



REPUBLIC OF KENYA



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**In re Estate of Mama Hasina Mohamed Hamisi (Deceased) (Succession Cause 444 of 2011) [2022] KEHC 10816 (KLR) (20 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 10816 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
SUCCESSION CAUSE 444 OF 2011**

**JN ONYIEGO, J**

**MAY 20, 2022**

**IN THE MATTER OF THE ESTATE OF MAMA HASINA MOHAMED HAMISI (DECEASED)**

**JUDGMENT**

1. Before embarking on the substance of the revocation application herein which is the subject of this judgment, a brief background will suffice. The deceased herein Mama Hasina Mohamed Hamisi (hereafter the deceased) died on February 14, 1990 at Cost Provincial General Hospital Mombasa. According to form P&A 5, she was survived by;
  - a. Kibibi Mwamadi Hamisi )- Daughter
  - b. Khadija Salim Mwacharo- Daughter
  - c. Rukiya Salim Mwacharo - Daughter
  - d. Amina Salim Mwacharo - Daughter
  - e. Fatuma Mwinyikombo Mwakutema - Daughter
2. The only property listed as comprising the estate is L R Kwale/ Ng'ombeni/1104.
3. On May 22, 2012, Kibibi Mwamadi Hamisi, Rukiya Salim Mwacharo and Khadija Salim Mwacharo petitioned the court for a grant of representation. A grant of letters of administration intestate was made on August 28, 2012 and issued on September 24, 2012 to the said petitioners. Subsequently, the grant was confirmed on September 27,2015 and the estate shared out jointly to the beneficiaries in undivided share of 1/5 each.
4. Later, one Goga Abdalla Masemo claiming to have beneficial interest on the property filed a chamber summons dated October 2, 2018 seeking orders that;
  - a. The honorable court be pleased to certify the application as urgent and fix the application for hearing on a priority basis;



- b. That the court be pleased to revoke and annul the grant of letters of administration issued to Kibibi Mwamadi Hamisi, Rukiya Salim Mwacharo and Khadija Salim Mwacharo issued on September 24, 2012 and confirmed on October 30, 2015.
- c. That costs of this application be in the cause.
5. The application is anchored on grounds that; the grant was fraudulently obtained by making of false statement; concealing from the court material facts; the grant was obtained by means of untrue allegations of fact essential in point of law to justify the grant ;and that the beneficiaries to the only asset were not made aware of the proceedings.
6. To further amplify the application ,the applicant swore an affidavit on October 2, 2018 stating that the only asset listed as comprising the estate was family land which was registered in the name of the deceased herein a niece to his father to hold in trust for the family and not her sole property.
7. It was averred that failure to disclose that the property was ancestral land held in trust for the Masemo family by the deceased amounts to non-disclosure of material information as the petitioner should have included all family members. That the petitioners and their siblings have never lived on the said land hence not entitled to a share of the land. He sought for revocation of the grant to facilitate appointment of new administrators and subsequent re-distribution of the estate to the rightful beneficiaries.
8. In response, Khadija Salim Mwacharo swore a replying affidavit filed on November 5, 2018 stating that all her siblings have since died and she was the only surviving child to the deceased. She averred that the estate having been duly gazetted, the applicant ought to have filed an objection within 30 days. She denied the allegations that her mother held the subject property in trust for the Masemo family.
9. She alleged that the land in question was registered in the joint names of her mother and sisters as proprietors in common on May 5, 1989. She further stated that there was no family relationship with their mother and the applicant's family.
10. She went further to state that prior to the registration of the land, there were several suits filed against their mother during the adjudication process all the way to the minister where upon nobody raised the issue of trust or entitlement till now.
11. In their rejoinder, the applicant filed a further affidavit on November 19, 2018 stating that they were not aware of the existence of this suit, until when the respondents disclosed during the hearing in the Kadhi's court civil suit case no 35/2006 hence cannot be accused of being time barred.
12. He further stated that the deceased's mother Fatuma Nshuni was brought up by mzee Masemo's father the late Mwagoya hence a daughter who was considered as part of the family as she was brought up together with the children of Masemo.
13. It was further stated that the deceased's father one Mohamed Hamisi hailed from mtongwe hence the respondent would not have inherited the property in Ng'ombeni.
14. During the hearing, the applicant reiterated the content in the affidavit and further affidavit in support. He told the court that his father and grandfather were buried on the subject land. He further stated that the deceased was registered as a trustee given that his father had died and that his grandfather had left for treatment on the neighboring country.
15. On cross examination, he told the court that the subject land belonged to his great grandfather Mwagoga Juma who was also father to Abdalla Juma Mwagoga his (applicant) father. He however confirmed that none of his relatives was ever registered as the owner of the property. When shown the



