



**In re Estate of Hamisi Mwinyikai Ramadhan alias Khamis Mwinyikai (Deceased)
(Succession Cause 435 of 2012) [2023] KEHC 17864 (KLR) (19 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17864 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 435 OF 2012**

G MUTAI, J

MAY 19, 2023

**IN THE MATTER OF THE ESTATE OF HAMISI MWINYIKAI
RAMADHAN ALIAS KHAMIS MWINYIKAI (DECEASED)**

KADZO PETER BAYA.....OBJECTOR/APPLICANT

BETWEEN

KADZO PETER BAYA APPLICANT

AND

SULEIMAN KHAMISI MWINYIKAI 1ST RESPONDENT

MARYAM MWINYIKAI 2ND RESPONDENT

MASIKA KHAMIS MWINYIKAI 3RD RESPONDENT

RULING

1. Before me is a Summons for Revocation of Grant dated 30th May, 2022. The same is expressed to be brought under Sections 52, 57, 66, 70 and 76 of the [Law of Succession Act](#) and Rule 44(1) of the [Probate & Administration Rules](#). The Objector/Applicant seeks to have the grant of letters of administration intestate issued on 28th March, 2013 revoked and or annulled or in the alternative that the parcel of land forming part of the estate of the deceased identified as Subdivision No. 33 of section III/MN be excluded from the proceedings herein.
2. The Applicant avers that the proceedings *vide* which the grant was obtained were defective in nature, that the grant was obtained by concealment of material facts from the court and also by means of untrue allegation of fact essential in point of law. The summons is supported by the annexed affidavit of Kadzo Peter Baya sworn on 30th May 2022 and filed on 31st May 2022. In her Supporting Affidavit the Objector/Applicant avers that she is the granddaughter of a deceased person that she identifies as Jumwa Yeri Mbuwa who she claims was a co-owner of the disputed parcel of land which forms part of



the estate before the court. She deposed that it was wrongly included as part of the instant estate and that the error wasn't disclosed to the court or otherwise brought to its attention.

3. The Objector/Applicant stated that not only did her said grandmother co-own the said land with the 1st Petitioner/Respondent's ancestor, a Mr. Khamis bin Mohamed bin Juma, she also lived on the said land from 1947 until her death in 1983. She deposed that her said grandmother was buried on the said land. Kadzo Peter Baya averred that her entire family, herself included, have lived on the suit property. It is also stated that there is a danger they may be evicted from the suit property unless this court issues injunctive relief. To enable her prosecute the objection she took out Letters of Administration *ad litem* of the estate of her grandmother Jumwa Yeri Mbuwa (deceased). She annexed letters of administration *ad litem* issued by this honourable court on 28th March, 2022.
4. The Summons for Revocation of Grant is opposed by the Petitioners/Respondents. Maryam Mwinyikai swore an affidavit on 7th September 2022, which was filed in court on 30th November 2022. In her said affidavit she deposed that she knows the Objector/Applicant as she sued her in Kilifi SPMCC NO. 304 of 2015; Peter Mweri Mangi & another versus Zuhura Khamis Mwinyikai & others. The suit, it is alleged, was dismissed for want of prosecution. The court was also referred to Mombasa ELC NO 46 of 2021 Zuhura Khamis Mwinyikai versus Kadzo Peter Baya & Others which ongoing.
5. Maryam Mwinyikai deposed that the suit property belonged to her deceased father Hamisi Mwinyikai Ramadhan. She denied that the proceedings to obtain the grant was defective or that material facts were concealed. She stated that no untrue allegation of fact essential on point of law was made and that the Petitioners/Respondents followed the right procedure when applying for grant. She deposed that the Objector/Applicant and her family members are squatters on the suit property and have no lawful claim to it. The court was urged that Subdivision No 33 of section III/MN formed part of the estate of the deceased and should not be excluded from the proceedings. In support of her contentions, the 2nd Petitioner/Respondent produced a photocopy of the plaint filed in the SRM Court in Kilifi, typed proceedings, plaint filed by Zuhura Khamis Mwinyikai in Mombasa CMC ELC NO 46 of 2021 against the Objector/Applicant and 4 others, copy of the grant issued to her and 2 others in this matter on 15th April, 2013 together with the certificate of confirmation of Grant dated 17th March, 2014 and a letter written by Kadzo Peter Baya vide which it would appear she was withdrawing her previous statement.
6. When the matter came before me on 27th February, 2023 I directed that it be disposed of by way of Written Submissions. I fixed the matter for mention to confirm compliance on 29th March 2023. However, on the said date the Objector/Applicant hadn't filed her Written Submissions I thus stood over the matter to 24th April 2023. On the latter date, the Objector/Applicant had still not complied. Faced with the lack of diligence on the part of the Objector/Applicant I set the matter for ruling on 19th May, 2023. The Objector/Applicant filed her submissions when the matter was pending ruling. I have had the benefit of reading her submissions.

