



**Salah v Awke (Succession Cause E1303 of 2020)
[2023] KEHC 19681 (KLR) (Family) (23 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19681 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE E1303 OF 2020
MA ODERO, J
JUNE 23, 2023**

BETWEEN

ABDULHAMID SALAH OBJECTOR

AND

MOHAMED SALAH AWKE RESPONDENT

JUDGMENT

1. Before this Court is the summons for Revocation/Annulment of Grant dated 23rd February 2021 by which the Applicant Objector/Applicant Abdulhamid Salah Awke seeks the following orders:-

- “ 1. That the Grant of letters of Administration Intestate made to the said Mohamed Salah Awke on 2nd day of October 1967 be revoked.
2. That the costs of this application be provided for.

2. The Application was premised upon Section 76 of the *law of Succession Act* and Rule 44 of the Probate and Administration Rules and was supported by the Affidavit of even date sworn by the Objector.

3. The Administrator/Respondent Mohamed Salah Awke opposed the summons through the Grounds of opposition dated 9th July 2021.

4. The matter was canvassed by way of oral evidence.

Background

5. This Succession Cause relates to the estate of the late SALEH AWKE alias SALA AWAKE (hereinafter ‘the Deceased’) who died intestate on 16th February 1965. The Deceased was survived by one Widow AISHA JAMA and several children. The Widow later passed away in the year 1991.



6. The estate of the Deceased comprised the following assets:-
 - (i) Residential Property LR No. 36/11/243 situated at Eastleigh;
 - (ii) Residential Property on LR No. 448089 (LR. 1032) situated at Ngong Town Kajiado;
 - (iii) Commercial Plot No. 17 Ngong Township
7. Following the demise of the Deceased his eldest son MOHAMED SALAH AWKE (hereinafter 'the Administrator') petitioned the court for Grant of letters of Administration Intestate. A grant was duly issued in the name of said Administrator on 2nd October 1967. To date the Grant has not been confirmed and the estate of the Deceased is yet to be distributed to the surviving beneficiaries.
8. The Objector who is one of the sons of the Deceased and a beneficiary to the estate now filed this summons seeking to have the Grant issued to his brother (the Administrator) revoked.

The Evidence

9. The Objector relied on his supporting affidavit dated 23rd February 2021 as well as his witness statement dated 20th September 2021. The Objector confirms that following the demise of the Deceased Grant of letters of Administration Intestate were on 2nd October 1967 issued to his elder brother. He states that shortly thereafter the Administrator relocated to Tanzania where he remains resident to date.
10. The Objector accuses the Administrator of sleeping on the job and failing to actively administer the estate of the Deceased. He states that the Administrator only awoke from his slumber when Succession Cause No. 32 of 2016 was filed in the Nairobi Kadhi Court which matter was filed by Anab Salah Awke a daughter of the Deceased and the Objector herein seeking to have the Administrator removed.
11. The Objector claims that the Administrator has failed in the last 53 years to administer the estate of the Deceased. That due to the Administrator's neglect of his duties various assets of the estate has been comprised. As an example the Objector cited the property known as LR. No. 4480189 Ngong registered in the name of the Deceased. The Objector alleges that the 99 year lease on that lease on that parcel land has now expired yet the Administrator has to date taken no steps to have said lease renewed.
12. The Objector further alleges that the Administrator lacks capacity to administer the estate as he is elderly, sickly and that the Administrator is suffering from dementia meaning that he has a poor grasp of facts. That during a hearing in the Nairobi Kadhi Court a majority of the beneficiaries agreed to remove the Administrator and replace him with Hassan Salah Awke And Miriam Salah Awke, who are also children of the Deceased.
13. The Objector also disputes the inclusion of Ngong Plot 20 as an asset belonging to the estate in the Affidavit sworn in support of the summons for confirmation of Grant. The Objector asserts that Ngong Plot 20B belongs to him and is registered in his name.
14. Finally, the Objector states that the laxity and inaction of the Administrator for the past 53 years is inexcusable. That it is in the best interests of the entire estate that the Grant be revoked and a new Administrator(s) be appointed to complete the administration of the estate.
15. As stated earlier the summons was opposed. The Administrator who testified as DW4 relied on his witness statement dated 30th September 2021. The Administrator confirms that he is the eldest son of the Deceased and confirms that he was appointed as Administrator of the estate vide a Grant issued to him on 2nd October 1967. The Administrator list the following as the assets comprising the estate:-



