



REPUBLIC OF KENYA



**In re Estate of Abdi Aziz Sheikh Osman (Deceased) (Succession Cause
689 of 2011) [2024] KEHC 8939 (KLR) (22 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8939 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION CAUSE 689 OF 2011**

DKN MAGARE, J

JULY 22, 2024

IN THE MATTER OF THE ESTATE OF ABDI AZIZ SHEIKH OSMAN (DECEASED)

BETWEEN

LAILA ABDI AZIZ JAMA APPLICANT

AND

AHMED ABDI AZIZ JAMA RESPONDENT

RULING

1. The matter relates to an application for revocation of letters of administration intestate. The applicant who is a daughter of the deceased filed summons for revocation. The undated application annexed to the certificate of urgency dated 8/8/2023 sought the following orders: -
 - a. Spent.
 - b. That the grant of letters of administration intestate issued to Ahmed Abdi Aziz Jama be revoked and annulled as the grant was obtained fraudulently by the making of a false statement and concealment of material facts.
 - c. That the Respondent be restrained from transferring, Selling, Alienating, Collecting rent or in any way dealing with the deceased Properties in rent from Nanyuki Block 7/140, Nanyuki Block 7/148, Laikipia/Nanyuki Block Municipality Block 3/1098 and E.Bukusu/Kanduyi/2490 within Bungoma County pending the hearing of this Application inter partes.
 - d. That the Honorable Court be pleased to order that all the rent collected for the houses Nanyuki Block 7/140, Nanyuki Block 7/148, Laikipia/Nanyuki Municipality Block 3/1098 and E.Bukusu/Kanduyi/2490 within Bungoma County be deposited with the Registrar of trustees pending the determination of this Application.



- e. That all monies in the Kenya Commercial bank left by the (Deceased) v was not disclosed to this Honorable Court be frozen until hearing determination of this Suit.
- f. The administrator/Respondent Ahmed Abdi Aziz Jama be ordered to deposit his passport in court and not to leave the country for Canada where he also resides the jurisdiction of the court until the application is heard and determined.
- g. That costs be in the cause.

Background

2. Letters of administration intestate were issued by this court on 3/11/2011. The grant was subsequently confirmed and rectified. All these time, the Applicant indicated that he was the sole heir of the estate. He went to the chief Eastleigh South and got a letter to apply for letters of administration indicating that he was the only beneficiary.
3. The chief confirmed through his letter dated 6/7/2011 that the Respondent was the sole beneficiary. Later he indicated that he had inadvertently left out land parcel plot EB/SK/2740 in Bungoma. The property was included.
4. The applicant filed for a citation being Nairobi HCFP&A E988 of 2023 at Nairobi. Upon filing the citation the respondent herein responded to the same and disclosed the existence of this cause. She disclosed properties remaining as Nanyuki Block 7/140, Nanyuki Block 7/148, Nanyuki Municipality/Block 3/1098 and East Bukusu/Kanduyi/2490.
5. There is also account number 055-17XXXXXXX At KCB, Nanyuki Branch. It was her case that the brother was evasive. He had failed to include the collection account for rent collected.
6. The applicant was seeking that the administrator should not leave the country and should deposit the passport in the court.
7. In a strange turn of events, the petitioner acknowledged his sister, whom she had denied for 13 years. The petitioner also acknowledged existence of the parcels set out by the sister. However, he did not explain why he did not include them in the certificate of confirmation of grant.
8. He annexed part of the account statement showing money in account number 055-17XXXXXXX At KCB, Nanyuki Branch above. He prayed that instead of revoking, the court should confirm the grant in accordance to Islamic law.
9. The grant was confirmed on 21st May, 2019. All the three disclosed properties were confirmed in favour of the Petitioner/Respondent. The Respondent submitted that the letters place the applicant in trust-like situation and the law burdens the administrator to distribute all assets remaining after paying debts. They stated that this was not an irregularity but an inadvertent failure and was not meant to defraud the estate.
10. He stated that he has been willing and ready to surrender the Applicant's share of the father's estate. They relied on Section 2(3) and 2(4) of the *Law of Succession Act*. It is their case that since both parties are Muslims, the court should distribute according to Islamic law.
11. They relied on the case of *Ismail Osman Adam (Deceased), Noorbanu Abdul Razak v. AbdulKader Ismail Osman*, Mombasa Civil Appeal No. 285 of 2009. They also referred to the case of *R.G & RGO V HSB & ASB* (2014) eKLR.



