



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Lugano v Zauko & another (Succession Appeal 14 of 2021)
[2024] KEHC 14878 (KLR) (27 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14878 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
SUCCESSION APPEAL 14 OF 2021
WM MUSYOKA, J
NOVEMBER 27, 2024**

BETWEEN

STEPHEN LUGANO APPELLANT

AND

NAOMI MIHADI ZAUKO 1ST RESPONDENT

HARRIS AGINGA ASILIGWA 2ND RESPONDENT

(An appeal arising from orders made in the ruling by Hon. RM Ndombi, Senior Resident Magistrate, SRM, in Vihiga PM CSC No. 45 of 2015, of 24th October 2019)

JUDGMENT

1. The appeal herein arises from a decision of the trial court, in Vihiga PM CSC No. 45 of 2015, of 24th October 2019. The grounds of appeal revolve around the trial court erring in not considering the entire evidence on record, and failing to appreciate the application it was considering; the trial court erring in finding that the subject application was without merit, and that the matter should have been handled first at the Environment and Land Court; the trial court failing to find that the grant was confirmed without involving him as a purchaser; and the trial court failing to find that orders that he was aggrieved about had been made by the trial court, and not the Environment and Land Court.
2. The orders, made on 24th October 2019, which form the basis of the appeal, were made on an application for revocation of grant, filed on 2nd September 2019, dated 26th August 2019.
3. The deceased person in Vihiga PM CSC No. 45 of 2015, Ester Mudomu M'Mbo, had died on 12th August 2008, according to the certificate of death on record, serial number 0463165, of 6th August 2015. The letter from the Chief of Wodanga Location, dated 20th January 2016, introduced the family to the court. It was indicated, in the letter, that the deceased had 4 daughters and 4 sons, being the late Nifredah Kaseza, Finike Malesi Imali, Margaret Kigasi, Mary Kahunguka, the late Enock Amuyunzu,



- Nafas Uluyayi, Aggrey Vulimu, the late Elisha Odanga, Javan Amuyunzu and Caleb Amisi Luyai. Stephine Lugano and Harris Aginga Asiligwa were listed as persons with purchasers interests. Stephine Lugano is the appellant in these proceedings, and I shall refer to him in this judgment as such. Harris Aginga Asiligwa is named as the 2nd respondent in these proceedings, and I shall refer to him as such.
4. Representation to the intestate estate of the deceased was sought by Naomy Mihadi Zauko, who is named in this appeal as the 1st respondent, and I shall refer to her hereto as such, vide a petition, that she filed in Vihiga PMCS No. 45 of 2015, on 25th August 2015. She listed the survivors of the deceased as herself, Aviola Fenike Imali, Mary Kahunguka Odanga, Jackson M'Mbo Amuyunzu and Caleb Amisi Luyai, whose relationship with the deceased was not disclosed. Kakamega/Lusengeli/794 was listed as the asset that he died possessed of. Liabilities were listed as the appellant, the 2nd respondent and Patrick Chesi Lumasai. Letters of administration intestate were made to the 1st respondent on 22nd January 2016, and a grant in those terms was duly issued to her, bearing an even date.
 5. The said grant was confirmed on 2nd August 2016, founded on a summons for confirmation of grant, dated 23rd June 2016. In that summons, the survivors of the deceased were listed as the 1st respondent, Aviola Fenike Imali, Mary Kahunguka Odanga, Jackson M'Mbo Amuyunzu and Caleb Amisi Luyai. The proposal was that Kakamega/Lusengeli/794 be devolved wholly upon the 1st respondent. A consent, in Form 9, under rule 40(1) of the Probate and Administration Rules was attached, purportedly executed by the 1st respondent, Aviola Fenike Imali, Mary Kahunguka Odanga, Jackson M'Mbo Amuyunzu and Caleb Amisi Luyai. That consent had been filed simultaneously with a certificate of official search, on Kakamega/Lusengeli/794, to disclose a property registered in favour of the deceased in 1991, with a caution lodged at the registry in 2008 by Javan Amuyunzu William, and a restriction filed by the appellant sometime in 2015. The grant was confirmed on the basis that the same was not opposed, and a certificate of confirmation of grant, dated 2nd August 2016, in the terms proposed in the confirmation application, was issued.
 6. It was those confirmation orders that provoked the filing of the summons for revocation of grant, dated 26th August 2019. The said application targeted the orders made on 2nd August 2016, for setting aside, cancellation of the certificate of confirmation of grant issued based on those orders, and a rehearing of the summons for confirmation of grant. The appellant claimed that he had bought ½ of Kakamega/Lusengeli/794, from the deceased in 2008, and that, although he had been captured as a liability in the petition, he was not involved in the confirmation process. That application was canvassed by way of oral submissions. The trial court dismissed the application, on the basis that the 1st respondent was a lawful administratrix, and that what the appellant was concerned about was survey and demarcation of the land that he was entitled to.
 7. The matter is fairly straightforward, whether the trial court was wrong in coming to the conclusions that it came to.
 8. The starting point should be with the fact that the application, dated 26th August 2019, was for setting aside of orders that had been made on 2nd August 2016, cancellation of a certificate of confirmation of grant that was subsequently issued based on those orders, and a rehearing of the confirmation application. The rest of the prayers were ancillary. The primary focus of the application, dated 26th August 2019, was on the confirmation orders.
 9. The discretion given to the court, under section 76 of the *Law of Succession Act*, Cap 160, Laws of Kenya, is for revocation of grants. The *Law of Succession Act* does not define a grant, but section 53 thereof does describe the kinds of grants that a court may make, being a grant of probate of a Will, and grants of letters of administration, either with the will annexed or intestate. The Probate and



