



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Omondi Sewe (Deceased) (Succession Cause
703 of 2012) [2024] KEHC 2222 (KLR) (6 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2222 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 703 OF 2012
HM NYAGA, J
MARCH 6, 2024**

BETWEEN

PIUS ISHOME OMONDI APPLICANT

AND

ROSALYNE CHEMELI OMONDI 1ST RESPONDENT

ANTHONY OCHIENG OMONDI 2ND RESPONDENT

JOHN KARUKU THUKU 3RD RESPONDENT

JOEL MUNA KINYUA 4TH RESPONDENT

PAUL NGIGE NJUGUNA 5TH RESPONDENT

RULING

1. This Ruling determines the Preliminary Objection raised by the 3rd, 4th and 5th respondents to the Summons for Revocation of Grant dated 14th August, 2023 filed by the Applicant seeking orders that:
 - i. Grant of letters of administration made to Rosalyne Chemeli Omondi & Anthony Ochieng Omondi on 17th April, 2013 be revoked or annulled.
 - ii. The title Nakuru/Kirengero Settlement Scheme/153 held by the 4th and 5th Respondents be declared as improperly procured and the same be cancelled.
 - iii. The 4th and 5th Respondents having no proper title all the entries entered against the title Nakuru/Kirengero Settlement Scheme/153 be cancelled and the title revert to the names of the deceased.
 - iv. Costs of the Application be borne by the Respondents.



2. The grounds upon which the application is based are, among others, that the Grant and Certificate of Confirmation of Grant were issued through fraud and concealment of the Applicant as one of the deceased's dependant; without the Applicant's involvement or consent to the institution of cause herein; and that the 4th and 5th Respondent have served the Applicant with a decree to vacate from Title number Nakuru/Kirengero Settlement Scheme/153 that he resides in with his family and which property was registered in the name of the deceased at the time of his demise.
3. The applicant also filed a Supporting Affidavit setting out further alleged acts of fraud by the respondents. In particular, he stated that the Pius Oluoch, who was listed as one of the beneficiaries of the deceased estate is not a member of the deceased's family and that after the grant was confirmed on 28th March, 2014, the 1st and 2nd respondents sold the aforementioned parcel of land to the 3rd respondent who later sold the same to the 4th and 5th Respondents.
4. The 4th and 5th respondents in opposition to summons filed a Preliminary Objection (PO) dated 28th September, 2023 contending that this court has no jurisdiction to determine this matter as it became *functus officio* upon confirming the grant and that the property in question no longer forms part of the estate.
5. The summons was canvassed through Submissions.

Respondent's Submissions

6. The respondent submitted that the property in issue no longer forms part of the estate as it has changed hands to third parties.
7. The respondents posited that this court become *functus officio* once Section 83(i) of the [Law of Succession Act](#) was complied with.
8. The respondents posited that the primary mandate of the probate court is to distribute the estate of the deceased to its rightful beneficiaries and once the same is done the court's work becomes complete, and if there is a dispute with regards to their rights to the property, then the proper forum to present their case is the Environment and Land Court.
9. In support of their Submissions, the respondents referred this court to the cases of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696; [Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & others](#) [2012] eKLR ; [In re Estate of Alice Mumbua Mutua \(Deceased\)](#) [2017]eKLR; & [In re Estate of Njagi Njeru \(Deceased\)](#) [2018] eKLR.

Applicant's Submissions

10. The Applicant submitted that it has not been disputed the property in issue was registered in the sole name of the deceased, Omondi Sewe. He asserted that he has attached a birth certificate to prove that he is the son of the deceased and demonstrated that he was not involved in the proceedings leading to confirmation of the grant.
11. He argued that in light of the provisions of Section 76 of the [Law of Succession Act](#) a grant can be revoked even after confirmation and as such this court has jurisdiction to hear and determine this matter.
12. He urged the court to dismiss the PO with costs.



Analysis and determination

13. From the Application, response and parties' submissions, I discern the following issues for determination: -
- i. Whether this court has jurisdiction to entertain the instant application.
 - ii. Whether this court should revoke the confirmed grant.
 - iii. Whether the Title No. Nakuru/Kirengero Settlement Scheme/153 held by the 4th and 5th Respondents should be declared as improperly procured and consequently cancelled.

