



In re Estate of Liwali Sheikh salim Bin Khalfan (Deceased) (Succession Cause 94 of 2011) [2024] KEHC 9240 (KLR) (10 June 2024) (Ruling)

Neutral citation: [2024] KEHC 9240 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 94 OF 2011**

**G MUTAI, J
JUNE 10, 2024**

BETWEEN

RAMADHAN IDD RAMADHAN 1ST PETITIONER

BAKARI OMAR 2ND PETITIONER

AND

SEIF SAID SEIF 1ST APPLICANT

THELMA ANDREW LYALL 2ND APPLICANT

SULEIMAN MOHAMED SAID 3RD APPLICANT

TWAHIR SALIM SOUD 4TH APPLICANT

ABBAS SOUD ALI 5TH APPLICANT

RULING

1. Before this court is the Summons for Revocation or Annulment of Grant dated 26th April 2021. The Summons seeks to revoke the grant issued to the Petitioners/Respondents on 31st August 2012 and confirmed on 11th September 2012 on the grounds that:-
 - a. The grant of letters of administration was obtained by the Respondents deliberately lying on oath by claiming that they were great-grandsons of the deceased while in actual fact the Respondents are not related to the deceased at all and therefore, the Respondents committed perjury;
 - b. The Respondents obtained the grant of letters of administration by means of fraud as they lied to court that they were grandsons of the deceased which they knew to be untrue and false as they were not in any way related to the deceased;



- c. That before the Respondents filed their application herein, they had already also fraudulently applied for letters of administration with respect of the estate of the deceased in Malindi Kadhi's Probate & Administration Cause Case No. 107 of 2007, which they did not disclose to court;
 - d. That at the time the Respondents filed the application herein, they had already been registered as administrators of the estate of the deceased with respect to Plot No.39 which is the only property that belongs to the deceased among the properties listed as belonging to the deceased in the petition for letters of administration; and,
 - e. That the Respondents while having no locus or any colour of right to apply for letters of administration in respect of the estate of deceased also included in their application properties not belonging to the estate which properties were included in the letters of administration and in the confirmation of grant thus committing a fraud against third parties who have no interest in the estate of the deceased.
2. The Summons is supported by the affidavit of Seif Said Seif filed on 28th April 2021, vide which he stated that he is a son of the late Said Bin Seif AlBusaidy, who up to 23rd February 1999 was an administrator of the estate of the late Liwali Salim Bin Khalfan. He further stated that he is an administrator of his father's estate. He averred that he, Suleiman Mohamed Said and Abbas Soud Ali are the great-grandsons of the late Liwali Salim Bin Khalfan while Thelma Andrew Lyall is the great-granddaughter and Twahir Salim Soud is a great-great-grandson of the late Liwali Salim Bin Khalfan.
 3. He deposed further that his father died, leaving part of the estate of the deceased un-administered. He stated that as he was unable to trace the file in respect of Probate and Administration Cause No.114 of 1920, he, together with his co-applicants, applied for a grant of letters of administration in Malindi Kadhi's Court No.14 of 2015 for the un-administered estate. He stated that they later learnt of this matter, as well as the grant that had been issued and confirmed to the Petitioners/Respondents, who had disguised themselves as grandsons of the deceased herein.
 4. He stated that the petitioners are not grandsons of the deceased and thus obtained the grant fraudulently and through concealment of material facts from the Court as they did not disclose that they had already obtained a grant in Kadhi's Court Malindi in Succession Cause No.14 of 2008 which was registered against the title for Plot No.39 Malindi.

Response to the Summons for Revocation of Grant

5. In response, the Petitioners/Respondents filed a Replying Affidavit sworn by the 1st Petitioner/Respondent, Ramadhan Iddi Ramadhan, on 12th November 2021.
6. He stated that the Summons lacks merit and that the orders could not be granted as the Applicants are not parties to this suit. He deposed that the court is functus officio.
7. He averred that the deceased herein had two sons, Sir Ali and Seif, who were the only heirs of his estate. He refuted claims of fraud and stated that they were grandchildren of the ex-slaves of the deceased and that the errors referred to were caused by a clerk who assisted them in drafting the pleadings and the same should not be visited on them. He deposed that the issue of misrepresentation and fraud was dealt with by Lady Justice Thande and thus can't be raised in these proceedings.
8. He stated that the Applicants' intention was to grab properties from the children of the ex-slaves. He termed the application an abuse of the court process and urged the court to dismiss the same with costs.



