



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 110 OF 2015**

**IN THE MATTER OF THE ESTATE OF KASAINO OLE KUYONI ALIAS JOSEPH KASAINO  
(DECEASED)**

**AND**

**PETER NDABI REBO ALIAS PETER NDABI .....APPLICANT**

**-VERSUS-**

**MOSES SAYTANGA (ADMINISTRATOR).....RESPONDENT**

**RULING**

The applicant **Peter Ndabi Rebo** alias **Peter Ndabi** brought and filed under certificate of urgency summons for revocation and annulment of the certificate of confirmation of grand dated 27/8/2012 issued in favour of the respondent.

This applicant further prayed for an order of stay and or inhibition on any inhibitive on any dealings in the parcels of land better known as OLCHORO-ONYORE/16392, OLCHORO-ONYORE/16394 and other subdivisions being OLCHORO-ONYORE/16507, 16508, 16509, 16512, 16513, 16514, 16517, 16480, 16484, 16486, 16487, 16489, 16499, 16707, 16863, 16864 pending the determination of the application.

The cost of the application was also sought.

The application brought pursuant to Rule 73 of the Probate and Administration Rules and Section 76 of the law of Succession Act Cap 160 of the Laws of Kenya was supported by an affidavit dated 5<sup>th</sup> September 2013 and further affidavit by the applicant dated 16<sup>th</sup> July 2014.

The respondent in opposition to the application for summons for revocation and annulment of grant filed a replying affidavit dated 15<sup>th</sup> June 2014.

This matter originally filed at Machakos High Court where parties agreed to dispose off the application by way of written submissions.

In the affidavit in support the applicant swore that he had entered into a sale agreement with one Joseph Ole Kuyioni (deceased) together with Oiboo Ole Kudate for the purposes of four (4) acres of land to be excised from title LR. OLCHORO-ONYORE/53.

In support of his contention he attached what he claimed to be the sale agreement and a copy of the

green card to prove the agreement and ownership.

The applicant further deponed that on 16/6/2001 they entered into a fresh agreement with the respondent as legal representatives of the estate of the deceased Kasaine Ole Kuyioni.

It was applicant contention that LR OLCORO-ONYORE/53 was subdivided to give rise to new parcels referred as LR. 16392, 16393 and 16394.

According to the applicant's affidavit he was to benefit from excision of four acres from LR OLCORO-ONYORE/53.

The applicant's claim against the respondent is that the respondent applied for Letters of Administration in Succession Cause No. 8 of 2002 at Kajiado Senior Resident Magistrate Court.

The applicant has deponed that the court considered the application for Letters of Administration which was granted in favour of the respondent.

That the grant of letters obtained and confirmed recognized his interest as a beneficiary of the estate of the deceased.

The applicant further deponed that on 17/8/2012 respondent through concealment of material facts applied for amendment of confirmed grant, which did not recognize his interest as a beneficiary to the estate of deceased.

In support of his contention he attached a copy of another confirmed grant dated 17/8/2012.

The respondent filed a replying affidavit and denied the allegations on claim of land and interest by the applicant.

In his affidavit he denounced a sale agreement entered into with the applicant on 16/6/2011 as void abinitio.

The respondent further deponed denying that he had any legal capacity to enter into a legally binding agreement with the applicant.

As per applicant's claim the respondent denied that he is neither a dependant nor a beneficiary.

## **BACKGROUND**

The deceased Joseph Kasaine alias Kasaine Ole Kuyioni died intestate on 15/4/1999. The respondent filed Succession Cause No. 8 of 2002 at Kajiado Magistrate's Court petitioning for grant of Letters of Administration.

In the respondent's affidavit in support for issuance of Letters of Administration dated 29/8/2012 he listed the following as dependants and beneficiaries:

1. Margaret Wanjiru Kuyioni (mother)
2. Njenga Kuyioni (brother)
3. Robert Salaton Kuyoni (brother)
4. Moses Soytinga (brother)
5. Stepehn Weru Kimondo (purchaser)
6. Peter Ndavi (purchaser)
7. Njoroge Kirumba (purchaser)

According to affidavit respondent gave inventory of the asset as OLCORO-ONYORE/53 valued at Ksh. One Million (1,000,000).

The respondent having satisfied the criteria of issuance of grant of Letters of Administration intestate the court issued the same on 3/12/2003.