- title deed in question, he confirmed that the land was registered in the names of five people the deceased being one of them.
16. On further cross examination, the applicant stated that during his marriage, Mzee Mwangoga's wife was accompanied by her sister's daughter by the name of Fatuma Nshuni whom he brought up together with her child. That Fatuma was the mother to the deceased who is also mother to the respondents/petitioners.
  17. He confirmed that Fatuma the deceased's mother had no relationship with his family hence the deceased had no blood relationship with the applicant /objector's family. He also confirmed that neither his father, nor great grandfather ever made a claim over the subject property.
  18. He further confirmed that under the law of succession, neither his father nor grandfather nor himself have a right to inherit from the deceased.
  19. Juma Hassan a witness to the applicant told the court that one Magoya was an uncle to the deceased. On cross examination, he admitted that the deceased and Masemo had no blood relationship.
  20. On her part, Khadija Salim (1<sup>st</sup>respondent) one of the administrators and a daughter to the deceased adopted the content of the affidavit sworn on November 5, 2018 she denied having any blood relationship with the deceased.
  21. Hamisi Swaleh swore an affidavit on September 9, 2021 in which he stated that the deceased was his cousin from his father's side. He stated that the deceased had a long fight over the said property during adjudication process up to the minister's appeal level where she won the claim and eventually had the land registered in her name and that of her children in equal shares.
  22. Upon conclusion of the hearing, parties filed submissions. The applicant appearing in person filed his submissions on June 14, 2021 entirely adopting her evidence.
  23. On the other hand, the respondent filed her submissions on August 6, 2021 through the firm of Mr Tindika who contended that the deceased and her daughters were the absolute registered owners of the land in question pursuant to section 24 of the *Land Registration Act*. That since 1989 when the land was registered, nobody raised any claim hence there was no fraud in stating that the deceased was the registered owner of the land in question.
  24. Counsel submitted that in the absence of any blood relationship between the deceased and the applicants, they had no reason to consult the applicant hence no concealment of material information.
  25. Mr Tindika asserted the applicant had failed to establish the three grounds set out under section 76 of the *Law of Succession Act*. To support this position the court was referred to the holding in the case of *Augustine Johnston Moi Kirigia vs Catherine Muthoni Isumali Karimi* (2017) eKLR.
  26. It was counsel's further submission that there was no blood relationship between the deceased and the applicant hence not a beneficiary of the estate. That he was not a dependant to claim reasonable provision. In that regard the court was referred to the case of *Re estate of Ndongu Kabugua (deceased)* (2019) eKLR.
  27. To support the position that not every relative is entitled to the estate where there is a spouse and children, the court was referred to the holding in the case of the *re Estate of Mugo Mwendu (deceased)* (2019) eKLR where the court quoted that case of *In the matter of the estate of Joshua Orwa Ojode (deceased)* succession case number 2015 Of 2012. Regarding costs, counsel submitted that the applicant is liable for payment of costs.



