



In re the Estate of Zadlack Omwandho Otieno (Deceased) (Miscellaneous Succession Cause E014 of 2023) [2024] KEHC 10037 (KLR) (8 August 2024) (Ruling)

Neutral citation: [2024] KEHC 10037 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS SUCCESSION CAUSE E014 OF 2023**

**RE ABURILI, J
AUGUST 8, 2024**

IN THE MATTER OF THE ESTATE OF ZADLACK OMWANDHO OTIENO (DECEASED)

BETWEEN

MAURICE OYARO OTIENO OBJECTOR

AND

TOM ONYANGO OTIENO 1ST PETITIONER

EMILY AKOTH OYUGI 2ND PETITIONER

RULING

1. This matter arises from the original Kisumu HC P&A No. 697 of 2009 which was closed on 4th December 2017 upon confirmation of the grant reissued to Tom Onyango Otieno and Emily Akoth.
2. The original Petitioner Nereya Ogalo Otieno, the widow who had been issued with the grant which was confirmed on 23rd November 2015 had since died hence the grant as confirmed in her name was revoked and reissued
3. The Applicant for substitution of the administrator was Tom Onyango Otieno, the son to Nereya Ogalo Otieno and the deceased, Zadlack Omwandho Otieno/Shadrack Omwandho Otieno, the intestate herein.
4. In the revoked confirmed grant, Nereya Ogalo Otieno had not distributed the estate which comprised 4 properties listed.
5. At the time that she petitioned for grant, Tom Onyango Otieno and Maurice Oyaro Otieno were listed as the surviving sons of the deceased and that they consented by signing a consent on 12th June 2015, to the widow being the administratrix.



6. There was no objection raised to the grant issued to Nereya Ogalo Otieno until she was substituted and a fresh grant issued and confirmed in the names of Tom Onyango Otieno and Emily Akoth Oyugi is when the objector herein Maurice Oyaro Otieno filed objection seeking to have the grant as reissued revoked vide summons of revocation of grant dated 30th November 2023.
7. The grounds in support of the summons are that the Petitioners concealed material facts and failed to disclose to court that the applicant is one of the surviving beneficiaries of the deceased during Succession proceedings; that there was no fairness during subdivision of the estate property, which distribution was not consented to by the applicant; that he will suffer irreparable damage if the grant is not revoked and that it is fair and just that the grant as confirmed be revoked.
8. In his supporting affidavit, he annexes copies of grant and certificate of confirmation of grant and denies ever signing the consent to the mode of distribution of the estate property and claims that the same was forged. That there was unfairness in the mode of distribution. That he had been disinherited of his rightful share.
9. In the Replying affidavit opposing the summons for revocation of grant, the 2nd Respondent Emily Akoth Oyugi deposes denying the allegations by the objector and asserting that the objector should have filed a protest instead of summons for revocation of grant since he is only challenging the mode of distribution of the state that the objector was not disinherited as he was given two parcels of land in the estate; that he is an intermeddler who subdivided one of the parcels of land Kisumu/Wathnorego/1312 and sold out, which dispute is before ELC in Kisumu ELS 35 of 2021 wherein he is the defendant and which suit is pending determination. Pleadings from ELC 35 OF 2021 are annexed, wherein the plaintiff, Samuel Nyumba Otieno, one of the beneficiaries hereto, is seeking for cancellation of the title in the named parcel from the objector to the name of the deceased and restitution of the subdivided parcel among other prayers.
10. The parties argued the application orally. On behalf of the applicant, Mr. Odhiambo argued that there is fraud, no consent on the mode of distribution of the estate was signed by the Objector/Applicant; that the Petitioners went against the resolutions of the family meeting on the mode of distribution of the estate; that the sizes of the properties were not stated; that the daughters were never included or involved in the process and that the threshold under Section 76 of the *Law of Succession Act* had been met.
11. Opposing the application, Mr. Jeji submitted that the Applicant was involved in the succession process, was summoned to court but that he never showed up; that he was given two properties and one of them, Kisumu/Wathorego/1312 is subject of a suit with another beneficiary. That the applicant intermeddled with the estate property which he subdivided and sold portions of it; that the objection is intended to scuttle the suit in the lower court and that it was his intermeddling which had delayed the distribution of the estate. That the distribution was fair and that other beneficiaries relinquished their rights to the estate.
12. In a rejoinder, it was submitted that the estate had not been distributed for over seven years and that buyers had always been in occupation of the land with the consent of the entire family.

