



**In re Estate of Rebecca Jelagat Misoi (Deceased) (Succession Cause
188 of 2004) [2024] KEHC 12184 (KLR) (11 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12184 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 188 OF 2004
RN NYAKUNDI, J
OCTOBER 11, 2024
IN THE MATTER OF THE ESTATE OF REBECCA JELAGAT MISOI (DECEASED)**

BETWEEN

STEPHEN KIPKEMBOI MISOI 1ST PETITIONER

SAMMY CHOMANGEI 2ND PETITIONER

AND

SAMUEL KIPTANUI MAIYO OBJECTOR

RULING

1. What is pending before this court is the application dated 23rd March 2024 where the applicant seeks the following orders;
 - i. Pending the hearing and determination of this summons, there be a temporary injunction restraining the respondents by themselves, their agents, servants, and/or any person claiming under them from evicting, interfering and/or dealing in any manner whatsoever in the portion of the suit parcel LR No. 776/6 the applicant herein is in possession and use.
 - ii. The grant of letters of administration intestate in respect of the estate of Rebecca Jelagat Misoi who died on 12th October 2002 made to the Petitioners herein, confirmed on 16th October 2006 and amended on 12th July 2019 be revoked and/or annulled.
 - iii. The court do distribute the estate of the deceased afresh and each beneficiary's share including the applicants be determined by the court.
2. The application for revocation expressed to be brought under Section 76, 40 and 52 of the *Succession Act* and Rule 44, 49 and 73 of the *Probate and Administration Rules* as read with Order 40 Rule 1 of the *Civil Procedure Rules* was canvassed by way of affidavits of the Objector, Samuel Maiyo and corresponding annexures in the form of sale agreements, certificate of confirmation of Grant dated



16th October, 2006 as amended on 3rd October, 2019 together with photographic impressions of the developments on the suit property.

3. The applicant avers that he is a purchaser for value as he bought 11.1 acres of the suit property from Philip Kiptoo Yego (deceased) and Sammy Chomangei who were the administrators of the estate. He has been in occupation of the said property and is entitled to a share of the estate. The applicant maintains that the grant was obtained by material non-disclosure as the petitioners failed to disclose to the court that he was a beneficiary to the estate.
4. The respondents opposed the application vide a replying affidavit dated 8th May 2024. They denied that the objector purchased property from the deceased but acknowledged that they are aware that he purchased property from the deceased. Further, that the deceased's family (Philip Kiptoo Yego) is in occupation of the property together with the objector's family. They stated that they do not intend to dispossess the objector as when a title is issued to the right beneficiary, then the objector shall pursue his claim from the beneficiary. The respondents maintained that they are administering the estate in accordance to the confirmed grant and that the objector is aware of the process. They urged the court to dismiss the application with costs.
5. In buttressing the affidavit evidence, Learned Counsel Ms. Tum Canvassed the highlights of opposition to the application by way of brief written submissions dated 7th August, 2024. Learned counsel's contention was that the impugned intestate estate was duly issued with a certificate of confirmation of grant and in adherence with the law the administrators have complied in transmitting the various shares of the immovable property being Kapsaret/Simat/Block 6 to the rightful beneficiaries. That the net intestate estate is now capable of being liquidated for the title was surrendered to the Land Registrar subdivision undertaken by the County Surveyor as supported by a report dated 3rd June, 2021. Learned Counsel in her submissions invited the court to decline any application of revocation of Certificate of Grant of Confirmation as agitated by the Objector. Learned Counsel invited the court to be guided by the principles in the case of *Re Estate of Stone Kathuli Muinde (deceased)* (2016) eKLR and *Re Estate of Amos Kiteria Madeda (deceased)* P&A E004 of 2021.

Analysis & Determination

6. The issue of determination by this court is whether the applicant herein has furnished sufficient grounds for grant of revocation order under Section 76 of the *Law of Succession Act*

The Law

7. Revocation of grant is governed by section 76 of the *Law of Succession Act* which 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.”

