

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO 619 OF 2000

IN RE ESTATE OF MURIMI (DECEASED)

RULING

Although the parties are before me for the hearing of what they call an application for revocation of a grant, what is before me for hearing is a Miscellaneous Civil Application No 1248/96 for the hearing of a Notice of Motion therein dated 28th November 1996. That Notice of Motion is praying for revocation of a grant issued in the Magistrate's Court at Kiambu and not in this court.

The applicant having come to this High Court with a Notice of Motion praying for revocation of a grant of letters of administration, this court's civil registry could be forgiven for having assigned the applicant the above case number. That was in 1996 before the Family Division was established but there was a section of the Civil Registry handling Probate and Administration cases. From the registration number assigned, this case was handled among ordinary civil cases until the year 2000 when it was ordered transferred to the Probate and Administration section. When the case file in HC Misc Civil Application No 1248/96 was received by the Probate and Administration section, a new case file Succession Case No 619 of 2000 was opened and the file having number HC Misc Civil Application 1248/96 was filed inside the new case file. Proceedings started being recorded as if the Notice of Motion were summons for revocation of grant simply because the Notice of Motion was asking for revocation of grant. What came before me for hearing, therefore, was recorded as summons dated 28th November 1996 for revocation of grant in Succession Cause No 619 of 2000. I looked for that summons in that file. I saw no summons. Instead I saw the Notice of Motion among papers inside HC Misc. Application No 1248/96 case file. Both advocates in this matter subsequently confirmed the Notice of Motion was the application before me for hearing.

Properly, the application for revocation of a grant should be by way of summons for revocation or annulment of grant being Form 107 filed under section 76 of the Law of Succession Act and rule 44 of the Probate and Administration Rules. Those provisions do not make room for the application being brought by way of a Notice of motion or Chamber Summons or any other form.

The filing of the summons in Form 107 is done together with the filing of a supporting affidavit in Form 14. After the applicant has filed those two forms, the Registrar of the High Court issues Form 70 giving notice to the applicant to attend court in chambers for the giving of directions as to what persons, if any, should be served, by the applicant, with a copy of the summons for revocation and of the affidavit in support and as to the manner of effecting service.

The persons who would be named to be served would include the deceased's personal representative, beneficiaries or other dependants and any other persons who may be affected by the revocation of grant. If the grant sought to be revoked was made by a Magistrate's Court, the directions given at this stage should also state that the relevant case file from the Magistrate's Court be brought to the High Court to be filed in the High Court case file.

It is important to note that service of the summons for revocation and its supporting affidavit together with a notice in Form 68 upon the people referred to above gives them the opportunity to file their respective affidavits in reply stating whether they support or oppose the application and why.

After the people served have filed their papers, and the Magistrate's relevant case file has been brought, if the grant was made in a Magistrate's Court, the cause may be set down for determination where it is felt there is no need for further directions. Otherwise the cause should be set down, when the applicant

together with the persons served will attend court, for further directions as to the facts to be proved and as to the mode of hearing, it being advisable to consider whether it is necessary to call *viva voce* evidence to prove the facts listed or whether submissions on the basis of filed affidavits will suffice. When further directions have been taken, the summons for revocation may be set down for hearing.

In this matter before me, no summons for revocation in Form 107 supported by an affidavit in Form 14 have been filed in Succession Cause No 619 of 2000 under section 76 of the Law of Succession Act and rule 44 of the Probate and Administration Rules and Forms 70 and 68 have not therefore been used. In short the procedure I have outlined in previous paragraphs has not been followed. It follows that there is no summons for revocation of grant for me to properly hear under the provisions of the Law of Succession Act and the rules thereof.

In the circumstances, to proceed to hear the Notice of Motion dated 28th November 1996 in HC Misc Civil Application No 1248 of 1996 purporting to hear summons for revocation of grant in Succession Cause No 619 of 2000 would be improper.

The above being the position, and notwithstanding the fact that both sides are telling me to proceed with the hearing of the Notice of Motion, it is my humble opinion that it will be wrong for me to hear it. As such, I should not entertain it.

Accordingly, the said Notice of Motion dated 28th November, 1996 in HC.Misc Civil Application No 1248 of 1996 be and is hereby struck out.

Proper summons for revocation of grant may be filed if the applicant still wishes to have the grant in question revoked.

From what the parties have been telling me, each party to bear its own costs of the Notice of Motion dated 26th November, 1996.

Leave to appeal granted.

Dated and delivered at Nairobi this 25th day of February, 2002

J.M KHAMONI

JUDGE