Evidence Adduced by the Parties

9. Both parties filed a list of witnesses, witnesses' statements for their witnesses and a list of documents. The matter was then canvassed by way of viva voce evidence.

Evidence of the Applicants

10. The Applicants had one witness, Seif Said Seif, the 1st Applicant herein. Mr Seif relied on his Supporting Affidavit to the Summons for Revocation as his evidence in chief, together with the documents annexed therein, as well as his statement and list of documents filed on 30th May 2022.
11. He stated that his grandfather, Seif Salim, had three sons, Nasser, Mohamed and Said Bin Seif, while Salim Bin Khalfan had two sons, Ali Bin Salim and Seif Bin Salim. The estate belongs to his grandfather, who died in 1920. The first administrator was Sir Ali Bin Salim, who administered the estate until his demise in 1939, when his son, Said Bin Ali, took over. After Said died, his father took over the administration of the estate. However, they couldn't trace documentation/records for the administration from 1920. He stated that he had no idea whether his great-grandfather had a will. He averred that Plot No.39 had not been distributed to beneficiaries and that the grant was issued to people without proper claim to the deceased's estate.

Evidence of the Petitioners/Respondents

12. The Petitioners/Respondents called two witnesses, Ramadhan Idi Ramadhan and Abubakar Omar Kombo, aka Bakari Omar.
13. Ramadhan Idi Ramadhan was the first witness for the Respondent. He relied on his Replying Affidavit, witness statement dated 7th October 2022 and the lists of documents dated 20th October 2022 and 31st July 2022 in his evidence in chief.
14. It was his evidence that he was a descendant of people from Nyasaland who were brought to the Kenyan Coast by Arab slave traders. He testified that he had never met the deceased, nor do they have a blood relationship, nor is he his grandson. He testified that they came to court to seek their inheritance and that before coming to court, they obtained a letter from the Chief Malindi Town Location dated 7th March 2011.
15. He averred that his grandparents were slaves of the deceased. His evidence was that the deceased granted his former slaves the subject parcels of land. The lands were registered in their favour under the will, and he has an interest under the will. He stated they produced the will in court, and it was on that basis that they were issued with the grant.
16. He testified that he was illiterate and was not aware that they lied to the Court.
17. The second witness, Abubakar Omar Kombo, aka Bakari Omar, relied on his witness statement dated 7th October 2022. He testified that they entered into the land after being shown a will by their grandfathers. They went to the chief's office, who took them to the Kadhi's Court. He stated that the Kadhi advised them to move to the High Court. Pursuant to the said advice, they moved the court and were issued with a grant. The said grant was subsequently confirmed. It was his evidence that their grandfathers were slaves of the Arabs who gave them land through will, and thus, as grandchildren, they were beneficiaries of the will. He stated that there was no evidence that the will was invalid. He also testified that the will was irrevocable.



18. He stated that court clerks assisted them in drafting the pleadings and that they signed them after being asked to, as they didn't know that they were wrongly described as grandchildren of the deceased, which they are not.

Submissions of the Parties

19. Upon conclusion of the hearing, I asked the parties to file written submissions.

Written Submissions of the Applicants

20. The Applicants, through their learned counsels, Messrs. Kiarie Kariuki & Company advocates filed their written submissions dated 9th February 2024.
21. Counsel relied on section 76 of the [Law of Succession Act](#) and submitted that the Petitioners/ Respondents, in presenting themselves as grandsons of the deceased to the Court, while they knew they were not, is a good ground for revocation of the subject grant, as is the non-disclosure of material facts, to wit, that they filed Malindi Cause No.107 of 2007 and also that their claim was founded on a will whereas the cause giving rise to this proceedings was an intestate succession.
22. Counsel further submitted that the issues raised by the Petitioners/Respondents with respect to ownership of properties and historical injustices cannot be dealt with in a succession matter.
23. Counsel urged the court that the petitioners obtained the grant fraudulently by concealment of material facts from the court and submitted that the same should be revoked as the Petition for letters of administration intestate was a nullity. It was, therefore, urged that the same be set aside or struck out.

