



In re Estate of Mohamed Abubakar Mohamed Zubedi (Deceased) (Succession Cause 37 of 2021) [2023] KEHC 19156 (KLR) (12 June 2023) (Ruling)

Neutral citation: [2023] KEHC 19156 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 37 OF 2021
G MUTAI, J
JUNE 12, 2023
IN THE MATTER OF THE ESTATE OF MOHAMED
ABUBAKAR MOHAMED ZUBEDI (DECEASED)**

BETWEEN

BADAR MOHAMED ABUBAKAR PROTESTOR

AND

ABUBAKAR SWALEH SALIM 1ST PETITIONER

ALI ABUBAKAR MOHAMED 2ND PETITIONER

RULING

Introduction

1. This Court granted Letters of Administration Intestate in respect of the estate of Mohamed Abubakar Mohamed Zubedi (deceased) (hereafter “the decedent”) to Abubakar Swaleh Salim and Ali Abubakar Mohamed, the cousin and brother, respectively, of the decedent, on 7th March 2022. The grant to these two relatives of the decedent was with the consent in writing of all the beneficiaries, including the Protestor, who all individually signed the consents before a Commissioner of Oaths on 23rd April 2021. In accordance with section 71 of the *Law of Succession* Act the grant could be confirmed upon expiry of 6 months from the said date. Section 71(3) of the *Act* however provides that a grant may be confirmed, notwithstanding the fact that the said period hasn’t elapsed, where there are no dependants, or if the dependants, being of full age, consent to the application for dispensation of the said requirement and it is just and expending in the circumstances of the case to do so.
2. The Grant of Letters of Administration Intestate issued herein was due for confirmation at any time after the 6th day of September 2022. On 12th day of September 2022 the two administrators filed a summons for confirmation of Grant dated 8th September 2022. The said summons was supported by the joint affidavit of Abubakar Swaleh Salim and Ali Abubakar Mohamed who, as is clear from



above are the administrators of the estate. The affidavit listed the thirteen beneficiaries of the estate. In paragraph 4 of the affidavit the respective shares of the beneficiaries was given. The applicants failed to include an inventory of the assets of the deceased and opted instead to give the percentages that each beneficiary was entitled to. In what has been said was dictated by the Islamic law on intestate succession the deceased's widow was allocated 12.5% of the estate. Each of the sons was allocated 8.75%. Daughters, on the other hand, were allocated half what their brothers got.

3. It was deposed that the beneficiaries are in dire need of funds and hoped to access the accounts of the deceased without delay. In paragraph 7 of the Supporting Affidavit, it was stated that:-

“That we have to sell a portion of the deceased's property, subdivision Number 2735/V/MN (CR 72569) Jomvu, Subdivision Number 1786/V/MN (CR 30518) Jomvu, Subdivision Number 1785/V/MN (CR 30517) Jomvu and Subdivision Number 385/V/MN (CR 8230), to enable us as the dependants of the deceased distribute their shares”.

4. In paragraph 8 of the said affidavit the deponents further deposed:-

“That the deceased children are struggling to make ends meet and are therefore indeed of funds to survive”.

5. There was attached to the application a consent to confirmation of Grant which is dated 8th September, 2022. The protestor is a signatory to the said document (on page 3 of the consent). It is indicated that he appended his signature in the presence of Mohamed A. Mohamed advocate. In his affidavits he admits having signed the said document. He however contends that what he signed was a 5-page document, not the Summons for Confirmation of Grant of Letters of Administration Intestate.
6. The summons for confirmation of grant was due for hearing on 11th October, 2023. On the said date an Affidavit of Protest was filed by the Protestor. The Protestor deposed that his consent (presumably to the distribution of the estate) hadn't been sought nor had the administrators explained to him how the estate was to be distributed to the heirs. He expressed his displeasure to the fact that the summons for confirmation of grant had not been supplied to him despite the fact that he had requested for the same. He was similarly displeased by the fact that the administrators, had in his view, undervalued the estate and for not being transparent in their dealings. He was also not content with the fact that the money in the descendant's bank accounts had not been disclosed. In support of his protest he annexed correspondence between his advocates and those of the administrators. The said correspondence show that there was a high level of suspicion between the parties.
7. The suspicion is evident from the Affidavit of Protest. In the said document the Protestor sought to be given the Summons for Confirmation of Grant so that “upon perusal of the Summons I shall crave leave of the Court to make observations and appropriate comments” on 11th October 2022.
8. The Court directed the administrators to file an affidavit. This was done on 25th October 2022. Mr. Abubakar Swaleh Salim deposed that the Protestor signed the necessary consent. He stated that the Protestor however failed to attend a family meeting held on 2nd October 2022. He further stated that since the deceased was a Muslim his estate would be distributed in accordance with Muslim Sharia Law. He said that it was open for the Protestor to list down any other assets, if at all that any had been omitted, and to buy out his siblings if he was interested in keeping all the properties. The 1st Administrator attached to his affidavit the consent, two sale agreements, a deed of indemnity, minutes of a family meeting, photographs of the meeting participants, the Grant of Letters of Administration Intestate, and regret letters of the family members who didn't attend the meeting.