The court reveals that the grant of Letters of Administration dated 3/12/2003 issued to the respondent was confirmed on 8/7/2004.

In that confirmation of grant the applicant was named as a beneficiary in the distribution of the estate of the deceased.

He is listed as a beneficiary to a portion of land measuring four acres on 14/10/2004.

Summons for review of the confirmation of grant issued to the respondent was filed by one Ngethe Karuga.

In his affidavit he claimed that he did not participate in the confirmation of grant proceedings and that 41.7 acres was wrongly distributed by the respondent.

Mr. Ngethe Karuga averred that his land was not part of the estate of the deceased and available for distribution.

The learned trial magistrate Hon. F. Kombo RM (as he then was heard the application for review of confirmation of grant issued on 8/7/2004. Pursuant to that application the learned magistrate revoked and cancelled certificate of confirmation of grant issued on 8/7/2004 in favour of the respondent.

Following the cancellation of earlier grant respondent on 26/11/2011 petitioned the court for fresh grant of Letters of Administration.

In his affidavit land parcel LR KAJIADO/OLCHORO/ONYORE/53 was listed as the only asset be subject of the succession cause.

On 17/8/2012 a confirmation of grant was issued to the respondent pursuant to the provisions of Section 71(1) of the Law of Succession. The property and description for distribution itemized as KAJIADO/OLCHORO/ONYORE/53 is absolute to the respondent.

Those are the circumstances and facts underlying the present application in respect of the estate of the deceased and what has transpired since his demise in 1999.

I have considered the rival submissions by counsels, the affidavit evidence, the authorities attached and facts deduced from the lower court record. I have given due regard to the entire proceedings to appreciate the background giving rise to the present application.

The following two issues emerge as the ones to determine this appeal:

1. **Whether the subordinate court had competent jurisdiction to hear and determine Succession Cause No. 8 of 2002.**
2. **Whether there exist just cause for the revocation and annulment of the confirmed grant of Letters of Administration of the late Kasaine Ole Kuyioni alias Joseph Kasaine estate to the respondent.**

### **ISSUE NO. 1**

The principle of jurisdiction was laid down in the case of **NWUKUWO Vs. YARDUA 2010 12 NWLR 2009, MADUKAHT Vs. NKEMAULUN 1962 2 (SCNLR 241)**

The supreme court of Nigeria restated thus:

**“The law is indeed trite that a court is only competent to exercise jurisdiction in respect of any matter where:**

- a. It is properly constituted as regards members and qualifications of the members, and no member is disqualified for one reason or the other.**
- b. The subject matter of the case is within it’s jurisdiction and there is no feature on the case which prevent the court from exercising it’s jurisdiction.**
- c. The case comes by due process of the law and upon fulfillment of any condition procedures to the exercise of jurisdiction.”**

In the case of **OWNERS OF MOTOR VESSEL Vs. LILIAN (Supra) 1989**. The Court of Appeal stated thus:

**“Jurisdiction is everything without it, a court has no power to make one step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence.**

**A court of law lays down founs in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”**

See also **FERDINARD NDUNG’U WAITITU Vs. IEBC & OTHERS Civil Appeal No. 324 of 2013**

**“.....by jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the Statute, Charter or commission under which the court is constituted, and may be extended or restricted by like means. If no restrictions or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of the facts in order to decide whether it has jurisdiction; but except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”**

There is no dispute that respondent petitioned for grant of Letters of Administration in Succession Cause No. 8 of 2002.

The petition was filed in the magistrate’s court.

The respondent obtained a copy of chief’s letter, a death certificate of the deceased in support of the petition.

The respondent further complied with the requirements to petition for Letters of Grant of Administration by filling the necessary forms, applicable affidavits and prerequisite sureties. Both affidavits dated 29/8/2002 gave description of the property of the deceased as LR. OLCORO-ONYORE/53 as available for distribution with a net value of Ksh.1,000,000.

The jurisdiction to determine and entertain a Probate and Administration matter is set by the Statute Law of Succession Act Cap 160.

It is settled law that courts are creatures of Stature based on the Constitution 2010 with their jurisdiction prescribed therein.

The jurisdiction to determine and entertain a succession cause in a magistrate's court was provided for under Section 48 of the Law of Succession Cap 160.

