



**In re Estate of Ali Mohamed Zaid (Deceased) (Succession Cause
115 of 1979) [2023] KEHC 17620 (KLR) (Family) (15 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17620 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 115 OF 1979
MA ODERO, J
MAY 15, 2023
IN THE MATTER OF THE ESTATE OF ALI MOHAMED ZAID (DECEASED)**

BETWEEN

NELSON WARUINGE KIMANI APPLICANT

AND

PUBLIC TRUSTEE 1ST RESPONDENT

FATUMA ALI 2ND RESPONDENT

ABDALLA ALI FERUZ 3RD RESPONDENT

SERIFA ALI 4TH RESPONDENT

ZAMIDA ALI 5TH RESPONDENT

JARA KHALIL 6TH RESPONDENT

SALIMA ALI 7TH RESPONDENT

RULING

1. The Interested Party/Applicant herein Nelson Wariunge Kimani has filed the summons for Revocation of Grant dated 17th May 2022 seeking the following orders:-

- “1. Spent.
2. That Nelson Waruinge Kimani be and is hereby joined to this proceedings as an Interested Party.



3. That the limited Grant of letters of Administration Ad Litem issued on 29th October 2019 be and is hereby revoked.
4. That costs of this Application be provided for.”
2. The application was premised upon Article 159 and Article 50(1) of the [Constitution of Kenya](#) 2010, Section 76 and 93 of the [Law of Succession Act](#) and Rule 44 and 73 of the [Probate and Administration Rules](#) 1980 and was supported by the Affidavit of even date sworn by the Applicant.
3. The Respondents opposed the application through the Replying Affidavit dated 16th June 2022 filed by William M. Malombo the Assistant Public Trustee, the Replying Affidavit dated 7th June 2022 sworn by Fatuma Ali (the 2nd Respondent) as well as the Replying Affidavit dated 5th December 2022 sworn by Salima Ali the 7th Respondent.
4. The matter was canvassed by way of written submissions. The Applicant filed the written submissions dated 18th January 2023 whilst the 7th Respondent filed written submissions 3rd February 2023.

Background

5. This Succession Cause relates to the estate of the late Ali Mohamed Zaid who died intestate on 26th May 1973. A copy of the Death Certificate Serial Number 37387 appears as Annexure ‘FA-1’ to the petition for letters of Administration Ad Litem dated 28th October 2019.
6. The Deceased was said to have been survived by a widow Ms Zeenat Ali and by the following:-
 - 1) Sherifa Ali - Daughter
 - 2) Zamida Ali - Daughter
 - 3) Fatuma Ali - Daughter
 - 4) Salima Ali - Daughter
 - 5) Abdalla Ali - Son
7. Amongst the assets left behind by the Deceased is the property known as LR No. 11876 Karen (hereinafter the ‘suit property’)
8. Following the demise of the Deceased Grant of letters of Administration Intestate were on 21st March 1979 issued to the Public Trustee (the 1st Respondent).
9. The Applicant avers that on 28th July 1980 the Public Trustee as the Administrator of the Estate of the Deceased entered into a sale Agreement with the Applicant for the sale of 2.5 acres of land to be hived out of the property known as LR. 11876 Karen which was an asset belonging to the estate of the Deceased.
10. The Applicant paid an amount of Kshs.50,000 as consideration for the purchase of the 2.5 acres (hereinafter the ‘suit land’). The suit land was then transferred and was registered in the name of the Applicant.
11. Thereafter the children of the Deceased (the 2nd to 7th Respondents) raised a challenge to the sale of the suit property to the Applicant. Two of said children (Fatuma Ali and Abdalla Ali Feruzi) petitioned the court for a Grant of letter of Administration Ad Litem which Grant was issued to them on 29th October 2019. The Respondents then filed in the Environment and Land Court (ELC) suit No. 356 of 2019 challenging the Applicants claim to ownership of the suit land.



12. The Applicant then filed this application seeking to be enjoined in this Succession Cause and also seeking to have the Grant Ad Litem issued to the Respondents revoked.
13. As stated earlier the application was opposed.
14. The 1st Respondent the Public Trustee stated that the Grant Ad Litem issued to the Respondents was validly issued to enable them challenge the sale of the suit land to the Applicant. They submitted that said Grant Ad Litem is not contrary to the Grant which was issued to the Public Trustee.
15. The other Respondents state that they were not consulted and were not involved in the sale of the suit land to the Applicant. That in any event the Public Trustee had no Legal capacity to sell the suit land to a third party as the Grant issued to them had not yet been confirmed.
16. The Respondents assert that they had the right to seek a Grant Ad Litem to enable them file suit in the ELC to challenge the sale of their inheritance to the Applicant. They submit that the Applicant not being a beneficiary to the estate ought not be enjoined to the Succession Cause. They urge court to dismiss this Application in its entirety.

Analysis and Determination

17. I have carefully considered the application before this court, the replies filed by the Respondents as well as the written submissions filed by the parties. The two issues for determination are:-
 - (1) Whether the Applicant ought to be enjoined in this Succession Cause.
 - (2) Whether the Grant Ad Litem issued to the Respondents ought to be revoked.