- Administration Rules, which are made under section 96 of the *Law of Succession Act*, do define a grant, at Rule 2, to mean a grant of representation, whether of probate, or of letters of administration with or without a Will, to the estate of a dead person.
10. Under section 76 of the *Law of Succession Act*, the court has discretion to revoke a grant on 3 general grounds. See Joyce Ngima Njeru & another vs. Ann Wambeti Njue [2012] eKLR (Githinji, Nambuye & Maraga, JJA) and In re Estate of Luka Modole (Deceased) [2019] eKLR (Musyoka, J).
 11. The first general ground relates to the process of obtaining the grant. There are 2 situations under this first general ground. The first is where the process was defective, in some way, in terms of a flaw in the process of obtaining the grant. In such a scenario that grant would be a candidate for revocation. See Mwathi vs. Mwathi & another [1995-1998] 1 EA 229 [1996] eKLR (Gicheru, Kwach and Shah, JJA), In Re the Estate of Dr. Arvinder Singh Dhingra (Deceased) [2001] eKLR (Aluoch, J), Musa vs. Musa [2002] 1 EA 182 (Ringera, J), In Re Estate of Naftali (Deceased) [2002] 2 KLR 684 (Waki, J), In Re Estate of James Kiarie Muiruri (Deceased) [2004] eKLR (Koome, J) and Patrick Ng'olua M'Mungania vs. Fredrick Kimathi Ng'olua & 8 Others [2013] eKLR (JA Makau, J). The second situation would be where there was fraud, misrepresentation or concealment of matter from the court. See Samwel Wafula Wasike vs. Hudson Simiyu Wafula [1993] LLR (Kwach, Omolo & Tunoi JJA), Yasmin Rashid Ganatra & another (Suing as legal representatives of Rashid Juma Kassam) vs. Gulzar Abdul Wais [2015] eKLR (Waki, Nambuye & Kiage, JJA), Susan Wangithi Muchungu & 6 others vs. James Thurui Mucungu & another [2016] eKLR (Limo, J), In re Estate of Magangi Obuki (Deceased) [2020] eKLR (Wendoh, J), In re Estate of Jeremiah Njoroge (Deceased) [2021] eKLR (Onyiego, J) and Chepkerich vs. Murei & another [2022] KEHC 3115 (KLR)(Ogola, J).
 12. The second general ground is about the process of administration. Where the administration is demonstrated to have failed, again the grant would be a candidate for revocation. This covers situations where the administrator fails to do things that are commanded of him by the law. 3 such things are identified, under section 76(d)(i)(ii) and (iii), as the failure to apply for confirmation of grant within the timelines given in law, the failure to exercise diligence in the administration of the estate, and the failure to render accounts as and when required by the law. This area may be said to be about failure of administration. See In re Estate of Festo Akwera Kusebe (Deceased) [2019] eKLR (Musyoka, J), In re Estate of Kiruthu Kimiti (Deceased) [2021] eKLR (Mutuku, J), In re Estate of Peter Ngumbi Mulei (Deceased) [2021] eKLR (Odunga, J) and In re Estate of the Late Njonjo Kihiga (Deceased) [2022] eKLR (Chemitei, J).
 13. The third general ground is where the grant has become useless and inoperative owing to subsequent events. Such events are not defined in the *Law of Succession Act*, but would include where a sole administrator dies, or is adjudged bankrupt, or is rendered so physically or mentally infirm as to be unable to discharge his duties as such. See Julia Mutune M'Mboroki vs. John Mugambi M'Mboroki & 3 others [2016] eKLR (Gikonyo, J), In re Estate of Goolamhoosain Manjee Keshavjee (Deceased) [2017] eKLR (Onyiego, J), In re Estate of Prisca Ong'ayo Nande (Deceased) [2020] eKLR (Musyoka, J) and In re Estate of Kamatu Kabara (Deceased) [2021] eKLR (Gitari, J).
 14. The application, dated 26th August 2019, was not framed as founded on the grounds specified in section 76 of the *Law of Succession Act*. In the first place, that application did not seek revocation of a grant of representation, but rather it sought the setting aside of confirmation orders, the cancellation of a certificate of confirmation of grant, and the rehearing of the confirmation application. The discretion given, in section 76, has nothing to do with the orders sought in that application, dated 26th August 2019. The discretion is confined to the revocation of a grant of representation.



