



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**CIVIL APPEAL NO. 29 OF 2018**

**IN THE MATTER OF THE ESTATE OF KIBERENGE MUKWA (DECEASED)**

**BEATRICE NATECHO.....APPELLANT**

**VERSUS**

**DAVID WABULULU KIBERENGE.....RESPONDENT**

*(Being an Appeal from the Ruling of the Honourable C.A.S Mutai in Bungoma*

*Chief Magistrate Succession Cause No.89 of 2016 delivered*

*on 26<sup>th</sup> of April 2018 at Bungoma)*

**JUDGEMENT**

1. The Appellant herein filed a Memorandum of Appeal herein dated **20<sup>th</sup> May, 2018** seeking to set aside the ruling of Hon. Principal Magistrate C.A.S Mutai made on **26<sup>th</sup> April, 2018** in **Bungoma C.M.C Succession Cause No. 89 of 2016** and that the appellant's summons for revocation of grant dated 9<sup>th</sup> November, 2017 be allowed as prayed.

2. A perusal of the lower court record reveals that the appellant had filed summons for revocation of grant dated **9<sup>th</sup> November, 2017** wherein he had sought for an order to set aside the certificate of confirmation of grant made by the Honourable magistrate on **20<sup>th</sup> July, 2017**. When the application came up for hearing on **22<sup>nd</sup> February, 2018** directions were taken to the effect that the said application be canvassed by way of oral submissions. The learned trial magistrate vide his ruling dated **26<sup>th</sup> April, 2018** dismissed the appellant's application hence this appeal.

3. The Appellant's Memorandum of appeal raises the following grounds: -

i. That the learned magistrate erred in fact and in law by ruling that he is functus officio whereas the application before him was a revocation application that could be handled by him.

ii. That the learned magistrate erred in fact and in law by not appreciating that the Appellant's consent was paramount before confirmation and lack of it was a ground for revoking the grant.

iii. That the learned magistrate erred in fact and in law by holding that the estate of the deceased becomes complete with confirmation, whereas the certificate of confirmation was yet to be implemented.

iv. That the learned magistrate erred in fact and in law by failing to appreciate that summons for revocation of grant can come at any time.

v. That the learned magistrate erred in fact and in law by misapprehending the application dated 9<sup>th</sup> November, 2017, the law in support and evidence on record.

vi. That the learned magistrate erred in fact and in law by not appreciating that the Appellant was never served with summons for confirmation neither did she consent to the confirmation, distribution and apportionment of the deceased's estate.

vii. That the learned magistrate erred in fact and in law by not considering the interest of the Appellant as wife to **Pius Wasike Kiverenge** (now deceased), the son to the deceased.

viii. That the learned magistrate erred in fact and in law by declining to decide on the Appellant's interest more so on NDIVISI/MUCHI/1839 despite there being previous orders vesting NDIVISI/MUCHI/1839 to the Appellant's husband.

4. The Appeal was canvassed by way of written submissions. Both parties filed and exchanged submissions.

5. The Appellant submitted that the trial court erred by declaring itself functus officio and by failing to appreciate that revocation of grant can be done at any time. Counsel relied on the case of **Ansazi Gambo Tinga & Another v. Nicholas Patrice Tabuche (2019) eKLR**. The Appellant further submitted that her consent was paramount before the confirmation could be allowed and that the concealment of her existence as the administrator of the estate of Pius Wasike Kiverenge (deceased) only proved fraudulence. She argued that she was supposed to consent to the mode of distribution a fact that her name was left out in the consent form obtained. Counsel relied on the case of *Grace Kagwria v. Japheth Mburugu Ringera & another (2015) eKLR*. On the aspect of the estate of the deceased becoming complete with confirmation whereas the certificate of confirmation was yet to be implemented, counsel submitted that the estate of the deceased only ceases to exist when each beneficiary gets their title and even then, it does not stop an application for revocation. Counsel relied on the case of **E.N. Ng'ang'a & Co. Advocates v. Joyce Wanjiru Gitaka & 2 Others (2013) eKLR**. Finally, counsel submitted that the trial court's disregard to the entitled share of the Appellant in the estate of the deceased by virtue of being the wife of the deceased's son of the estates whose estate relates to NDIVISI/MUCHI/1839 was erroneous. It was submitted that the appellant's husband had been proposed to be awarded 0.05Ha in the application for confirmation, but the certificate of confirmation has excluded her as she has not been allocated any share.

