



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Estate of Pila Musa Ang'aha alias Pila Ang'aha (Deceased) (Succession Cause 97 of 2021) [2023] KEHC 20943 (KLR) (26 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20943 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
SUCCESSION CAUSE 97 OF 2021**

**JN KAMAU, J**

**JULY 26, 2023**

**IN THE MATTER OF THE ESTATE OF PILA MUSA  
ANG'AHA ALIAS PILA ANG'AHA (DECEASED)**

**BETWEEN**

**DAMARIS ONEA OKINDA ..... OBJECTOR**

**AND**

**EPHAH AKHATINDIKO ..... 1<sup>ST</sup> PETITIONER**

**WILSON OPWOKO ANG'AHA ..... 2<sup>ND</sup> PETITIONER**

**AND**

**ANNE WAKA OYALO ..... RESPONDENT**

**RULING**

**Introduction**

1. In her Summons for Revocation/Annulment of Grant dated 28<sup>th</sup> October 2022 and filed on 1<sup>st</sup> November 2022, the Objector herein had sought for orders that the court be pleased to annul the grant of letters administration issued and confirmed on 6<sup>th</sup> September 2019, that the court revoke registration of certificate of confirmation of grant relating to LR No West Bunyore/Emusire/1053(hereinafter referred to as “ the subject property”) in the names of the Objector and the Respondent herein and its further transfer and demarcation from the name of the deceased to the name of the Respondent or third party and that the court be pleased to set aside the orders of 22<sup>nd</sup> January 2021. She swore her Affidavit in support of her said application on 28<sup>th</sup> October 2022.
2. In opposition to the said Summons for Revocation/Annulment of Grant, the Respondent filed Replying Affidavit on 26<sup>th</sup> January 2023. She swore the same on 18<sup>th</sup> December 2022. On the said date



of 26<sup>th</sup> January 2023, she also filed a Notice of Preliminary Objection also dated 18<sup>th</sup> December 2022 against.

3. It was her case that the aforesaid application was an abuse of the court's process, had been brought without leave of court and that the court was functus officio.
4. Musyoka J who was seized of this matter directed the parties to file Written Submissions in respect of the Petitioner's Preliminary Objection. The Objector's Written Submissions were dated 2<sup>nd</sup> February 2023 and filed on 3<sup>rd</sup> March 2023. The Respondent filed two (2) sets of Written Submissions. The first one was dated and filed on 31<sup>st</sup> January 2023 while her Supplementary Submissions were dated 9<sup>th</sup> March 2023 and filed on 10<sup>th</sup> March 2023. This Ruling is based on the said Written Submissions which both parties relied upon in their entirety.

### **Legal Analysis**

5. The Respondent submitted that the Objector had come to court with unclean hands as she failed to inform it court that the applications she had made reference to were all dismissed. She also stated the Objector had filed several applications which she did not serve but were subsequently dismissed. She asserted that this was delaying the timeous disposal of this matter.
6. She added that on 18<sup>th</sup> December 2021, the Objector filed a Notice of Appeal dated 15<sup>th</sup> February 2021 intending to challenge the court's order dated 22<sup>nd</sup> January 2021 which in essence settled the matter herein because the only step remaining was for the Deputy Registrar to sign necessary transfer documents to complete the process but that upon realising that the said Notice of Appeal had been overtaken by events, she filed an application dated 16<sup>th</sup> February 2021 seeking to stay of the said order and enlargement of time for filing an appeal which was granted but that she again failed to file an appeal.
7. She pointed out that in violation of the order dated 4<sup>th</sup> November 2022 which ordered that the status quo of the subject property be maintained, which was that the same had been demarcated and beacons affixed to distinguish each beneficiary's share, the Objector had ploughed the entire subject property at her detriment.
8. She argued that it was not true that the surveyor's notice of his visitation was served late upon the Objector as she was present on the material day. She was categorical that it was common knowledge that the application for review was dismissed and that the order of 22<sup>nd</sup> January 2021 effectively concluded this matter.
9. She asserted that save for the Objector herein, all beneficiaries of the deceased had given their consent. She averred that the Objector disrupted the entire process of demarcation and refused to hand over her identification card and KRA pin number prompting her to ask the court to grant the aforesaid orders.
10. She denied that there was any fraudulent transfer to the Petitioners after the Grant was confirmed and the subsequent rectification to correct some typographical errors.
11. She blamed the Objector for not challenging her powers to distribute the deceased's estate and argued that she was only a beneficiary like her. She also blamed her for the delay of approximately eight (8) years and asserted that litigation had to come to an end.
12. She further argued that this court was functus officio and that the firm of Mukabi & Co Advocates required leave of court before coming on record.
13. On her part, the Objector submitted that abuse of process could lie in either proper or improper use of the judicial process in litigation. She pointed out that Arthur Pila Ang'aha filed an application for