## Determination

28. I have considered the application herein, affidavit in support and response thereto. I have also considered oral evidence by both parties and their written submissions. The only issue that arise for determination is whether the applicant has met the criteria for revocation or annulment of a grant.
29. Before a court would attempt to revoke a grant, the party in whose favour the order is being sought must prove salient elements set out under Section 76 of the Law of Succession Act which 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 has ordered or allowed; 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.”
30. It is therefore upon the applicant to establish that the grant was obtained through fraudulent means, concealment of material information or that the proceedings to obtain the grant were defective in substance. This position was succinctly espoused in the case of *Jesse Karaya Gatimu Vs Mary Wanjiku Gitbinji* (2014) eKLR and Augustine Jonstone Moi Kirigia (*supra*)
31. According to the applicants, the petitioners obtained the grant herein without consulting his family (Masemo family). This was based on the ground that the deceased was his cousin being a niece to his grandfather.
32. However, in his evidence in chief and cross examination, he admitted that the deceased had no blood relationship with his (applicant) family. In particular, the applicant stated that the deceased was a daughter to Fatuma who was a niece to Mwagoya’s wife. Mzee Mwagoya therefore was not related to Fatuma by blood and by extension Fatuma’s daughter Mama Hasina the deceased herein.



33. Without any blood relationship in the order of consanguinity, the applicant had no right to be consulted by the respondents before filing this succession case. Further, the applicant did not claim nor prove dependency hence that option is not available in his favor to demand beneficial interest. To that extent it was not necessary to seek the applicants consent. In any event, the deceased only left children as survivors which is not disputed hence any other relative could only come on board as a dependant which is not applicable in this case.
34. Therefore, there was no element of fraud nor defective proceedings in substance in the circumstances.
35. Regarding non-disclosure that the subject property was held in trust of the Masemo property by the deceased, two questions are bound to arise; firstly, whether the applicant is claiming that the entire property belonged to the deceased. Secondly. Whether this court has jurisdiction to determine the issue of trust.
36. A perusal of a copy of title deed annexed to the application for revocation, L.R Kwale/Ng'ombeni/1104 was registered and title deed issued to Mama Hasina Mohamed, Kibibi Mwamadi Hamisi, Fatuma Mwinyi Mwakutema, Amina Salimu Mwacharo, Rukia Salim Mwacharo as joint owners each holding 1/5 share.
37. According to the confirmed grant only 1/5 of the said land belonged to the deceased hence the only available estate. For the applicant to demand that this court declares the entire title of LR Kwale/Ng'ombeni/1104 as belonging to the family of Masemo would be tantamount to asking this court to determine a substantial issue of land ownership dispute between himself and some other owners who are not deceased persons in this estate.
38. The court is only dealing with 1/5 of the estate being the deceased's share. To ask a probate court to determine issues of land ownership arising out of a claim hinged on trust is akin to asking this court to sit as an Environment and Land Court.
39. Issues regarding disputes on land based on claims of trust should be addressed though an ELC and not a probate court. See the case of *in re estate of Jonathan Kinyua Waititu (deceased)* (2013)eKLR where the court stated that;
- “the upshot is that this court lacks jurisdiction to resolve the property interest on land based in the alleged trust. The available option was for the objectors to articulate their claim by instituting proceedings against the estate of the deceased suing administrators to obtain orders on declaration of a trust leading to enforcement of their proprietary interest on the land.”
40. Similar position was held in the case of *In re-estate of Samuel Katheri (deceased)*( 2019) eKLR and *re-estate of Charles Muita Murmi (deceased)* (2022) eKLR where the court held that;
- “I need not emphasize that the duty of a succession court is to protect estate of the deceased person, and oversee the transition of the estate to the lawful beneficiaries. Where there is a dispute on the ownership of the property of the deceased person like in this instance the issue of ownership and trust can only be ventilated before the Environment and Land Court”.
41. In the instant case, the claim of the entire piece of land is to say the least an attempt to convert a probate court into a land court. Issues of disputes bordering on land ownership on account of trust are purely within the jurisdiction of the ELC hence this court has no jurisdiction. In the absence of any relationship between the petitioners and the applicant and considering that the deceased was together



with her children registered as absolute owners of the land they had no reason to look for 3<sup>rd</sup> parties for consent. For those reasons, I do not find any material non-disclosure of information.

42. In view of the above finding, it is my holding that the applicant has not proved his case to the required standard to warrant revocation of the grant. Accordingly, the application is dismissed with costs to the respondents.

**DATE, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 20<sup>TH</sup> DAY OF MAY 2022.**

**J N ONYIEGO**

**JUDGE**