12. The Applicant submitted that the proceedings were defective in substance. They stated that the application was concealed from the Applicant until HCFP P& A E988 of 2023 was filed.
13. The applicant relied on section 51(2) of the *Law of Succession Act*. the Applicant stated that she is not aware where the rent was being deposited. They question why the applicant insists on not disinheriting while at the same time not including the Applicant in the application.
14. Reliance was placed on section 66 of the *Law of Succession Act*, which provides as follows: -
 - “ 66. Preference to be given to certain persons to administer where deceased died intestate When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-
 - a. surviving spouse or spouses, with or without association of other beneficiaries;
 - b. other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V.
 - c. the Public Trustee; and
 - d. creditors;
 - e. Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.”
15. She prays to be appointed. She stated that she will apply immediately for confirmation.

Analysis

16. The law governing revocation or annulment of grant is Section 76 of the *Law of Succession Act*, Cap 160 Laws of Kenya, and Rule 44 of the *Probate and Administration Rules*. The said Section 76 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.

17. Rule 44 provides that: -

1. Where any person interested in the estate of the deceased seeks pursuant to the provisions of section 76 of the Act to have a grant revoked or annulled he shall, save where the court otherwise directs, apply to the High Court for such relief by summons in Form 107 and, where the grant was issued through the High Court, such application shall be made through the registry to which and in the cause in which the grant was issued or, where the grant was issued by a resident magistrate, through the High Court registry situated nearest to that resident magistrate's registry.
 2. There shall be filed with the summons an affidavit of the applicant in Form 14 for revocation or annulment identifying the cause and the grant and containing the following particulars so far as they are known to him—
 - a. whether the applicant seeks to have the grant revoked or annulled and the grounds and facts upon which the application is based; and
 - b. the extent to which the estate of the deceased has been or is believed to have been administered or to remain un-administered, together with any other material information.
 3. The summons and affidavit shall without delay be placed by the registrar before the High Court on notice in Form 70 to the applicant for the giving of directions as to what persons (if any) shall be served by the applicant with a copy of the summons and affidavit and as to the manner of effecting service; and the applicant, upon the giving of directions, shall serve each of the persons so directed to be served with a notice in Form 68, and every person so served may file an affidavit stating whether he supports or opposes the application and his grounds therefor.
 4. When the persons (if any) so directed to be served (or such of them as the applicant has been able to serve) have been served with a copy of the proceedings, the matter shall be placed before the High Court on notice by the court to the applicant and to every person so served, and the court may either proceed to determine the application or make such other order as it sees fit.
 5. Where the High Court requires that notice shall be given to any person of its intention of its own motion to revoke or annual a grant on any of the grounds set out in section 76 of the Act the notice shall be in Form 69 and shall be served on such persons as the court may direct.”
18. Upon consideration of the evidence and submissions of all the parties, the issue that arises for determination is whether the Defendant/Respondent obtained the grant of letters of administration fraudulently.



19. The petitioner conceded that he did not disclose the sister. However, he does not appear to have wasted the estate. The only requirement that was to be demonstrated is fraudulent concealment. It cannot be inadvertent that the Petitioner did not know that he had a blood sister. This is a fact he readily conceded. However, he had to be jolted to action by the citation. The Applicant did not want to go alone while the Respondent was comfortable not disclosing the sister. What a nice way to treat a sister.

