
 26. From the forgoing there exists overwhelming evidence that the respondent is who she claims to be. That she is Arshad who was (as conceded by the objector) married to Abdulaziz, the grandson of the deceased.
 27. The respondent told the court that her husband died in the year 2010. The objector confirms that after searching for Abdulaziz he came to learn that Abdulaziz had died. The respondent did annex to her petition the death certificate serial number xxxx confirming that her husband passed away at the Aga Khan Hospital on March 14, 2010. From the evidence availed to this court, I am satisfied that the respondent is the widow of Abdulaziz who was a grandson to the deceased and as such is a beneficiary with a valid legal claim to the estate. There is no evidence of fraud or concealment on the part of the respondent.
 28. The objector on the other hand is not a member of the family of the deceased. He has no legal claim to the property of the deceased. The objectors tale that Abdulaziz offered him accommodation in the suit property where he lived undisturbed for thirty (30) years is simply not believable. Why would the said Abdulaziz vacate such prime property and disappear with his two (2) wives leaving a man who was not a relative in the house? The story is simply not plausible.
 29. The objector alleges that the respondent is being used by a councilor named ‘Fuad’ to wrest the house from him. The house in question does not belong to the objector – it belonged to the



deceased and following her demise became part of her estate. Moreover, there is no evidence of any collusion between the respondent and this ‘Fuad’.

30. The objector bases his claim to the suit property on the principle of ‘adverse possession’. Such a claim as between the estate and a third party cannot be determined by the probate court. The mandate and function of this probate court is to oversee the distribution of the estate to the genuine beneficiaries. Disputes between the estate and third parties can only be determined in courts with requisite jurisdiction.
31. It is manifest that the real dispute here is whether the suit property belonged to the deceased or whether the objector can validly claim ownership of the same by way of adverse possession.
32. Matters relating to the ownership use and occupation of land have now under article 162 of the [Constitution of Kenya 2010](#) been mandated to be determined by a specialized court being the Environment and Land Court (‘ELC’).
33. Section 13 of the [Environment and Land Court Act](#) provides for the jurisdiction of that court as follows:-
 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. [Rev. 2012] No 19 of 2011 Environment and Land Court 9 [Issue 1]
34. Therefore, the correct and proper forum before which the objector ought to ventilate his claim to the suit property is the ELC. The Environment and Land Court is the only court exclusively mandated by law to determine the question of ‘ownership’ of the suit property.
35. [In Re Estate Of Stone Kathubi Muinde \(deceased\)](#) [2016] eKLR Hon Justice William Musyoka held that:-

“Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit properly brought before a civil court in accordance with the provisions of the Civil Procedure Act and the Civil Procedure Rules. This could mean filing suit at the magistrates’ courts, or at the Civil or Commercial Divisions of the High Court, or at the Environment and



Land Court. If a decree is obtained in such suit in favour of the claimant then such decree should be presented to the probate court in the succession cause so that that court can give effect to it.” (own emphasis)

36. The applicant is not claiming the suit property as a beneficiary to the estate. He is claiming by way of ‘adverse possession’. He must therefore file his claim in the Environment and Land Court for determination. If and when the applicant obtains judgment in his favour from the Environment and Land Court then he is at liberty to present the decree to this court for implementation. This court has no jurisdiction to determine the Applicants claim.
37. In conclusion I find no merit in the summons for revocation of grant dated July 2, 2020. The same is dismissed in its entirety. Costs will be met by the objector.

DATED IN NAIROBI THIS 18TH DAY OF NOVEMBER, 2022.

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MAUREEN A. ODERO

JUDGE