9. The Protestor responded to the 1st Administrator's affidavit vide the affidavit he filed on 9th November, 2022. In the said affidavit he acknowledged that he signed the consent to the confirmation of Grant. He, however, stated that "prior consent was not sought as alleged from me before the filing of the summons of confirmation of Grant". He gave a list of the properties of the deceased in paragraph 13 of his Further Affidavit and accused the administrators, in particular Abubakar Swaleh Salim of acting without propriety, integrity, honesty and good faith while administering the estate of the deceased. He denied that he was acting selfishly by filing the protest. He exhibited correspondences, certificates of title, and photographs of some of the properties of the deceased.
10. The 1st Administrator filed a Supplementary Affidavit on 3rd February, 2023 in which he listed the assets of the decedent and explained that although they had entered into agreements for the sale of some of the assets no transfer could take place until the grant was confirmed. He urged that the grant be confirmed so that beneficiaries could get their shares.
11. On February, 2023 the Protestor responded to the 1st Administrator. In his affidavit, the Protestor accused the administrators of not making full disclosures of the assets of the deceased.
12. Witness statements of the 12 consenting beneficiaries were filed on 8th February, 2023. They expressed their satisfaction with the mode of distribution and indicated that they were ready to sell the estate assets so that the proceeds could be distributed. They indicated that a beneficiary was free to make an offer to buy the properties, provided payment would be made within a reasonable time.

Submissions of the Protestor

13. The Protestor referred to his 3 affidavits sworn and dated 7th October and 8th November, 2022 and 6th February, 2023 and reiterated their contents. It was submitted that the summons for confirmation of Grant was incompetent and in violation of the law. The Protestor alleged that the administrators had schemed to defraud the beneficiaries and to benefit themselves instead. The evidence of the alleged fraud was the fact that the administrators are a cousin and a brother of the deceased, the fact that they applied for confirmation of Grant on the 6th Month after the grant was issued, the fact that the summons had no list of assets, the failure to provide the Protestor with a copy of the summons, non-disclosure of the sums banked in the decedent's bank accounts and failure to value the assets of the decedent prior to the proposed sale. It was also submitted the two administrators hadn't diligently administered the estate and that they had taken advantage of the beneficiaries' poverty to defraud them.
14. The Protestor alleged that his consent had been obtained through trickery. The Court was referred to the agreements of sale for the proposition that the administrators acted unlawfully as they were in the process of selling parcels of land even before the grant was confirmed.
15. The Protestor thus sought to have the summons for Confirmation of Grant declined and for the Grant issued on 7th March, 2022 revoked. He also sought the costs of the protest.
16. The Protest filed what was referred to Reply to the Administrators Written Submissions dated 11th April, 2023. The said document repeated what had previously been submitted. The only difference was that in the second submission documents marked as "BMA1" to "4" were attached.

Submissions of the Respondent

17. The Petitioners/Respondent identified 2 issues to wit
 1. Whether the issues raised by the Protestor are valid or premature?



2. Whether the administrators ought to be discharged from administering the estate and the grant subsequently revoked?
18. In respect of the first issue the Administrators submitted that the Summons for Confirmation of Grant accorded with section 71 of the [Law of Succession Act](#) and Rules 40 and 41 of the [Probate and Administration Rules](#). It was further submitted that the Protestor signed the consent, and had in fact admitted to have done so. Regarding giving a copy of the Summons to the Protestors the Administrators argued that they were under no legal obligation to do so. It was further argued that they had supplied all information the administrators were required by the Rules to provide.
19. On proposed sales the Administrators submitted that these were subject to the grant being confirmed. In response to the allegation that they had undervalued the estate the Administrators submitted that they were under an obligation to provide an estimated value of the properties known to them and not the exact value. They submitted that despite being cousins and brother respectively they were appointed as administrators with the consent of all beneficiaries including the Protestor who signed the consent to the Making of Grant of Administration Intestate to the person of Equal or Lesser Priority on 23rd April, 2023. The Court was urged to take note of the fact that all other beneficiaries had agreed to the division and that the Protestor was the only hold out.
20. Regarding the question as to whether the Grant should be revoked it was submitted that the test in section 76 of the [Law of Succession Act](#) had not been met. The Administrators submitted that there was no summons for revocation of Grant before me. I was thus urged to dismiss the prayer for discharge of the administrators until such time a proper application is made.

Issues for Determination

21. I would agree with the parties that I am called upon to determine
 1. Does the Protest raise valid issues regarding the distribution of the estate of the decedent?
 2. Should the grant issued to the Petitioners/Respondents be revoked?