Under this provisions the magistrate's courts was to exercise jurisdiction on an estate of a deceased person whose net value was not more than one hundred thousand (100,000) only.

The magistrate court is to apply Section 48 to assume jurisdiction to entertain Probate and Administration cause with monetary restrictions embodied therein.

Section 48 of the Succession Act captures limit of jurisdiction in a subordinate courts in clear provisions thus:

**“48 (1) Notwithstanding any other written law which limits jurisdiction but subject to the provisions of Section 49, a resident magistrate shall have jurisdiction to entertain any application other than an application under Section 76 and to determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed one hundred thousand shillings.”**

The court exercising jurisdiction over a succession cause is bound to consider the facts deponed in the affidavits, writ of summons or petition and or statement of claim before taking a step to adjudicate and determine a matter.

Jurisdiction being the forerunner of the judicial process and adjudication cannot be waived or compromised.

In the instant case respondent filed necessary suit papers and annextures in support of Succession Cause No. 8 of 2002 at Kajiado Magistrate's Court.

The record of lower court establishes that affidavit of justification and inventory of deceased property referenced as LR. OLCORO-ONYORE/53 was valued at Ksh.1000,000. This net value indicated in form P&A 5 was above the jurisdiction of a magistrate court of Ksh.100,000 as restricted by the provisions of Section 48 of the Succession Act Cap 160 of the Laws of Kenya.

Having considered the record in Succession Cause No. 8 of 2002 none of the learned trial magistrates had the jurisdiction to grant Letters of Administration or any orders sought by the petitioner.

The petitioner had no right to donate or collude to confer jurisdiction which the court lacked by virtue of Section 48.

The provisions of Section 48 goes to the root cause of the matter subject of appeal to this court.

In view of the foregoing grant of Letters of Administration and subsequent confirmation on 17/8/2002 in favour of the petitioner was void abinitio and is hereby declared a nullity.

Jurisdiction issue cannot sustain the proceedings holden before Kajiado Magistrate's Court to confer legal capacity to the petitioner to administer estate of the deceased on that basis alone. The decision by the magistrate court confirming the grant is hereby set aside.

## **ISSUE NO. 2**

Revocation or annulment of grant of Letters of Administration is provided for under Section 76 (a) – (e) of the Succession Act Cap 160 of the Laws of Kenya.

Under the section grant of Letters of Administration may be revoked or annulled in breach of any of the provisions outlined in the said section.

The provisions under Section 76 of the Succession Act provides the criteria the grant of Letters of Administration shall be revoked.

Section 76 of the Law of Succession Act provides:

**“A grant of representation, whether or not confirmed, may be anytime 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 reasons 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 in advertently.**
- 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 has ordered or allowed; or**
  - ii. **To proceed diligently with the administration of the estate; or**
  - iii. **To produce to the court, within the time prescribed any such inventory or account of administration as is required by the provisions of paragraph (e) and (g) of Section 83 or has produced any such inventory or account which is false in any material particulars; or**
- e. **That the grant has become inoperative through subsequent circumstances.”**

This court has further evaluated and considered the record to confirm whether administrator administered the estate in conformity with the law.

It emerged from the record that the proceedings in the lower court were defective in regard to distribution. The Probate court in confirming the grant to the administrator of the estate is to be guided by Section 71 of the Law of Succession Act.

Under Section 71 it states:

**“Provided that, in cases of intestacy, the grant of Letters of Administration shall not be confirmed until the court is satisfied to the respective identities and shares of all persons beneficially entitled and when confirmed such grant shall specify all such persons and their respective shares.”**

In application before me applicant has deponed that respondent had excluded him as a beneficiary in the grant confirmed on 27/8/2012.

According to his affidavit an initial confirmed grant dated 8/7/2004 recognized his interest as a beneficiary to a share of 4 acres to the estate of the deceased.

However in the subsequent amendment applied for by the administrator to the confirmed grant of 27/8/2012 his name had been omitted.

In the confirmation proceedings in the lower court leading to amended and confirmation of fresh grant, no evidence was adduced why the name of the applicant was omitted as a beneficiary.

Section 71 of the Succession Act is clear on the obligation of the court confirming the grant of Letters of Administration. The court has to identify the share of each beneficiary before confirming the grant. This does not seem to have been the case in the summons for confirmation dated 26/11/2011.