8. Section 76 was discussed at length 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.”

9. Similarly, in the case of *Re Estate of Agwang Wasiro (deceased)* eKLR, the court stated that an application for revocation of Grant was made by Joshua Oluoch Mahero, who had purchased property from the deceased. The application was on the grounds that the administrator Anthony Okello who was one of the sons of the deceased, had failed to take action to finalize the matter. A second application was filed by Donald Oroka (another son of the deceased), who complained of the following:

The administrator had failed to complete administration of the estate by failing to apply for confirmation;

The administrator had not proceeded diligently with administration; and

The grant was obtained fraudulently by making of false statement and by concealment from court of certain facts.



10. Section 93 of the *Law of Succession Act* provides as follows:

- “(1) All transfers of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act;
- (2) A transfer of immovable property by a personal representative to a purchaser shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities, funeral and testamentary or administration expenses, duties, and legacies of the deceased have not been discharged nor provided for.

11. The contentious issue in this matter is a claim by the purchaser that he had entered into a sale agreement for the sale of 11.1 Acres of the suit property from Philip Kiptoo Yego (now deceased) and Sammy Chomangei who were at the time administrators of the estate of Rebecca Jelagat Misoi. The Objector/ Applicant seeking an order of revocation of Certificate of confirmation of grant avers that following the sale, he has been in occupation and use of the said suit property notwithstanding that he is yet to have it registered as a proprietor of that portion forming part of the larger estate of the deceased Rebecca Jelagat Misoi. The Objector heavily relies on two sale agreements one made on the 6th day of May 2008 and a supplementary agreement dated 15th February, 2007 both with one Samuel Chomangei and Philip Kiptoo (now deceased) also as of right beneficiaries to the estate of Rebecca Jelagat Misoi. In the first agreement, Samuel Maiyo the Objector purchased one acre at an agreed price of Kshs. 200,000/= whereas in the supplementary agreement Philip Kiptoo (now deceased) is alleged to have sold 7 acres being part of LR NO. 772/6 situated within the County Council of Wareng in Uasin Gishu District. The grievances by the objector are that the impugned Certificate of Confirmation of Grant and as further amended were obtained by means of untrue allegations of facts essential to render it fatally defective. It is also the contention by the Objector that following the two sale agreements he was granted vacant possession and overtime he has made various improvements and developments to the parcel of land.
12. This estate as matters stand from the current administrators as affirmed from the replying affidavit, it is no longer under transmission. That means that the administrators have been able to survey the estate by having it shared out to the identified beneficiaries under Section 29 of the *Law of Succession Act* by issuance of title deeds. The administrators acknowledge the existence of a sale of a share of the portion excised in favour of the beneficiary Philip Kiptoo (now deceased) and the Objector which took vacant possession immediately after the sealing of the agreement. It is also not disputed that the Objector is in occupation of the suit property and they have no intention of depriving of his entitlement, rights and beneficial interest as premised in the sale agreement. It is apparent from the replying affidavit that Samuel chomangei makes no mention of sale agreement with the Objector in terms of the sale agreement dated the 6th May, 2008.
13. The objector has based his application on the grounds that there was concealment of material information, being that he was a purchaser for value of land that forms part of the estate. As evidence of this, he produced a sale agreement dated 6th May 2008. I have perused the sale agreement which names Samuel Kibet Chomangei as the vendor and Samuel Kiptanui Maiyo as the purchaser. The agreement was for the purchase of one acre from the land parcel known as LR. No. 772/6. Additionally, there is a supplementary agreement between Philip Kiptoo Yego and Samuel Kiptanui Maiyo for an additional 7 acres from the same parcel. As the respondent has pointed out, the jurisdiction of this court is restricted



to probate and therefore I shall not delve into the validity of the agreements. However, it is clear that none of the agreements were between the deceased and the objector. Therefore, the objector cannot claim to be a purchaser for value from the estate of the deceased.

