



In re Estate of Michael Sule Obuola(Deceased) (Miscellaneous Succession Cause E001 of 2024) [2024] KEHC 7072 (KLR) (13 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7072 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS SUCCESSION CAUSE E001 OF 2024**

RE ABURILI, J

JUNE 13, 2024

IN THE MATTER OF THE ESTATE OF MICHAEL SULE OBUOLA(DECEASED)

BETWEEN

PASKAL MATENGO SULE APPLICANT

AND

PAUL ONYANGO SULE 1ST RESPONDENT

KRISTINA ACHIENG SULE 2ND RESPONDENT

GAUDENCIA APONDIU SULE 3RD RESPONDENT

AGNETA JUMA SULE 4TH RESPONDENT

TERESIA OCHIENG SULE 5TH RESPONDENT

AND

GURBUX SINGH AHYER INTERESTED PARTY

CHARANJIT SINGH HAYER INTERESTED PARTY

T/A HAYER BISHAN SINGH & SONS LIMITED

RULING

1. The applicant Paskal Matengo Sule, vide the summons dated 8th January 2024 sought for the revocation of the grant issued to the respondents vide a court order dated 14th May 1996 on grounds among others that the proceedings to obtain the grant were defective in substance since the largest majority of the dependants and beneficiaries of the deceased’s estate some of whom have since passed on were left out of the proceedings despite being listed as beneficiaries of the deceased.



2. It was the applicant's case that on the 7th November 1995, letters of administration intestate of the deceased's estate were issued to the 1st respondent but following an application by the 2nd to 4th respondents to have the said grant revoked, by consent, the court on the 14th May 1996 ordered the said grant revoked and another issued in the names of the respondents herein.
3. The applicant further alluded to fraud on the respondents' part on account of the fact that even the initial consent that was filed in court granting the 1st respondent administrative rights of the deceased's estate was undated and not attested thus raising suspicion about its origin and purpose.
4. The applicant averred that at no time given time were they ever aware of the proceedings before court to obtain the grant and that they were never summoned to court during the confirmation of the said grant thus allowing the 1st respondent to disinherit the other dependants of the deceased.
5. The applicant further averred that upon the death of the deceased, the respondents fraudulently intermeddled in the deceased's estate and sold the estate of the deceased compromising parcel number West Kisumu/Ojola/1767 measuring 2.0 hectares to the interested parties herein.
6. The applicant thus also sought temporary injunctions halting any further dealings in the following parcels of land sold by the respondents to the interested parties and further that the OCS Kisumu Central Police Station be ordered to ensure compliance with the same;
 - i. Kisumu/Kadongo/1175
 - ii. W. Kisumu/Ojola/1869
 - iii. W. Kisumu/Ojola/1878
 - iv. W. Kisumu/Ojola/1887
 - v. W. Kisumu/Ojola/1771
 - vi. W. Kisumu/Ojola/1988
 - vii. W. Kisumu/Ojola/3936
 - viii. W. Kisumu/Ojola/28/54
 - ix. W. Kisumu/Ojola/2630
 - x. W. Kisumu/Ojola/1767
7. The summons was grounded on the annexed affidavit of the applicant, Paskal Matengo Sule.
8. In response to the summons, the interested parties initially filed a preliminary objection dated 23rd January 2024 raising the following points of law:
 - i. The application lacks foundation as the same ought to have been filed in Kisumu High Court Succession Cause No. 246 of 1993 in line with Section 76 of the *Law of Succession Act* (Cap 160) and Rule 44 (1) of the Probate and Administration Rules.
 - ii. This cause is a thinly veiled abuse of the process of court in view of the decisions in Kisumu Environment and Land Court Case (OS) No. E017 of 2023 in which the Objector herein is the Plaintiff.
9. The applicant filed grounds of opposition dated 24th January 2024 opposing the preliminary objection stating that the instant summons was rightfully before this court as the original file had been archived;



that summons for revocation of grant could be brought at any time in the subsistence of the deceased's estate administration; that the case in Kisumu Environment and Land Court Case (OS) No. E017 of 2023 in which the applicant was alleged to be the plaintiff had nothing to do with the instant application and that the preliminary objection lacked merit, was frivolous, vexatious and an afterthought brought in bad faith.