Regarding the applicant to this appeal one Peter Ndabi Rebo. The applicant was not a party to the proceedings initiated in 2011 and determined on 17/12/2012 where an amended grant was confirmed.

The logical conclusion from the facts is that the administrator concealed material information to the court during confirmation hearings. The purported obtained certificate of confirmed grant was with the sole intention of defrauding the applicant of the said suit land.

The grant in favour of the respondent was obtained by means of untrue allegation of a fact essential to just determination of the issues. This court took notice of non compliance of Section 83 of the Law of Succession Act on duties and obligations of an administrator are outlined.

The court has perused the record of Succession Cause No. 8 of 2002 in the matter of the estate of KASAINÉ OLE KUYIONI alias JOSEPH KASAINÉ. The instant appeal arose from the succession cause.

There is nothing on record to show that the respondent has ever filed a true inventory and account of the properties of the estate. The administrator under Section 83 is bound to administer the estate according to the law by filing true inventories and accounts within a mandatory period of six months.

The respondent from the evidence on record has filed neither a full inventory nor accounts of the properties of the estate of the late KASAINÉ KUYIONI as undertook in the bond.

The provisions under Section 83 are mandatory which respondent as administrator was bound by law to comply with.

I have carefully considered the application and also perused the lower court record. There is evidence that the respondent was issued with a grant duly confirmed under Section 71(1) and (2) of the Law of Succession on 8/7/2004.

An application was filed in court by the objector on 14/10/2004 seeking inter alia review and setting aside confirmed grant issued on 8/7/2004 to the respondent.

In a ruling dated 29/7/2005 the learned magistrate set aside the confirmed grant issued to the respondent with a condition that fresh summons for confirmation be filed.

The respondent according to the record complied with court ruling and filed summons for confirmation dated 26<sup>th</sup> May 2011. This application under Section 71 of the Law of Succession was to confirm grant of Letters of Administration dated 3/12/2003. The application for confirmation was heard and determined on 17<sup>th</sup> August 2012.

This court find that the respondent willfully and without reasonable cause failed to exhibit inventory or account of the assets and liabilities of the estate within the required period.

The upshot and on the evidence adduced there exist a breach of Section 76 to justify the revocation and/or annulment of the grant of Letters of Administration to the estate of the late KASAINÉ KUYIONI alias JOSEPH KASAINÉ to the respondent.

### **DECISION**

All in all on the basis of lack of jurisdiction; by the magistrate's court in contravention with Section 48 and in breach of Section 76 and 83 of Succession Act I hereby revoke/annul the Letters of

Administration granted to the respondent.

As a result the following orders shall issue and abide:

1. A declaration that respondent obtained the grant by intentional and deliberate untrue, false allegations and concealment from court material information on 17/8/2012,
2. An order revoking/and or annulling the Letters of Administration and confirmation of grant issued on 17/8/2012 to the estate of the late Kasaine Ole Kuyioni alias Joseph Kasaine granted to the respondent by the magistrate court in Succession Cause No. 8 of 2002.
3. A citation against the respondent directing him to surrender and deliver to the court the Letters of Administration granted to him by SRM Kajiado on 17/8/2012 vide Succession Cause No. 8 of 2002.
4. An order directing the respondent to make a just and true inventory and property of the late Kasaine Ole Kuyioni alias Joseph Kasaine when applying for fresh grant.
5. A permanent injunction restraining the respondent from any further dealing in the estate of the late Kasaine Ole Kuyioni alias Joseph Kasaine till he obtains Letters of Administration.
6. The titles arising out of subdivisions of KAJIADO/OLCHORO/ONYORE/53 being further subdivisions of KAJIADO/OLCHORO/ONYORE/16392, 16934 and other subdivisions as prescribed in paragraph 2 of the summons be and hereby revoked.
7. The title do revert to the name of the deceased.
8. That the respondent do commence fresh petition for Letters of Administration before competent court with jurisdiction.
9. The respondent to pay cost to the applicants of this application.
10. The administrator to apply for grant of Letters of Administration within 60 days from today's date.

It is so ordered.

**Dated, delivered at Kajiado on 18/3/2016**

R. NYAKUNDI

JUDGE

In the presence of

Ms Moinket holding brief for Waweru for Gatimo for the Applicant present

Mr. Mburu for the Respondent present

Mr. Mateli Court Assistant