



REPUBLIC OF KENYA



KENYA LAW
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In re Estate of the Late George Habil Awuor Achola (Deceased) (Succession Cause 157 of 1995) [2023] KEHC 2023 (KLR) (7 February 2023) (Ruling)

Neutral citation: [2023] KEHC 2023 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION CAUSE 157 OF 1995
TA ODERA, J
FEBRUARY 7, 2023**

BETWEEN

CAREN AKOTH AWUOR APPLICANT

AND

BENTER AOKO AWUOR RESPONDENT

RULING

1. Caren Akoth Awuor the objector/applicant filed summons for revocation dated June 7, 2021 brought under sections 48 and 76 of the Law of Succession Act and rule 44 (1) and 73 of the Probate and Administration Rules, seek for orders of revocation of grant issued and confirmed on March 21, 2016 in favour of Benter Aoko Awuor on grounds that the same was fraudulently obtained.
2. Contemporaneously the applicant/objector sought some injunctive reliefs for preservation of the estate and a stay of payment of the proceeds from the sugarcane planted on the land.
3. On the June 7, 2021 the court granted stay of payment of the proceeds from the sugarcane till the February 28, 2022.
4. In opposition to the application, the respondent filed a replying affidavit dated December 31, 2019 in which she denied the allegations in the summons generally.
5. As evidenced by the record the parties herein on numerous occasions attempted to settle this matter out of court in vain.
6. Thereafter on the December 7, 2022 the court issued directions on filing of submissions, pursuant to which the applicant/objector filed her submissions on December 22, 2022 while the respondent/petitioner filed her submissions on December 21, 2022.



The Objector's Case

7. In her supporting affidavit dated June 4, 2021 the applicant contends that she is a daughter of the first wife of the deceased i.e Gladys Awuor Ocholla-deceased). That the petitioner/respondent herein was the second wife and obtained the certificate of confirmation of grant (JO -3) through concealment of facts.
8. That the petitioner/respondent failed to disclose to court that deceased was survived by a spouse and 10 children of the 1st wife (5 of whom have since died) and 4 children by the respondent who are all beneficiaries to the estate of the deceased.
9. She also deponed that upon the demise of deceased herein, the respondent threw her and her siblings from their mother's home.
10. Also that deceased owned land parcels Tamu/God-Abuoro/214 and Tamu/God-Abuoro/614 whose proceeds the respondent has been benefitting from.
11. She told this court that there was no consent to distribution of the estate of the deceased as alleged by respondent in her affidavit in support of summons for confirmation of grant.
12. It was her further contention that she had met the threshold for revocation of grant as stipulated by section 76 of the Law of Succession Act. And conversely that the petitioner/respondent had fallen short of section 51(2) (g) of the Law of Succession Act due to non-inclusion of all dependants.
13. In support of the prayers for injunction and preservative orders the applicant/objector submitted that the estate was in danger of being wasted since the grant given to the petitioner/respondent empowered her to deal with the estate as she wishes. In spite of the legal rights that accrue to the applicant.

Respondent/Petitioner's Case

14. In her replying affidavit filed on January 31, 2022 the petitioner acknowledged that the applicant/objector was a daughter of the deceased and that she had 9 siblings from her mother's house while she (respondent) had 4 children. She however contended that the applicant/objector and her siblings were married and were not dependants of the deceased at the time he passed on.
15. That at the time the deceased died the applicant/objector and other members of the first house had moved to their own homes and were not deriving their livelihood from the deceased's estate.

Issues For Determination

16. From a careful analysis of the summons, the supporting affidavit, the replying affidavit and the submissions filed the only issue that arises for determination is whether the applicant/objector has presented sufficient evidence to warrant revocation or annulment of the grant;

The Law

17. Section 76 of the Law of Succession Act gives the court the powers to revoke a grant provided the conditions stipulated therein have been met. It states 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
18. What the above provision implies is that a grant may be revoked where the proceedings leading up to its making were defective, or where the grant was obtained fraudulently and by concealment of an important fact, or was obtained by an untrue allegation of a fact that is essential.
19. Notably, the power to revoke or uphold a grant is a discretionary one. This principle was enunciated in the case of *Albert Imbuga Kisigwa v Recho Kawai Kisigwa Succession Cause No 158 of 2000* where Mwita J stated:-
- “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.”
20. In this case it is not in dispute that the objector/applicant is a daughter of the deceased, it is also evident from the summons for confirmation of grant that the petitioner/respondent only presented herself as the sole beneficiary of the deceased’s estate.
21. In her submissions the petitioner/respondent seems to justify leaving out the objector/applicant and her siblings from the succession on the ground that she was already married and was not a dependent on the deceased at the time of his death.
22. Section 51 (2)(g) of the *Law of Succession Act* stipulates that the names and addresses of all the surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers deceased should be included in an application for grant of representation.
23. By failing to list the applicant and the other dependants the petitioner/respondent acquired the grant through material concealment of facts.
24. It is clear from the foregoing that the applicant/objector has met the threshold for revocation due to the fact that she has been able to demonstrate that the grant was obtained through concealment of material facts and without notice to interested parties as was held by the court of Appeal in the case of *Lalita Devi Lalchand Galot v Mohan Galot [2020] eKLR*.



25. On the issue of preservation of the estate, no evidence has been led to indicate that the estate is being wasted, however, that notwithstanding section 47 of the Law of Succession Act vests court with wide discretion in granting protective powers for purposes of safeguarding the estate of a deceased person. It provides that:

The High Court shall have jurisdiction to entertain any application and determine any dispute under this act and to pronounce such decrees and make such orders therein as may be expedient.”

26. Likewise, rule 73 of the Probate and Administration Rules provides that: -

“Nothing in these rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

27. In as much as no evidence of wastage has been adduced, considering the circumstances of this case, it would be in the best interest of the estate that that it be preserved until the issue of legal representation is sorted out .

28. The court thus makes the following orders

- i. The certificate of confirmation of grant issued to the petitioner/respondent on December 7, 1998 and confirmed on May 30, 2014 be and is hereby revoked.
- ii. An order be and is hereby issued land registrar Awasi to preserve the estate of the deceased by placing restrictions on any dealings on land parcels Tamu/God-Abuoro /214 and Tamu/God-Abuoro /614 or any titles born from them until an administrator is appointed by the court .
- iii. Costs of the application to the applicant/objector.
- iv. Parties to file summons for confirmation of grant within 30 days from today.
- v. 30 days Right of appeal.

T A ODERA - JUDGE

February 7, 2023

**DELIVERED VIRTUALLY VIA TEAMS PLATFORM IN THE PRESENCE OF;
COURT ASSISTANT; ALLAN ONYANDO.**

Omondi T For applicant

Miss Onsongo For Respondent /Petitioner

T A ODERA - JUDGE

February 7, 2023

Miss Onsongo: We seek to be supplied with typed ruling.

Order: Granted.

T A ODERA - JUDGE

February 7, 2023

