



REPUBLIC OF KENYA



In re Estate of Mohamed Suleiman Issa aka Mohamed Sheikh Issa (Deceased) (Succession Cause 371 of 2009) [2023] KEHC 23950 (KLR) (23 October 2023) (Ruling)

Neutral citation: [2023] KEHC 23950 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 371 OF 2009
G MUTAI, J
OCTOBER 23, 2023**

BETWEEN

ANSWARI MOHAMED SHEIKH ISSA APPLICANT

AND

SAIDA MOHAMED ISSA 1ST RESPONDENT

FIRDAUS MOHAMED ISSA 2ND RESPONDENT

RULING

1. The petition for letters of administration intestate in respect of the estate of the deceased person was filed on 9th December 2009. On 7th June 2010, the Grant of Letters of Administration Intestate was issued jointly to the 1st and 2nd respondents. The said grant was confirmed on 13th April 2011, and a Certificate of Confirmation of Grant was issued. The distribution schedule provided that the deceased person's sole property, Title No. Mombasa/Block XVII/544 would be shared by the deceased person's 13 heirs in accordance with Islamic Sharia law.
2. On 7th March 2018, the applicant filed the Summons for Revocation of Grant now before the court seeking the orders I shall set out below. The applicant avers that he is the son of the deceased. He claims that he was left out of the list of the heirs of the deceased and that he has not been involved in the administration of the estate. He denies that the Title No. Mombasa/Block XVII/544 belongs to the deceased. In his view, the said property belonged to the deceased's father.
3. Vide the said Summons, the applicant sought the following orders: -
 - a. Spent;
 - b. That pending the hearing of this application interpartes, there be an order restraining Saida Mohamed Issa and Firdaus Mohamed Issa from acting as administrators of the estate of Mohamed Suleiman Issa, known as Mohamed Sheikh Issa;



- c. That the certificate of grant issued on the 13th day of April 2011 be revoked or this honourable court do appoint a joint administrator for the deceased's estate; and
 - d. That the cost of the application be in the cause.
4. I have already alluded to the grounds upon which the application is based. The applicant also filed a supporting affidavit on 7th March 2018.
 5. He stated that the deceased was his father. The respondents were issued with a Certificate of Confirmation of Grant on 13th April 2011, which he became aware of through an affidavit sworn by the 1st respondent on 30th November 2017. The respondents had filed a succession petition in the Kadhi's Court Succession Cause No.72 Of 2017. They omitted him from the list of beneficiaries. In his said affidavit, he stated that "it is in the interest of justice to have the certificate of grant issued on 13th April 2011 and confirmed on 1st April 2011 be revoked".
 6. In response, the respondents filed a replying affidavit sworn by the 1st respondent on 11th May 2018.
 7. She stated that the deceased herein died on 11th April 1999. After his demise, they petitioned the court for a grant of letters of administration intestate. The same was gazetted in the Kenya Gazette to enable any person with interest in the estate to file any objection. No one raised a claim or interest in respect of the estate of the deceased. A certificate of confirmation of grant was then issued on 13th April 2011.
 8. She further stated that the applicant is unknown to them and that he was never introduced to them in the lifetime of their father. Thus his application should be disallowed.
 9. She deponed that the applicant has not tendered sufficient proof to warrant revocation of the grant. The 1st respondent averred that the applicant is conniving with the deceased's siblings by producing a forged certificate as proof of paternity. Further the application is meant to delay ELC Case No.398 of 2017. She urged the court to dismiss the summons.
 10. The applicant further filed a supplementary affidavit on 25th June 2018. He stated that his mother got married to the deceased in 1975 at a secret wedding conducted by Sheikh Rashid Bakuli at his then-residence in the Stadium area of Mombasa. Subsequently, she gave birth to him in the year 1977 before divorcing in the year 1980. His late father (the deceased herein) assisted him in obtaining his national identity card, passport and certificate of birth.
 11. He further averred that during his lifetime, the deceased introduced him to his mother, the late Hamude Binti Khamis. He has, on several occasions, mingled with his brothers and sisters, including the respondents, at the deceased's residence in Bondeni. Some of his brothers attended his wedding at Masjid Nour and at his house in Bondeni. His younger brother Ahmad Mohamed Issa stayed with him in 2000 at his residence in Gulshan. He stated that his uncles and aunts recognized him as a legitimate son of the deceased. Thus the respondents cannot claim that he is a stranger.
 12. He stated that he was in the Republic of Yemen from 21st July 2008 and in Saudi Arabia from 2011, and thus, he was unaware of the happenings in respect of the deceased's estate. He came back on 2nd February 2018, and he was informed by his aunt Faiza Issa Suleiman of a case filed by the respondents at the Kadhi's Court seeking to evict them from his late grandfather's house in Bondeni which was registered in the deceased's name. He learnt of the succession matter herein through his aunt.
 13. He further stated that the deceased's estate has not been distributed, and thus the respondents will suffer no prejudice. He then urged the court to allow the application.