6. The Respondent's counsel submitted that the Appellant was aware of the summons for confirmation of grant filed on 19<sup>th</sup> April, 2017 as she entered appearance vide counsel on 6<sup>th</sup> March, 2017 and that her counsel was informed of the mode of distribution of the estate vide letter received on 12<sup>th</sup> April, 2017 and that the Form P& A 9 was served upon her but she did not file any objection. Counsel further submitted that, the Appellant was duly informed of the proposed distribution and the consent form P&A 37 was sent to her, and was duly included in the distribution list as a beneficiary. According to counsel, all the beneficiaries including her step son signed Form 37 and that they were verbally informed about the date for confirmation to which they duly attended court save for the Appellant who never filed any objection to the proposed distribution. Finally, on the contentious land title NDIVISI/MUCHI/1839, counsel submitted that part of the land was sold by the Appellant's deceased husband to one Hellen Wambulwa who thereafter sold her portion to one Peter Wanyonyi Shigangah. Counsel mentioned that a tribunal decision gave the whole land to the Appellant on 30<sup>th</sup> December, 1999 and adopted in 2001 but she has never enforced the said decision. Counsel finally submitted that this appeal should not be allowed.

7. A certificate of confirmation of a grant is not a grant of representation, but a certificate to the effect that the grant had been confirmed by the court. The discretion given to the court by the provisions in section 76 of the **Law of Succession Act** is for revocation of grants of representation, not certificates that confirm those grants. There is therefore no power in those provisions for the court to revoke a certificate of confirmation of grant. As can be seen from the outset, the said appeal stands on shaky ground.

8. The grounds given for the appeal are that the Appellant was never served with summons for confirmation of grant and neither did she consent to the confirmation, distribution and apportionment of the deceased's estate, hence there was no attendance on her part, and that the hearing proceeded to her detriment. She seeks that the certificate be revoked

9. I am being invited to revoke a certificate of confirmation of grant. The certificate is not an order of the court. A certificate is not a judicial order. It is an extract from a court order made in the confirmation proceedings. The certificate is generated from the court order. It is important for the parties to differentiate between the character of a grant of representation and a certificate of confirmation of grant. A grant is a court order; it is a judicial pronouncement to the effect that some person has been appointed as administrator and granted the power to act as such. The certificate of confirmation of grant on the other side merely certifies that orders have been made to confirm the grant. The certificate of confirmation of grant is not the order itself but a confirmation that the grant has been confirmed and the shares of the beneficiaries ascertained.

10. Perhaps I could exercise inherent power under **Rule 73** of the **Probate and Administration Rules**, where such power is saved to meet the ends of justice or to prevent abuse of the process of court. The Appellant has not invoked Rule 73, but the power is inherent as the court can tap on it at any time when it appears that it may be necessary to meet the ends of justice. I understand the Appellant to be inviting me to revoke certificate of confirmation of grant dated 20<sup>th</sup> September, 2017, on the ground that she did not consent to the same and the mode of distribution proposed.

11. According to the Respondent, the Appellant was well aware of the summons for confirmation of grant and that she entered appearance vide counsel on 6<sup>th</sup> March, 2017 and that her counsel was informed of the mode of distribution of the estate vide letter received on 12<sup>th</sup> April, 2017 and further that the Form P& A 9 was served upon her but she did not file any objection.

12. I have already stated that the Appellant did not lodge any objection within the period stipulated. The appeal for determination seeks revocation of grant. The **Law of Succession Act** provides for revocation of grants under section 76, which 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.”**

13. Under section 76, a court may revoke a grant so long as the grounds listed above are disclosed, either on its own motion or on the application of a party. A grant of letters of administration may be revoked on three general grounds. The first is where the process of obtaining the grant was marred by several irregularities. The first would be where the process was defective, either because some mandatory procedural step was omitted, or the persons applying for representation was not competent or suitable for appointment, or the deceased died testate having made a valid will and then a grant or letters of administration intestate was made instead of a grant of probate, or *vice versa*. It could also be that the process was marred by fraud and misrepresentation or concealment of matter, such as where some survivors are not disclosed or the applicant lies that he is a survivor when he is not, among other reasons. The second general ground is where the grant was obtained procedurally, but the administrator, thereafter, got into problems with the exercise of administration, such as where he fails to apply for confirmation of grant within the time allowed, or he fails to proceed diligently with administration, or fails to render accounts as and when required. The third general ground is where the grant has become useless and inoperative following subsequent circumstances, such as where a sole administrator dies leaving behind no administrator to carry on the exercise, or where the sole administrator loses the soundness of his mind for whatever reason or even becomes physically infirm to an extent of being unable to carry out his duties as administrator, or the sole administrator is adjudged bankrupt and, therefore, becomes unqualified to hold any office of trust.

