



In re Khadija Jama alias Khadija Jama Farah (Deceased) (Succession Cause E130 of 2021) [2023] KEKC 2 (KLR) (9 February 2023) (Ruling)

Neutral citation: [2023] KEKC 2 (KLR)

REPUBLIC OF KENYA
IN THE KADHI'S COURT AT UPPER HILL (NAIROBI MILIMANI LAW COURTS)
SUCCESSION CAUSE E130 OF 2021
AH ATHMAN, SPK
FEBRUARY 9, 2023
IN THE MATTER OF THE ESTATE OF KHADIJA
JAMA ALIAS KHADIJA JAMA FARAH (DECEASED)

BETWEEN

ABDULKADIR HUSSEIN IBRAHIM 1ST PETITIONER

HASSAN HUSSEIN IBRAHIM 2ND PETITIONER

AND

KHALIF HUSSEIN IBRAHIM OBJECTOR

RULING

1. The summons for revocation of grant dated April 1, 2022 seeks the following orders:
 - a. That the application be certified urgent
 - b. That an order of temporary injunction be issued restraining the respondents herein from dealing in whatsoever way with the property of the late Khadija Jama alias Khadija Jama Farah and more particularly all that piece of land known as LR No 209 / 3271/39
 - c. That the limited grant of letters of Administration for purposes of collection, preservation, receiving the deceased assets and entering into joint venture agreement of the leasehold interest comprised of LR No 209 / 3271/39 which was issued by the Hon A I Hussein, Principal Kadhi on December 9, 2021 be revoked.
 - d. That the Honourable court be pleased to issue injunction orders restraining any dealings in the property and especially by a third party by the name of Rasmal International Ltd.
 - e. That Costs of this application be in the cause.



2. The applicant also filed, attached to the summons for revocation of grant, a Notice of objection to making of grant dated April 1, 2022 on the grounds that he was not consent to the making of the grant, other beneficiaries are left out in the petition and that their father is unfit to be administrator due to his advanced age.
3. The applicant deposed he and his brother Ibrahim Abdi were not aware of and did not consent to the petition in the estate of the deceased in this matter. He deposed that that respondents were issued with the limited letters of administration specifically for entering a joint venture agreement with Rasmal International ltd. He further deposed that the joint land owner, their father is 91 years old and senile and probably didn't understand the nature of the business of the joint venture. He averred that the all beneficiaries were not included in the petition and the estate shall suffer if the order of injunction is not granted.
4. The application was opposed through separate but identical replying affidavits by the respondents both dated August 2, 2022. They also filed grounds of opposition on the notice of objection to the making of a grant.
5. The respondents deposed that the applicant had agreed to be bound by the decisions of the respondents. They further deposed that the applicant failed to take out letters of administration for over (13) years and it is a right to any beneficiary. They deposed that the applicant is misinforming the court as all the beneficiaries are listed in the petition and all legal heirs resident in Kenya are aware of and consented to the petition. They further stated that their father despite being a joint owner of the land, is unable to benefit from the land and needs medical care.
6. On the Notice of objection for making of letters of grant, they stated that the objector and all heirs were fully aware to and authorised the administrator to enter a joint venture agreement and that the agreement was entered into with the express authorization of and disclosure to the court.
7. The application was disposed by way of written submissions. The firm of Turunga Ithagi & Associates represented the objector while Mr Jama represented the petitioners.

Background

8. The LR No 209/3271/39 was transferred to Khadija Jama and Hussein Ibrahim Khalif on January 31, 2008. The two proprietors of the property were wife and husband. Khadija passed away on April 13, 2009 at Mater Hospital, Nairobi due to acute renal failure. They are blessed with eight children: Mohamed, Ahmed, Hassan, Fatuma, Abdulkadir, Abdirazak, Khalif and Amina Hussein Ibrahim. They are all adults and some of them reside out of the country. They are six sons and two daughters. The deceased husband and co-proprietor is now 94 years old (DOB 1929). The respondents approached court for and were issued with limited letters of administration to enter a joint venture agreement of the leasehold interest of the estate property and all developments thereon for their own benefit and that of the legal heirs of the late Khadija Jama.
9. Section 76 of the *Laws of Succession Act*, Cap 160 Laws of Kenya allow for revocation on grounds of defective proceedings, if it were obtained on the basis of false statement or concealment of material facts or an untrue allegation of fact essential in point of law. It provides:

‘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 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...’
10. In *John Mundia Njoroge & 9 others v Cecilia Muthoni Njoroge & another* [2016] eKLR, the court cited with approval Koome J, (as she then was) *in the matter of the estate of Muratbe Mwaria – deceased*, where she summarized the grounds for revocation of grant under section 76 as follows:
- i. When the procedure followed in obtaining the grant is defective in substance
 - ii. When the grant is obtained fraudulently by making a false statement
 - iii. Making an untrue allegation of fact essential in point of law to justify the grant
 - iv. Or when the person who has the grant has failed to proceed diligently with the administration of the estate.
11. In the instant case, deceased and all heirs and parties profess the Muslim faith. The applicable law in succession of such estates under the sections 2 (3) and 48 (2) of the *Law of succession Act*, Cap 160 laws of Kenya is Islamic laws of inheritance. The application of probate rules may be applied where they are not inconsistent with Islamic law. The requirement for all heirs to give their consent for taking out of letters of administration is inconsistent with Islamic law that confers on all heirs the same right. Publication of the gazette ment affords any beneficiary or with interest in the estate to object and the right to be heard. It is notable in this case that a petition for letters of administration is yet to be gazetted. The grant issued is limited.
12. It is important to understand the inheritance interest of the parties in the estate property to have a clear context of the the dispute. The property in this matter is co-owned by the deceased husband who also has, under Islamic laws of inheritance, a 25% share in her estate. He thus owns 62.5% of the property and the eight children will share the remaining 37.5%; each son getting 10.71% and each daughter getting 2.685%.
13. The applicant, as a legal heir, had the liberty to petition the court for letters of administration for more than fourteen years since the death of his mother. The record is very clear he is recognised as a beneficiary and listed as a heir of the estate. His siblings, with the consent of their father exercised their legal right when they approached court for the making of limited grant.
14. The court may revoke letters of grant of probate if it were obtained on the basis of false statement or concealment of material facts or an untrue allegation of fact essential in point of law. Where there is a remedy according rights of legal heirs, the court may, instead of revoking the grant proceed to make an order that ensures and protects heirs’ rights. In the case of *John Mundia Njoroge & 9 others v Cecilia Muthoni Njoroge & another* [2016] eKLR, further held:
- ‘under section 76, the court has discretionary power when faced with an application for revocation. It can make such orders as it considers fit in the circumstances. The court is not bound to issue revocation even where the case been set out under section 76. In *Kipurgat arap Chepsiror and Others v Kisigut Arap Chepsior*, the court declined to grant the prayer for revocation, but instead entered the names of the applicants in the grant as beneficiaries...’



15. The applicant, apart from claiming lack of knowledge and that he had not given his consent to the filing of the petition failed to demonstrate how the making of the grant prejudices him.
16. The applicant sought injunction orders restraining the administrators and a third party, a developer from dealing in any way with the estate property. The administrators entered a joint venture agreement upon successful application to court and through a valid court order. The agreement had the court's blessings. Under the provision of section 93 (1) of the *Law of succession Act*, Cap 160 Laws of Kenya, any contract entered with a third party on estate property by a duly authorised administrator is valid and cannot be revoked.
17. Grant of injunction orders is discretionary and only issued based on strong evidence and clear legal principles. The conditions for grant of interlocutory injunctions are well settle by case law. In the case of *Giella V Cassman Brown & Co Ltd* [1973] EA 358 the court stated:

"The conditions for the grant of interlocutory injunction are now, I think, well settled in East Africa, First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience".
18. In *Halsbury's Laws of England*, the test for grant of injunction is elucidated: it stated:

'It is the very first principle of injunction law that prima facie the court will not grant an injunction to restrain and actionable wrong for which damages are the proper remedy. Where the court interferes by way of injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds first, that the injury is irreparable and second that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if these rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages, an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question.'
19. The factors for consideration in grant of injunction are applied sequentially. The court in *John Ngumo Murere Vs Muriuki Karue & 7 Others* [2006] eKLR cited with approval the court of appeal case in *Kenya Commercial Bank Vs Afraba Education Society* [2001] 1 EA 86 (CAK) as follows:

" The sequence of granting interlocutory injunction is firstly, that an applicant must show a prima facie case with a probability of success if this discretionary remedy will inure in his favour; secondly, that such an injunction will not be normally be granted unless the applicant might suffer irreparable injury; and thirdly, when the court is in doubt it will decide the application on the balance of convenience. These conditions are sequential so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt the third condition can be addressed."
20. The applicant has failed to demonstrate the irreparable damage he will suffer if the orders sought are not granted. On the other hand, if granted, the respondent will clearly suffer more damage considering the parties' father has far more considerable share in the property and has urgent need to benefit from the



property at his advanced age and ramifications of breach of contract with a third party. The application lacks merit. It is hereby dismissed with costs.

DATED, SINGED AND DELIVERED VIRTUALLY ON 9TH FEBRUARY, 2023

HON. ABDULHALIM H. ATHMAN

SENIOR PRINCIPAL KADHI

In the presence of:

Mr. Suleiman A. Mohamed, court assistant

Mr. Stanley holding brief for Mr. Turunga for respondent / Applicant