- (a) Residential Property LR No. 36/11/243 Eastleigh;
 - (b) Ngong Plot No. LR No. 4480/89 (LR. 1032);
 - (c) Ngong Plot No. 20B; and
 - (d) Ngong Plot No. 17.
16. The Administrator denies the allegations made by the Objector that he has failed and/or neglected to fulfil his duties as Administrator.
 17. The Administrator whilst confirming that has resided in Tanzania since 1965 insists that he is well and is able to manage and administer the estate despite residing outside of the country. The Administrator asserts that he is of sound mind and is of good health and is capable to supervising the administration of the estate and the distribution thereof.
 18. The Administrator states that during the lifetime of the widow it was agreed that she would manage the estate for the benefit of the entire family. That following the demise of the widow on 22nd July 1991, the family held a meeting where agreement was reached on who would occupy and /or manage the assets left behind by the Deceased.
 19. The Administrator accuses the Objector and another beneficiary Hassan Salah Awke of treating the house in Eastleigh as their own personal property. He alleges that they are collecting and utilizing the rental income to the exclusion of the other beneficiaries, and accuses the two of working in cohort with third parties to deny the other beneficiaries any benefits from the said property.
 20. The Administrator further accuses the Objector and Hassan Salah Awke of forging documents to effect the transfer of Ngong Plot No. 20B into the name of the Objector. Whilst conceding that since the Grant was issued to him in October 1967 the same is yet to be confirmed, the Administrator claims that attempts to confirm the Grant were hindered by the Objectors action in filing Succession Case No. 32/2016 before the Nairobi Kadhi Court. That following the conclusion of the case in the Kadhi Court and the appeal arising therefrom he has now filed a summons for confirmation of Grant dated 28th September 2020.
 21. The Administrator complains that the summons for confirmation of Grant could not be heard as the court file went missing. That further the Objectors refusal to transfer monies belonging to the estate held in the estate account has also hindered the hearing of the summons for confirmation.
 22. Finally, the Administrator states that he has always acted diligently in the best interests of the estate and ready, willing and able to conclude the process of distribution of the estate.
 23. DWI Kuthum Sallah Awke, Dw2 Miriam Sallah Awke And Dw3 Zarah Sallah Awke are all the daughters of the Deceased and beneficiaries to the estate. They all oppose the summons for revocation of Grant filed by the Objector. The three witnesses all support the evidence of the Administrator.
 24. The three insist that the Administrator who is their eldest brother has diligently managed the estate. They assert that though he suffers from physical ailments the Administrator is mentally lucid and is capable to proceeding with the distribution of the estate. They pray that this summons for revocation of Grant be dismissed in its entirety.



25. Upon conclusion of the hearing parties were invited to file final submissions. The Objector filed written submissions dated 15th December 2022 whilst the Administrator relied upon his written submissions dated 3rd February 2023.

Analysis and Determination

26. I have carefully considered the summons before this court, the reply filed thereto, the evidence on record as well as the written submissions filed by all parties. The issues which arise for determination are:-
- i. Whether sufficient grounds have been laid to warrant revocation of the Grant issued to the Administrator.
 - ii. If so who should be appointed to Administer the estate.
- (i) Revocation of Grant
27. It is common ground that following the death of the Deceased the Administrator Mohamed Salah Awke was appointed as Administrator of the estate vide the Grant of letters of Administration Intestate dated 2nd October 1967. It is not disputed that to date the Grant has not been confirmed and the estate has not been distributed to the beneficiaries.
28. Once he was appointed as Administrator of the estate, the Administrator was obliged to carryout certain statutory duties.
29. The duties of an Administrator are clearly set out in Section 83 of The *Law of Succession Act*, Cap 160 Laws of Kenya. Sections 83(e) and (9) of the said Act provide as follows:-

“ 83

- (a)
- (b)
- (c)
- (d)
- (e) to produce to the Court, if required by the Court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the Deceased and a full and accurate account of all dealing therewith up to the date of the account.
- (f) Subject to Section 55 to distribute or retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this Section and the income therefrom, according to the respective beneficial interests therein under the Will or on intestacy, as the case may be.
- (g) to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the Court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration.” [own emphasis]



30. In the case of Re: Estate Of Julius Mimano (deceased) [2019] eKLR, Hon Justice William Ouko stated as follows:-

“ Although the personal representative has legal title akin to that of an owner, the property does not belong to them. They only hold it in trust for the eventual beneficiaries thereof, that is those named in the will, in cases of testate succession, and those identified at confirmation of grant, in cases of intestacy. They would also be holding it for the benefit of creditors and any other persons who might have a valid claim against the estate. That would mean that they are trustees of the estate, and, indeed, the *Trustee Act*, Cap 167, Laws of Kenya, defines trustees to include executors and administrators. In the circumstances, therefore, the personal representative would stand in a fiduciary position so far as the property is concerned, and owes a duty to the beneficiaries to render an account to them of their handling of the property that they hold in trust for them. The duty to render accounts to beneficiaries arises from the trust created over estate property when the same vests in the personal representative to hold on behalf of the beneficiaries.” [own emphasis]