14. The respondents filed a response to the supplementary affidavit sworn on 7th August 2018. They stated that the applicant did not tender any evidence to show that the deceased assisted him in obtaining his identity card, passport and certificate of birth. The applicant has never been seen with the deceased, and they only interacted during special occasions, and it is the siblings who invited him to the house. They argued that the fact applicant stayed with Ahmed Mohamed Issa does not prove that he is his brother.
15. The respondents reiterated that the applicant is a stranger to them and urged the court to dismiss the application.
16. The 1st respondent filed a further affidavit sworn on 11th June 2018. They reiterated their position in the replying affidavit and response to the supplementary affidavit.
17. The applicant, on the other hand, filed a reply to the response to the supplementary affidavit sworn on 17th September 2018.
18. He reiterated his position in the previous affidavits and stated that the certificate of birth annexed to the supplementary affidavit was a second certificate issued to him by the registrar of persons after his first certificate was rejected by the immigration for the reason that it was laminated. That the deceased maintained him throughout his lifetime till his demise. When his father was sick, he stayed in the hospital for four days together with Ahmad Mohamed Issa and Abubakar Mohamed Issa and even entered his grave during burial which is only done by close family members. He urged the court to allow the application.
19. The respondents filed a response to the reply sworn on 18th June 2019. They reiterated their earlier position and stated that their father was visited by a numerous number of people who also slept in the hospital. That it is their elder brother who performed the burial rituals and not the applicant.
20. The matter came up for hearing on 28th April 2023, when the applicant gave his evidence. He reiterated his position in his affidavits and urged the court to revoke the grant. When the matter came for the respondent's case on 12th June 2023, counsel for the respondents told the court that his client was unwell and couldn't attend court to give evidence. The advocates for the parties adopted the affidavits of the respondents as evidence in the result that cross-examination of the witnesses was dispensed with. The court then directed the parties to file their written submissions.
21. Subsequently, the applicant, through his advocates A.O. Hamza & Co. Advocates, filed his written submissions dated 21st June 2023.
22. Counsel submitted that the deceased was a polygamous man married to Leila Said Mbarak (the respondent's mother), with whom they were blessed with 12 children, and Umi Bwana Kherry Al Kame (the applicant's mother), with whom they were blessed with the applicant herein. The applicant's mother was later divorced. That upon the demise of the deceased, the children of the first wife applied for the grant of letters of administration, excluding the applicant as a beneficiary of the estate. The exclusion was intentional and contrary to Islamic law on succession.
23. Counsel relied on Section 76 of the *Law of Succession Act* and submitted that the respondents herein made false statements and concealed from this court material fact on the heirs of the deceased by excluding the applicant.
24. Counsel further relied on section 107(1) of the *Evidence Act* and submitted that the respondents have not proved that the applicant is not a beneficiary of the deceased. The respondents did not comply with the order for a DNA test, whereas they were the ones who had requested for the same. The respondents did not challenge the evidence tendered by the applicant. That children born out of a polygamous



marriage are entitled to equal rights in inheritance matters regardless of their birth order or the marital status of their parents.

25. In conclusion, counsel urged the court to allow the summons for revocation of grant with costs.
26. On the other hand, the respondents, through their advocates Muturi Gakuo & Kibara Advocates, filed their written submissions dated 10th July 2023.
27. Counsel submitted that the applicant failed to discharge his burden of proof and urged the court to dismiss the summons, Counsel relied on section 107 of the Evidence Act to support his submissions.
28. Counsel raised a preliminary objection on the jurisdiction and submitted that this court has no jurisdiction to grant the orders sought. Firstly that court became functus officio upon confirming the grant herein on 1st April 2011. Secondly, the applicant's case hinges entirely on alleged secret marriage, which only the Kadhi's Court can authoritatively determine.
29. On the court being functus officio, counsel submitted that the applicant is seeking revocation of the certificate of confirmation of grant and not challenging the legality or validity of the grant of representation from which the certificate of grant emanated. The court became functus officio upon confirmation of the grant. Counsel relied on the case of In re Estate of Kiberenge Mukwa(Deceased) [2021]eKLR, where the court held that Section 76 of the Law Of Succession Act has nothing to do with the confirmation of grant or the confirmation process neither does it provide relief for any person aggrieved by the confirmation process.
30. On the 2nd point of objection, counsel submitted that the Kadhi's Court is the best suited to determine the existence and or legality of the alleged marriage between the applicant's mother and the deceased.
31. In conclusion, counsel urged the court to dismiss the summons.
32. The applicant, through his counsel, further filed supplementary submissions on 19th July 2023.
33. Counsel relied on Section 76 and various case laws and submitted that this court has jurisdiction to hear and determine the applicant's summons.
34. Counsel further reiterated the applicant's position in his affidavits and evidence in court and submitted that the respondents did not rebut the evidence tendered by the applicant. Counsel urged the court to grant the orders sought.
35. I have considered the summons, the responses therein and the applicant's submissions and the issues that arise for determination are:-
 - a. Whether this court has jurisdiction?
 - b. Whether the grant should be revoked?
36. On the issue of jurisdiction, the respondents, in their submissions, raised preliminary objection on the jurisdiction of the court on the grounds that the court has become functus officio upon confirming the grant and that the case is entirely based on the alleged secret marriage which only the Kadhi's Court can authoritatively determine. In the locus classicus case of The Owners of the Motor Vessel "Lillian S" versus Caltex Oil (Kenya) Ltd [1989] eKLR, Nyarangi, JA stated:-