14. The facts of the matter is that material facts have now come to light from the affidavits of both the objector and the applicant though with minimal differences as to the chain of events culminating in the sale agreements being relied upon by the Objector to seek remedy under Section 76 of the [Law of Succession Act](#). There is evidence from the Petitioners which I accept that the only asset of the estate has been subdivided in accordance with the Certificate of confirmation of Grant dated 16th October, 2006 and later amended on 3rd October, 2019. It is also not in dispute that the current administrators in the estate of the deceased acknowledge the purchase interest due to the objector but limited to the seven acres excised from the shares of one Philip Kiptoo (now deceased) an administrator and a beneficiary. Incidentally, the co-administrator Samuel Chomangei makes no reference to a sale agreement of one acre between him and the objector. I think for this claim, with due respect to the objector, the same can be pursued legitimately before the Environment and Land court. Another limb of the objection concerns the portion of land constituting the share of one Philip Kiptoo as earlier stated is deceased and any outstanding claim defined as purchasers' interest ought to be pursued against his estate and not that of Rebecca Jelagat Misoi. There is crystal clear evidence by the estate of Rebecca Jelagat Misoi within the Spectrum of the Certificate of Confirmation of Grant issued by this court and subsequently amended has been executed in compliance with the law. The saving grace for the objector is the admission of facts as they relate to the sale agreement entered into with one Philip Kiptoo. Unfortunately for the Objector, his interest to land no longer involves the primary estate of the late Rebecca Jelagat Misoi. I believe the Petitioners/Administrators version of the events on his purchaser's interest involving the portion of land sold by the beneficiary Philip Kiptoo (now deceased) given the vacant possession is available for registration completion and acquisition of title. It goes without saying that revocation of Certificate of Confirmation of Grant to the estate of the deceased Rebecca Jelagat Misoi is not available as a remedy to the Objector.
15. The court [in Re Estate of Stone Kathuli Muinde \(deceased\)](#) (2016) eKLR had this to say on almost similar set of circumstances facing the objector

“With regard to the assets, one of the questions that may present itself would be the ownership of the assets presented as belonging to the deceased. An outsider may claim that the property does not form part of the estate and therefore it need not be placed on the probate table. The resolution of such questions do not necessitate joinder into the cause of the alleged owner to establish ownership. It is not the function of the probate court to determine ownership of the assets alleged to be estate property. That jurisdiction lies elsewhere.

Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit properly brought before a civil court in accordance with the provisions of the [Civil Procedure Act](#) and the [Civil Procedure Rules](#). This could mean filing suit at the magistrates' courts, or at the Civil or Commercial Divisions of the High Court, or at the Environment and Land Court. If a decree is obtained in such suit in favour of the claimant, then such decree should be presented to the probate court in the succession cause so that that court can give effect to it”.



16. The court also in *Alexander Mbaka v Royford Muriuki Rauni And 7 Others* [2016] eKLR;

“It is only where one has established claim against the estate that has already crystallised that he can litigate it before a Family Court. The claim is to be considered as a liability to the estate. This Court, in my view, cannot be called upon to ascertain whether or not one has a right to an estate of the deceased where such right has not yet crystallised. The right must be shown to have crystallised before the Family Court can entertain it.”

17. I have anxiously evaluated the summons for revocation of Grant and the material evidence adduced by the Objector to persuade this court to invoke Section 76 of the *Law of Succession Act*. In the instant case, I hold a strong view that the threshold outlined in this provision has not been met by the Objector to secure judgment on the set of facts pleaded in the application. This is purely a discretionary remedy governed by the tenets and interpretation of Section 76 which incidentally against the belief and presumption by litigious parties to the probate proceedings did not provide or stipulate that a Certificate of confirmation of Grant should be revoked or annulled. The classical test of this revocation is as profoundly stated in the case of *Albert Imbuga Kisigwa versus Recho Kawai Kisigwa* (2016):

“(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.”

18. The factual influence pleaded by the objector and the imports’ guidance of the law under the circumstances of this case are not capable of this court’s judicial discretion to invoke Section 76 of the *Law of Succession Act* to indict the conduct of the petitioner/administrator to find in favour of the Objector. It is conceivable that not every non-disclosure or misrepresentation constitutes a transgression by an administrator to the intestate estate to warrant this court to exercise jurisdiction as outlined under the aforesaid Section 76 of the operative statute. Consequently, the application for revocation of Grant is lost with no orders as to costs.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 11TH DAY OF OCTOBER 2024

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R. NYAKUNDI

JUDGE

Tum & Associates Advocates

Cheruiyot Kirui & Co. Advocates

