



In re Estate of Gaudencia Akumu Oikiko (Deceased) (Succession Cause 395 of 2015 & 253 of 2006 (Consolidated)) [2024] KEHC 16866 (KLR) (11 October 2024) (Judgment)

Neutral citation: [2024] KEHC 16866 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 395 OF 2015 & 253 OF 2006 (CONSOLIDATED)
G MUTAI, J
OCTOBER 11, 2024
IN THE MATTER OF THE ESTATE OF GAUDENCIA AKUMU OIKIKO (DECEASED)**

IN THE MATTER OF

FARAJ OKIKO PETITIONER

**AS CONSOLIDATED WITH
SUCCESSION CAUSE 253 OF 2006**

BETWEEN

FARAJ OKIKO OBJECTOR

AND

NAGIB MOHAMED SHAMSAN ADMINISTRATOR

AND

OGALI HOLDINGS LTD 1ST INTERESTED PARTY

BERYL LINDA OGALI 2ND INTERESTED PARTY

JUDGMENT

Introduction

1. The deceased, Ms Gaudencia Akumu Oikiko, died at the age of 46 years from what is stated as “cardiorespiratory failure due to acute renal failure & PTB in ISS” at the Kenya National Hospital on 5th February 2006.



2. At the time of her death, the deceased owned a parcel of land at Mtwapa in Kilifi County identified as Title No. Kilifi/Mtwapa/797, which measured 5.9 hectares or thereabouts, having been registered as a proprietor thereof on 26 February 2004.
3. Two Petitions for grant of letters of administration intestate were filed. The first petition, Mombasa High Court Succession Cause 253 of 2006, was filed by Nagib Mohamed Shamsan of P. O. Box 653, Mombasa, in his alleged capacity as the attorney of Faraj Okiko, the Objector/Applicant. The Petition was gazetted vide Gazette Notice No 6390 on 11 October 2006. There being no objection, the grant was issued to the said Nagib Mohamed Shamsan (hereafter referred to as “Nagib”).
4. Nagib Mohamed thereafter procured the transfer of Title No. Kilifi/Mtwapa/797 to himself. On 30 May 2007, the title was simultaneously transferred to Ogali Holdings Limited of P.O. Box 10150 Mombasa.
5. On 12th November 2015, the Objector/Applicant filed a Petition for Letters of Administration Intestate in respect of the estate of the deceased. The Objector/Applicant is the son of the deceased, as evidenced by a letter from the Assistant Chief of Kisauni sub-location, Mr Said K Shuma, dated 24th February 2015. The Objector/Applicant listed himself as the only child of the deceased. He listed as the only property of the deceased a plot at Mtwapa Settlement Scheme, Plot No 501, measuring 12 acres, whose value he gave as being Kes.500,000/-.
6. It would appear that after the latter petition was filed, the Court file disappeared and could not be traced for a long time. On 15th March 2023, I allowed the application for reconstruction of the Court file and fixed the matter for directions on 24 April 2023.
7. On 24th April 2023, I consolidated Succession Cause No. 253 of 2006 and Succession Cause No. 395 of 2015, both in respect of the Estate of Gaudencia Akumu Oikiko (deceased).

Summons for Revocation of Grant dated 13th April 2023

8. Summons for Revocation of Grant dated 13th April 2023 were filed on 12th May 2023. The Summons sought the following orders:-
 1. That the grant of letters of administration issued to Nagib Mohamed Shamsan on 11th October 2006 in Mombasa High Court Succession Cause No 253 of 2006 be revoked and or annulled as the same was obtained fraudulently by concealment of material facts;
 2. That the honourable court be pleased to declare all the processes emanating, procured and or based on the illegal grant of letters of administration intestate issued to Nagib Mohamed Shamsan as illegal, null, and void and of no legal effect and the same be cancelled;
 3. That consequent to granted prayer 1 above, the honourable court be pleased to direct the Land Registrar Kilifi County to cancel all the illegal and resultant titles emanating from the illegal grant and the title revert to the deceased’s name Gaudencia Akumu Oikiko;
 4. That the honourable Court be pleased to consolidate the cause with Mombasa High Court Succession Cause No 395 of 2015; in the matter of the estate of Gaudencia Akumu Okiko (deceased);
 5. That the honourable Court be pleased to appoint Faraj Okiko as the administrator of the estate of Gaudencia Akumu Okiko (deceased) and issue a fresh grant of letters of administration intestate; and