review but that he died on 31<sup>st</sup> July 2020 before he prosecuted the same. The said application was subsequently dismissed. She stated that she only became aware of the dismissal of the same in 2022 when she instructed M/S D.C Chitwa & Co Advocates to represent her.

14. She did not deny having filed an application dated 16<sup>th</sup> February 2021. She asserted that the said application was never prosecuted and was neither dismissed (sic) thus the application could not be an abuse of the court process. She pointed out that the same applied to the Notice of Appeal that was filed in that it was never prosecuted as she believed that handling the review application would achieve the same justice she desired out of the appeal.
15. She denied moving the court late but averred that she filed her application on 11<sup>st</sup> November 2022 because she was served with the land surveyor's notice a few days to his visit. She added that the orders were served upon the Respondent on 14<sup>th</sup> November 2022 after the demarcation was done but that the court ordered that status quo be maintained as at 4<sup>th</sup> November 2023(sic).
16. She contended that the firm of Mukabi & Co Advocates was properly on record as they filed a Notice of Change dated 28<sup>th</sup> October 2022 on 1<sup>st</sup> November 2022. She was emphatic that everyone had a right to access justice as enshrined in Article 48 of the Constitution of Kenya, 2010 hence she had the right of seeking the services of any advocates without prejudice.
17. She invoked Section 76 of the Law of Succession Act and asserted that a grant of representation whether or not confirmed could be revoked or annulled at any time either on application by any interested party or by the court on its own motion.
18. It was her contention that the Grant issued herein was defective in nature for lack of consent of all the beneficiaries, the distribution of the land parcel was not in accordance with the acreage and the transfer by the personal representative was fraudulently registered. It was therefore her averment that she was trying to get what was just and that she was not vexatious as indicated by the Respondent.
19. She was emphatic that it was in the interest of justice the application for revocation be allowed to bring an end to this matter and that the Respondent's Preliminary Objection be dismissed.
20. A preliminary objection has been defined by the courts in a number of cases. In the celebrated case of *Mukisa Biscuits Manufacturing Co Ltd vs West end Distribution Ltd* [1969] EA 696, the court defined it as:

“ a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose the suit.... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.
21. A preliminary objection can only therefore be raised on a pure point of law which if determined would dispose the entire case.
22. The Respondent had argued that the court was functus officio having confirmed the Grant herein. There was no doubt that her Preliminary Objection was thus well founded on a pure point of law. The only issue was whether or not the said Preliminary Objection was merited.
23. This court had due regard to the case of *Telkom Kenya Limited vs John Ochanda (Suing On His Own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Limited)* [2014] eKLR where the Court of Appeal held that functus officio was an enduring principle of law that prevented the re-opening of a matter before a court that rendered the final decision thereon.



