



REPUBLIC OF KENYA



In re Estate of Amalemba Zakaria Lugonzo (Deceased) (Succession Cause 265 of 2011) [2024] KEHC 16680 (KLR) (13 December 2024) (Ruling)

Neutral citation: [2024] KEHC 16680 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 265 OF 2011**

G MUTAI, J

DECEMBER 13, 2024

IN THE MATTER OF THE ESTATE OF AMALEMBA ZAKARIA LUGONZO (DECEASED)

BETWEEN

BEATRICE AMALEMBA APPLICANT

AND

HUMPHREY MUSULI AMALEMBA RESPONDENT

AND

FRANK KARURI MWANGI GICHOHI INTERESTED PARTY

RULING

1. Before the Court is a summons for revocation and/or annulment of grant dated 8th March 2023. Vide the said summon, the Applicant seeks to have the grant issued to Humphrey Musuli Amalemba (hereafter the “Administrator” or “the Respondent”), on 5th October 2012 and confirmed on the 31st day of July 2013 be revoked on the grounds that the Administrator, in cahoots with Frank Karuri Mwangi Gichohi, (hereafter “the Interested Party”) used fraud, forgery and deceit to obtain it. It was further averred that the signatures of the deceased's estate beneficiaries were forged.
2. The Applicant further averred that using fraud, the Administrator sold the only family property, to wit Title No Lamu/Hindi/Magogoni/72, to Frank Karuri Mwangi Gichohi.
3. In the affidavit in support of the application, Beatrice Amalemba denied that she signed the consent to the issuance of the grant to the Respondent. She stated that the signatures were forgeries. She deposed that a complaint was made to the Director of Criminal Investigations and that the matter was pending investigation. She further deposed that using the alleged grant, the Respondent sold the land to the Interested Party for Kes.4,000,000.00 on 31st December 2012. It was thus urged that the said grant be



- revoked. She expressed a fear that unless the grant was revoked, Frank Karuri Mwangi Gichohi would evict the family from the entry land they knew.
4. The Applicant also filed a Further List of Documents vide which she attached the Police Document Examiner's Report dated 16th May 2023, whose finding was that the signatures on the purported consent, said to have been appended by Beatrice Kazilika Amalemba, Lydia Kavuzza Amalemba and Peris Uside Amalemba were all forgeries. Ms Audrey Otieno of the Directorate of Criminal Investigations did the document examination.
 5. The Applicant thus prayed that the application be allowed.
 6. The Respondent did not file any document in opposition to the application.
 7. The Interested Party filed a response to the application. His replying affidavit was sworn on 4th October 2023. In his replying affidavit, he averred that there was a memorandum of understanding between the Applicant's family members vide which Humphrey Musuli Amalemba was given "absolute authority and power to do whatever actions needed to be done in obtaining title documents for the said property ad generally represent the estate in its dealings."
 8. Mr. Gichohi averred that the Respondent petitioned for a grant on behalf of his family, and it was on that basis that it was granted to him. On 31st December 2022, the 1st Respondent sold the property to him for Kes.4,000,000.00.
 9. The Interested Party accused the Applicant of abuse of the Court process for having filed an application for a grant in Malindi, which wasn't disclosed in these proceedings, and of attempting to procure a duplicate title when the original was in existence. Regarding the document examiner's report, it was averred that signatures vary over time. The Interested Party's view was that the document examiner's report wasn't contemporaneous with signing the consent. For that reason, the report of the document examiner wasn't helpful in these proceedings.
 10. The Court summoned the representatives of the firms of Madzayo Mrima & Jadi Advocates and Oduor Okumu, who separately denied having authored the applications filed in Court in respect of these proceedings.
 11. Pursuant to the direction of the Court, the matter was heard by way of viva voce evidence.
 12. The Applicant called two Witnesses, herself and Peris Uside Amalemba. Both averred that the 1st Respondent obtained the grant fraudulently and that he sold the only asset of the deceased without their involvement, thus rendering them destitute.
 13. In his testimony, the Interested Party averred that he agreed to buy the land after being convinced that the Respondent had the requisite authority to sell. Regarding the issue of advocates, he averred that he was a client of Ms. Ngina Mutua, who had an office at the firm of Madzayo Mrima Advocates. He denied committing fraud or seeking to evict the widow from the land. He, therefore, urged that the application be dismissed.
 14. Upon the conclusion of the hearing, the Court directed the parties to file written submissions. I shall refer to each party's submissions below.
 15. In support of the application, Mr Ambwere, for the Applicant, filed Written Submissions dated 2nd August 2024, in which it was submitted that the grant herein was obtained fraudulently.