Determination

13. I have considered the application – summons for revocation of grant and the replying affidavit as well as the oral arguments for and against.
14. The issue for determination is whether the application is merited.



15. The grounds upon which a grant whether confirmed or not may be revoked or annulled are well settled and spelt out in Section 76 of the [Law of Succession Act](#) namely.
16. The court's power to revoke grants is also discretionary and which discretion must be exercised judiciously and not capriciously.
17. The grounds upon which grounds can be revoked are:-
- a. Where proceedings to obtain the grant were defective in substance;
 - b. That the grant was obtained fraudulently by the making of false statement or by the concealment from the court of something material to the case;
 - c. 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 has ordered or allowed; or
 - ii. To proceed diligently with the administration of the estate or
 - iii. To produce to court within the time prescribed, any such inventory or account of administration as it required by the provisions of Para (e) and (g) of Section 83 or has produced any such inventory or account which is false in any material particular or
 - iv. The grant has become useless and inoperative through subsequent circumstances.
18. This Section has been interpreted in several decisions inter alia, in the matter of [Estate of L.A.K \(Deceased\)](#) [2014] eKLR as follows:
- “Revocation of grants is governed by Section 76 of the [Law of Succession Act](#). The relevant portions of Section 76 are paragraphs a, b and c since the issues raised relate to the process of the making of a grant.
- A grant may be revoked where proceedings leading up to its making were defective, or were attended by fraud and concealment of important matter; or was obtained by an untrue allegation of a fact essential to the point.”
19. The discretionary power to revoke grants was captured in [Albert Imbuga Kisigwa vs Recho Karai Kisigwa](#) case No. 158 of 2000 at Kakamega as follows:-
- “Power to revoke the 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.”
20. In the present case, it is not in dispute that the Respondents were substituted as administrators after the death of the widow Nereya Ogalo Otieno who was the initial Petitioner and administratrix of the estate. I further note that as at the time of such substitution, the grant issued to her had been confirmed



on 23rd November 2015 but there was no distribution of the estate to the beneficiaries and importantly, in the certificate of confirmation, no provision was made for the beneficiaries. The entire estate was given to her wholly. It comprised 4 parcels of land namely:- Kisumu/Wathorego/1312, 2315, 2828 and 1156 respectively.