The Applicable Law

7. It is necessary for me to set out the law here. Section 76 of the *Law of Succession Act* provides for revocation or annulment of Grant. It 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. To succeed an applicant must prove that any of the above ingredients exist by showing that on the basis of the evidence which has been presented or which is apparent from the record, the proceedings to obtain the grant were defective and that the defect went to the root of the proceedings. The Objector could show that the grant was obtained fraudulently by making of a false statement or by concealment from court of something material to the case. An Objector may also show that the grant was obtained upon the making of untrue allegation of fact essential in point of law to justify the grant notwithstanding that the allegations was made in ignorance or inadvertently, or if it is shown that there hasn't been diligent administration of the estate or that the estate has otherwise become useless and inoperative.

9. When considering applications for revocation of grant courts exercise discretionary powers. Although such powers are stated to be discretionary their exercise is subject to certain principles so that judges or judicial officers don't act whimsically or capriciously. In Albert Imbuga *Kisigwa vs Recho Kawai Kisigwa* Succession Cause No. 158 of 2000 Mwita J stated as follows:-

“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.”

What then are the issues in this matter?

10. Issues were not identified by the parties. It was left to the court to review the objection proceedings and to determine for itself what these are. I have considered the matter at length. In my view the following questions call for my determination: -



1. Whether the grandmother of the Objector/Applicant had a registrable interest in subdivision No. 33 of section III/MN, Mtwapa;
2. Whether the grant was obtained by fraud or concealment of material information; and
3. Whether a case had been made for revocation or annulment of grant.

I shall look at each of these in turns.

Did the grandmother of the Objector/Applicant have legal or equitable interest in subdivision No. 33 of Section III/MN?

11. The *Law of Succession Act* lists the ground upon which a grant may be revoked. I have already set these out in extenso. In *Re Estate of Njagi Kandii (deceased)* [2019] eKLR the court held that “the grounds upon which a grant may be revoked or annulled are thus statutory and it is incumbent upon any party making an application for revocation or annulment of a grant to demonstrate the existence of any, some or all the above grounds.”
12. The duty of the Objector/Applicant is therefore one of discharging the burden of proof that section 109 of the *Evidence Act* places on him. The said section provides: -

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”
13. In her application the applicant averred that her grandmother had bought the subject land with an ancestor of the Petitioners/ Respondents. Although it was her duty to prove this assertion she did not produce evidence that would convince the court that that was indeed so. She didn’t therefore discharge her evidentiary burden. Evidence was however provided by the Petitioners/Respondents that showed that the Objector/Applicant had filed a claim against the Petitioners/Respondents in which suit she alleged that she had stayed in the suit premises for over 20 years. In the said suit the Plaintiffs did not assert legal ownership nor make a reference to an alleged co-ownership arrangement between their ancestors and those of the Petitioners/Respondents. The said suit was subsequently, it would seem, dismissed for want of prosecution.
14. Given the foregoing I find and hold that the Objector/Applicant has not demonstrated that she has an interest in the subject land that would have required the Petitioners/Respondents to disclose when seeking grant of representation. I must however hasten to add that determination of right to own, use or title to land lies with the Environment and Land Court and not Family Court.

Was the Grant obtained by concealing of material information and or fraud?

15. The grant was obtained on 15th April, 2013. On 17th March, 2014 this court confirmed the same. The Objector/Applicant appears to have been aware of the grant for vide a plaint filed in August 2015 in Kilifi CMCC No 304 of 2015 she sued the administrators of the estate of the deceased.
16. The duty to disclose information is one that a party has those who are lawfully entitled to that information. I have already found and held that neither Objector/Applicant nor her grandmother had legal or equitable interest in the subject property based on the evidence that was adduced in court. That being the case the Petitioners/ Respondents had no obligation to inform her about the application for grant save to the extend provided by law. In any case it would appear to me that she was aware of the grant of representation given the fact that she sued the administrators in the case, then before the Kilifi



Court. Given the foregoing, I am unable to see how Information was either concealed or withheld. From the evidence on record the Objector/Applicant is a stranger.

17. In any case no explanation was given for the delay in bringing this objection application. Why didn't she bring the same at the earliest opportunity? Given her conduct, even if her application had merit, which it so clearly doesn't, I would have been most reluctant to allow her application as she is guilty of laches.

Whether or not a case for revocation has otherwise been made?

18. This is an omnibus issue. Having found that the grandmother had no interest in the subject land and in view of my finding that the no information could possibly have been withheld from a party that had no right to receive it the Summons for Revocation of Grant must fail.

19. Accordingly, I dismiss the said summons.

20. This being a family matter costs shall be borne by parties.

Orders accordingly.

DELIVERED, DATED, AND SIGNED THIS 19TH DAY OF MAY 2023 AT MOMBASA VIA MICROSOFT TEAMS.

.....
GREGORY MUTAI

JUDGE

In the presence of:-

Ms. Chano for the Petitioners/Respondents

No appearance for the Objector/Applicant

Winnie Migot – Court Assistant