15. Secondly, the application was not founded on any of the grounds in section 76 of the [Law of Succession Act](#), which I have discussed in paragraphs 11, 12 and 13, hereabove. It was not about a grant that had been obtained on the basis of a process that was defective; or tainted by fraud, misrepresentation and concealment of matter from court. Neither was it about failure of administration, where an administrator had failed to apply for confirmation of grant within the timelines given in law, or where an administrator had failed to diligently administer the estate, or to render accounts. Nor was it alleged that the grant had become useless or inoperative, on account of changed circumstances. It was not enough to merely allege that the application was brought under section 76 of the [Law of Succession Act](#), the substance of the application ought to have been on the 3 thematic areas set out in that provision. An alleged application for revocation of a grant, which is not founded on any of those 3 themes, would be dead in water.
16. The trial court captured that in its ruling, when it noted that the revocation application was more about how survey and demarcation works were being carried out on the ground, but not about how the grant was obtained, or how the estate was managed, or the incidence of an inoperative or useless grant. Survey works and demarcations of land are matters which are governed by land legislation, to wit the [Land Act](#), Cap 280, Laws of Kenya, and the [Land Registration Act](#), Cap 300, Laws of Kenya, and not the [Law of Succession Act](#). These statutes carry provisions which state that any disputes about matters that are governed and regulated by them should be resolved by the Environment and Land Court and the enabled subordinate courts. Those provisions are in sections 2 and 150 of the [Land Act](#) and sections 2 and 101 of the [Land Registration Act](#). A court, seized of a probate or succession matter, ought not get embroiled in matters around surveys and demarcations, following confirmation of a grant, and arising from the transmission process.
17. It is with that in mind that some courts have held that once a grant is confirmed, a probate court would pretty much be functus officio, and issues that arise after confirmation, and during transmission of the estate, in accordance with the confirmation orders, ought to be placed before the land court, as such are regulated and governed by the applicable land legislation, and not the [Law of Succession Act](#). See *Kantaben Pranal Shah vs. Pradeep Virji Shah & another* [2006] eKLR (Kubo, J), *Beatrice Wangui Kamau alias Beatrice Wangui Kagunda vs. John Kariuki Kamau & another* [2016] eKLR (Ombwayo, J), *In re Estate of Wangechi Wangombe* [2020] eKLR (Ngaah, J) and *In re Estate of Daniel Khasievera Anusu (Deceased)* [2022] eKLR (Musyoka, J). Quite often, probate courts do make orders on transmission of estates, relating to such matters as survey and demarcation of land. However, that does not signify exercise of jurisdiction properly vested. It would be more about prudence, pragmatism and a desire to do justice, and to keep the matter moving forward, otherwise jurisdiction lies elsewhere.
18. As a follow-up to the above, I should, perhaps, add that the succession or probate court does have jurisdiction, in an application for revocation of grant, to make the orders that were sought in the application, dated 26th August 2019, that is to say the setting aside of confirmation orders, cancellation of the certificate of confirmation of grant, and the reversal of the transmission process. However, such orders are secondary or ancillary or incidental to the primary order, which is revocation of the grant of representation. They are secondary or incidental orders as they arise from and are consequential to the revocation of the grant. They cannot be made independently of a determination on whether or not the grant of representation is to be revoked, for they ought to flow from that determination, for the discretion, under section 76, is for revocation of the grant, and nothing else. An application, under section 76, can only be mounted for revocation of the grant, and any other prayers, such as those sought in the application, dated 26th August 2019, would only be thrown-in as secondary or consequential prayers, and orders, on such secondary or incidental prayers, would be made under the inherent powers



