



In re Estate of Veronica Juma Ombedho (Deceased) (Miscellaneous Cause E003 of 2022) [2023] KEHC 3024 (KLR) (3 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3024 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
MISCELLANEOUS CAUSE E003 OF 2022**

RE ABURILI, J

APRIL 3, 2023

**IN THE MATTER OF THE ESTATE OF VERONICA JUMA OMBEDHO-
DECEASED**

BETWEEN

LOICE AYIETA CHORA APPLICANT

AND

IGNATIUS OWUOR OTIENO RESPONDENT

RULING

1. The applicant herein Loice Ayieta Chora in her notice of motion dated September 1, 2022 seeks the following orders:
 - a. The honourable court be allowed to reconstruct the missing documents in the court file with the hereto attached documents and others to be supplied by the respondent.
 - b. The honourable court be pleased to set aside and vary its order made on May 10, 2022 dismissing and or striking out the applicant's summons for revocation of grant or annulment of grant dated April 25, 2022 and filed in court on April 26, 2022 and reinstate the same to be heard on merit.
 - c. Costs be provided for.
2. The application is predicated on the grounds on the face of the motion and the supporting affidavit of Loice Ayieta Chora who deposes that she filed summons for the revocation of grant *vide* an application filed on April 26, 2022 which application was not heard because the court found that some documents from the court file were missing and proceeded to strike out the application.



3. That she is not the one responsible for the loss of the said documents which she has now attached to the application while the other documents not in her possession shall be supplied by the respondent so the application can be heard on merits.
4. She further deposes that her application was an arguable one with high chances of success so that she will suffer substantial loss if the orders sought herein are not granted.
5. The application is opposed by the respondent who filed a replying affidavit sworn on October 3, 2022 where he deposes *inter alia* that pursuant to the order of May 10, 2022, the applicant ought to have availed copies of the summons for revocation of grant earlier on filed and dealt with by J. Makau J which copies the applicant failed to produce or explain its whereabouts.
6. The respondent wonders how the applicant failed to have copies of an application she had filed herself. He denies being an administrator of the estate of the deceased and finally, he contends that the applicant has not laid any basis for the grant of the orders sought.
7. The parties thereafter filed their written submissions.
8. The applicant submitted through her counsel that the issue that this court ought to determine is whether there were any documents missing in the court file and whether the court should grant the orders sought. It was submitted that there is no document missing from the court file as demonstrated in the proceedings of May 5, 2011, July 30, 2012, September 4, 2012, and October 29, 2012 and on December 16, 2016 where the application dated October 15, 2012 was dismissed. That in all this, after the application of October 15, 2012, the subsequent proceedings show that the reference application was the same and there is no evidence that another application was filed thereafter.
9. Counsel submitted that in the event that the stated application of October 15, 2012 was given a wrong date or title, the anomaly can be cured by article 159 of the [Constitution](#) and sections 99 and 100 of the [Civil Procedure Act](#).
10. The respondent through his counsel submitted in opposition that for the court to vary its orders of May 10, 2022, it is vital that the application of October 15, 2016 which was dismissed alongside the notice of motion dated October 12, 2012 to be availed for perusal by the court since the order of May 10, 2022 has not been complied with and the basis for setting aside has not been laid.
11. That if the applicant wished the court to look afresh at the application, she ought to have first sought the setting aside, review and or variation of the orders of December 16, 2016 which dismissed the application dated October 15, 2012.
12. It was submitted that unless the order of December 16, 2016 is dealt with, no fresh application in the nature of summons for revocation of grant can be filed and properly be dealt with as the instant application seeks to convolute the matter.

Analysis And Determination.

13. I have considered the application and the opposition thereto. The main issue for determination is whether the application has merit. When this matter came up before me on May 10, 2022 for directions, I struck out the applicant's application dated April 25, 2022 on the grounds that the court record shows that my predecessor, James Makau J had heard an application in the nature of summons for revocation of grant and dismissed it vide a ruling delivered on December 16, 2016, but which ruling was not found in the court file and only the final order was available. I also found that the application itself was not in the court file but that the replying affidavit was available in the court file.



