



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT ELDORET**  
**SUCCESSION CAUSE NO.100 OF 2014**  
**IN THE MATTER OF THE ESTATE OF JARED OKOTH OLOO... DECEASED**

**-BETWEEN-**

**CHARLES OCHIENG OKOTH.....PETITIONER/RESPONDENT**

**VERSUS**

**JOSEPH MARICKY OKOTH.....OBJECTOR/APPLICANT**

**RULING**

1. The application before me is the one dated 6<sup>th</sup> November, 2014. The applicant **Joseph Maricky Okoth** filed the application contemporaneously with a summons for revocation or annulment of the grant of letters of administration issued to the respondent **Charles Ochieng Okoth** on 27<sup>th</sup> August, 2014 in respect of the Estate of **Jared Okoth Oloo**.

2. In the application, the applicant seeks the following substantive orders:-

**a)** An order be and is hereby issued staying and or suspending the operation and use of the grant of letters of administration intestate of the estate of **Jared Okoth Oloo** issued to **Charles Ochieng Okoth** on 27<sup>th</sup> August 2014 pending the hearing and determination of the application interpartes and thereafter pending the hearing and determination of the application for annulment and/or revocation of the grant.

**(b)** An order be and is hereby issued suspending and/or staying the powers of the respondent as vested upon him by the grant of letters of administration intestate of the estate of **Jared Okoth Oloo** issued to him on 27<sup>th</sup> August, 2014 and consequently the respondent be restrained from acting as an administrator of the estate of **Jared Okoth Oloo** pending the hearing and determination of this application interpartes and thereafter pending the hearing and determination of the application for annulment and/or revocation of the grant.

**(d)** Costs be awarded to the applicant.

3. The application is premised on grounds that the grant issued to the respondent was obtained by fraudulent misrepresentation and concealment of material facts; that the respondent was using the grant to unjustly enrich himself and to abuse the court process as he had instructed tenants to pay rent directly to him in contravention of the court orders issued in Eldoret HCC No. 185 of 2011 (O.s) and that it was in

the interest of justice that the application be allowed.

4. The applicant swore an affidavit on 6<sup>th</sup> November 2014 in support of the application in which he reiterated the grounds stated on its face. He in addition deposed that there is a valid will in respect of the deceased's Estate; that all the other beneficiaries have taken possession of their respective entitlements under the will except himself as the respondent has taken over what was bequeathed to him on the strength of the grant sought to be revoked; that in violation of the court order aforesaid, the respondent has instructed tenants to deposit rent in an account other than the one ordered by the court.

5. The application is opposed through a replying affidavit sworn by the respondent on 14<sup>th</sup> November 2014 in which he admitted that the court in Eldoret HCC 185 of 2011 issued orders of injunction on 27<sup>th</sup> October, 2011 pertaining to *some* of the assets in the deceased's Estate. He deposed that he obtained the grant in good faith for the purpose of preserving the Estate and denied that he was using it to contravene court orders or to unjustly enrich himself as alleged by the applicant .

He also denied that the grant was obtained fraudulently or through misrepresentation or concealment of facts. Further, the respondent averred that the court order issued on 27<sup>th</sup> October, 2011 is no longer valid as the interim injunction issued therein has now lapsed.

6. By consent of the parties, the court on 17<sup>th</sup> November, 2014 directed that the application be disposed of by way of written submissions. Subsequently, the parties exchanged and filed written submissions advancing their respective positions in the matter.

7. I have considered the application, the affidavits and written submissions filed by the parties. I find that prayer (c) is basically a duplication of prayer (b) since both prayers seek interim orders revoking the grant of representation issued to the respondent pending the hearing and determination of the summons for annulment or revocation of the said grant. The application is in the main anchored on grounds that the grant was fraudulently obtained through misrepresentation and concealment of material facts and that the respondent is using the grant to unjustly enrich himself by having rent from assets in the Estate paid directly to him in contravention of a court order. These allegations have been specifically denied by the respondent.

8. It is important to note that the grounds relied upon by the applicant in support of the instant application and the summons for revocation of grant are the same. This being an interlocutory application and in view of the respondents denial of all the allegations made by the applicant, this court is unable to make any findings of fact at this stage regarding whether the grant was obtained lawfully and procedurally as contended by the respondent or fraudulently through misrepresentation and concealment of facts as claimed by the applicant. It is my view that a finding concerning the manner in which the grant was obtained and its validity or otherwise can only be made on the basis of evidence adduced in the hearing of the summons for revocation of the said grant.