conferred by Rule 73 of the Probate and Administration Rules, not section 76 of the *Law of Succession Act*.

19. The other issue is that the appellant was dissatisfied with what happened at confirmation of the grant. The discretion, granted under section 76 of the *Law of Succession Act*, is not designed to address problems with the confirmation process. Section 76(d)(i) does make reference to the confirmation process, but that is limited to situations where the administrator fails to apply for confirmation of their grant within the time allowed in law. It has nothing to do with where he, in fact, files a confirmation application, whether within or outside the time limits, and orders are made in that application which displease any of the parties. The discretion, for revocation of grant, is not available as a remedy to address such displeasures. See *In Re Estate of Gitau (Deceased)* [2002] 2 KLR 430 (Khamoni, J), *In Re Estate of Ngugi (Deceased)* [2002] 2 KLR 434 (Khamoni, J) and *Mburu Njoroge vs. Frederick Mburu Njoroge* [2014] eKLR (Ngaah, J).
20. Related to the above, is the presumption, by some parties, that the remedy, under section 76 of the *Law of Succession Act*, is akin to the right of appeal or review or setting aside of orders of the probate court, of whatever character, including those relating to confirmation of grant. So that a party, who is aggrieved by orders made by a probate court, on confirmation of grant, for example, rushes to file a revocation application, under section 76, for revocation of the grant or of the setting aside of the confirmation orders, on grounds, such as those advanced in the application, dated 26th August 2019, instead of filing an appeal against, or a review application on, or an application for setting aside of, the confirmation orders. I would reiterate everything that I said in the foregoing paragraphs of this judgment, that the remedy for revocation of grant is not a silver bullet for all the problems that may arise within the succession process, for it is limited to the 3 general thematic areas discussed above. It is not designed as a substitute for appeal, review or setting aside of court orders.
21. I believe I have said enough, to demonstrate that the trial court did not err in any way, in dismissing the application, dated 26th August 2019. The appellant, perhaps, did have a good case, on the facts that he placed before the court, but, most certainly, that was not a case for revocation of the grant. I find no merit in the appeal herein, for the reasons given. I shall, as I hereby do, disallow it. The consequence shall be that the appeal herein is dismissed, the orders made in Vihiga PM CSC No. 45 of 2015, on 24th October 2019, are hereby confirmed, and upheld. There shall be no order on costs. The appeal herein is disposed of in those terms. Let the original trial court records be returned to the relevant registry. The instant file shall be closed. It is so ordered.
22. The appeal herein should have been delivered on or about 31st March 2023. It, however, transpired that the original trial court records availed, in respect of Vihiga PM CSC No. 45 of 2015, were incomplete. I delivered a ruling herein on 21st July 2023, where I directed that the complete record be availed, to facilitate finalisation of the judgment. Those trial court records were not available until October 2024, when the same were forwarded to me, vide a letter from the Deputy Registrar, Vihiga High Court, dated 8th October 2024. That is the background to the delayed delivery of this judgment. The parties had no hand in the delay, and, for that reason, I shall apologise to them, as I hereby do, on behalf of myself and all the registries involved. The delay is highly regretted.

DELIVERED VIA EMAIL, DATED AND SIGNED, IN CHAMBERS, AT BUSIA, THIS 27TH DAY OF NOVEMBER 2024.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.



Advocates

Mr. Osewe, instructed by Owiti Otieno & Ragot, Advocates for the appellant.

Mr. Chanzu, instructed by ZK Yego Law Offices, Advocates for the respondents.