31. The Administrator by his own admission has not in the fifty-three (53) years following his appointment as Administrator concluded the administration and distribution of the estate of the Deceased. He instead he told the court that during the life time of this mother (the widow of the Deceased) he left it to her to enjoy quiet possession of the estate properties. This was a dereliction of his duties as a personal representative and amounted to an abdication of his duties as administrator.
32. It is not the duty of an Administrator to sit back and allow any beneficiary quiet possession of the estate but rather his duty is to actively to administer and distribute the estate of the Deceased. Even if the court accepts that the Administrator was right not to act during the lifetime of the widow the questions still remains why he has remained inactive for the twenty (20) odd years since March 1991 when the widow passed away.
33. The Administrator submits that he has not been served with any notice requiring him to apply for confirmation of the Grant. The Administrator did not need to receive a notice to prompt him to file a summons for confirmation of Grant. The fact that this Administrator was expecting to receive such notice is a clear indication that he did not comprehend his duties as personal representative of the estate.
34. The grant was issued to the Administrator not to his mother. The failure of the Administrator to conclude the distribution of the estate despite the lapse of fifty-three (53) years is a complete dereliction of his statutory duties as a personal representative. Moreover there is no evidence that the Administrator has ever filed accounts in this matter – which again amounts to a dereliction of his statutory obligations as a personal representative of the estate.
35. All the parties confirm that the Administrator resides in Tanzania. The Administrator himself confirms this. It would appear that upon being issued with the Grant the Administrator promptly relocated to Tanzania leaving the estate in the hands of his late mother. Even upon her death in 1991 the Administrator did not bother to return to Kenya to finalize the administration of the estate.
36. DW1 who testified on behalf of the Administrator states that the Administrator was last in Kenya in the year 2021 when he came to seek medical treatment. It is difficult to fathom how the Administrator can effectively administer the estate from Tanzania.
37. The Objector alleges that the Administrator is elderly and ailing and is not competent to continue administering the estate. The Administrator while admitting that he suffers certain Physical ailments



- denies that he suffers from dementia or any mental disability that would render him incapable of administering the estate of this late father.
38. I have seen the medical report dated 16th November 2016 written by Dr. Waweru-Mathu (Annexure 'MSA 3' to the Replying Affidavit dated 23rd February 2021). The report lists the various physical ailments suffered by Mohamed Salah Awke (the Administrator herein). The Report also indicates the Administrator "has dementia and is very forgetful". The Doctor goes on to recommend that the patients mental state requires that he is given as little mental stress as possible.
 39. The Administrator has not denied that this report refers to him. Indeed under cross-examination the Administrator admits..." It is true I have a poor memory. It is true I ought not be stressed". The Report confirms that he suffers a mental ailment and as such he is not a suitable administrator of the estate.
 40. The Administrator did testify in court. I noted that indeed he was an elderly man who appeared somewhat frail. The court noted that the Administrator did not seem to have a full grasp on the estate matters. For example inspite of all the other witnesses confirming the existence of a case at the Kajiado Law Courts involving Ngong Plot 20B the Administrator insisted that no such case existed. Yet in his written statement the Administrator clearly mentions Case No. 509/2017 filed at the Kajiado Law Court where the Objector is facing charges of forging and transferring documents for Ngong Plot 20B to his own name. The Administrator seemed to have forgotten about the existence of this case when testifying in court. The Administrator under cross-examination admits "I know nothing about the case in Kajiado. I am not aware there is a case in the Kadhi Court... I am not aware that the Hon. Kadhi revoked the Grant issued to me."
 41. Further the Administrator admits under cross examination that he does not know how many rental units the Eastleigh property has and he also does not know how much rent is collected from each tenant.
 42. Clearly the Administrator is in the dark concerning pertinent issues relating to the estate he is required to manage. With such level of ignorance regarding estate matters the Administrator cannot by any means be said to be a competent Administrator of this estate.
 43. The court also noted that on several occasions the Administrator mixed up the names and identities of the beneficiaries to the estate and he often did not seem to remember which of his siblings had passed on. For example the Administrator stated in court that Hassan Saleh was Deceased whereas the said sibling is alive and identified himself to the court. The Administrator further claimed that her sister Anab Saleh was alive when the truth is that she died in 2020. It is obvious that the Administrator suffers from a failing memory and is unable to even identify which beneficiaries of the estate are still alive.
 44. Several times the Administrator had to look to one of his family members seated in court to provide the answer to a question put to him during cross-examination. Even DW2 who testified on behalf of the Administrator admitted under cross-examination that the Administrator gave a power of Attorney to one of his sisters due to his health problems. She further confirms that since the Grant was issued five (5) siblings have passed away without receiving their share of the estate.
 45. From my own observations, I formed the opinion that the Administrator has poor memory and is not able to recall relevant facts without being prompted. In my view he certainly does not have the mental capacity to administer the estate.
 46. On the question of Ngong Plot 20B, the Administrator insisted that the same forms part of the estate yet the Objector insists that the said Plot is registered in his name.



