



REPUBLIC OF KENYA



**Epere v Igasia & 3 others (Succession Appeal E040 of 2021)
[2023] KEHC 21305 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21305 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
SUCCESSION APPEAL E040 OF 2021
WM MUSYOKA, J
JULY 28, 2023**

BETWEEN

REUBEN ABWANA EPERE APPELLANT

AND

GEORGE IGASIA 1ST RESPONDENT

PATRICK SANGALO 2ND RESPONDENT

LINUS OMUSOLO 3RD RESPONDENT

VINCENT OTULIA 4TH RESPONDENT

(an appeal arising from orders made in the ruling of Hon. PY Kulecho, Senior Resident Magistrate, SRM, in Busia CM CSC No. E198 of 2020, of 4th October 2021)

JUDGMENT

1. The appeal herein arises from a decision of the trial court, in Busia CM CSC No E198 of 2020, of October 4, 2021. The grounds of appeal revolve around the appellant being known to the respondents, and whether he was known as Reuben Obwani Ebere or Reuben Abwana Epere not being of any moment; the court erring in finding and holding that the grant was obtained fraudulently by making of false statement and concealment of matter from the court; whether the certificate of death presented was forged or not; the court not appreciating that the appellant was claiming only a portion of North Teso/Abolo/1001 and not the entire parcel; treating the issue of fraud causally; and failing to consider submissions. The appellant would like the said decision set aside, and replaced with a finding that the appellant was a beneficiary of the 2 hectares out of the estate.
2. The impugned ruling, of October 4, 2021, turned on a summons for revocation of grant, dated February 5, 2021, by the respondents. It had been argued that the grant had been obtained fraudulently, as the appellant, who had obtained the grant sought to be revoked, had relied on a forged



- certificate of death, had lied to be a son of the deceased, had never filed any citation, had left out some of the beneficiaries, had no legitimate claim to the estate as beneficiary or purchaser, and that he lacked financial clout to administer the estate whose value was in excess of Kshs 5,000,000.00.
3. To that application the appellant filed a reply, vide an affidavit that he swore on February 17, 2021. He asserted that he caused citations to issue on the respondents, which were served, but the respondents did not petition for representation. He denied filing the cause without authority, and of practicing deceit, misrepresentation and production of false documents. He stated that he had disclosed that his interest was that of a decree-holder for 2 acres out of an asset of the estate. He registered no objection to the respondents being made co-administrators.
 4. The respondents filed a further affidavit, on February 22, 2021, to react to the reply by the appellant. They averred to be unaware of the filing of the citations, for none was served on them, and that the citation on record had been served by a person known as Reuben Obwani Ebere against the 1st respondent. They stated that they did not know the said Reuben Obwani Ebere, and his role in the citation. They stated that they were not aware of any decree having been obtained against the deceased or his estate, and, even if such a decree existed, it could not be executed through or in the succession cause. They stated that the appellant had not come to court with clean hands, and was too old to be an administrator.
 5. Directions were taken on March 8, 2021, that the application would be disposed of by way of *viva voce* evidence, and that statements be filed. Subsequently, a number of statements were filed in the cause. The said directions were reversed on July 26, 2021, when it was directed that the revocation application be disposed of by way of written submissions. Written submissions were filed, and the trial court delivered the impugned ruling on October 4, 2021.
 6. In the said ruling, the trial court noted that the deceased had been survived by at least 10 children, sons and daughters, yet only 1 of them was cited to take out representation, and held that alone was a fertile ground for challenging the citation proceedings. The court further noted that the appellant had not described himself as a son of the deceased, but rather as a purchaser. It was ruled that the citation proceedings were not part of the matters for determination in the revocation application, although it went ahead to consider that the citation issued at the instance of Reuben Obwani Ebere, yet the grant was issued in the name of Reuben Abwana Eperere. It was averred that the discrepancy was not explained, and for that reason the appellant had no authority to petition for representation given that the orders out of the citation proceedings were not directed at him. On the falsification of the certificate of death, the court noted that the appellant relied on a certificate of death dated August 1, 2020, while that issued to the respondents was issued on August 31, 2020, based on a burial permit dated August 3, 2020. It was noted that a certificate of death could not legitimately issue before a burial permit was issued, for it should be based on the burial permit. Secondly, it was noted that a certificate of death was a personal document, issued to close relatives of the deceased. The court declared the certificate of death used by the appellant a forgery, and proceeded to have it expunged from the record. The grant was annulled. The court struck out the petition on grounds that the proceedings had been commenced using a false document, and declined to appoint new administrators.
 7. Directions on the disposal of the appeal were given on May 22, 2023, for it to be canvassed by way of written submissions. Both sides have complied, by filing their respective written submissions. I have read through the same, and noted the arguments made.
 8. The proceedings before the trial court turned largely on the citation proceedings in Busia CM miscellaneous citation No. 39 of 2020. The original record in those proceedings was not placed before me, and I am not able to tell whether the same was before the trial court, but it is quite clear that



the same was initiated by Reuben Obwani Eber, and the order of Hon PA Olengo, Senior Principal Magistrate, SPM, of November 4, 2020, was to that individual, to initiate succession proceedings in respect of the estate herein. However, instead of the said Reuben Obwani Eber initiating these proceedings, they were initiated by another, going by the name Reuben Abwana Epere, the appellant herein. When the issue of these names was raised in the revocation application, the appellant said it was a minor mistake that the trial court should not have lunched upon. With respect, I do not think it is that simple. The order of the names that make up the corporate name of an individual is at the core of identity. Reuben Obwani Eber and Reuben Abwana Epere are different names. The only name in common within the 2 sets of names is Reuben. The order was given to Reuben Obwani Eber, once the issue was raised, that it was not Reuben Obwani Eber who petitioned, but the appellant, the appellant acquired a duty to explain the discrepancy. One way would have been to explain that it was a mere typographical error, or that both names refer to him. I doubt that it was a case of typographical error, for he had exhibited documents in his witness statement, dated April 8, 2023, what I believe are supposed to be proceedings and determination of a Land Tribunal, in case number 2 of March 9, 2005. That document reflects a dispute between Reuben Obwani Eber and the deceased. If all these names referred to him, then the appellant ought to have indicated the official name, and the alias or aliases. I agree with the trial court, the succession cause was initiated by a person other than that to whom leave was granted by Hon Olengo, SPM, on November 4, 2020.