14. I therefore declined to deal with another summons for revocation of grant unless the applicant explained the whereabouts of the earlier summons filed and dismissed.
15. Pursuant to the above orders, the applicant has now approached this court seeking reconstruction of the court file to include the documents which this court found to be missing from the court file and setting aside of the orders given on May 10, 2022 striking out her summons for revocation of grant.
16. Having considered the parties' respective positions in this matter, I must first reprimand the individuals who participated in the distortion of the court file by removing documents unfavourable to whoever removed them, be it judicial staff, the advocates and or parties to this dispute. This is a practice that goes to the root of the very existence of courts and a sad state of affairs that brings injustice to an aggrieved party.
17. Nonetheless, an issue was raised by the respondent that he is not the administrator of the estate but just a beneficiary. I have perused the entire court file in Siaya HCPA No 120 of 2016 which is the mother file to this miscellaneous file and note that the petitioner in the initial matter in Siaya PM succession cause No 109 of 2010 was Beldina Achieng Otieno who petitioned and was issued with a grant which was confirmed, to administer the estate of the late Veronica Juma Ombedho on March 11, 2011. The said grant was confirmed on May 5, 2011 by Hon W.K Chepseba, Principal Magistrate. In the schedule to the distribution of the assets of the deceased, is a leasehold land parcel No Ugunja Trading Centre/7 and South Ugenya/Ambira/1775 which the administratrix assigned to the respondent herein in the case of the first property at 100% and in the case of the latter property, 50%. It is not clear who else would be the beneficiary of the 50% of the latter property. I also observe that the administratrix disclosed in the P&A 5 that she was the only surviving child of her deceased mother Veronica Juma Ombedho. From the letter dated February 28, 2011, Ignatius Owuor Otieno the respondent herein wrote to court stating that the latter parcel No South ugenya/Ambira/1775 was previously held by Okech Ojuolo and that it should be transferred in the respondent's name.
18. Upon the respondent herein being named as the beneficiary of the property No Ugunja trading centre/7, he filed an application dated July 30, 2012 seeking orders to compel the clerk of Ugunja Town Council to transfer the said property in his name as per the certificate of confirmation of grant of May 5, 2011
19. Vide a replying affidavit sworn by Livingstone Alego the town clerk of Ugunja Town Council, dated August 10, 2012, he deposed that the court had no jurisdiction to make orders sought as the issue of land registration fell in the newly enacted National Land Commission Act, the Land Registration Act and the Land Act.
20. That is how the respondent herein started appearing as applicant and a party to the succession cause herein by virtue of being a beneficiary who was trying to enforce the benefits of the estate of the deceased Veronica Juma Ombedho.
21. It is after the above situation that the applicant herein filed an application seeking for revocation of grant which is not on record except the notice of motion dated October 15, 2012 seeking for an injunction to restrain the respondent herein from dealing with three parcels of land namely, those in the certificate of confirmation of grant and another parcel South Ugenya/Ambira/1776, and claiming that her late husband Cosmas Odhiambo Otieno was the son to Veronica Juma and that he predeceased her in 1992 and he left her with four children, three sons and a daughter who had died. That the respondent herein fraudulently obtained grant in respect of the estate of her mother in law yet he was a grandson and that at the time of her demise, Veronica Juma had even put in motion the process of transferring plot number Ugunja Trading Centre/7 to her son Joseph Otieno Odhiambo.



22. The respondent herein swore a very detailed affidavit admitting that indeed the husband to the applicant herein was a son to the late Veronica Juma Ombedho but denied that the late Cosmas Otieno Odhiambo was entitled to inherit from the estate of the deceased since he was not born of the first husband of Veronica Juma where the latter got land and that Beldina Achieng was the only daughter and child of this first husband who was therefore entitled to benefit from that estate since Cosmas had his own father from who he got land and settled there prior to his demise in 1992.
23. That notice of motion dated October 15, 2012 does not contain any prayer for revocation of grant hence my issue with the order by Justice James Makau dismissing the application for revocation of grant and orders for injunction dated October 15, 2012, on December 16, 2016.
24. Although the respondent denies being an administrator, the certificate of confirmation of grant in the file also shows that he is the administrator of the estate of the late Okech Ojuolo whose status in this matter is not clarified and which should be laid bare as the genesis of the mix-up is not clear and has to be addressed in HCPA 120 of 2016.
25. Even in the description of the order dismissing the summons for revocation of grant, the respondent herein is named as the respondent/petitioner.
26. I reiterate that from the filed documents, the respondent herein became the beneficiary of the estate of the late Veronica Juma Ombedho after Beldina Achieng Otieno daughter and administrator of the estate of the late Veronica Juma Ombedho relinquished the estate to the respondent herein but since the applicant claims that her late husband was the son to the said Veronica Juma Ombedho and that she is therefore entitled to the estate, that is a matter for interrogation by the court based on evidence that parties will adduce.
27. Further, I observe that both parties are under a duty to assist the court do justice. If the applicant did not have the documents which appear to have been removed from the court file, which documents the respondent was also in possession of as he was served with the same, then the respondent should have filed those documents for the court to consider. A party to proceedings of this nature should not be allowed to sit on the fence and watch as the court demands for essential documents for it to be well seized of the matter before it. The documents that this court was looking for are the summons for revocation of grant dated October 15, 2012 which are not on the court file to date as the only application is for injunction and is dated October 15, 2012. Perhaps whoever prepared the application for the applicant herein may have omitted that prayer or may have filed a different application and this can be deduced from prayer No 3 of the application by way of notice of motion dated October 15, 2012.
28. In addition, there is no substantive ruling that dismissed the summons for revocation of grant, this court cannot merely be asked to set aside an order which order exists in a vacuum. It is the ruling which gives rise to an order and without that ruling, this court can never tell the reasons for the dismissal of the summons for revocation of grant.
29. However, a keen perusal of the file herein which originated from Kisumu High Court reveals more. The court file shows that on December 16, 2016 when the application dated October 15, 2012 was dismissed, none of the parties were before the court and that on the previous date of November 24, 2016, the Deputy Registrar had fixed the matter for mention before the judge for December 16, 2016 hence it is not clear when the learned judge heard the application and whether there is any ruling for that matter. There is also no evidence that parties who were not present when the matter was fixed for mention after it was brought from Kisumu High Court, were served with notice to appear before the



