



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**SUCCESSION CAUSE NO. 146 OF 2016**

**IN THE MATTER OF: THE ESTATE OF ZAKARIA LUGONZO AMALEMBA (DECEASED)**

**BETWEEN**

**FRANK KARURI MWANGI GICHOHI .....INTERESTED PARTY/APPLICANT**

**AND**

**BEATRICE KAZILIKA AMALEMBA ..... 1<sup>ST</sup> RESPONDENT**

**HUMPREY MUSULI AMALEMBA ..... 2<sup>ND</sup> RESPONDENT**

**Coram: Hon. Justice Reuben Nyakundi**

**Matata and Mwabonje Advocates for the Applicant**

**RULING**

The Interested Party and applicant herein, **Frank Karuri Mwangi Gichohi** filed a summons for revocation of grant dated 10<sup>th</sup> November 2020 and brought under Section 76 of the Law of Succession Act, Rule 44, 49 59, 63 (1) 6 73 of the Probate and Administration rules, Article 159 of the Constitution and all other enabling provisions of the Law. The summons relate to the estate of **Zakaria Lugonzo Amalemba** (deceased) who died on 20<sup>th</sup> January 2010 and prays for orders that the Grant of Letters of Administration intestate issued to **Beatrice Kazilika Amalemba** on 21<sup>st</sup> June 2017 and confirmed on 30<sup>th</sup> October 2018 in this matter be revoked and annulled forthwith. He also prays that costs of the application be borne by the respondents.

The application was advanced on the grounds espoused therein and in the affidavit in support of summons for the revocation or annulment of grant sworn by the Applicant on 10<sup>th</sup> November 2020.

**Grounds for the Summons**

It is contended that the **late Zakaria Lugonzo Amalemba** died intestate in Lamu on 20<sup>th</sup> January 2010. The 2<sup>nd</sup> respondent thereafter petitioned for the Grant of Letters of Administration intestate on 21<sup>st</sup> January 2012 vide **Mombasa High Court Succession Cause No. 265 of 2011** through the firm of **Madzayo Mrima & Co. Advocates** listing a plot known as **Lamu/Hindi Magogoni/72** (the suit property) as the only asset left behind by the deceased. Grant of Letters of Administration Intestate were subsequently issued out to the 2<sup>nd</sup> respondent on 14<sup>th</sup> September 2012.

According to the applicant, on 31<sup>st</sup> December 2012, the 2<sup>nd</sup> respondent herein, being the administrator of the of the estate of the deceased, entered into a sale agreement with the applicant for the suit property for a consideration of 4 million.

It is further averred that the 2<sup>nd</sup> respondent through the firm of **Oduor Okumu & Co. Advocates** sought to have the Grant issued on 14<sup>th</sup> September 2012 confirmed which Grant was subsequently confirmed and a Certificate of Confirmation of Grant issued to the 2<sup>nd</sup> respondent on 22<sup>nd</sup> July 2013.

However, as per the applicant, on 15<sup>th</sup> September 2016 the 1<sup>st</sup> Respondent through the firm of **Kikanae Tipoti Advocates** filed a second succession cause being the instant cause, Malindi High Court Succession Cause No. 146 of 2016 for the estate of the same **Zakaria Lugonzo Amalemba**. This case also listed the suit property as part of the assets left by the deceased. Letters of administration in this cause thereafter were issued to the 1<sup>st</sup> respondent on 3<sup>rd</sup> April 2017 and were confirmed on 30<sup>th</sup> October 2018.

The case is made that it is apparent that two succession causes were filed in respect of the estate of the deceased **Amalemba Zakaria Lugonzo's** estate: **Mombasa High Court succession cause 265 of 2011** and **Malindi Succession cause 146 of 2016**. Consequently, there are two confirmed grants for the estate of same deceased person.

The argument put forth is that the proceedings for petition of letters of administration in the instant cause were defective, fraudulent and a blatant abuse of the court process as there already existed a confirmed grant for the estate of the deceased **Zakaria Lugonzo Amalemba** issued on 22<sup>nd</sup> July 2013 which had never been annulled or revoked. That the grant issued in this cause was obtained fraudulently by the concealment from this court of material facts. It is further averred that the respondents colluded with the beneficiaries and fraudulently instituted this cause to deprive the applicant of the suit property which had been legally sold to him by the 2<sup>nd</sup> respondent in his capacity as an administrator of the estate of the deceased.

The applicant also contends that the Interested Party has filed a land case against the 2<sup>nd</sup> respondent and two other persons to compel them to transfer the suit property to him. That it is in the interest of justice that the grant issued in this cause to the 1<sup>st</sup> respondent be revoked and annulled.