I agree with the respondent's submissions that the court cannot make a determination on the validity or otherwise of the grant at this stage as this would be premature and would in any event prejudice the hearing of the summons for revocation of grant. But in the absence of a finding that the said grant had been obtained fraudulently or unlawfully, i am unable to find any basis upon which i can order the stay or suspension of the grant as prayed by the applicant. The applicant ought to have prosecuted the said summons straight away in order to have the issue of representation of the deceased's Estate conclusively determined instead of prosecuting the instant application.

9. Another complaint made by the applicant is that the respondent was using the grant to unjustly enrich himself and to circumvent a court order issued in Eldoret HCC 185 of 2011.

I have looked at the court order annexed to the applicant's supporting affidavit. I have noted that the order was issued on condition that the applicant was to file an undertaking under oath as to damages within 5 days of the date of the order. The applicant has not annexed evidence to prove that such an

undertaking was furnished to the court within the prescribed time in order to substantiate his allegation that in using the grant to collect rent from the assets in the Estate, the respondent was violating terms of a valid court order.

10. The law is that the onus of proof falls on the party who alleges the existence of certain facts- See **Section 107** of the **Evidence Act**. If the applicant wanted the court to rely on his averment that the respondent was using the grant to circumvent existing court orders, it was incumbent upon him to prove not only the fact of issuance of the orders in question but also that he had complied with the condition imposed by the court to validate them which he failed to do. It is doubtful that the said orders are actually in force because if they were, one wonders why the applicant had not instituted contempt of court proceedings against the respondent.

11. Besides the foregoing, it is my considered opinion that suspending the operation of the grant as sought will be prejudicial to the Estate and to all its beneficiaries including the applicant. I say so because the effect of such an order would be to temporarily revoke the grant which means that the Estate will be left without an administrator as the respondent did not have a co-administrator. This in effect means that there would be nobody to manage the affairs of the Estate or maintain its assets which include rental buildings during the pendency of the summons for revocation of grant.

12. Creating a vacuum in the management of the deceased's Estate would definitely lead to its wastage. Granting such an order would therefore go against the courts duty of preserving the Estate pending its distribution to its rightful beneficiaries. It is important to note that the grant was issued to the respondent in respect of the deceased's entire Estate. It was not limited to the assets the applicant claims had been bequeathed to him under a will.

13. From the foregoing, it must be clear by now that I have come to the conclusion that the order sought in this application cannot be granted as it is not merited. But I am also alive to the fact that once a grant of letters of administration to an Estate is issued, the administrator is legally enjoined to administer the Estate in accordance with the law for the benefit of all the beneficiaries. There has been an allegation that the respondent is using the grant issued in this case to unjustly enrich himself to the detriment of the applicant who is his brother and a beneficiary to the Estate. In this regard, it is not disputed that the respondent has directed all tenants renting premises in buildings comprising the Estate to deposit their rent directly in his personal account.

14. The court has a duty to ensure that the assets of a deceased's person's Estate are preserved and properly managed for the benefit of all the beneficiaries. One of the ways the court can discharge this duty is to require administrators to render a true and just account of their management of the Estate which the court is mandated to do either on its own motion or on application by any party interested in an Estate- See **Section 83 (h)** of the **Law of Succession Act**.

15. For all the foregoing reasons, I decline to order a stay or suspension of the grant issued to the respondent on 27<sup>th</sup> August, 2014 but in the interest of justice, I make the following orders:-

1). The respondent shall render a true and just account of the deceased's Estate by filing before the Deputy Registrar of this court a full statement of the Estates rental income prepared by a recognized Certified Public Accountant of Kenya bi- monthly (once in two months) pending the determination of the summons for revocation of grant dated 6<sup>th</sup> November, 2014. The said statements to be filed with effect from 1<sup>st</sup> September, 2015.

ii). That the hearing of the summons for revocation of grant filed herein be fast tracked. To this end, a mention date for directions on the hearing of the summons should be taken in the registry on a priority basis.

iii). On costs, given that this is a family dispute between brothers regarding administration of their father's Estate, I find that the order which most commends itself to me is that each party shall bear his own costs.

It is so ordered.

**C.W. GITHUA**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET THIS 30TH DAY OF JULY 2015**

In the presence of :-

Miss Mwagoni holding brief for Mr. Kamau for the Objector/Applicant

No appearance for the Petitioner/Respondent

Mr. Lesinge court clerk