24. The pertinent question herein was whether the order issued confirming the Grant could be re-opened. The answer to that question is to be found in Section 76 of the [Law of Succession Act](#) Cap 160 (Laws of Kenya). The said provision states that:-

“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 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 material particular; or
  - e. That the grant has become useless and inoperative through subsequent circumstances.”
25. It was evident from the above provision of the law that applications for revocation of grant were not limited by time and could be made at any time by any interested party or by the court on its own motion.
26. Having said so, even though a grant and/or confirmed grant could still be revoked, it could only be revoked and/or annulled if a good case for such revocation and/or annulment had been made within the ambit of Section 76 of the [Law of Succession Act](#).
27. Notably, the review application was filed by Arthur Pila Ang’aha and it was dismissed after he died. The Objector herein filed the Summons for Revocation/Annulment of Grant in her capacity as beneficiary to the deceased’s estate.
28. Undoubtedly, she had the locus standi to file the present Summons for Revocation of Grant. She was an interested party in the context of Section 76 of the Law of Succession. Having approached the court under the said Sections 76 of the [Law of Succession Act](#), she was entitled to a hearing, no matter the merits of her application and did not require any leave of this court to file such an application.
29. Indeed, in his further order of 4<sup>th</sup> November 2022, Musyoka J directed that the Summons for Revocation/Annulment of Grant dated 28<sup>th</sup> October 2019 (sic) be served and the same be mentioned before the Deputy Registrar for directions. The Respondents’ submission that the Summons for Revocation of Grant was res judicata thus fell by the way side.
30. Going further, the Objector had also sought the order of 22<sup>nd</sup> January 2021 be set aside. In his Ruling of 30<sup>th</sup> July 2020, Musyoka J acknowledged the importance of the Objector’s application dated 18<sup>th</sup>



February 2020 that had sought the setting aside of the orders of 6<sup>th</sup> September 2019 being heard first as the same had a bearing on the distribution of the assets of the deceased's estate.

31. The Respondent's argument that the delay in settling this matter was caused by the Objector as she was fond of filing many applications that were eventually dismissed by court was best advanced during the hearing of the Summons for Revocation/Annulment of Grant as the Objector had sought a substantive prayer to set aside the orders of 22<sup>nd</sup> January 2021 in which the Respondent's Notice of Motion application dated and filed on 19<sup>th</sup> June 2020 seeking orders that the Deputy Registrar sign the Transfer documents was allowed after she failed to oppose the said application and/or attend court.
32. The issuance of a certificate of confirmation of grant cannot be equated to a judgment as contemplated in Order 9 Rule 9 of the Civil Procedure Rules, 2010 which would require the firm of M/S Mukabi & Co Advocates to come on record as succession proceedings are continuous and seamless. Indeed, survivors continuously stepped into the shoes of beneficiaries to a deceased estate whenever they passed away or were incapacitated by old age, illness or any other cause from being parties in the succession proceedings.
33. Order 9 Rule 9 of the Civil Procedure Rules provides as follows:-
  - “When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court-
  - a. upon an application with notice to all the parties; or
  - b. upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”
34. This court was thus not persuaded that the Objector's present advocates ought to have sought leave before representing her as had been submitted by the Respondent herein. The said Notice of Change of Advocates that was dated and filed on 29<sup>th</sup> October 2020 by the firm of M/S Mukabi & Co Advocates was sufficient for purposes of acting for the Objector herein.

### **Disposition**

35. For the foregoing reasons, the upshot of this court's decision was that the Respondent's Preliminary Objection dated 18<sup>th</sup> December 2022 and filed on 26<sup>th</sup> January 2023 was not merited and the same be and is hereby dismissed. Costs of the Preliminary Objection will be in the cause.
36. It is hereby directed that the Summons for Revocation/Annulment of Grant dated 28<sup>th</sup> October 2022 and filed on 1<sup>st</sup> November 2022 be listed for directions on 30<sup>th</sup> October 2023.
37. It is so ordered.

**DATED AND DELIVERED AT VIHIGA THIS 26<sup>TH</sup> DAY OF JULY 2023**

**J. KAMAU**

**JUDGE**