9. The other argument is that the appellant did not list all the survivors of the deceased, being his children. That is true, he listed 6, the respondents said the total number of children was 10. He can, however, be excused. He is not a member of the family, and comes in as a creditor, he might not have had information on all the children of the deceased. He still had the time to ascertain all the survivors and other persons beneficially interested in the estate, after obtaining representation, for the purpose of applying for confirmation of the grant, as is required by the proviso to section 71(2) of the *Law of Succession Act*, cap 160, Laws of Kenya, and rule 40(4) of the *Probate and Administration Rules*. He is also accused of describing himself as a son of the deceased. The trial court ruled that that was not the case, and I agree. It is true, that in the petition he says that he related to the deceased by way of being a son, but in the affidavit in support of the petition, he does not list his name amongst that of the children, instead his name appears in the column for liabilities. Of course, this amounts to presenting mixed positions to the court, one as a member of the family, and the other of an outsider claiming as a creditor. However, it is clear that he comes in as a creditor, and I do not believe that there was an intent to lie, with respect to the entry that he was a son.
10. On the matter of the certificate of death used to initiate the cause, the certificates of death lodged herein by both sides indicate that the deceased died on July 30, 2020. It is highly unlikely that his death would have been registered 2 days later. The burial permit on record was issued on August 3, 2020. It is a matter of notoriety that certificates of death are issued upon presentation of a burial permit. Questions would abound, where a certificate of death is issued before a burial permit is given. One would wonder what documentation was placed before the registrar of births and deaths as evidence that the deceased had died, for purpose of the registration of the death on August 1, 2020? I agree with the trial court, the details in the certificate of death presented by the appellant should raise eyebrows about the integrity of the process through which it was procured. It raises questions, therefore, about the integrity of the appellant, and his fitness for appointment to an office of trust, such as that of an administrator.
11. However, I think the action taken, of striking out the succession cause, on that account was too drastic. I believe the shadow around the certificate of death should only point to the lack of integrity on the part of the appellant, and it should not affect the standing of the cause itself, since there is no dispute on the fact that the deceased died, on the dates indicated in the certificates of death presented by the 2 sides. The cause is about the death, and where there is concurrence on the death, there would be no



reason to dismiss the petition, on grounds that the certificate of death, presented to prove the death, although containing the correct details on the death, was obtained through a shadowy process. The best way forward would be to have the appellant removed as administrator, and to have the impugned certificate of death replaced with the one processed through the right channels. Otherwise, having the proceedings, in Busia CMCS No E198 of 2020, halted and the file closed, would send the parties back to square one, where they will have to file fresh proceedings, get the same gazetted, and all that. It will take them another year, before they can apply for distribution of the estate. That would not serve the interests of justice.

12. Overall, it is my finding that the decision by the trial court, to revoke the grant, was properly founded, and I hereby uphold it. However, the trial court ought not have dismissed the petition, and declared that the succession proceedings, in Busia CMCS No E198 of 2020, could not be continued for lack of integrity in the certificate of death used to initiate them. The petition had already been determined, when the grant was made on January 26, 2021. The petition was no longer pending. It was a petition for a grant of representation, and once the grant was made, the petition was exhausted or spent. There was, therefore, no petition available for dismissal. The only thing the trial court could do, and was supposed to do, was to revoke the grant, and do no more, for that is the only mandate given to it under section 76 of the *Law of Succession Act*. It could, though, appoint fresh administrators, so long as there was proof that the person, in respect of whom the succession cause was initiated, was in fact dead.

13. The final orders are:

- a. That the appeal herein has no merit, and it is hereby dismissed
- b. That I hereby substitute the order dismissing the petition with an order appointing the respondents herein, that is to say Geoffrey Igasia, Patrick Sang'alo, Linus Omusolo and Vincent Otulia, administrators of the estate of the deceased;
- c. That a grant of letters of administration intestate shall issue to them out of Busia CMCS No E198 of 2020;
- d. That the new administrators shall file a summons for confirmation of their grant, wherein they shall disclose all the children of the deceased, and any other persons beneficially entitled, and they shall place on record the authentic certificate of death to replace that which was expunged from the record;
- e. That the appellant shall be at liberty to present his case, for entitlement to the 2 acres he claims in the estate property, by way of an affidavit of protest, once the administrators apply for confirmation;
- f. That the original trial court records shall be returned to the trial court, for further handling, along the lines ordered above, while this appeal file shall be closed;
- g. That each party shall bear their own costs; and
- h. That any party aggrieved by the orders made above, has 30 days, to move the Court of Appeal, appropriately.

14. Orders accordingly.

**JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS
.....28TH..... DAY OFJULY..... 2023**

WM MUSYOKA



JUDGE

Mr. Arthur Etyang, Court Assistant.

Appearances

Mr. Odhiambo, instructed by Odhiambo Benjamin FO & Company, Advocates for the appellant.

Mr. Kanyoko, instructed by Kanyoko Lewis & Comapny, Advocates for the respondents.