6. Costs of the application be provided for.
9. The grounds upon which the Summons was based were listed in the Summons and in the supporting affidavit of Mr Faraj Okiko (hereafter “Faraj”) sworn on 25th April 2023. The Objector/Applicant deposed that he is the only child of the deceased. He averred that during the time his mother was alive, he lived and still does, in Europe. When she came to Kenya for her burial, he found that her personal effects and documents had been stolen or interfered with by third parties.
10. Faraj deposed that he petitioned for a letter of administration intestate of his mother's estate. Upon doing so, it was discovered that a grant had previously been issued in respect of the same estate in the Mombasa High Court Succession Cause No 253 of 2006 to Mr Nagib. The grant was issued fraudulently to Nagib as he misled the Court that he was a beneficiary of the estate when he was not related to the deceased.
11. He stated that he perused her document at one of the deceased's properties. Upon conducting a search, he found that it had been transferred amongst the Respondents who were not the beneficiaries of the deceased's estate. For that reason, the transfers were irregular.
12. He averred that the process of obtaining the grant was defective in substance. He lamented that unless the application were allowed, he would stand to lose her heritage and the sentimental value of her mother's estate. He thus prayed for the orders sought to be issued.

Summons for Revocation of Grant dated 15th April 2024

13. Vide a Notice of Withdrawal dated 15th April 2024, Faraj withdrew the Summons for Revocation of Grant dated 13th April 2023. Concomitantly he filed a fresh Summons for Revocation of Grant dated 15th April 2024, in which he sought the following orders:-
 1. That the grant of Letters of Administration Intestate dated 11th October 2006 and the certificate of confirmation of grant dated 16th March 2007, issued by this honourable court to Nagib Mohamed Shamsan in respect of the estate of the late Gaudencia Akumu Oikiko, together with the consequential orders pursuant thereto, be annulled and revoked as the same was obtained fraudulently by concealment of material fact;
 2. That subsequent transmission and transfers of Land parcel No Kilifi/Mtwapa/797 in the names of the Respondents Nagib Mohamed Shamsan, Ogali Holdings Ltd and Berly Linda Ogali as proprietors pursuant to the certificate of confirmation of grant dated 16th March 2007 be revoked and cancelled;
 3. That the land parcel No. Kilifi/Mtwapa/797 revert to the deceased's name Gaudencia Akumu Oikiko;
 4. The honourable Court be pleased to issue a fresh grant of letters of administration intestate for the estate of the late Gaudencia Akumu Oikiko in the name of the Objector/Applicant, Faraj Oikiko; and
 5. Costs of the application be borne by the Respondent.
14. In the affidavit supporting the fresh application, the Objector/Applicant raised the same grounds as those he had stated earlier but added that the grant issued to Nagib on 11th October 2006 was confirmed on 16th March 2007. Faraj denied that he knew Nagib or had heard or met him anywhere before coming across this succession cause. He deposed that Nagib transmitted the title to himself based on the grant



and that he subsequently sold the land to Ogali Holdings Ltd for Kes.2,900,000.00. Ogali Holdings Ltd after that sold the land to Berly Linda Ogali for Kes.1,000,000.00

Hearing of the Summons for Revocation of Grant

15. As evidenced by the affidavit of service sworn by Mr Nelson Mwachimbi Nyiro on 25th May 2023, the Summons for Revocation of Grant and the hearing notice were served on the respondents by registered post sent to their respective last known addresses. On 20th June 2023, when the matter came up for hearing, the advocate for the Objector/Applicant sought an adjournment on the ground that the Petitioner/Respondent had reached out to them and sought time to appoint an advocate. For a time, the Court was informed that the parties were negotiating. On 4th March 2024, the Court was informed by Ms Osewe, learned counsel for the Objector/Applicant, that negotiations had broken down.
16. The matters were due for hearing on 19th June 2024. On that date, despite being served, the Respondents never appeared. Being satisfied that service was effected, upon perusing the affidavit of service, I gave directions that the Summons dated 15th April 2024 would be canvassed by way of Written Submissions.

Written Submissions of the Objector/Applicant

17. The Respondents did not file written submissions. The Objector/Applicant's submissions are dated 13th September 2024.
18. The Objector/Applicant's counsel submitted on his behalf that the proceedings to obtain the grant were improper, irregular and defective in substance "and the same should be revoked."
19. It was urged that the legal provision upon which grants are revoked is section 76 of the *Law of Succession Act*. Counsel relied on the case of *Jamleck Maina Njoroge v Mary Wanjiru Mwangi* [2015] eKLR and *Albert Imbuga Kisigwa v Recho Kawai Kisigwa* [2016] eKLR.
20. Counsel urged that Nagib Mohamed Shamsan misled the Court into thinking he was the sole beneficiary of the deceased, but that was not true. The court was thus asked to revoke that grant issued to Nagib and all the transfers made in respect of the estate property and for Title No Kilifi/Mtwapa/797 to revert back to the estate of Gaudencia Akumu Oikiko.