21. Subsequently, following her demise, the beneficiaries filed summons for rectification of grant dated 10th December 2016 and it was upon this summons that a fresh grant was issued and confirmed in favour of the Respondents herein, on 4th December 2017 and issued on 20th December, 2017.
22. In the new mode of distribution, the beneficiaries and their shares are listed and the Objector herein was given two portions one, ½ of Kisumu/Wathorego/1312 and whole parcel Kisumu/Wathorego/2315.
23. I observe that the Objector herein did not attend court on 9th March 2017, 24th March 2017 on the latter occasion is when the old grant was revoked and reissued to the Respondents herein and also on 4th December 2017 when the new grant was confirmed.
24. The Respondents claim in their affidavit that the objector was summoned to attend court severally but that he refused. I have perused the entire court file, Succession Cause No. 697 of 2009 but I have not seen any single summons calling on the Objector being one of the beneficiaries to attend court.
25. No affidavit of service was ever sworn and filed to indicate the stubbornness of the Objector.
26. In addition, I have not seen any consent signed by the beneficiaries on the proposed mode of distribution of the estate or a prayer seeking that such consents be dispensed with for being unreasonably withheld by other beneficiaries including the objector herein. There is therefore no evidence of forgery of any signature of the Objector as alleged, on any consent as there is no such consent filed into court. Only the Respondents swore an affidavit on 2nd October 2017 in support of the summons for confirmation of grant which was allowed on 4th October 2017.
27. It follows that the Petitioners cannot claim that they consulted the Objector on the mode of distribution of the estate. Similarly, the objector's allegation of forgery of his signature or that he was being disinherited of his rightful share or denied a share in the estate does not arise.
28. Curiously, however, is the conduct of the Objector in these proceedings. In as much as there is no evidence of his involvement in the Succession process, there is evidence on record that way back in 2013 even before the grant was first confirmed in favour of the widow Nereya Ogallo Otieno and before it was revoked, he had caused Land Parcel No. Kisumu/Wathorego/1312 to be registered in his name and he then subdivided it into other various parcels of land.
29. The actions of the Objector which are no doubt illegal, are subject of Kisumu ELC No. 35 of 2021 which is pending in court between Samuel Nyumba Otieno alias Samuel Nyumba Otieno and the Objector and 3 others including the District Land Registrar, Kisumu as Defendants.
30. The Objector has not responded to the allegations of intermeddling with the estate of the deceased where he got himself registered as the proprietor of land of the deceased before the estate was due for distribution vide letters of administration.
31. Here, he now comes, with unclean hands, claiming that he is being disinherited because he was assigned half of the said intermeddled parcel of land and that the distribution was not fair.
32. With utmost respect, the Objector, being an intermeddler, does not deserve audience before this court as he has not explained how he got title to land belonging to a deceased person then he subdivided it, before that land was distributed through the succession process. He who comes to equity must come with clean hands.



33. Section 45 of the *Law of Succession Act* outlaws intermeddling with estates of deceased persons.
34. The Objector now claims that daughters were not provided for but he does not indicate in his affidavit whether he has any authority to represent the said daughters who are, am sure, adults and with capacity to speak for themselves. He has not said that when the subdivided parcel of land No. Kisumu/Wathorego/ 1312, he gave portions thereof to the said daughters.
35. In addition, he claims through submissions that purchasers have always occupied the land with consent of family members. He does not indicate which family members consented to such intermeddling.
36. In my view, whereas two wrongs cannot make one right, I find the Objector to be an intermeddler who cannot be heard to say that he was given a small portion. He does not say what he thinks should have been given to him, to satisfy him. Anyhow, it is good that he brought himself before this court to expose his illegal activities which are abhorred in law.
37. I find that the objector has not made out a case to warrant orders being made in his favour and that most likely, his intention is to use this court process to defeat the ELC Case pending in Court. he will however not succeed on that front because of his illegitimate actions which cannot be swept under the carpet.
38. However, for the reasons that there is no full distribution of the estate of the deceased from 2017 when the grant was confirmed by my brother judge Majanja (RIP) and without any filed consents from the beneficiaries of the estate and the fact that the confirmation of the grant for distribution of the deceased's estate was done when one of the parcels No. Kisumu/Wathorego/1312 was already illegally registered in the name of the Objector herein, which registration is illegal and void ab initio, and alive to the pending litigation before the Environment and Land Court over Land Parcel Kisumu/Wathorego/1312, I proceed and make the following orders:-
- i. The grant confirmed on 4th December 2017 and issued on 20th December, 2017 in favour of the petitioners herein Tom Onyango and Emily Akoth is hereby revoked as it has become useless and inoperative.
 - ii. That the beneficiaries of the estate shall petition for a fresh grant.
 - iii. That as the intermeddling of the estate is subject of ELC No. 35 of 2021, I shall not order for cancellation of the registration and subdivision of land parcel Kisumu/ Wathorego/1312 since that court has powers to deal with the matter before it on its merits.
 - iv. That each party shall bear their own costs of the summons for revocation of the grant, this being a dispute between family members who are nonetheless implored to explore alternative dispute resolution mechanisms to resolve the dispute between and among themselves, in order to restore their close family ties as kins.
39. This file is closed.
40. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 8TH DAY OF AUGUST, 2024

R. E. ABURILI

JUDGE