Submissions of the Petitioners/Respondents

24. The Petitioners/Respondents, through their advocates, Gitonga Muriuki & Co. Advocates, filed written submissions dated 1st March 2024. The said counsels submitted on four issues; whether the summons for revocation are barred due to excessive and inordinate delay; whether there was fraud at the time of obtaining the grant by the petitioners; whether the purported revocation of will stood the test of the principles of natural justice; whether the applicants are barred by the Limitations of Actions Act.
25. On the first issue, counsel relied on several authorities and submitted that the applicants did not give any reasons for the delay in filing the Summons and, therefore, the same should be dismissed with costs.
26. On the second issue, counsel reiterated that the error in the description of the Petitioners was not intentional as it was caused by the person assisting them in drafting pleadings and that their being descendants of the ex-slaves of the deceased was not in dispute and the same should not vitiate the validity of the grant. The Petitioners/Respondents had no intentions of misleading the court on the same as they did not have legal representation and relied on clerks to draft pleadings for them. They urged that the Applicants would not suffer any prejudice as they are not entitled to Parcel No. 39. They further urged that portions of the said land had changed hands to third parties, and nothing was left that could revert back to the estate.
27. Counsel urged the court not to revoke the grant as it resolved the issue of injustices visited on the people of the former coast province.
28. On the third issue, counsels submitted the Summons offend Sections 76, 26 and 29 of the [Law of Succession Act](#) as Plot No. 39 was a gift to the slaves/or former slaves of the deceased herein. It was urged



that the Wakf cannot be revoked. It was submitted that the Applicants failed to disclose the many suits they had filed in Malindi Courts claiming ownership of Plot No.39.

29. Counsel urged the court to dismiss the Summons for Revocation of Grant with costs.
30. The Applicants filed a reply to the Petitioners' submissions dated 9th April 2024.
31. On delay, counsel submitted that the summons cannot be said to have been brought out of time or the delay to be inordinate as the subject matter, to wit, Plot No.39, is still intact.
32. On fraud, the Applicants' counsel submitted that the Petitioners committed fraud by presenting themselves as grandsons/great-grandsons of the deceased in the Petition for Letters of Administration Intestate and Summons for Confirmation of Grant despite knowing very well they are not.
33. On natural justice, counsels for the Applicants submitted that the issue of historical injustices has no place in succession matters.
34. On the application of the Limitation of Actions Act in succession matters, counsel submitted the same does not apply as a matter of succession cannot be said to be an action.

Analysis and Determination

35. I have considered the Summons, the responses thereto, the oral evidence tendered by parties and rival submissions by both parties' counsels. In my view, the sole issue calling for my determination is whether the subject grant should be revoked.
36. My first port of call is the applicable provision of the Law of Succession Act. Section 76 of the said Act provides as follows:-
 - “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.”
37. The Petitioners/Respondents have contended that the Summons before the Court is statute barred. I will deal with the issue of limitation as a preliminary matter. My view is that there is no time limitation



and that an application for revocation can be made at any time. I am guided by the case of *In re Estate of Josephine Magdalena Motion (deceased)* [2016] eKLR where the Court stated as follows:-

“My reading of this is that an application founded on section 76 of the *Law of Succession Act* can be made at any time. There is no limitation set by the provision for the making of the application. The provision is open-ended. Of course there is room for bringing in the test of reasonableness into the play. That, however, does not introduce time limitation; it merely requires the court to bring in to bear reasonableness in its exercise of discretion on whether or not to revoke a grant...

The *Limitation of Actions Act* prescribes periods for limitations of actions and arbitrations. My reading of the actions to which that statute applies is that it does not include succession causes, or, at any rate, causes or actions governed by the *Law of Succession Act*. It covers such matters as actions founded on contracts and torts, actions to recover land and rent, actions to recover money, actions in respect of trust property or movable property of a deceased person, and related causes. In short, it envisages ordinary civil suits brought within the framework of the *Civil Procedure Act* and Rules. It does not envisage the special proceedings governed by such statutes as the *Law of Succession Act*.”

38. The court’s power to revoke a grant was discussed by the court in the case of *Albert Imbuga Kisigwa vs Recho Kawai Kisigwa* [2016]eKLR. In the said case the Court stated as follows:-

“(13) Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the court to invoke section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased’s estate and ensure that the action taken will be for the interest of justice.”