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for



a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”

37. Further, the Supreme Court, in the case of *Samuel Kamau Macharia & another versus Kenya Commercial Bank Limited & 2 others* [2012] eKLR stated,

“A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.”

38. The probate court derives its jurisdiction from Section 47 of the *Law of Succession Act* and *Probate and Administration Rules* rule 73, which provides;

Section 47

“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:

Provided that the High Court may, for the purpose of this section, be represented by Resident Magistrates appointed by the Chief Justice.”

Rule 73

“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.”

39. My understanding of the respondents’ submissions and the case laws relied on is that this court has no jurisdiction due to the fact that Section 76 of the *Law of Succession Act* does not provide for revocation of certificate of confirmation of grant and or relief to a person who is unhappy with the confirmation process. The lack of the same, coupled with the fact that the grant had already been confirmed, renders this court functus officio.

40. The Court of Appeal in the case of *Telkom Kenya Limited versus John Ochanda (Suing on His Own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Limited)* [2014]eKLR stated:-

“Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon. It is a doctrine that has been recognized in the common law tradition from as long ago as the latter part of the 19th Century. In the Canadian case of *Chandler versus Alberta Association of Architects* [1989] 2 S.C.R. 848, Sopinka J. traced the origins of the doctrines as follows (at p. 860);

“The general rule that a final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal *In re St. Nazaire Co.*, (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the Judicature Acts to the appellate division. The rule applied only after the



formal judgment had been drawn up, issued and entered, and was subject to two exceptions:

1. Where there had been a slip in drawing it up, and,
2. Where there was an error in expressing the manifest intention of the court. See *Paper Machinery Ltd. vs. J.O. Rose Engineering Corp.*, [1934] S.C.R. 186”

...The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once a final judgment has been entered and a decree thereon issued.”

41. I am of the view that the lack of a provision in the *Law of Succession Act* that provides for revocation of the certificate of confirmation of grant does not render this court functus officio. It is my finding that this court has jurisdiction under section 47 of the *Law of Succession Act* and rule 47 of the Probate and Administration Rules, and therefore the preliminary objection fails.

42. On the issue of revocation, Section 76 of the *Law of Succession 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.

43. The summons before this court is for revocation of the certificate of confirmation of grant. Faced with a similar issue, the court in the case of *In re Estate of Joel Cheruiyot Ronoh* [2016] eKLR stated: -

“A certificate of confirmation of a grant is not a grant representation, but a certificate to the effect that the grant had been confirmed by the court. The discretion given to the court



by the provisions in section 76 of the Law of Succession Act is for revocation of grants of representation, not certificates that confirm those grants. There is therefore no power in those provisions for the court to revoke a certificate of confirmation of grant. As can be seen from the outset, the said application stands on shaky ground... I am being invited to revoke a certificate of confirmation of grant. The certificate is not an order of the court. A certificate is not a judicial order. It is an extract from a court order made in the confirmation proceedings. The certificate is generated from the court order. It is important for the parties to differentiate between the character of a grant of representation and a certificate of confirmation of the grant. A grant is a court order; it is a judicial pronouncement to the effect that some person has been appointed as administrator and granted the power to act as such. The certificate of confirmation of the grant, on the other side, merely certifies that orders have been made to confirm the grant. The certificate of confirmation of grant is not the order itself.”

44. From the above authority, it is evident that the court has no power to revoke a certificate of confirmation of grant. Accordingly, it is my finding that the summons for revocation is misconceived and the same is hereby dismissed.

45. This being a family matter each party shall bear own costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED THIS 23RD DAY OF OCTOBER 2023 AT MOMBASA VIA MICROSOFT TEAMS

GREGORY MUTAI

JUDGE

In the presence of: -

Ms. Hamid holding brief for Mr. Hamza for the Applicant;

No appearance for the Respondent;