10. This court gave directions on the 6th February 2024 acknowledging that this file had been opened as a Miscellaneous file because the original file No. 246 of 1993 had been taken to the archives thus this would be the parent file hosting it. The court further directed that the respondents file their replying affidavit to the summons for revocation of grant.
11. The interested parties filed their response in objection to the summons for revocation of grant vide a replying affidavit sworn on the 13th February 2024 by one Jane Betty Atieno, an administrator with the 2nd interested party.
12. It was her deposition that the applicant had never had any dealings with the 2nd interested party and further that parcel number Kisumu/Ojola/1767 was the subject matter in Kisumu High Court Civil Suit No. 63 of 2006, Paul Onyango Sule v Charanjit Hayer and Gurbux Singh Hayerin which suit the issue of ownership of the said parcel was determined with finality and a decree issued and that no appeal had been preferred or lodged against the said decision.
13. It was further averred on behalf of the interested parties that the instant summons was an attempt by the applicant to either appeal or apply for review of the decision in Kisumu High Court Civil Suit No. 63 of 2006.
14. The respondents failed to file any response to the summons for revocation of grant. The parties agreed to have oral submissions in disposal of the matter.

The Applicant's Oral Submissions

15. Mr. Awuonda counsel for the applicant submitted that the deceased died on the 17.3.1986 and the 1st respondent got a grant on the 17.11.1995 which grant was revoked by consent on application by the 2nd to 5th respondents.
16. It was further submitted that 15 beneficiaries were left out of the succession proceedings and further that the initial consent was filed without a date and not signed thus the process leading to the obtaining of the grant was defective.
17. Mr. Awuonda submitted that there was intermeddling with the deceased's estate as no leave of court was obtained before selling of the land vide the agreement of 23.3.1989 over parcel number West Kisumu/Ojola/1766 that was executed before the grant was confirmed contrary to sections 45 and 82 of the *Law of Succession Act*.
18. Mr. Awuonda further submitted that summons for revocation of grant can be filed at any time and that the decree in Kisumu High Court Civil Suit No. 63 of 2006 is not relevant as it was between the 1st respondent and the interested parties who are the culprits of intermeddling with the deceased's estate and further that the case was used to sanitize the illegalities committed.
19. It was submitted that the grant issued to the respondent ought to be revoked and a fresh grant issued to the applicant to take care of interests of all the beneficiaries.



The Interested Parties' Oral Submissions

20. Mr. Onsongo counsel for the interested parties submitted on behalf of the interested party that the instant summons sought to overturn the decree in Kisumu High Court Civil Suit No. 63 of 2006 and that this was not the right forum to overturn that decree.
21. It was Mr. Onsongo's submission that the subject matter in the Kisumu High Court Civil Suit No. 63 of 2006 was the sale agreement of 28.3.1989 and that the 1st respondent was seeking to vitiate or nullify that agreement in a case where the plaintiff had a confirmed grant but the court found the properties to be of the interested parties thus this court cannot overturn the decree in Kisumu High Court Civil Suit No. 63 of 2006.

Analysis & Determination

22. I have considered the Summons for revocation of grant, the grounds, supporting affidavit and oral submissions by the applicant's counsel. I have given equal consideration to the replying affidavit and the oral submissions by counsel for the interested parties. The issue for determination herein is whether the Applicant's application meets the threshold for the revocation of a grant within the meaning of Section 76 of the *Law of Succession Act*.
23. For avoidance of doubt, Section 76 of the *Law of Succession Act* states 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.”

24. Section 76 was clearly expounded on by the court In re Estate of Prisca Ong’ayo Nande (Deceased) [2020] eKLR where it was stated that:

“Under section 76, a court may revoke a grant so long as the grounds listed above are disclosed, either on its own motion or on the application of a party. A grant of letters of administration may be revoked on three general grounds. The first is where the process of obtaining the grant was attended by problems. The first would be where the process was defective, either because some mandatory procedural step was omitted, or the persons applying for representation was not competent or suitable for appointment, or the deceased died testate having made a valid will and then a grant or letters of administration intestate was made instead of a grant of probate, or vice versa. It could also be that the process was marred by fraud and misrepresentation or concealment of matter, such as where some survivors are not disclosed or the Applicant lies that he is a survivor when he is not, among other reasons. The second general ground is where the grant was obtained procedurally, but the administrator, thereafter, got into problems with the exercise of administration, such as where he fails to apply for confirmation of grant within the time allowed, or he fails to proceed diligently with administration, or fails to render accounts as and when required. The third general ground is where the grant has become useless and inoperative following subsequent circumstances, such as where a sole administrator dies leaving behind no administrator to carry on the exercise, or where the sole administrator loses the soundness of his mind for whatever reason or even becomes physically infirm to an extent of being unable to carry out his duties as administrator, or the sole administrator is adjudged bankrupt and, therefore, becomes unqualified to hold any office of trust.”

