



REPUBLIC OF KENYA



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In re Estate of Silvanus Oduori Oulula (Deceased) (Succession Cause 60 of 2008) [2023] KEHC 24175 (KLR) (27 October 2023) (Ruling)

Neutral citation: [2023] KEHC 24175 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
SUCCESSION CAUSE 60 OF 2008
WM MUSYOKA, J
OCTOBER 27, 2023**

IN THE MATTER OF THE ESTATE OF SILVANUS ODUORI OULULA (DECEASED)

RULING

1. I am tasked with determining a summons for revocation or annulment of a certificate of confirmation grant, dated 31st October 2022, which is brought at the instance of Maria Were Oduor. I shall refer to her as the applicant. The application seeks that the certificate of confirmation of grant, dated 14th February 2017, be revoked or set aside or annulled; and that a fresh certificate of confirmation of grant be issued reflecting the proper names of the beneficiaries, and the mode of distribution proposed in the application.
2. The applicant avers that the name of a beneficiary, known as Leonard Charles Okeka, is erroneously reflected as Edwin James Ogola Okega. That is said to have been occasioned by a typing error. The name of Gervas Owino Oduori is also said to be misspelt as Grevas Owino Oduor. 2 of the beneficiaries, under the said certificate, said to be sons of the deceased, Francis Juma Oduori and John Nyongesa Oduori, are said to have been convicted of murder, and are serving a life sentence in prison. The applicant is proposing to have the distribution in the certificate of confirmation of grant altered, to give her 1 acre out of the land, instead of a life interest, to raise funds for her upkeep. She avers that all her children are agreed on that proposal. She states that the protestor has no claim to the land, in view of the decision of the Busia Environment and Land Court and the Court of Appeal at Kisumu. The appli/can't has attached a number of documents to her affidavit. There is a copy of the certificate of confirmation of grant sought to be revoked, copies of identity cards of the persons whose names are said to have been misspelt, and judgments in Busia ELC No. 27 of 2012 (OS) and Kisumu CACA No. 46 of 2017.
3. A consent to confirmation of grant, dated 17th June 2023, was subsequently, filed herein, on even date, purportedly signed by Grevas Owino Oduor, Francis Juma Oduori, John Nyongesa Oduori, Maria Were Oduor and Leonard Charles Okeka.
4. The reply to the application is by Margaret Auma Omoto, vide her affidavit, sworn on an unknown date, but filed herein on 27th June 2023. I shall refer to her as the respondent. She opposes the



- application. She points out that the subject property, Marachi/Kingandole/16, is under dispute between her and the applicant, and that she has not exhausted her claims on the land, as she has filed an appeal at the Supreme Court, which is yet to be determined. She asserts that the matter is sub judice. She explains that the land in question was held in trust for her late husband, by the deceased herein, who was the husband of the applicant. She argues that the grant herein was confirmed and the estate devolved contrary to the law, and that it was a nullity as it was done before the Court of Appeal rendered itself on the matter. She says that she shall be seeking revocation of the said certificate until the dispute on the property is finally determined. She urges me to dismiss the application.
5. The respondent filed a further affidavit, on 17th July 2023, again sworn on an undisclosed date. She reiterates that she opposes the application, and that she needs to go to the Supreme Court to challenge the decision of the Court of Appeal. She has attached affidavits of various individuals to make the point that she has a right in customary law to the land in question. She also attaches copy of a letter, dated 26th September 2022, addressed to the Deputy Registrar of the High Court, asking for certified copies of the judgment and proceedings of an undisclosed judgment, delivered herein, to enable her appeal to the Supreme Court. Much of the rest of the affidavit regurgitates the contents of the earlier affidavit.
 6. The applicant filed a supplementary affidavit, on 4th September 2023, sworn on even date. She gives a history of how this succession cause was initiated by the late husband of the respondent, and she had to object, and the court ruled in her favour, and appointed her administratrix. She asserts that no one appealed against her appointment as administratrix. She avers that the appeal by the respondent against the judgment in Busia ELC No. 27 of 2012 (OS) was dismissed by the Court of Appeal in Kisumu CACA No. 46 of 2017. She argues that the respondent's claim raises no substantial matter of public interest, to warrant its being entertained by the Supreme Court, and in any event it has not been demonstrated that she has filed any pleadings at the Supreme Court.
 7. Directions were given on 17th July 2023, for canvassing of the application by way of written submissions. Both sides have filed their respective written submissions, which I have read through, and noted the arguments made.
 8. Is there a case for revocation of the grant herein? The application is mounted as one for revocation of grant. However, the applicant appears to be mixed up on what exactly he would like the court to revoke, between the grant itself and the certificate confirming it. Section 76 of the [*Law of Succession Act*](#), Cap 160, Laws of Kenya, gives discretion to the court to revoke grants of representation. A certificate of confirmation of grant is not a grant of representation, but a document which certifies that the grant has been confirmed. The certificate of confirmation of grant is often referred to as a confirmed grant. That is misleading. There is provision for only one grant, which is subsequently confirmed. Confirmation of the grant does not result in the making of a fresh grant, the confirmed grant. After confirmation, there is still the one initial grant in place. What the court does, after confirmation, is to certify that that one grant has been confirmed, and to issue a certification to that effect. That certification does not produce a fresh grant. So, section 76 of the [*Law of Succession Act*](#) is not about revoking certificates of confirmation of grants, but of the grants of representation themselves. The certificate of confirmation of grant is, therefore, not available for revocation, under section 76. If the applicant aims at having the court revoke the certificate of confirmation of grant herein, using the discretion given under section 76, then her application is fatally bad.
 9. Section 76 is only relevant to confirmation of grants to the limited extent of failure to apply for such confirmation. Under section 76(2)(d)(i) of the [*Law of Succession Act*](#), failure to apply for confirmation of grant, within the given timelines, is a ground for revocation of the grant. It is only in that respect that discretion, under section 76, can be exercised regarding confirmation of a grant. Where an application is in fact filed for confirmation of grant, which is heard and determined, and a party is aggrieved, about