Enjoinment of the Applicant

18. The Applicant has prayed to be enjoined as a party in this Succession Cause. He submits that being the registered owner of the suit property which he has developed and made investments upon amounting to hundred of millions of shillings, he is entitled to be enjoined in this Succession Cause to enable him defend his acquisition of the suit property.
19. The cause in issue is a Succession Cause. This court being a Probate Court is authorized to supervise the distribution of the estate of the Deceased to the genuine beneficiaries.
20. The Applicant is not a beneficiary to the estate nor does he claim to be a beneficiary. As such the Applicant has no locus standi to be enjoined in this cause.
21. The Applicant's claim is that he is a bona fide purchaser of an asset belonging to the estate of the Deceased. In other words the Applicant claims a proprietary interest in an asset belonging to the estate. That claim cannot be ventilated in this Succession Cause. The proper forum for the Applicant to prosecute his claim to the suit property is the ELC.
22. In the case of *Alexander Mbaka v Roy Ford Muriuki Rauni 67 others* [2016] eKLR, the court held as follows:-

“It is only where one has an 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 crystalized before the family court can entertain it.” [own emphasis]



23. It is manifest that the dispute herein relates to the question of ownership of the suit land. The Applicant claims to be the bona fide owner of the land whilst the Respondents insist that the suit land belongs to the Deceased and his estate.
24. Matters relating to the ownership use and occupation of land have now under Article 162 of the *Constitution of Kenya* 2010 been mandated to be determined by a specialized court being the Environment and Land Court ('ELC').
25. Section 13 of the *Environment and Land Court Act* provides for the jurisdiction of that court as follows:-
13. Jurisdiction of the Court
- (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the *Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
- (2) In exercise of its jurisdiction under Article 162(2)(b) of the *Constitution*, the Court shall have power to hear and determine disputes—
- (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
- (b) relating to compulsory acquisition of land;
- (c) relating to land administration and management;
- (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
- (e) any other dispute relating to environment and land. [Rev. 2012] No. 19 of 2011 Environment and Land Court 9 [Issue 1]
26. Therefore, the correct and proper forum before which the Applicant ought to ventilate his claim to the suit land is the ELC. The Environment and Land Court is the only court exclusively mandated by law to determine the question of 'ownership' of the suit land.
27. *In Re Estate Of Stone Kathubi Muinde (Deceased)* [2016] eKLR Hon Justice William Musyoka held that:-
- "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." (own emphasis)
28. Therefore the remedy for this Applicant lies in the Environment and Land Court. If and when the Applicant obtains judgment in his favour from the Environment and Land Court then he is at liberty to present the decree to this court for implementation.



29. There is already in existence Nairobi ELC No. 356 in which the question of ownership of the suit land is to be determined. Once a determination is made by the ELC then that decree will be brought to this court for enforcement.
30. Finally I find no merit in the Applicant's prayer to be enjoined to this Succession Cause. That prayer is therefore declined.

Revocation of Grant

31. The Applicant has prayed that the Grant Ad Litem issued to the 2nd and 3rd Respondents on 29th October 2019 be revoked. He avers that the proceedings to obtain the limited Grant were defective in nature and that said Grant was obtained by making of false statements and by concealment of material facts. He argues that there cannot be in existence two (2) grants of Administration over the same estate.
32. It is common ground that Grant of letters of Administration Intestate in respect of the estate of the Deceased were on 21st March 1979 issued to the Public Trustee. The Public Trustee apparently proceeded to sell and transfer part of the estate to the Applicant. The children of the Deceased who are beneficiaries to the estate were aggrieved by the actions of the Administrator in selling off an asset belonging to the estate.
33. It is very unlikely that the Public Trustee who are the ones being accused of irregularly selling off an asset belonging to the estate would file a suit against themselves to recover the suit land. The only option available for the aggrieved beneficiaries was to file suit against the Applicant the purchaser of the suit property.
34. The Grant issued to the 2nd and 3rd Respondent was a Grant limited only for purpose of filing suit. Thus the Grant is finite in nature and does not entitle the Respondents to administer and/or distribute the entire estate.
35. I do agree with the Assistant Public Trustee that the Grant Ad Litem issued to the Respondents is not in any way contrary to the Grant issued to the Public Trustee. The grant issued to the Public Trustee is for purposes of administering and distributing the estate whilst the Grant issued to the 2nd and 3rd Respondent is limited only for purposes of filing suit. Once the suit is determined then the Grant Ad Litem issued to the 2nd and 3rd Respondents automatically becomes obsolete and can no longer be used. The two Grants were issued for different purposes.
36. I therefore find no contradiction in the issuance of a Grant Ad Litem to the 2nd and 3rd Respondent whilst the full Grant issued to the Public Trustee is still subsisting.
37. The grounds upon which a Grant may be revoked are set out in Section 76 of the *Law of Succession Act* Cap 160 laws of Kenya.
38. The Applicant alleges that the proceedings to obtain the Grant Ad Litem were defective in nature. He has however not specified the nature of the defect.
39. The Applicant further claims that the Respondents obtained the Grant Ad Litem by fraudulently by making false statements and by concealment of material facts. Once again no specifics are provided of the alleged fraud or of the false statements used to obtain the Grant Ad Litem. I find no evidence to support the Applicants claim that the Grant Ad Litem was obtained fraudulently.
40. In the premises I find no merit in the prayer to revoke the Grant Ad Litem issued on 29th October 2019.



41. Finally and in conclusion this court finds no merit in the summons dated 17th May 2022. The same is hereby dismissed in its entirety costs are awarded to the Respondents.

DATED IN NAIROBI THIS 15TH DAY OF MAY, 2023.

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MAUREEN A. ODERO

JUDGE