### **Analysis and Determinations**

I have appraised the pleadings filed in this application. The question that sets itself apart is whether the Applicant has properly brought himself within the ambit of Section 76 of the Law of Succession Act Cap. 160 and Rule 44 of the Probate and Administration Rules to benefit from the revocation of grant as prayed.

Section 76 of the Law of Succession Act Cap. 160 sets out the provisions for the revocation of a grant in the manner reproduced below:

#### ***“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) ....*

*(e) that the grant has become useless and inoperative through subsequent circumstances.”*

The Probate and administration Rules, 1980 as regards the revocation or annulment of grant provide under Rule 44 that:

*“(1) Where any person interested in the estate of the deceased seeks pursuant to the provisions of section 76 of the Act to have a grant revoked or annulled he shall, save where the court otherwise directs, apply to the High Court for such relief by summons in Form 107 and, where the grant was issued through the High Court, such application shall be made through the registry to which and in the cause in which the grant was issued or, where the grant was issued by a resident magistrate, through the High Court registry situated nearest to that resident magistrate’s registry.*

*(2) There shall be filed with the summons an affidavit of the applicant in Form 14 for revocation or annulment identifying the cause and the grant and containing the following particulars so far as they are known to him—*

*(a) whether the applicant seeks to have the grant revoked or annulled and the grounds and facts upon which the application is based; and*

*(b) the extent to which the estate of the deceased has been or is believed to have been administered or to remain unadministered, together with any other material information.*

*(3) The summons and affidavit shall without delay be placed by the registrar before the High Court on notice in Form 70 to the applicant for the giving of directions as to what persons (if any) shall be served by the applicant with a copy of the summons and affidavit and as to the manner of effecting service; and the applicant, upon the giving of directions, shall serve each of the persons so directed to be served with a notice in Form 68, and every person so served may file an affidavit stating whether he supports or opposes the application and his grounds therefor.*

*(4) When the persons (if any) so directed to be served (or such of them as the applicant has been able to serve) have been served with a copy of the proceedings, the matter shall be placed before the High Court on notice by the court to the applicant and to every person so served, and the court may either proceed to determine the application or make such other order as it sees fit.*

**(5) Where the High Court requires that notice shall be given to any person of its intention of its own motion to revoke or annual a grant on any of the grounds set out in section 76 of the Act the notice shall be in Form 69 and shall be served on such persons as the court may direct.”**

The court in the case of **Jamleck Maina Njoroge –vs- Mary Wanjiru Mwangi (2015) eKLR** outlines the grounds upon which a grant can be revoked. It stated as follows:-

**“11. The circumstances that can lead to the revocation of grant have been set out in Section 76 Law of Succession. For a grant to be revoked either on the Application of an interested party or on the court’s own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.” (emphasis added.)**

In **Civil Appeal 129 of 2018 in re Estate of Kanyeki Kimatu (Deceased) [2020] eKLR** the Court was faced with a situation where two confirmed grants existed with regard to the same estate. In that matter the Court found that the issuance of the two grants over the same suit property by two different courts which contradict each other is an embarrassment to the court process. It concluded that there had been a concealment of material facts and went on to revoke the grant. The Court in that instance stated:

**“28. It is not in dispute that there are two grants in respect of the suit property. One grant was made to the appellant and the respondent on 27<sup>th</sup> June 2005 in Thika Succession Cause Number 107 of 2005(subject of the instant appeal) and confirmed on 27<sup>th</sup> September 2018 and was in respect of the entire suit property. The other grant was made to Margaret Muthoni Kanyeki on 13<sup>th</sup> June 2011 in Thika Succession Cause No. 170 of 2010: The Estate of Joyce Gachiru Kimatu and confirmed on 20<sup>th</sup> June 2014 and amended on 12<sup>th</sup> September 2014 in respect of ½ (a half) share of the suit property. One cannot help but notice the absurdity of the two grants and wonder how the same ought to be enforced. I have gone through the pleadings in the file of Thika Succession Cause No. 170 of 2010 and note that Margaret Muthoni Kanyeki did not mention or bring to the attention of that court that Thika Succession Cause Number 107 of 2005 was pending and that it related to the same suit property, facts which were within her knowledge. It was only after the respondent filed an application objecting to the grant therein that she mentioned the proceedings in Thika Succession Cause Number 107 of 2005. This is tantamount to material non-disclosure on the part of Margaret Muthoni Kanyeki and I have no doubt that her tight-lipped approach in obtaining the grant in that proceeding misled the learned trial magistrate therein to issue and confirm the grant as he did. In any case, I fail to understand why the learned trial magistrate did not interrogate how Margaret Muthoni Kanyeki was laying claim to the suit property when the same was registered in the name of the deceased and not Joyce Gachiru.**