Analysis and Determination

21. As earlier indicated, the Respondents did not enter an appearance nor filed any responses to the Summons for Revocation of Grant despite being served. The case of the Objector/Applicant was therefore unchallenged. The foregoing notwithstanding, this Court must examine the evidence presented before it and determine if there are enough grounds to revoke the grant and to revert the title to the deceased's estate.
22. The circumstances under which a Court may revoke a grant are set out in section 76 of the *Law of Succession Act*. The said section provides that:-

"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.

23. The said provision was discussed in the case of *Jamleck Maina Njoroge* (*supra*) where the Court stated that:-

- “ 11. The circumstances that can lead to the revocation of grant have been set out in Section 76 *Law of Succession*. For a grant to be revoked either on the application of an interested party or on the court’s own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.
- 12. A grant may also be revoked if the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the estate. See - *Matheka and anor v Matheka* [2005] 1 KLR pg 456. It may also be revoked if it can be shown to the Court that the person to whom the grant has been issued has failed to produce to the Court such inventory or account of administration as may be required.”

24. In the case *Albert Imbuga Kisigwa v Recho Kavai Kisigwa* [2016] eKLR the Court stated that:-

- “ 13. Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not a 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.”

25. It is evident that where there has been fraud or if an untrue allegation was made in respect of something material regarding the succession proceedings the Court may revoke the grant. The court must also act cautiously and exercise its discretion to do so judiciously.



26. In this case, the Petitioner/Respondent passed himself off as the attorney of the Objector/Applicant. Mr Faraj Okiko denied knowing the Petitioner/Respondent before being made aware of these proceedings. Although he was served, the Petitioner/Respondent never appeared. The Objector/Applicant's version of events was therefore unchallenged. Since the existence of the power of attorney was denied, the alleged document is fraudulent. The issuance of the grant of representation was, therefore, premised on a fraudulent document.
27. In the circumstances, I find and hold that the Petitioner/Respondent had no authority to transact for the Objector/Applicant and that his actions were fraudulent.
28. Having obtained his grant fraudulently, the Court has no choice but to revoke the same.
29. From the evidence, the Petitioner/Respondent used the grant he fraudulently obtained to transfer the property to himself and then to the 2nd Respondent, who in turn transferred it to the 3rd Respondent. Since he held no good title, he could not transfer a good title to any subsequent parties.
30. *Republic vs The Registrar Of Titles, Mombasa & 2 Others ex parte Emfil Limited* (2012) eKLR the Court stated as follows:-

“Moreover, the private law principle of *nemo dat quod non habet* (see *Brown's Legal Maxims*, (1939) 10th at p. 546) is only a general principle that where goods are sold by a person who is not the owner and who does not sell under the authority of the owner or with the consent of the owner, the buyer acquires no better title to the goods than the seller and it has important exceptions including sale by apparent owner of the goods and usage of the market and the buyer acquires good title if he buys in a market overt, in good faith and without notice of defect or want of title of the part of the seller.”
31. In my view, the transactions between the Respondents were not genuine. They appear to have known about the defect of the title of the Petitioner/Respondent. It is alleged that the 2nd Respondent bought the property for Kes.2,900,000/- and then transferred it to the 3rd Respondent for Kes.1,000,000/-. Why would it do that? In my view, these transactions were intended to defeat any application for revocation of the grant by putting the sole property of the estate beyond the reach of the Probate and Administration Court. This Court will not look aside as fraud of such magnitude is committed.
32. I am thus of the opinion that the title should be revoked, and I proceed to do so.

Orders of the Court

33. From the foregoing, it is evident that I have found merit in the Summons for Revocation of Grant dated 15th April 2024. Consequently, I order as follows:-
 1. The Grant issued to Nagib Mohamed Shamsan on 12th October 2006 and confirmed on 16th March 2007 is hereby revoked as the same was obtained fraudulently;
 2. I revoke the transfers of Title No Kilifi/Mtwapa/797 from the deceased to Nagib Mohamed Shamsan, Ogali Holding Ltd and Berly Linda Ogali;
 3. I order the Land Register Kilifi to revert the title to Title Number Kilifi/Mtwapa/797 back to the name of the deceased;
 4. I issue grant of letters of administration intestate of the Estate of Gaudencia Akumu Oikiko to the Objector Faraj Okiko. The grant will be confirmed upon the expiry of 30 days;



5. Succession Cause No. 253 of 2006; re Estate of Gaudencia Akumu Oikiko (deceased) is hereby closed forthwith.
34. Since the 1st Petitioner/Respondent committed fraud, I order that he pays the costs of the Objector/Applicant.
35. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 11TH DAY OF OCTOBER 2024. DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of: -

Ms Osewe, for the Objector/Applicant;

No appearance for the Respondents; and

Arthur - Court Assistant.