- what transpires at the confirmation hearing, or is aggrieved about the outcome of the confirmation hearing, section 76 would be of no application. The aggrieved person would have no recourse under section 76, and ought to seek relief under other provisions of the law, or through other processes, such as review and appeal. The relief under section 76 is not available to right wrongs occurring during the confirmation process. It is only relevant where there is failure to apply for confirmation.
10. If the case by the applicant is for revocation of the grant itself, the question would be whether she has the requisite standing to apply for such revocation. Under section 76, a grant may be revoked by the court on its own motion or on application by an interested party. Where the application is by a party, that party ought to demonstrate their interest. In this case, the applicant is the administratrix of the estate. She would appear to be seeking revocation of her own grant. that is an unusual occurrence. An administratrix can only seek to have her own grant revoked, where circumstances have changed, under section 76(e) of the [Law of Succession Act](#), and her grant has become useless and inoperative as a result. That does not appear to be the case here.
 11. What is quite clear, from the averments, is that the applicant is not seeking revocation of her grant, instead she seeks revocation of the certificate of the confirmation of the said grant. Section 76 of the [Law of Succession Act](#) does not give the court discretion to revoke certificates of confirmation of grant, which is what I have stated above, and that then means that the instant application is misconceived. The applicant does not have a problem with the grant itself. She has issues with the confirmation orders, and she would like to have the distribution, as reflected in the certificate of confirmation of grant altered on grounds that something has happened, which has necessitated such change in the distribution. Such change of circumstances is not what is envisaged under section 76(e) of the [Law of Succession Act](#), and it does not provide basis for exercise of discretion under section 76(e).
 12. The applicant is thinking more of a rectification of the details or contents in the certificate of confirmation of grant. Such rectification does not call for revocation of the certificate of the confirmation of grant. Rectification is provided for under section 74 of the [Law of Succession Act](#). But, the discretion granted to the court under section 74 is limited, like in section 76, to rectification of errors, made in grants, with respect to names of the deceased or of the administrator, and relating to misdescriptions of places and the date of the death of the deceased. I reiterate, a certificate of confirmation of grant is not a grant of representation, and rectification of errors in the grant, under section 74, has nothing to do with it. The errors alleged in this case are not in the grant, but in the certificate of confirmation of the grant. they cannot be addressed through section 74 of the [Law of Succession Act](#).
 13. I am persuaded that the principle prayer in the application, is about re-distribution of the estate. The court is being invited to re-visit the confirmation process, so as to re-distribute the estate, because something has happened, which, in the opinion of the applicant, necessitates such re-distribution. A need for re-distribution or revision of the distribution ordered by the court does not call for revocation of the grant, under section 76, and the discretion given under section 76, does not extend to cover such re-visits or alteration of distribution or confirmation. That can only be done through review of the confirmation orders, if there exist grounds for review. Review is available, by dint of Rule 63 of the [Probate and Administration Rules](#), which imports Order 45 of the [Civil Procedure Rules](#) into probate practice, but one has to demonstrate that there was an error on the face of the record, or that new evidence of critical importance has been discovered, which could not be made available at the time the orders sought to be reviewed were being made. Perhaps, that is what the applicant ought to have done, if what she founds her application on brings it within review.
 14. Alternatively, she should have moved the court under Rule 49 of the [Probate and Administration Rules](#), which caters for situations where the applicant seeks reliefs or remedies that have not been