47. A look at the Title Document reveals that Plot No. 20B is in fact registered in the name of the Deceased. A letter dated 6th October 2015 written by the County Government of Kajiado (annexed to the supporting Affidavit dated 23rd February 2021) states that Plot 20B Ngong Township is registered in the name of Abdulhamid Saleh Awke.
48. It is not for this Probate Court to determine the question of ownership of Plot 20B. If the Objector has any claims over the said plot then he must pursue that claim in the Environment and Land Court which is the court mandated by *the constitution* to determine questions of “ownership, use and occupation of land”
49. The Administrator claims that the Objector fraudulently transferred the said plot from the name of Deceased into his own name. The Administrator as the legally appointed person representative of the estate had power to act if such a fraud on estate assets had taken place. There is no evidence that the Administrator made a report of this alleged fraud to the Police or indeed to any other lawful authority. Neither did he approach the Courts to reverse what he terms as a “fraudulent transfer” of estate property. As an Administrator it fell within his mandate to preserving estate property.
50. Further the Administrator accuses the Objector and Hassan Salah Awke of Interfering with the Eastleigh Property by failing to pay rent for their occupation of the family houses and by treating estate assets as their own property and failing to distribute the rental income to the other beneficiaries as had been agreed.
51. Once again the pertinent question is what action did the Administrator take as the legal representative of the estate to counter the alleged intermeddling. It is not enough to lament about the actions of the beneficiaries. The duty of the Administrator is to preserve and protect the estate from any intermeddling pending final distribution. The Administrator did not file any case in court seeking an injunction to protect the estate against the alleged intermeddlers. He therefore failed in his duty as a personal representative of the estate.
52. On the whole I find that this Administrator failed dismally in his duties. It is important that beneficiaries carefully consider the suitability of the person[s] they recommend for appointment as an Administrator. The mere fact that one is the eldest child or as in this case the eldest son of the Deceased is not sufficient reason to have him appointed as Administrator. Appointment as an Administrator is a serious duty and carry with it a host of onerous statutory obligations. If one is not ready to carry out those statutory obligations then he/she ought not accept an appointment as an Administrator. On this ground alone the Grant ought to be revoked.
- (i) Revocation of Grant
53. The Objector has prayed that the Grant issued to the Administrator be revoked. 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 which provides as follows:-
- “76. Revocation or annulment of grant
- A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by an 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 allegations 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.” [own emphasis]

54. In the case of *Re Estate of Prisca Ong’aya Nande (Deceased) 2020 eKLR* the court held as follows:-

“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 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 circumstance, 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”. [own emphasis]

55. In this case it is manifest that the Administrator has failed dismally in carrying out his duties. He has committed all the omissions referred to in Section 76 (d) (i) (ii) and (iii) of the *Law of Succession Act*. Moreover, I find that the Administrator is neither suitable nor competent to continue administering the estate of the Deceased. I therefore find merit in this summons and I hereby revoke the Grant of letters of Administration Intestate issued to Mohamed Salah Awke on 2nd October 1967.

56. It is clear from the evidence that there exists two camps within the family. One camp is allied to the Objector Abdulhamid Salah Awke and another camp is allied to Mohamed Salah Awke. This is an extremely old matter and it is essential that the same be concluded as soon as possible.



57. In order to facilitate the taking over the estate by new Administrator I direct that the former Administrator Mohamed Salah Awke file within Sixty (60) days a full inventory of all the assets and liabilities of the estate as well as a full account of his administration of the estate from 2nd October 1967 to date.
58. I further direct that the family engage together with their Advocates and appoint two (2) persons acceptable to all the beneficiaries to be appointed as Administrators in place of Mohamed Salah Awke.

Conclusion

59. Finally this court makes the following orders:-
- (i) The Grant of letters of Administration Intestate issued to Mohamed Salah Awke on 2nd October 1967 be and are hereby revoked.
 - (ii) The beneficiaries to appoint two (2) persons to be appointed as Administrators to conclude the distribution of the estate.
 - (iii) If parties are unable to agree on two (2) persons within thirty-one (31) days then the court will appoint the new Administrators.
 - (iv) Mohamed Salah Awke to file within Sixty (60) days a full inventory of all the assets and liabilities of the estate as well as full accounts of his administration of the estate from 2nd October 1967 to date.

SUBPARA (v)

This being a family matter each side will bear its own costs.

Dated in Nairobi this 23rd day of June 2023.

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MAUREEN A. ODERO
JUDGE