**29. From the record, the issue of the confirmed grant in Thika Succession Cause No. 170 of 2010 was brought to the attention of the trial court but the trial court makes no reference to it in its judgment which I think was an oversight if not an error on the part of the learned trial magistrate. Had the learned trial magistrate given more thought and attention to the decision in Thika Succession Cause No. 170 of 2010, she would have come up with a different decision or direction that was not in vain or unenforceable like the instant one.**

**30. The issuance of the two grants over the same suit property by two different courts which contradict each other is an embarrassment to the court process for which I fault Margaret Muthoni Kanyeki. The two grants no doubt present a difficulty and/or impossibility when it comes to distribution and enforcement.”**

The court in **Re Estate of Kanyeki Kimatu (Deceased)** went on to hold:

**“35. Based on the aforementioned provisions as read with Section 76 of the Law of Succession Act, it is my considered view that the grant that was made to Margaret Muthoni Kanyeki in Thika Succession Cause No. 170 of 2010, The Estate of Joyce Gachiru Kimatu ought to be revoked on the ground that there was concealment of material facts. I am also satisfied that the that the proceedings to obtain the grant therein were defective and illegal in substance.”**

This Court had occasion to deal with similar circumstances as the instant matter in **Succession Cause 14 of 2015 Selina Tipango v Emily Wambui Ishmael & 7 others [2016] eKLR**. In that matter, the Court stated:

**“24. There is abundant evidence on record to show that the respondent obtained the Grant of Letters of Administration Intestate in relation to the estate of Oisesoi Tipango through fraud and false misrepresentation of facts. The Respondent failed to disclose that the subject asset in dispute was subject to a pending cause in the High Court Nairobi being cause No 607 of 2000. Additionally, the Respondent failed to disclose that she and William Siasai Tipango had made an application for grant of letters of Administration against the estate of Stephen Oisesoi. From the record, it is very clear that the land had since devolved from Osiesoi Tipango to Stephen Osiesio Tipango.**

**25. The petitioners had petitioned the High Court in Succession Cause No. 607 of 2000 at Nairobi to administer intestate the estate of Stephen Oiseoi Tipango. The letters of Administration intestate dated 18/7/2000 duly issued by High Court Nairobi. That fact was not disclosed while applying for fresh Letters of Grant to the same estate at Machakos High Court in Succession Cause No 526 of 2011.”**

In **Succession Cause 19 of 2000 Ndamba v M’Murungi & another [2004] eKLR**

**“The conclusion here therefore is that succession cause No. 148 of 2000 was improperly dealt with. The suit should have been**

*stayed and therefore the grant issued therein and the subsequent confirmation of the same were null and void. Having found as I have that succession cause No. 148 of 2000 ought to have been stayed in view of the previously instituted succession cause 19 of 2000, is the applicant's prayer for revocation of the grants under section 76 of the Law of Succession Act maintainable? The applicant has submitted that the petitioner in succession cause No. 148 of 2000 concealed something material to the case, namely that a similar case had already been filed in respect of the same subject matter. It is on the basis of this that I am persuaded that the grant of representation in succession cause No. 148 of 2000 was made in error and I direct that the same should be revoked and annulled."*

Again, regarding two separate causes in respect of the same estate, the Court in **Succession Cause 1842 of 1999 re Estate of Nyambia Mukaya (Deceased) [2019] eKLR** held that such a situation was an embarrassment to the Court process and tantamount to concealment of material facts owing to the fact that the respondent in that matter was aware of the existence of another matter that had fully dealt with the estate of the deceased. The Court held:

*"30. The respondent does not deny filing both succession causes. What justification is there in filing a succession cause in respect of one estate affecting same property in two different courts and worse still after losing the first one"*

*31. I do agree with Mr. Gacheru there cannot be two separate succession files in respect of the same estate. It does not matter whether there is a Will. The best the respondent would have done was to disclose to the High court of the existence of a similar file already determined. Alternatively, the respondent should have filed an appeal to the high court for revocation of the grant on account of discovery of new material evidence in this case a Will. It is embarrassing to the court process to have two parallel proceedings touching on the same estate with different enforceable orders.*

*32. Without considering the merits or validity of the Will, it is my conviction that the respondent is guilty of concealment of material facts and or information by failing to disclose that there was another case having been filed at Murang'a, fully determined and estate fully distributed"*

Finally, in **Succession Cause 2393 of 2014 in re Estate of Karam Singh Bhogal (Deceased) [2018] eKLR** regarding an administrator that held two confirmed grants relating to the same property, my esteemed colleague **Musyoka J** had this to say:

*"7. As it is, the administrator herein holds two grants, a grant of probate made in HCSC No. 650 of 1988 and a grant of letters of administration intestate made herein. Both grants have been confirmed. It is curious that in the petition in the instant cause she did not disclose her three sons, and created the impression that her daughter was the only child she had. There is no doubt at all in my mind that the cause herein, HCSC No. 2393 of 2014 was initiated in abuse of court as the deceased had not died intestate as alleged but testate. Representation over the estate had already been sought and granted, and the said grant had been confirmed. The proceedings herein were a total waste of court's time. I suspect that the same were brought with a sinister motive, but I shall be content to leave it at that."*

Guided by the ample authorities I have set out herein above, I now turn to the instant case. The case made by the Applicant is that there has been a material concealment of facts being that the proceedings for petition of letters of administration in the instant cause were defective, fraudulent and a blatant abuse of the court process on account of the existence of a confirmed grant for the estate of the deceased **Zakaria Lugonzo Amalemba** issued on 22<sup>nd</sup> July 2013 in **Mombasa High Court Succession Cause No. 265 of 2011** which grant had never been annulled or revoked. The applicant further charges that the essence of the instant cause is to deprive him of the suit property that he acquired legally from the administrator of the estate of the deceased being the 2<sup>nd</sup> respondent.

As the foregoing thread of authorities reveal, it is untenable that there be two grants issued by courts of concurrent jurisdiction over the same estate of the same deceased person. I am satisfied that there exists a valid grant issued in **Mombasa High Court Succession Cause No. 265 of 2011** which grant had never been annulled or revoked. In that grant, the 1<sup>st</sup> respondent herein who also applied for grant of letters of administration in the instant cause is listed as a beneficiary and per the evidence did not object to those proceedings but gave her consent to the 2<sup>nd</sup> respondent taking out that grant and being made an administrator. I find it strange therefore that the 1<sup>st</sup> respondent would then turn around and file a fresh succession cause in respect of the same suit property. Such a situation reeks of ulterior motives and is clear evidence of concealment of material facts. The facts concealed being that there existed a confirmed grant in respect of the estate of the deceased.

The grant issued in this instant suit, **Succession Cause No. 146 of 2016** ought not to have been issued in the first place. Its existence is premised on an irregularity. On this line of argument, I am of the same view as espoused in **Selina Tipango v Emily Wambui Ishmael [supra]**, where the Court relied on **Republic =vs= The Business Premises Rent Tribunal Respondent Lenco Investments Limited Interested party and Samina Investments Limited exparte Applicant Nairobi Misc Application Number 562 of 2007** where the Learned Judge gave the following guideline on how to deal with nullities and irregularities when encountered in the judicial process:

*"1. A nullity is a nullity and always remains a nullity.*

*2. If nullities are condoned by the courts of law, they are capable of clogging the justice system, erode its effectiveness and respect of the rule of law.*

*3. Failing to act in the circumstance would be a serious abdication of the seat of justice.*

*4. The principle to be observed is the principle that no litigant should be allowed to benefit from irregularities or nullities since these would be against the policy of law.*

**5. Nullities are defects and cobwebs in our legal system which if allowed to remain would discredit and litter, derail the administration of justice in accordance with the law.**

**6. It would be unjust for the court not to intervene in the face of a nullity where the tribunal and the lower court had no jurisdiction from the word go.**

**7. Where preservation of the status quo is a threat to the rule of law, the conscience of this court, the spirit and its sense of justice cannot allow the preservation of the status quo.**

**8. It cannot be good law to allow a party benefit from a blatant violation of the law”**

In the circumstances, I am satisfied that the proceedings to obtain the grant herein were defective and illegal in substance. Indeed, a case against the respondents has been established under Section 76 of the Succession Act. There is therefore justifiable cause for the grant of letters of administration issued to the 1<sup>st</sup> respondent on 3<sup>rd</sup> April 2017 and confirmed on 30<sup>th</sup> October 2018 in Succession Cause No. 146 of 2016 be revoked or annulled forthwith.

Accordingly, the summons dated 10<sup>th</sup> November 2020 is hereby allowed and the following orders shall abide the revocation of the grant:

**a. A declaration that the 1<sup>st</sup> respondent obtained the grant by intentional and deliberate false statement of facts and concealment of material facts and information from the succession court.**

**b. The 1<sup>st</sup> respondent as administrator is directed to surrender and deliver to the Deputy Registrar the certificate of confirmed grant dated 30<sup>th</sup> October 2018.**

**c. A permanent injunction restraining the administrator and beneficiaries of the estate of Zakaria Lugonzo Amalemba (Deceased) from dealing with the suit property until further orders from this court or any other court with equal status.**

**d. The costs of this application be borne by each party.**

**It is so ordered.**

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 26<sup>TH</sup> DAY OF FEBRUARY 2021**

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**R. NYAKUNDI**

**JUDGE**

**In the presence of:**

**1. Mr. Ndegwa holding brief for Mr. Mwabonje  
Advocate for the applicant**