20. *In re Estate of David William Kigumi Kimemia (Deceased)* [2021] eKLR, H. A. Omondi, as then she was stated as follows: -

“I find that the applicant has demonstrated misrepresentation on the part of the administrators, and there is nothing on record, either by way of information to the court, or by some other document, to show that the court was made aware that one of the beneficiaries was outside the country.

I find that the applicant has met two of the limbs envisaged under Section 76 of the *Law of Succession Act*, namely that there was non-disclosure as regards the absence of the applicant (which if the court had been informed, I am sure it would have set certain conditions to be met so as to be certain that he applicant was aware of the on-goings and had consented.

43. Secondly, there was obvious misrepresentation as to who signed all the documents against the applicants name so as to make it appear that he was the signatory, yet at the time he was out of the country.”

21. In the case of *R.G Patel -V-Lalji Makanji* [1957] EA 314 the former Court of Appeal for East Africa stated thus:

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

22. In *Christopher Ndaru Kagina -v- Esther Mbandi Kagina & Another* [2016] eKLR, the court stated that:

“It is trite law that he who alleges fraud must prove fraud. Allegations of fraud must strictly be proved. Great care must be taken in pleading allegations of fraud or dishonesty. In particular, the pleader needs to be sure that there is sufficient evidence to justify the allegations. In the Case *Central Bank of Kenya LTD v Trust Bank Ltd & 4 Others* [26] the Court of Appeal in considering standard of proof required where fraud is alleged state that fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof is much heavier on the person alleging than in an ordinary Civil Case. The burden of proof lies on the applicant in establishing the fraud that he alleges.”

23. In *Belmont Finance Corporation Ltd -v- Williams Furniture Ltd* [27] Buckley L.J said:

“An allegation of dishonesty must be pleaded clearly and with particularity. That is laid down by the rules and it is a well-recognized rule of practice. This does not import that the word ‘fraud’ or the word ‘dishonesty’ must be necessarily used. The facts alleged may sufficiently demonstrate that dishonesty is allegedly involved, but where the facts are complicated this may not be very clear, and in such a case, it is incumbent upon the pleader to make it clear when dishonest is alleged. If he uses language which is equivocal, rendering it doubtful



whether he is in fact relying on the alleged dishonesty of the transaction, this will be fatal; the allegations of its dishonest nature will not have been pleaded with sufficient clarity.”

24. In this case the Petitioner concedes that he has a sister. When he has been caught, he remembered that he was Muslim. He wants to set in motion processes that will not favour the Applicant. For 13 years he has not disclosed the presence of the sister. He has not faithfully administered the assets of the estate, which are three. Islam abhors lies. The translations of the holy Quran 16:115-116 provide-

“Only they forge the lie who do not believe in Allah’s communications, and these are the liars. [16.116] And, for what your tongues describe, do not utter the lie, (saying) This is lawful and this is unlawful, in order to forge a lie against Allah; surely those who forge the lie against Allah shall not prosper.”

25. How then will a man who lies to court dare invoke the name of God in his aid. He knew there exists in this county Kadhis courts. However, he willfully chose the High Court. Article 170 of the Constitution provides as follows: -

- “(1) There shall be a Chief Kadhi and such number, being not fewer than three, of other Kadhis as may be prescribed under an Act of Parliament.
- (2) A person shall not be qualified to be appointed to hold or act in the office of Kadhi unless the person-
- (a) professes the Muslim religion; and 74 Constitution of Kenya, 2010 Const2010
- (b) possesses such knowledge of the Muslim law applicable to any sects of Muslims as qualifies the person, in the opinion of the Judicial Service Commission, to hold a Kadhi’s court.
- (3) Parliament shall establish Kadhis’ courts, each of which shall have the jurisdiction and powers conferred on it by legislation, subject to clause (5).
- (4) The Chief Kadhi and the other Kadhis, or the Chief Kadhi and such of the other Kadhis (not being fewer than three in number) as may be prescribed under an Act of Parliament, shall each be empowered to hold a Kadhi’s court having jurisdiction within Kenya.
- (5) The jurisdiction of a Kadhis’ court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi’s courts.”