- application was dismissed. is an undated notice issued with no evidence of service upon the parties' advocates requiring them to appear for mention on December 16, 2016.
30. It follows that the dismissal of the notice of motion for injunction-not summons for revocation of grant was done without notice to the parties or even hearing them out.
 31. Nonetheless, as earlier stated, the respondent herein is a beneficiary of the estate of Veronica Juma Ombedho and not an administrator. Whereas he is a necessary party to this proceedings since he acquired the entire estate from his grandmother through his mother Beldina Achieng, the main and primary benefactor and administrator of the estate subject of the dispute is Beldina Achieng who must be the 1st respondent and necessary party not by choice but mandatorily, before the court can consider whether or not to revoke the grant issued to her.
 32. In my view, the applicant is misguided in filing applications for revocation of grant against the respondent herein yet the respondent holds no such grant and if he does, and indeed he has a grant in respect of the estate of Okech Ojuolo, then he can only be enjoined with proper description of his status in this matter.
 33. It therefore follows that setting aside the orders of May 10, 2022 that struck out the application by the applicant, which striking out does not bar her from filing an appropriate application, will not aid her in any way. In addition, reinstating the application which was struck out will be in vain as the court record shows that Beldina Achieng is the one who is the administrator of the estate subject of the dispute herein and therefore in her obvious absence, it would be a waste of judicial time to reinstate summons filed and directed at a wrong person.
 34. I hasten to add that those are the facts in the file and that the advocates for the applicant must take the liberty to read this file thoroughly if indeed they are desirous of assisting the applicant client access justice. This is so because the administrator of the estate is Beldina Achieng and she must be brought on board for the dispute herein to be fully resolved. Cosmetic applications on the face of it cannot aid in bringing this dispute which involves landed properties to an end.
 35. I find that there are issues which need to be addressed in the matter which can only be dealt with the input and involvement of all the parties concerned.
 36. In light of the above, I find that whereas the prayer for reconstruction of the file is merited as the integrity of the court file demands that all documents filed on record must be insitu whether merited or not, I however find that the prayer for setting aside of this court's order made on May 10, 2022 striking out the applicant's summons for revocation of grant dated April 25, 2022 and filed in court on April 26, 2022 and reinstating the same to be heard on merit is not merited for the reasons given above.
 37. The application/ summons for revocation of grant remain struck out. The applicant is now at liberty to file an appropriate application for consideration by the court on merit *vide* the substantive file succession cause No 120 of 2016 which is hereby consolidated with this file to be one.
 38. In view of the sensitivity of this matter I hereby direct that this file shall at all times be kept in custody of the Deputy Registrar of the court and be accessed only by the parties' counsel for perusal and or filing of documents without taking it to the registry.
 39. I further order that any party interested in the estate of the deceased shall file documents in a fresh file which shall be considered alongside this consolidated file for institutional memory otherwise this files as consolidated are hereby marked as closed.
 40. Each party shall bear their own costs.



DATED, SIGNED AND DELIVERED AT SLAYA THIS 3RD DAY OF APRIL, 2023

R.E. ABURILI

JUDGE