14. What is sought to be revoked here is not the grant itself, but the certificate that was issued upon the confirmation of the grant. In principle, the Appellant appears to be unhappy with the confirmation process. That is what comes out from the body of the record of appeal and her written submissions. The principal prayer in the application is for revocation of the certificate of confirmation of grant.

15. The power or discretion given to the court by section 76 of the Law of Succession Act is for revocation of grants of representation. The Law of Succession Act does not define grant of representation, as the section that carries definitions or interpretations of terms or words used in the Act, that is to say section 3, does not include the word or term “grant”. **The Probate and Administration Rules**, the subsidiary legislation made under the Law of Succession Act does define the term, at **Rule 2**, in the following words:

**““grant” means a grant of representation, whether a grant of probate or of letters of administration with or without a will annexed, to the estate of a deceased person.”**

16. Rather than dealing with the definition of the term, what the Law of Succession Act does at, at sections 53 and 54, is to provide for the forms that the grant may take, which then gives us some sense of what a grant of representation is or means or refers to. The provisions say as follows:

#### **“Forms and Grants**

##### **53. Forms of grant**

**A court may—**

**(a) where a deceased person is proved (whether by production of a will or an authenticated copy thereof or by oral evidence of its contents) to have left a valid will, grant, in respect of all property to which such will applies, either—**

**(I) probate of the will to one or more of the executors named therein; or**

**(ii) if there is no proving executor, letters of administration with the will annexed; and**

**(b) if and so far as there may be intestacy, grant letters of administration in respect of the intestate estate.**

##### **54. Limited grants**

**A court may, according to the circumstances of each case, limit any grant of representation which it has jurisdiction to make,**

**in any of the forms described in the Fifth Schedule to this Act.”**

17. As stated above, the principal concern of the Appellant is the confirmation of the grant. What she seeks principally is revocation of the certificate of confirmation of grant. The question then that arises is whether a certificate of confirmation of a grant is in fact a grant of representation intestate or the equivalent of a grant, to be revoked or annulled through section 76 of the Law of Succession Act. The answer to that question, appears to me, to be that a certificate of confirmation of grant is not a grant of representation.

18. Grants of representation take the form stated in sections 53 and 54 of the **Law of Succession Act**. They are either a grant of probate or of letters of administration intestate or of letters of administration with will annexed or limited grants. A certificate of confirmation of grant does not take any of those forms, and it cannot possibly, therefore, be a grant of representation. It is a document extracted from the orders that a court makes after confirmation of a grant under section 71 of the Law of Succession Act, as evidence by the fact that a grant of representation has been confirmed. It should be emphasized that the confirmation process does not produce another grant.

The grant sought to be confirmed, through that process, remains intact, after confirmation. Whereas a grant of representation appoints personal representatives or administrators, the certificate of confirmation does not do anything of that sort. All what it does is to confirm that the court has approved the persons appointed under the grant to continue to administer the estate, with a view to distribute it in accordance with the distribution schedule approved. A certificate of confirmation of grant is akin to that order or decree that is extracted from a ruling or judgement made by a court; it is an extract of the orders that the court makes on an application for confirmation of grant. Quite clearly, therefore, a certificate of confirmation of grant is not a grant of representation, and for that reason it is not available for revocation under section 76 of the **Law of Succession Act**.

19. In any event, as the certificate of confirmation of grant is a mere formal expression of the orders made by the court on a confirmation application, the revocation of the certificate, if at all it is revocable under section 76, which I continue to assert that it is not, would be of little consequence, as it is only the certificate that would be affected by such a revocation order, since the orders on confirmation, from which it is extracted would remain intact. The certificate is a mere extract, its revocation would not affect its source, the orders of confirmation of grant. A grant of representation is not equivalent to a certificate, it is not an extract from some order, and it is the order itself, appointing administrators, and it is the court granting representation. The orders on confirmation of a grant remain unaffected by a revocation or annulment of the certificate of confirmation of grant. The proper thing to do should be to have the confirmation orders vacated and thereafter the certificate of confirmation of grant annulled, following the setting aside of the orders from which it draws its life. Otherwise, failure to vacate the orders would mean that a fresh certificate could still be extracted from the same orders. The grant of representation and the certificate of confirmation of grant are two separate or different things.

20. The certificate of confirmation of grant is provided for under **Rule 41(5)** of the **Probate and Administration Rules**, which says as follows:

**“Where the court in exercise of its power under section 71(2) (a) of the Act directs that a grant be confirmed it shall cause a certificate of such confirmation in Form 54 to be affixed to the grant together with the seal of the court and ...”**

21. Section 76 of the **Law of Succession Act** has nothing to do with confirmation of grants. It carries no provisions which relate to what a court should do with confirmation orders or certificates of confirmation of grant. Indeed, the provision says nothing about the powers prescribed in it being used for the purpose of the court intervening in the confirmation process, once orders are made on a confirmation application.