provided for, expressly, in the Act or the Rules, or for situations that cannot neatly be brought within what the Act and the Rules provide. Challenges with the orders at confirmation is one of such situations. The provisions of the Act and the Rules are not specific on what remedies or reliefs a party, who is aggrieved with orders made at confirmation of grant, has, and what processes are available to seek such remedies or reliefs. Such a party has recourse to Rule 49, where she can file a summons general, or a general summons, seeking orders such are sought here, for a re-visit or alteration of the orders made on distribution at the confirmation of the grant, instead of trying to move under provisions of the law which do not cater for what she seeks.

15. Although the summons before me is misconceived, for the reasons that I have given above, it is clear enough on what the applicant seeks. It can be salvaged under Article 159 of the Constitution, and Rule 73 of the Probate and Administration Rules, which saves the inherent powers of this court, for the purpose of doing justice to the parties. So, I shall consider the same on its merits.
16. Would the applicant be entitled to the orders sought in the application on its merits? One problem that I have with this application is that the grant herein was confirmed in 2017, on 14th February 2017, to be precise. Under section 83(g) of the Law of Succession Act, the estate ought to have been transmitted to the beneficiaries named in the certificate of confirmation of grant within 6 months. 6 months, from 14th February 2017, lapsed on or about 14th August 2017. The estate herein should have been transmitted to the beneficiaries herein by 14th August 2017, and by that date, the applicant ought to have completed administration of the estate, except with respect to the continuing trust accruing to her favour. It is now 5 years since. She has not accounted for her failure to discharge the duty that section 83(g) imposes upon her, to justify my having to make the orders that she is now seeking. These are statutory duties. A grant can be revoked, by the court, on its own motion, for failure to discharge this duty. The question that I ask is should I exercise discretion and grant orders to an administratrix who is in breach of her statutory duty under section 83(g).
17. I have noted, from the material before me, that the applicant was busy at the Environment and Land Court and the Court of Appeal, fighting with the respondent over the asset the subject of the probate proceedings. The suit at the Environment and Land Court was filed in 2012 and that at the Court of Appeal in 2017. The judgment of the Court of Appeal came out in February 2022. The applicant could not, therefore, transmit the disputed property to the beneficiaries, as named in the certificate of confirmation of grant, before the dispute was finally resolved by the courts seized of it.
18. There is the opposition to the application by the respondent. The respondent is telling me not to consider the application before me on its merits, as that dispute is still unresolved, for she is headed to the Supreme Court. An appeal is yet to be filed at the Supreme Court, from what I can see from the material before me. The respondent has not filed a stay order from either the Court of Appeal or the Supreme Court. The only evidence, that she has placed on record, on the matter being at the Supreme Court or being headed there, is a letter she purportedly wrote to the High Court, and a copy of a draft of the papers she proposes to lodge at the Supreme Court. That is not good enough. In the first place, why write to the High Court, when the dispute, now allegedly headed to the Supreme Court, was not even at the High Court. There is no automatic right of appeal, to the Supreme Court, from a decision of the Court of Appeal. One can only approach the Supreme Court with leave of the Court of Appeal. I have not seen before me, certification from the Court of Appeal, permitting the respondent to move to the Supreme Court, which means that the preliminary steps, in the alleged journey to the Supreme Court, have not even been taken. The judgment by the Court of Appeal came out in February 2022. The respondent has had adequate time to move the Supreme Court. There is nothing on record to bar the High Court, in these proceedings, in the circumstances, from disposing of the disputed asset.



19. Other than the prayers to correct what are alleged to be errors, there is an element of re-distribution of the estate. It would require that a tweak be made to the confirmation orders. Re-distribution should require involvement of all the beneficiaries. The applicant has done that, for I see, in the record, a consent, executed by all those affected, including the 2 beneficiaries said to be serving time in prison. In the circumstances, I find that there is compliance. I shall, accordingly, allow the application, dated 31st October 2022. The certificate of confirmation of grant, dated 14th February 2017, shall be amended, not revoked, in the manner proposed. There shall be leave, of 30 days, to challenge this decision at the Court of Appeal, by whoever may be aggrieved. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA ON THIS 27TH DAY OF OCTOBER 2023

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Wanyama, instructed by Wanyama & Company, Advocates for the applicant.

Mr. Chawla, instructed by Chawla & Company, Advocates for the respondent.