25. From the above provision of the law and case law, it is clear that a party seeking to have a grant revoked must prove either, or, all the grounds listed under Section 76 of the *Law of Succession Act*.
26. As I have already noted, the grounds in support of the applicant’s application are basically, that the succession cause was filed without involving the applicant and other beneficiaries despite the fact that applicant and other beneficiaries were listed as beneficiaries of the deceased’s estate. Further that the respondents fraudulently intermeddled in the deceased’s estate and sold the estate of the deceased compromising parcel number West Kisumu/Ojola/1767 measuring 2.0 hectares to the interested parties herein.
27. It is not in dispute that the applicant is a beneficiary of the deceased’s estate as he was among the beneficiaries listed in P & A 5. Further there is no evidence on record that the applicant’s consent or that of his other siblings was obtained prior to the 1st respondent petitioning for letters of administration intestate or prior to the issuance of the grant as confirmed.
28. Rule 7 of the Probate and Administration Rules provides that application for grant of representation in relation to an estate of a deceased person to whose estate no grant or no grant other than one under section 49 or a limited grant under section 67 of the Act has been made, the application shall be by petition supported by an affidavit. The said affidavit must contain amongst other details, the names, addresses, marital status and description of all surviving spouses and children of the deceased, or, where



the deceased left no surviving spouse or child, like particulars of such person or persons who would succeed in accordance with Section 39(1) of the Act {Rule 17(e)(i)}.

29. Rule 26 provides that letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant. Further that in an application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.
30. The effect of the above provisions is that where a person is applying for a grant of letters of administration intestate, he must get consent from persons of equal or lower priority than him.
31. I have perused the court record and I note that as earlier herein stated there is no consent to the making of a grant of letters of administration intestate from the applicant or other beneficiaries listed in P & A 5.
32. It is my view therefore that the said grant was obtained pursuant to proceedings which were defective in substance. The respondents ought to have obtained consent from all the other brothers and sisters. In *Antony Karukenya Njeru v Thomas M. Njeru* [2014] eKLR, a grant of letters of administration was revoked as persons with equal priority did not consent to the petitioners therein applying for grant of letters of administration. (See also *In the Matter of the Estate of Muriranja Mboro Njiri*, Nairobi H.C. Succ. Cause No. 890 of 2003).
33. It is my considered view therefore that the failure by the respondents more so the 1st respondent to obtain the consents from the other siblings makes the proceedings of obtaining the same to be defective in substance and the said grant ought to be revoked and a new grant issued upon application by the parties herein.
34. The applicant also raised the issue that the respondents fraudulently intermeddled in the deceased's estate and sold the estate of the deceased compromising parcel number West Kisumu/Ojola/1767 measuring 2.0 hectares to the interested parties herein.
35. There is no doubt that vide the agreement of 23.3.1989, the 1st respondent sold parcel number West Kisumu/Ojola/1766 to the interested parties. This was before a confirmed grant was issued to any of the respondents.
36. The provisions governing intermeddling in the estate of a deceased person is Section 45 of the [*Law of Succession Act*](#). This Section is worded: "No Intermeddling with property of deceased person". The section provides that:
 45.
 - (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
 - (2) Any person who contravenes the provisions of this section shall—
 - (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and



- (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration

37. This section needs no emphasis that taking possession of, disposing of, or otherwise intermeddling in any free property of a deceased person in ways that are not authorized by the Law of Succession Act or any other written law or by a grant of representation under the Law of Succession Act is a criminal offence punishable under Section 45 (2) of the Law of Succession Act.
38. It is clear that the sale of parcel number West Kisumu/Ojola/1766 amounted to an act of intermeddling. However, the applicant, instead of coming to challenge that intermeddling before this court, he went to the Environment and land court which decided on the ownership of the title to the said land, and it was in its jurisdiction to do so. The applicant having chosen that path, this court has no jurisdiction to overturn the decision of the court of equal status. Article 165(5) of the Constitution is clear on the supervisory jurisdiction of the High Court and it provides that:
- “The High Court has supervisory jurisdiction over the subordinate Courts, and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.”
39. The Environment and Land Court is a Superior Court established under Article 162(2) (b) of the Constitution. That Court having pronounced itself concerning ownership and title to land, which is within its jurisdiction, without reference to this Court for a determination on the distribution of the estate of the deceased, this court cannot sit on appeal of the decision of the other Superior Court.
40. This Court cannot therefore enter into the arena of the dispute that was before the Environment and Land Court. The applicant had the opportunity to appeal that decision and await the determination by the Court of Appeal.
41. The interested parties’ assertion therefore that this court cannot overturn the previous holding of a similar court in my view is correct and I have no doubt in my mind that I cannot make orders in this succession matter that have the effect of overturning a decision of a superior Court of equal status, however illegitimate those orders may appear. Furthermore, the duty of this Court as a succession court is with regard to the deceased’s estate and to distribute the estate. As was held in the case of *Re Estate of Julius Ndubi Javan(deceased)[2018]e KLR*:

“(14) The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified. Thus, where issues on the ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed. And that is the very reason why rule 41(3) of the Probate and Administration Rules was enacted so that claims which prima facie valid should be determined before confirmation. See rule 41 below:-

41. Hearing of application for confirmation

- (1) At the hearing of the application for confirmation the court shall first read out in the language or respective languages in which they appear the application, the grant, the affidavits and any written protests which have been filed and shall then hear the applicant and each protester and any other person interested,



whether such persons appear personally or by advocate or by a representative.