The Applicable Law

22. Section 71 of the [Law of Succession Act](#) provides as follows:-
 - (1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.
 - (2) Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may-
 - (a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or
 - (b) if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 inclusive, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be unadministered; or
 - (c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control; or



- (d) postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case:

Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed the grant shall specify all such persons and their respective shares. (2A) Where a continuing trust arises and there is only one surviving administrator, if the court confirms the grant, it shall, subject to section 66, appoint as administrators jointly with the surviving administrator not less than one or more than three persons as proposed by the surviving administrator which failing as chosen by the court of its own motion.

- (3) The court may, on the application of the holder of a grant of representation, direct that such grant be confirmed before the expiration of six months from the date of the grant if it is satisfied- (a) that there is no dependant, as defined by section 29, of the deceased or that the only dependants are of full age and consent to the application;
 - (b) that it would be expedient in all the circumstances of the case so to direct.
- (4) Notwithstanding the provisions of this section and sections 72 and 73, where an applicant files, at the same time as the petition, summons for the immediate issue of a confirmed grant of representation the court may, if it is satisfied that-
 - (a) there is no dependant, as defined by section 29, of the deceased other than the petitioner;
 - (b) no estate duty is payable in respect of the estate; and
 - (c) it is just and equitable in all circumstances of the case, immediately issue a confirmed grant of representation.”

23. Revocation of grants is under section 76 of the [Law of Succession Act](#). The said Act 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.

Analysis of the Facts and Law

24. It would appear to me that the Protestor does not oppose the proposed mode of distribution. In all his affidavits he has not objected to getting 8.75% of the estate. The point of departure from what I call tell is that he opposes the proposed sale of some of the properties of the deceased vehemently and would want part of the estate to be retained. He is also not comfortable with the Administrators and suspects that they are trying to defraud the estate.

Does the Protestor raise a valid question?

25. The Summons for Confirmation of Grant did not list down the assets of the deceased. In their submissions, the Administrators admitted to not having done so. They referred the Court to the inventory in the Affidavit in support of the Petition and suggested that that would suffice. They submitted their summons conformed with the form in the Act and they need not alter it to provide further information.
26. In my view given the nature of this matter the Administrators ought to provide as much information as possible in the Summons for confirmation of Grant. Listing the beneficiaries and their shares without giving the details of the underlying assets would, in all likelihood, generate suspicion.
27. Further the Administrators do not appear to have put together the full inventory of the estate. For example, the bank account details are insufficient. If as was argued banks were reluctant to provide the said information nothing prevented the Administrators from approaching the Court for appropriate orders.
28. Given the nature of the matter this Court must interfere so that justice is done.
Should the Petitioners/Respondents be discharged? Should the grant be revoked?
29. Parties are bound by their pleadings. The Protestor did not file a Summons for Revocation of Grant. This Court is therefore unable to grant him an order he didn't seek.
30. Grounds for revocation of grants have been extensively discussed in many dead cases. In *Jamleck Maina Njoroge v Mary Wanjiru Mwangi* (2015) eKLR the court discussed circumstances when a grant can be revoked. The court observed:

“ 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.”

31. Flowing from the foregoing I find and hold that there are insufficient grounds to discharge the Administrators under section 71 of the *Law of Succession Act*. The omissions they made in the documentation do not appear to have been actuated by malice. I have not seen evidence of an attempt



on their part to pilfer or embezzle the estate's assets or engage in private dealing. The alacrity with which they applied for confirmation of grant should not be held against. Whereas I fault them for sale of capital assets before the grant was confirmed I note that the respective agreements provided for consent of the beneficiaries (including the Protestor) and acknowledged that it would be necessary to confirm the grant before the transfer could be affected. That would appear to me to be a sufficient safeguard.

32. There is also no reason to revoke the grant under section 76 as the test therein has not been made.
33. In the circumstances of this matter it is necessary in my view to build confidences in the family members by requiring the Administrators to be as open and inclusive as possible.

Disposition

34. In view of what I consider to be a manageable dispute between the Protestor and the Administrators I order and direct as follows: -
 1. I direct the Administrators to amend the Summons for Confirmation of Grant to provide the following information: -
 - a. Description of all parcels of land owned by the deceased including their title numbers, sizes in acres/hectares, location and current open market value;
 - b. Description of all bank accounts held by the deceased, including bank branches and the current balances; and
 - c. Details of assets owned by the deceased in Dubai.
 2. I also direct the Administrators carry out the valuation of the immovable properties of the deceased for the foregoing purposes, within 60 days, and to charge the cost thereof to the estate;
 3. I direct the banks holding the deceased's accounts to provide current statements of account of all his accounts within 21 days; and
 4. Mention on 26th June 2023 for further orders.

Orders accordingly.

DELIVERED, DATED, AND SIGNED THIS 12TH DAY OF JUNE 2023 AT MOMBASA VIA MICROSOFT TEAMS

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GREGORY MUTAI

JUDGE

In the presence of:-

No appearance for the Applicant;

Mr. Mohamed for the Respondent;

Ms. Winnie Migot – Court Assistant

