



**In re Estate of Swaleh Karama Hantoosh (Deceased) (Succession Cause E012 of 2023) [2024] KEHC 6741 (KLR) (24 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6741 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
SUCCESSION CAUSE E012 OF 2023**

**G MUTAI, J**

**MAY 24, 2024**

**IN THE MATTER OF THE ESTATE OF SWALEH KARAMA HANTOOSH (DECEASED)**

**BETWEEN**

**KHALID SWALEH HANTOOSH ..... PETITIONER**

**AND**

**MOHAMED SWALEH KARAMA HANTOOSH ..... INTERESTED PARTY**

**AND**

**MOHAMED SWALEH KARAMA HANTOOSH ..... INTERESTED PARTY**

**RULING**

1. This Court issued a Limited Letters of Administration ad litem to the Petitioner/Respondent on the 21<sup>st</sup> day of March 2023 “limited only for the purposes of instituting and or prosecuting and or defending the estate in court proceedings began in a court of law but without power of distribution.” While issuing the said grant, I directed that the Petition for Letters of Administration Intestate be filed within 60 days, failing which the grant I had issued would lapse.
2. The Petitioner does not appear to have complied with the condition upon which the grant was issued.
3. Vide Summons for Revocation or Annulment of Grant dated 5<sup>th</sup> February 2024, the Interested Party/Applicant sought the following orders:
  - a. Spent;
  - b. Spent;
  - c. That this Honourable Court be pleased to order the grant of letters of administration dated the 21<sup>st</sup> day of March 2023 issued by this court be revoked; and



- d. That costs of this application be borne by the Petitioner.
4. The Interested Party/Applicant deposed that he was not consulted before and after the proceedings were instituted by the Petitioner/Respondent Khalid Swaleh Hantoosh and that the proceedings before this court are fraud, misrepresentation, and illegal, meant to defraud the estate of the deceased and deny the rightful beneficiaries their share of the estate of the deceased. He urged the court to nullify the grant.
  5. He further stated that the Petitioner/Respondent is unfit to be the administrator of the deceased's estate and that allowing him to continue administering it will result in loss and damage to the estate.
  6. In response, the Petitioner/Respondent filed a Replying Affidavit sworn on 26<sup>th</sup> February 2024. He stated that all the family members were consulted, including the applicant, who at the time refused to cooperate and even refused to participate. All family members except the Interested Party/Applicant participated in the succession cause, either physically or virtually. He averred that Succession Number 180 of 2019 is a totally separate cause and that the Interested Party/Applicant is opposing the application because he is the biggest beneficiary of his late father's property.
  7. He further stated that one cannot allege fraud without issuing particulars and urged the court to dismiss the application with costs.
  8. The Interested Party/Applicant filed a further affidavit sworn on 8<sup>th</sup> March 2024. He reiterated his position and stated that the Petitioner/Respondent did not invite him for a physical or virtual appearance. He urged the court to allow his application with costs.
  9. The application was canvassed by way of written submissions.
  10. Counsel reiterated the Interested Party/Applicant's position in his affidavits and submitted that he was never informed of the intended and subsequent filing of this succession cause and neither was his consent sought. Before filing the petition herein and issuance of grant to the Petitioner/Respondent, there were other existing succession matters in court that are still active, thus making the petition herein subjudice, illegal and unlawful. The Petitioner/Respondent failed to disclose to this Honourable Court the existence of Succession Cause No. 180 of 2019, Succession Cause No.239 of 2018 and Citation No.36 of 2021, all in respect of the deceased's estate herein.
  11. Counsel further submitted that this Honourable Court could not have granted representation to the Petitioner/Respondent if he had fully disclosed the existence of the other matters.
  12. Counsel relied on Section 76 of the [Law of Succession Act](#) and submitted that the Petitioner/Respondent acted against the law. The current grant was obtained fraudulently through deceit, non-disclosure of material facts and is subjudice. Counsel urged the court to revoke the grant.
  13. On the other hand, the petitioner, through his advocates Odour Siminyu & Co. Advocates, filed his written submissions dated 9<sup>th</sup> April 2024.
  14. Counsel submitted that the principles of subjudice and res judicata cannot be applied simultaneously, as the Interested Party/Applicant had done, and that none of them applies in this case.
  15. Counsel relied on Section 76 of the [Law of Succession Act](#) and submitted that the Interested Party/Applicant had not proved and/or fulfilled the said section's conditions and urged the court to dismiss the application with costs.
  16. I have looked at the contestation between the parties. In my view the issues that call for my determination are the following:-