Whether this court has jurisdiction to entertain the instant application

14. It is the Applicant's case that the grant was obtained fraudulently by making of a false statement or by concealment from the court of something material to the case. That the respondent failed to disclose all the beneficiaries in the distribution of the estate and his consent was not sought. He also contended that one Pius Oluoch who is not a beneficiary of the deceased estate was included in the list of beneficiaries. The main issue is therefore whether this court has power to revoke the grant.
15. It is trite law that jurisdiction is everything and without it a court must down its tools and make no further step. (See the *Owners of the Motor Vessels "Lillian S" v Caltex Oil Limited* [1989] KLR1).
16. The Supreme Court of Kenya held that jurisdiction is a product of *the Constitution* or written law. See Samuel Kamau Macharia and Another v Kenya Commercial Bank and 2 others (supra)
17. Section 76 of the *Law of Succession Act* provides that a grant may be revoked or annulled at any time at the instance of a party or on court's own motion if conditions spelt therein are satisfied.
18. Further, Section 47 of the *Law of Succession Act* and Rule 73 of the *Probate and Administration Rules* bestow wide discretionary powers to the court to consider any application and make any orders it considers expedient or necessary in the interest of justice. Additionally, the said Rule 73 also donates inherent powers to the court to make any decision that will ensure that the ends of justice are met.
19. In this case the property in question has already changed hands to 3rd parties. From the entries provided by the applicant himself, the property was transmitted to the two administrators, then to the first administrator, Rosalyne Chemeli Omondi. She then transferred the land to John Waruku Thuku on 22nd December 2014. On 30th May 2018 the property was then transferred to Joel Muna Kinyua And Paul Ngige Njuguna. The latter who are the registered proprietors at the moment had no way telling the history of the land in question. When they purchased the land, the same was in the name of John Waruku Thuku. As against the administrators, he may have a cause of action herein, but that cannot affect the rights of a 3rd as a purchaser for value who had no notice
20. As matters stand, there is no other property of the deceased left. In my opinion, the issue raised by the applicant as against the purchasers are not for this court to determine. *In re Estate of Ernest Kerry Komu (deceased)*[2016]eKLR, the court held that;

'I have perused the court record. The grant herein was confirmed on 31st October 2005. The subject property was indeed devolved to the applicant and the respondent jointly. The applicant alleges that the property was subsequently registered in their joint names. Once a grant is confirmed and the property is distributed, as is the case here, the probate court becomes *functus officio*. The property in question is no longer estate property. It no longer



vests in the administrators. It is no longer subject to the Law of Succession Act, Cap 160, Laws of Kenya, from which the probate court draws its authority and jurisdiction.’

21. In Re Estate of Alice Mumbua Mutua (Deceased) (*supra*) the court also held as follows:

“.....The Law of Succession Act, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.

Disputes of course do arise in the process. The provisions of the Law of Succession Act and the Probate and Administration Rules are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who are neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the Law of Succession Act and the Probate and Administration Rules. Such have to be resolved through the structures created by the Civil Procedure Act and Rules, which have elaborate rules on suits by and against executors and administrators.

The Probate and Administration Rules recognize that, and that should explain the provision in Rule 41(3), which provides as follows –

‘Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or property comprising it to abide the determination of the question in proceedings under ... the Civil Procedure Rules ...’

Clearly, disputes as between the estate and third parties need not be determined within the succession cause. The legal infrastructure in place provides for resolution elsewhere, and upon a determination being made by the civil court, the decree or order is then made available to the probate court for implementation. In the meantime, the property in question is removed from the distribution table. The presumption is that such disputes arise before the distribution of the estate, or the confirmation of the grant. Where they arise after confirmation, then they ought strictly to be determined outside of the probate suit, for the probate court would in most cases be *functus officio* so far as the property in question is concerned. The primary mandate of the probate court is distribution of the estate and once an order is made distributing the estate, the court’s work would be complete. The proposition therefore is that not every dispute over property of a dead person ought to be pushed to the probate court. The interventions by that court are limited to what I have stated above.’

22. In agreement with the above I find that this court as a probate court lacks the jurisdiction to determine an issue over a property that is no longer part of the estate herein.



23. I am aware of the holding in *Mcfoy v United Africa Co. Ltd.* [1961] 3 ALL ER 1169 where the court stated that:

“if an act is void, then it is in law a nullity. It is not only bad, but incurably defective. There is no need for an order of the court to set aside. It is automatically null and void without more a do, though it is sometimes convenient to have the court declare it to be so and every proceeding which is founded on it is also bad and incurably bad. You cannot put something in nothing and expect it to stay there. It will collapse.”

24. Although, as stated, an illegal act cannot breed a legal act and the acquisition of the grant through alleged fraudulent means can render a confirmed grant void ab initio that is only in respect to the grant itself. As for the property in question it has long passed to other parties, and any orders thereon are subject to other considerations as well. This court, as a probate court, cannot grant orders that it has no powers to so grant. The applicant ought to move the right court regarding the property. Again that is dependent on whether he is successful in revoking the grant.

25. In light of the aforesaid statutory provisions, I opine that this court became *functus officio* upon confirmation of grant and transfer of the property to the 3rd parties.

26. Therefore, I uphold the preliminary objection and strike out the application as against the 3rd 4th and 5th respondents with costs.

27. As regards the Revocation of the Grant to the two administrators, the applicant may proceed to prosecute his application over the said grant. The court will duly consider it.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 6TH DAY OF MARCH, 2024.

H. M. NYAGA,

JUDGE.

In the presence of;

C/A Oleperon

Ms Ngigi for Respondent

Mr. Wainaina for Applicant