- (2) The court may either confirm the grant or refer it back for further consideration by the applicant or adjourn the hearing for further evidence to be adduced or make any other order necessary for satisfying itself as to the expediency of confirming the applicant as the holder of the grant or concerning the identities, shares and interests of the persons beneficially entitled and any other issue which has arisen including the interpretation of any will.
- (3) 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 Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71 (2) of the Act, proceed to confirm the grant. [Underlining mine for emphasis]
- (4) In proceedings under subrule (3), unless the court otherwise directs, the personal representative of the deceased shall be the applicant seeking determination of the question, and the person claiming so to be beneficially interested together with the residuary legatee or other person to be appointed by the court to represent the residuary estate shall be the respondents; and the court in such proceedings shall give all necessary directions relative to the prosecution thereof including the safeguarding of the share or estate so appropriated and set aside and the provision of costs.
- (5) Where the court in exercise of its power under section 71 (2) (a) of the Act directs that a grant be confirmed it shall cause a certificate of such confirmation in Form 54 to be affixed to the grant together with the seal of the court and shall appoint a date not more than six months ahead, by which time the accounts of the completed administration shall be produced to the court for its approval.
- (6) Where the court, in exercise of its power under section 71 (2) (b) of the Act, instead of confirming a grant already issued directs the issue of a confirmed grant, this grant may be in Form 55.
- (7) On production of the accounts in court any person beneficially entitled and any creditor may appear and be heard before the court's approval is given. (8) The approval of the accounts in court may be dispensed with if all persons beneficially entitled have signed as consenting to the accounts as produced. (9) On



the date for approval of the accounts and on any adjourned date application may be made for an adjournment to a fixed date not longer than three months away.”

42. I thus find that although the sale land parcel number West Kisumu/Ojola/1767 which formed part of the estate of the deceased prior to the confirmation of grant amounted to an act of intermeddling, as a court of competent jurisdiction already pronounced itself on the issue of title and ownership of that land, this court cannot set aside the sale or transfer as the case may be.
43. However, as the person who sold the said land benefited from the sale, this court has the power to order that during the distribution of the estate of the deceased, the portion of land which he sold and benefitted from will be considered to be part of his share and therefore no other beneficiary shall be disinherited or be disadvantaged by the said disposal by the 2nd respondent
44. In this case, the Applicant seeks, inter alia, an order for a preservative order restraining the Respondents by themselves, their agents or servants, employees or any other assigns or representatives from intermeddling in any way with the estate of the deceased pending hearing and determination of this application and confirmation of the Grant.
45. The Applicant has not cited the provision under which the application is brought. However, Section 47 of the [Law of Succession Act](#) provides as follows:

The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.

46. The principles guiding the grant of interlocutory injunction are now well settled. Those principles were set out in *East African Industries v Trufoods* [1972] EA 420 and *Giella v Cassman Brown & Co. Ltd* [1973] EA 358. In *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR the Court restated the law as follows:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Ltd V. Afraha Education Society* [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to



injunction directly without crossing the other hurdles in between. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted.”

47. In light of the evidence on record, it is clear that the applicant has presented a prima facie case substantiating the need for grant of a temporary injunction. It is also clear that the applicant and other beneficiaries stand to suffer irreparable loss if the court does not grant the temporary injunction as they shall be disinherited.
48. In light of my findings above, I am satisfied that the applicant has satisfied the conditions necessary for the grant of the injunctory orders sought.
49. The upshot of the above is that I find the instant summons for revocation of grant to meritorious and proceed to order that the grant issued to the respondents on the 14th May 1996 be revoked and the beneficiaries of the estate shall make a fresh petition for grant of letters of administration intestate.
50. In order to preserve the estate of the deceased which has not been legally distributed to beneficiaries, I hereby issue a temporary injunction against the respondents and any other person from the intermeddling with the deceased’s estate or from dealing with any of the suit properties pending the fresh succession and distribution of the deceased’s estate to legitimate beneficiaries.
51. Each party shall bear their own costs of the application.
52. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 13TH DAY OF JUNE, 2024

R.E. ABURILI

JUDGE

