



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**SUCCESSION CAUSE NO. 545 OF 2001**

**IN THE MATTER OF THE ESTATE OF MULINDO EREMA (DECEASED)**

**RULING**

1. The proceedings herein are gravely convoluted. After the making of the grant, a summons for revocation of grant, dated 6<sup>th</sup> May 2002, was lodged herein on 7<sup>th</sup> May 2002, by a surviving widow of the deceased, Mwanahamisi N. Mulindo. It was responded to by one of the administrators, Ranson Mwangala Mulindo. Ariton Siminyu Erima and Ibrahim Wanjala Mulindo filed two affidavits in support of the revocation application in 2003 and 2004, which prompted a further reply by Ranson Mwangala Mulindo. While the revocation application was still pending, Ranson Mwangala Mulindo lodged herein, on 11<sup>th</sup> November 2005, a summons for confirmation of grant, dated 9<sup>th</sup> November 2005. It is not clear from the record whether Ariton Siminyu Erima and Ibrahim Wanjala Mulindo responded to that application, but I have seen on record an affidavit that the two swore on 23<sup>rd</sup> January 2007, in support of an unidentified application, and I presume that the said affidavit was intended to be a response to the confirmation application.

2. The minutes of the Judges with regard to these two applications bring out the confusion. The revocation application dated 6<sup>th</sup> May 2002 was placed before Waweru J., on 17<sup>th</sup> September 2002, Whereupon Waweru J. directed that the revocation application be served on all the adult heirs. The next court appearance was on 16<sup>th</sup> October 2002, again, before Waweru J., when eight individuals appeared. Seven of them indicated that they supported the revocation application. Waweru J. then gave directions, that the application be heard on the basis of the affidavits on record, any interested party could be heard on the application and hearing dates were to be obtained at the registry. The revocation application was listed for hearing several times, but did not proceed. Eventually the applicant died. The matter came up for hearing several times thereafter, to no avail. The application dated 6<sup>th</sup> May 2002 was withdrawn, by consent of the parties, on 19<sup>th</sup> September 2005, through an order recorded before GBM Kariuki J.

3. The withdrawal of the revocation application, dated 6<sup>th</sup> May 2002, appeared to pave way for disposal of the confirmation application dated 9<sup>th</sup> November 2005. The said confirmation application came up for hearing severally, without taking off.

4. On 5<sup>th</sup> February 2009, a Nandi, I presume that was the name of an advocate, for the objector, appeared, *ex parte*, before Ochieng J. He asked for and obtained directions, in proceedings that were recorded as follows:

*“Nandi: We ask for directions as follows;*

*1. Summons for revocation of the grant be deemed as the Plaintiff and the Objector shall be the Plaintiff.*

*2. The Replying Affidavit shall be the Defence; and the Petitioner shall be the defendant.*

*3. The trial will be by way of oral evidence, and the parties may call witnesses.*

*4. The case shall be heard by one judge at Kakamega, over one day.*

*5. Mutual discovery shall be concluded before the trial.*

*COURT: Directions are given as set out above.”*

5. The challenge with the directions, as given on 5<sup>th</sup> February 2009, is that they were in respect of an un identified summons for revocation of grant. The only summons for revocation of grant, ever filed in the matter, was that dated 6<sup>th</sup> May 2002, which was withdrawn, by concurrence of the parties, on 19<sup>th</sup> September 2005. No other revocation application was filed after that, and, as at 5<sup>th</sup> February 2009, there was no pending summons for revocation of grant. I have scrupulously perused the record, looking out for an order, made between 19<sup>th</sup> September 2005 and 5<sup>th</sup> February 2009, reinstating the application dated 6<sup>th</sup> May 2002, to enable the Judge make the directions made on 5<sup>th</sup> February 2009, and I have not come across any. The only application pending, by 5<sup>th</sup> February 2009, was the summons for confirmation of grant dated 9<sup>th</sup> November 2005.

6. On 10<sup>th</sup> February 2009, representatives from the advocates on record met at the court registry to obtain dates for hearing, and were given 23<sup>rd</sup> November 2009. It was not indicated, on the record, what was to come up for hearing on 23<sup>rd</sup> November 2009, as between the summons for revocation of grant, in respect of which directions had been given five days prior, and the summons for confirmation of grant dated 9<sup>th</sup> November 2005. Come 23<sup>rd</sup> November 2009, the oral hearing commenced, witnesses were put on the stand, and the court was not addressed with regard to what it was hearing, as between the two applications. The oral hearings continued until the last witness testified on 17<sup>th</sup> September 2019.

7. Quite clearly, from the record, there is ambiguity as to the oral proceedings that the court conducted. I am unable to prepare a judgement in view of that, and, I believe that the record should be set straight first. I cannot decide on the revocation application, which was the subject of the directions that provided the basis for the oral hearings, because that application has not identified and yet the previous one had been withdrawn; neither can I rule on the confirmation application, because the oral hearings that the court conducted were mounted on directions which referred to a revocation application. The court and the parties should read from the same page. The court record should be straight and unambiguous. This is a record of a trial court. It is a permanent record, and, it should, therefore, state and reflect a clear and certain position.

8. The matter shall be set down for mention for the parties to have the record straightened out and for further directions. In the meantime, let the parties acquaint themselves with the court record before the mention date.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 9<sup>TH</sup> DAY OF MARCH, 2020**

**W. MUSYOKA**

**JUDGE**