- a. Whether this matter is subjudice; and
  - b. Whether the grant should be revoked.
17. Is this matter *sub judice*? In my view, there is no pending cause as all the matters referred to in the application were dismissed by the respective courts, except for the citation, which the court marked as settled on 29th September 2023.
18. In discussing the issue of *subjudice* the court in the case of *Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya* [2020] eKLR stated:-
- “In order to check this very problem, there exists the concept of sub judice which in Latin means “under Judgement.” It denotes that a matter is being considered by a court or judge. The concept of sub judice is that where an issue is pending in a court of law for adjudication between the same parties, any other court is barred from trying that issue so long as the first suit goes on. In such a situation, order is passed by the subsequent court to stay the proceeding and such order can be made at any stage.
- In this regard, section 6 of the *Civil Procedure Act*<sup>[6]</sup> expressly provides that no court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”
19. The petition filed before this court is for a limited grant ad litem to institute, prosecute, and defend the estate in court proceedings without power of distribution until further representation is issued to the court. Thus, it does not relate to the other suits. In the circumstances it is my view that the doctrine of *sub judice* does not apply in this case.
20. Section 76 of the *Law of Succession Act* provides for grounds for revocation.
- “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.”

21. The court in the case of *In re Estate of Magangi Obuki (Deceased)* [2020] eKLR in dealing with the issue of revocation stated:-

“In the case of *Albert Imbuga Kisigwa v Recho Kavai Kisigwa*, Succession Cause No.158 OF 2000, Mwita J. made remarks on the guiding principles for the revocation of a grant. He stated:-

“ [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 wrong doing 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 interests of all beneficiaries entitled to the deceased’s estate and ensure that the action taken will be for the interest of justice.”

22. As stated earlier, the grant issued to the Petitioner/Respondent on 21<sup>st</sup> March 2023 is a limited grant referred to as grant ad litem, which is limited to instituting, prosecuting, and defending the estate in court proceedings without power of distribution.

23. Such grant is provided for in Section 54 and Paragraph 14 of the 5<sup>th</sup> Schedule the *Law of Succession Act* which provides that:-

Section 54

A court may, according to the circumstances of each case, limit any grant of representation which it has jurisdiction to make, in any of the forms described in the Fifth Schedule to this Act.

24. The court in the case of *In re Estate of Henry Kithia Mwitari (Deceased)* [2021] eKLR stated:-

“Therefore, it is clear that a grant ad litem is issued for a specific, limited, and finite purpose. Once the purpose for which such a Grant is issued is achieved, the Grant is exhausted and becomes obsolete. More pertinently, a grant *ad litem* cannot be used to collect, preserve, or distribute the estate of the Deceased.”

25. Further, the court in the case of *Karega & 2 others v Kiama & 2 others* (Succession Cause 6 of 2019) [2022] KEHC 9880 (KLR) (8 July 2022) (Ruling) stated:-

“However I did find the case of *Winrose Emmah Ndinda Kiamba vs Agnes Nthambi Kasyoka* illuminating as it dealt with an almost similar issue. The court was of the view that consent with regard to special limited grants of representation need not be mandatory...The court opined that that such a grant was normally issued due to the exigencies arising in relation to the estate and which could not wait for issuance of full grant through the normal way; that it was also without prejudice to the right of any other person to apply for full grant of



representation to the estate of the deceased and as such, limited grant may not be subjected to full and strict compliance with the requirements meant for a full grant of representation. That again, the person to whom the grant is so made undertakes to administer the estate according to the law but limited for the purpose for which the grant was issued until a further grant of representation is made by the court. In the aspect of consent of the other beneficiaries, the court stated that Law of Succession Act explicitly provides that, a court may, according to the circumstances of each case, limit any grant of representation which it has jurisdiction to make, in any of the forms described in the Fifth Schedule to this Act. The aforementioned, clearly depicted that the aspect of consent with regard to special limited grants of representation need not be mandatory.”

26. I am in agreement with the above-referenced decision. In the circumstances, I find and hold that the grant herein, being a limited grant ad litem, consent was not mandatory. That being the case the Summons for Revocation of the grant must fail.
27. From the foregoing it therefore follows that the application before me lacks merit and is for dismissal.
28. This being a family matter I make no orders as to costs.
29. Orders accordingly.

**DATED AND SIGNED AT MOMBASA THIS 24<sup>TH</sup> DAY OF MAY 2024.**

**GREGORY MUTAI**

**JUDGE**

In the presence of:-

No appearance for the Applicant;

No appearance for the Respondent; and

Arthur – Court Assistant.

