



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Willington Onyango Okumu (Succession Cause
409 of 2007) [2022] KEHC 16924 (KLR) (23 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16924 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 409 OF 2007
WM MUSYOKA, J
DECEMBER 23, 2022**

RULING

1. The application for determination is the dated November 11, 2016. It is at the instance of Pamela Vuhenda Agalo. Her affidavit in support was sworn on December 7, 2016. It is averred that the grant was made on June 21, 2007 and confirmed on October 28, 2009. It is stated that at the time of his death, the deceased was the registered proprietor of South Kabras/Shamberere/1279, measuring 11.5 acres. The persons who survived the deceased are listed as 2 widows, a deceased nephew, 2 daughters and a creditor. She proposes that the estate be shared out between the widows, the family of the dead nephew and the creditor. She had attached, to her affidavit, the grant issued to Ruth Anyango Nyaoke on July 11, 2007; a certificate of confirmation of grant dated October 29, 2009 and a certificate of official search dated October 6, 2015.
2. The administratrix, Ruth Anyango Nyaoke, did not respond to the application.
3. The application was disposed of orally. Only the applicant, Pamela Vuhenda Agalo, testified. She stated that the deceased had sold 4 acres out of South Kabras/Shamberere/1279 to Peter Majinji Musebe. She stated that the deceased had also brought James Onyango Oponyo into the land, as she had no sons. She asserted that James Onyango Oponyo was not a son of the deceased. The said James Onyango Oponyo was said to have died, and was survived by a widow. She testified that Titus Shikanga had bought land from Peter Majinji Musebe, and not the deceased.
4. The administratrix did not offer any oral evidence.
5. Only the applicant filed written submission, essentially arguing that section 51(2)(g) of the *Law of Succession Act*, Cap 160, Laws of Kenya had not been complied with, for all the children and surviving spouses of the deceased were not disclosed. It is also submitted that the late James Onyango Oponyo was a dependent of the deceased, by virtue of section 29(b) of the *Law of Succession Act* Rules 7(7) (b) and 26 of the *Probate and Administration Rules* are also cited, to support the submission that consents were not obtained from the survivors of the deceased; and Rule 40(8) of the Probate and Administration Rules, to support the submission that consents to distribution were not obtained from the persons beneficially entitled.



6. The application that I am invited to determine is a summons for revocation of grant. Discretion to revoke grants is granted by section 76 of the *Law of Succession Act*. There are three general grounds. The first targets the process of obtaining the grant, on account of defects in the process; and fraud, misrepresentation and concealment of matter from the court. The second targets failure of administration. Three instances of failure of administration are identified, being failure to apply for confirmation of grant within the set timelines, failure to exercise diligence in administration, and failure to render accounts as and when required to. The last ground is where the grant has become useless or uncooperative on account of subsequent events. Such events or inoperative are not enumerated, but would include the demise of the sole administrator, the loss of soundness of mind of a sole administrator, a sole administrator being adjudged bankrupt, or being unable to discharge duties of his office due to physical infirmity, among others.
7. For avoidance of doubt, section 76 of the *Law of Succession Act* states as follows; -
- ' 76. Revocation or annulment of grant
- 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 order or allow; 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'
8. The summons dated November 11, 2016 is not anchored on any of the grounds set out in section 76 of the *Law of Succession Act*. It is not alleged that the process of obtaining the grant had any issues, either on of defects in the process or fraud or concealment of matter from the court. It is also not alleged that administration had failed on account of failure to apply for confirmation of grant within the set timelines, or on account of lack of diligence in administration, or on account of failure to render accounts at the times when the same was required. Neither is it anchored on the ground that the grant had become useless or inoperation for whatever reasons.



9. A party is bound by its pleadings, and proceedings under a section 76 of the *Law of Succession Act* ought to be grounded on the grounds set out in that provision. As the application before me is not founded on the grounds set out in section 76 of the *Law of Succession Act*, it is not a proper summons for revocation of grant. I cannot possibly exercise discretion to revoke the grant based on it. Indeed, the application reads more like a summons for confirmation of grant, under section 71 of the *Law of Succession Act*, rather than as summons for revocation of grant.
10. Section 76 gives me discretion to revoke the grant on my own of motion, by dint of *Matbeka and another vs Matbeka [2009] 1 EA 251* (Omolo, O’Kubasu & Onyango Otieno), where it was said that for revocations by the court on its own motion, there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by the making of false statements or by concealment of something material to the case, among others. The affidavit drawn in support of the instant application brings out no evidence that would bring the matter within section 76. The oral testimony of the applicant did not help either, she testified on matter that did not dwell on grounds upon which a grant may be revoked.
11. The submissions by the applicant, dated April 25, 2022, are not in line with the facts deposed in support of the application dated November 11, 2016, nor the oral testimony that the applicant gave in court on June 23, 2021. They cannot possibly be submission, in support of the case presented. The said submissions a present case different from that set out in the application of November 11, 2016 and the oral testimony of June 23, 2021.
12. I do not, therefore, find any basis upon which I could revoke the grant herein, and I hereby dismiss the application dated November 11, 2016, with no order as to costs.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS.....23rd
.....DAY OFDecember.....2022**

WM MUSYOKA

JUDGE

Erick Zalo, Court Assistant.

Ms. Nafuye, instructed by KN Wesutsa & Company, Advocates for the applicant.

Ms. Shimoli, instructed by Shitsama & Company, Advocates for the Administratrix.