39. The court expounded on the grounds for revocation of a grant under section 76 of the *Law of Succession Act* in *In re Estate of Prisca Ong’ayo Nande (Deceased)* [2020] eKLR, by stating as follows:-

“Under section 76, a court may revoke a grant so long as the grounds listed above are disclosed, either on its 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.”

40. On non-disclosure of material facts from the court, the court in the case of *In re Estate of Julius Ndubi Javan (Deceased)* [2018] eKLR observed that:-

“Needless to state that, in any judicial proceeding, parties must make full disclosures to the court of all material facts to the case including succession cases. This general rule of law emphasises utmost good faith (*uberimae fidei*) from parties who take out or are subject of the court proceedings. The said responsibility is part of justice itself. Accordingly, non-disclosure of material facts undermines justice and introduces festering waters into the pure streams of justice; such must, immediately be subjected to serious reverse osmosis to purify the streams of justice, if society is to be accordingly regulated by law.”

41. From the evidence adduced, it is clear that the Petitioners/Respondents are not the grandsons/great-grandsons of the deceased, as stated in the Petition and also in the Summons for Confirmation of Grant of Letters of Administration Intestate, but rather are descendants of the deceased's slaves.
42. Although it has been indicated that the error in the description of the Petitioners/Respondents was inadvertent, the Petitioners/Respondents annexed a letter from the chief of their area of residence dated 7th March 2011 in which they were described as the great-grandson of the deceased. The court takes notice of the fact that the Chief Old Town Location Malindi could not have written the letter without having a discussion with the Petitioners/Respondents regarding their capacity. I do not see how the chief and the alleged clerk who drew the pleadings could have made the same mistake without the involvement of the Petitioners/Respondent. In my view, therefore, the false statement that they were grandchildren of the deceased was deliberate, authored by them, and meant to hoodwink the court into issuing them with a grant of representation they knew wasn't due to them.
43. I note that the Petitioners/Respondents opted if their account is to be believed, to have their pleadings prepared by unqualified persons. Having taken that path, they must own their mistakes and carry their crosses. They have no one to blame but themselves. In any case, as they executed the pleadings, their execution binds them. They cannot now resile from their pleadings.
44. Even if the allegation was made inadvertently, as was submitted, it was nevertheless an “untrue allegation of a fact essential in point of law to justify the grant.” thus meriting the revocation of the grant under Section 76(c) of the *Law of Succession Act*. The Court would not have issued them with the grant had they not held themselves out as being grandchildren of the deceased. The false statement gave them the standing they hitherto lacked. It was key to the determination that the Court made.
45. The court notes that the Petitioners/Respondents did not fully disclose all material information, including other proceedings before the Kadhi Court, Malindi, that resulted in the transfer of LR No.39 to their name. My view is that a party making representations before the Court must fully disclose all facts relevant to the case, even those facts that make it less likely that the Court will rule in favour of that party. That is the essence of the *uberimae fidei* principle referred to eloquently in *In re Estate of Julius Ndubi Javan (Deceased)* [2018] eKLR.
46. The Petitioners/Respondents filed this cause as an intestate succession. During the hearing, however, they asserted that their claim was based on a will allegedly made by the deceased. If indeed there was a will that gifted Plot No. 39 to the slaves of the deceased, then these proceedings, having been begun as



a Petition for Letters of Administration Intestate rather than as probate proceedings, are defective in substance and must, therefore, be revoked under section 76(a) of the *Law of Succession Act*.

47. Counsel for the Petitioners/Respondents submitted that the petition filed herein cured a historical injustice. That may be so. Unfortunately, the resolution of historical injustices isn't within the province of the Probate and Administration Court. It would be an extreme judicial overreach for this court to purport to cure historical injustices in succession proceedings.
48. Although courts should exercise their discretion to revoke a grant sparingly, this court holds the view that the circumstances under which this grant was issued call for the revocation of the instant grant.

Disposition

49. In the circumstances I revoke the grant issued to Ramadhan Idd Ramadhan and Bakari Omar on 31st August 2012 and confirmed on 11th September 2012.
50. I make no orders regarding costs as this is a succession matter.
51. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 10TH DAY OF JUNE 2024. DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.

Gregory Mutai

JUDGE

In the presence of:-

Mr Muriuki, for the Petitioners/Respondents;

Ms Kabole, holding brief for Mr Kiarie Kariuki for the Objectors/Applicants; and

Arthur – Court Assistant.