- 26 He has also not made an application for application of Islamic law. I therefore find that the applicant obtained the grant by fraudulently having a chief of Eastleigh South declare that the Applicant Ahmed Abdiaziz Jama was the sole beneficiary. In the declarations to the court, he also stated that he was the only beneficiary.



27. The parties did not submit to the jurisdiction of the Kadhi's court pursuant to Article 170(5) of the Constitution. This leaves them subject to the Law of Succession Act. The long title of the law of succession provides as follows: -

“An Act of Parliament to amend, define and consolidate the law relating to intestate and testamentary succession and the administration of estates of deceased persons; and for purposes connected therewith and incidental thereto.”

28. Section 2 of the law of succession provides for Application as follows: -

- 1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.
 - (2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.
 - (3) Subject to subsection (4), the provision of this Act shall not apply to testamentary or intestate succession to the estate of any person who at the time of this death is a Muslim to the intent that in lieu of such provisions the devolution of the estate of any such person shall be governed by Muslim law.
 - (4) Notwithstanding the provisions of subsection (3), the provisions of Part VII relating to the administration of estates shall where they are not inconsistent with those of Muslim law apply in case of every Muslim dying before, on or after the 1st January, 1991.
29. Part VII applies to the estate of every Muslim dying before, on or after the 1st January, 1991. In that respect the court is obligated, after finding fraud on part of the Respondent, to take steps to preserve the estate. The estate had been confirmed in favour of the Applicant. Now only 2 dependents remain.
30. The deceased was a resident of Kibera, hence only the Kibera chief should have written the chief's letter. In the circumstances, I revoke the grant of letters together with the confirmed grant of letters of administration intestate issued to the Respondent, Ahmed Abdi Aziz Jama.
31. In lieu thereof, I shall issue a fresh grant to Laila Abdi Aziz Jama and Ahmed Abdi Aziz Jama.
32. I direct that the administrators to file for confirmation immediately. If they are unable to agree on distribution, one to file an application for confirmation of grant and the other to file a schedule for confirmation. I shall issue directions on this at the tail end of today's proceedings.
33. The administrators must ascertain bank accounts and properties including their approximate values.
34. The court will not confirm the estate until all shares of the estate have been confirmed. If the parties wish to value or estimate, it is real not part of the court's considerations.
35. Regarding the passport, the same is a drastic order and whose justification has not been given. The court cannot unduly affect rights of movement without a compelling reason.
36. The properties are in the country and as such they are safe. In any case both parties are in Canada and as such can access each other including judicial proceedings in that country, if need be.
37. However, I shall issue two conservatory orders to protect the estate. The same are merited.



38. Given that the applicant has sufficiently succeeded, the Respondent shall pay costs of Ksh. 105,000/- for the application.

Determination

39. In the circumstances, I make the following orders: -

- a. The grant of letters of administration to the deceased's estate was obtained by an untrue allegation and as such it is hereby revoked. In lieu thereof, I issue a grant in the names of Laila Abdi Aziz Jama and Ahmed Abdi Aziz Jama.
- b. I direct that the administrators to file for confirmation immediately. If they are unable to agree on distribution, one to file an application for confirmation of grant and the other to file a schedule for confirmation.
- c. I shall issue directions on this at the tail end of today's proceedings.
- d. The estate be conserved. The advocates for the parties to open an escrow account for collection of rent from all the deceased's parcels of land, that is, Nanyuki Block 7/140, Nanyuki Block 7/148, Laikipia/Nanyuki Block Municipality Block 3/1098 and E.Bukusu/Kanduyi/2490. The account should be opened within 30 days.
- e. Ahmed Abdi Aziz Jama to render true and just accounts from March 2011 to today.
- f. Costs of Ksh 105,000/= to the Applicant.

DELIVERED, DATED AND SIGNED AT NYERI, ON THIS 22ND DAY OF JULY, 2024.

RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Ms. Achayo for the Applicant

Mr. Okanga for the Respondent

Court Assistant – Jedidah