The only connection between confirmation of grants and revocation of grant is that set out in section 76 (d) (i) of the **Law of Succession Act**. It has nothing to do with a grant having been confirmed, rather it deals with situations where a personal representative or holder of a grant or administrator has failed to apply for confirmation of their grant. Section 76 of the Act relates to confirmation of grants to that very limited extent, not with confirmation itself, but the failure to apply for confirmation. A person who is aggrieved by the orders made with respect to a confirmation application, which are encapsulated in the certificate of confirmation of grant, has no remedy under section 76 of the **Law of Succession Act**, since that provision does not envisage revocation of certificates of confirmation of grants.

22. I have keenly perused through the provisions of the Law of Succession Act, and I have not come across any provision that provides a remedy to a person who is aggrieved by confirmation orders. Sections 71, 72 and 73 of the **Law of Succession Act**, which deal with confirmation of grants, do not address the question of redress for parties who are unhappy with the confirmation process, nor do they deal generally with flaws in the confirmation process. As stated above, section 76 has nothing to do with the confirmation process, and provides no relief at all to any person unhappy with the confirmation process. In the absence of any provision in the Law of Succession Act, for relief or redress for persons aggrieved by such orders, the aggrieved parties have only two recourses under general civil law, that is to say appeal and review, to the extent that the same is permissible under the Law of Succession Act. I would believe that one can also apply for the setting aside or vacating of confirmation orders, where the same are obtained through abuse of procedure.

23. I reiterate that the power or discretion granted to the court by sections 76 of the **Law of Succession Act** is for revocation of grants. The ideal situation, where a person is unhappy with the process of confirmation of grant, for it would appear that that is what the appellant herein is aggrieved about, is not to move the court under section 76 for revocation of grant, as the reasons that I have discussed in the foregoing paragraphs show. What such a person should do instead, is to file an appeal against the orders made by the court on distribution. The court confirming a grant largely becomes *functus officio* so far as confirmation of the grant is concerned, and cannot revisit the matter unless upon review.

24. The grant herein was confirmed on 20<sup>th</sup> July, 2017, and the trial court became *functus officio* so far as confirmation of the grant was concerned. The Appellant ought to have appealed against the orders that confirmed the grant, if she was not satisfied with the distribution that the court ordered. Alternatively, the Appellant should have mounted an application for review of those orders, if she had the competence to file such an application, and if she had grounds upon which she could urge review. This court is being invited to relook at confirmation orders through a process that has not been provided for in law.

25. The other thing is that the Appellant invites the court, in that memorandum of appeal dated 25<sup>th</sup> May, 2018, to revoke a certificate of confirmation of grant. A certificate of confirmation of grant is a document that the court generates or extracts from the orders that had been made at confirmation as evidence or proof of the making of the said orders. Revoking or annulling the certificate of confirmation of grant without setting aside or vacating the confirmation orders which give it life would be an exercise in futility. Revoking or cancelling the certificate without more only renders the said document ineffective, but leaves the confirmations orders intact. The said memorandum of appeal dated 25<sup>th</sup> May, 2018 invites the court to revoke the certificate but leave the confirmation orders intact. Such an exercise serves no purpose, and it would be a wastage of judicial time and effort.

26. I have talked about the trial court which confirmed a grant being *functus officio*. The grant herein was confirmed on 20<sup>th</sup> July, 2017, and a certificate of confirmation was generated from that order. After a grant has been confirmed, the processes that follow, that is to say with respect to the implementation or execution of the confirmation orders as encapsulated in the certificate of confirmation of grant, have nothing to do with the Law of Succession Act, as the said law or the rules made under it, the Probate and Administration Rules, do not provide for what should happen after the certificate of confirmation of grant has been generated from the confirmation orders. The process of the carrying into effect of the confirmation orders is regulated by land legislation through a process known as transmission, which is not provided for under the Law of Succession Act.

27. I believe that I have said enough. It follows therefore that the learned trial magistrate did not err when he dismissed the appellant's application dated 9<sup>th</sup> November, 2017. I uphold the trial court's decision. Consequently, i find no merit in this appeal. The same is dismissed. Each party shall bear their own costs.

It is so ordered.

**DATED AND DELIVERED AT BUNGOMA THIS 30<sup>TH</sup> DAY OF NOVEMBER, 2021.**

**D. Kemei**

**Judge**

**In the presence of:**

**Olonyi for Anwar .....for Appellant**

**No appearance for Khakula.....for Respondent**

**Kizito.....Court Assistant**