16. Counsel for the Applicant averred that the pleadings were fraudulently drawn and had been denied by counsels who “drew” them. Mr Ambwere averred that Ngina Mutua, the advocate who is said to have drawn the petition and the supporting documents, including the consent, wasn’t called to testify.
17. Counsel urged that under Section 76(b) of the Law of Succession Act, the grant issued in these proceedings could be revoked on the grounds that it was obtained through fraud.
18. The Interested Party’s submissions are dated 1st October 2024. His counsel submitted that before purchasing the property, Mr Mwangi Gichohi carried out a due diligence exercise and established that the Petitioner had a grant of letters of administration confirmed on 22nd July 2013.
19. The Interested Party averred that the Applicant knew about the petition for grant of letters of administration. He referred to the fact that she filed petitions for letters of administration in Malindi twice (P&A No 34 of 2014 and P&C No 146 of 2016). It was submitted that the Malindi High Court revoked the latter grant on the ground that the Applicant deliberately made false statements.
20. On the documents party’s counsel accused the Applicant of dishonesty and of not approaching the Court with clean hands.
21. Regarding the document examiner’s report, it was urged that the same did not bind the Court since it was an opinion. It was further submitted that the report was incomplete and based on an old signature.
22. Lastly, it was urged that Ngina Mutua was an advocate of this Court and that she worked for the firm of Madzayo Mrima Advocates at the material time. It was urged that if there was fraud on her, the same shouldn’t be visited on her clients; instead, action could be taken against her at the Advocate Disciplinary Commission.
23. I have read the Summons and the responses thereto and considered the evidence of the parties as well as the written submissions filed herein.
24. In my view, the issue falling for determination is whether the grant issued herein was lawful. To answer this question, the Court must look at section 76 of the Law of Succession Act, which provides that:-

“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.”

25. This court’s power to revoke grant has been discussed in many decisions of the High Court. I shall refer to a few below.

26. In the case of *Albert Imbuga Kisigwa vs Recho Kawai Kisigwa* [2016] eKLR the Court stated as follows:-

“(13) 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 wrongdoing 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 the interests of all beneficiaries entitled to the deceased’s estate and ensure that the action taken will be for the interest of justice.”

27. The court expounded on the grounds for revocation of a grant under section 76 of the *Law of Succession Act* in *In re Estate of Prisca Ong’ayo Nande (Deceased)* [2020] eKLR, by stating as follows:-

“Under section 76, a court may revoke a grant so long as the grounds listed above are disclosed, either on its motion or on the application of a party. 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 of 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 circumstances, 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.”

28. What I discern from the foregoing decisions is that firstly revocation of grant is a remedy which should not be given lightly. There must be good grounds for doing so. Secondly the parameters set out in section 76 of the *Law of Succession Act* must be met. Among the grounds for revocation of grant is fraud.

29. Although serious allegations of fraud were made against the Petitioner/Respondent, he never appeared, nor did he file a response. In my view, the said allegations were unrebutted.



30. It was left to the Interested Party to rebut the averments of the Applicant. His response, however, lacked probative value as they were mostly hearsay. In my view, the Interested Party could not have known how the consent was executed and whether the family members agreed to appoint the Petitioner/ Respondent. Such issues ought to have been responded to by the Petitioner. In the absence of his explanation the Court is inclined to believe the account of the Applicant.
31. It is evident from the document examiner's report that the signatures of the beneficiaries were forgeries. Although an explanation was given that signatures vary over time, a contention this Court agrees with, such variations are taken into account by the document examiners. In the circumstances of this matter, I am inclined to accept the document examiner's report as being a correct appraisal of the documents examined.
32. The fraud perpetrated by the Respondent is further illustrated by the fact that the firms of advocates that supposedly sought the grant or had it confirmed denied doing so.
33. From the foregoing, it is evident that the grant issued on 5th October 2012 to Humphrey Musuli Amalemba was obtained through fraud perpetrated by the Administrator/Respondent.
34. Given the extent to which the other beneficiaries have gone to try to obtain grants and to reverse the damage done by the Respondent, I have no doubt that they were unaware of the fraud and were not complicit in it.
35. In the circumstances, I find and hold that the grant issued herein should be revoked.
36. The upshot of the foregoing is the grant issued on October 5, 2012 is revoked. I order that a new petition for grant of letters of administration intestate be filed forthwith.
37. As this is a succession matter between close family members, I order that each party shall bear its own costs.
38. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 13TH DAY OF DECEMBER 2024. DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of:

Mr Ambwere, for the Applicant;

No appearance for the Petitioner/Respondent;

No appearance for the Interested Party; and

Arthur – Court Assistant.

