



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of John Oduor Akwera (Deceased) (Succession Cause
64 of 2008) [2023] KEHC 3724 (KLR) (4 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 3724 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
SUCCESSION CAUSE 64 OF 2008**

WM MUSYOKA, J

MAY 4, 2023

IN THE MATTER OF THE ESTATE OF JOHN ODUOR AKWERA (DECEASED)

RULING

1. On December 6, 2022, the parties hereto resolved a pending application for revocation of grant, dated October 5, 2022, by consent, resulting in the court appointing Kizito Omondi Oduori, Alfred Makhulo and Timothy Ndubi as joint administrators, and they were directed to file a summons for confirmation of the grant to be issued to them. The court then went ahead and processed a grant of letters of administration intestate, dated December 6, 2022.
2. Alfred Makhulo and Timothy Ndubi then lodged the summons dated March 6, 2023, seeking revocation of the grant of December 6, 2022, on grounds that they had not given instructions to their Advocate to get into the consent of December 6, 2022. I shall refer to Alfred Makhulo and Timothy Ndubi as the applicants. Kizito Omondi Oduori opposes the application. His replying affidavit was sworn on March 7, 2023. I shall refer to him as the respondent.
3. The discretion to revoke grants is given in section 76 of the *Law of Succession Act*, Cap 160, Laws of Kenya. The reasons for revocation are also set out in that provision, being the process of obtaining the grant being defective, fraud and misrepresentation being brought to bear on the process, maladministration and failure of administration, and change in circumstances rendering the grant useless and inoperative.
4. For avoidance of doubt, section 76 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.”

5. The parties agreed before the Judge to have the grant then in place revoked, and to have fresh appointments of administrators made. They even placed before the court names of the individuals that they wanted appointed and the court went ahead, and made the appointments, and a grant was processed in those terms. There was no defect in the process, and there was no fraud or misrepresentation. The applicants had instructed their Advocate to act generally for them in the matter, which meant that he had power and authority to enter into consents in the manner that he did. It cannot be said that he acted without authority and could not bind the applicants. I do not think the Advocate acted without authority.
6. The reasons that the appellants give for seeking revocation of the grant do not fall within the 4 grounds that are set out in section 76 of the [Law of Succession Act](#). The applicants should have considered an application to have the impugned consent set aside.
7. In any case, rather than set the matter back by having the revocation application revived, the issues raised in it can be dealt with within the context of the confirmation application that the court directed the parties to file. The issue as to whether a grant should be confirmed or not is not limited to just the distribution of the estate, it also covers consideration of how the grant was made in the first place, and how the administrators have administered the estate after the grant was made to them. The court at confirmation has power to revoke a grant, if it is persuaded that it was not properly made or the administrators did not qualify for appointment, and after making such a revocation, the court can appoint fresh administrators in the confirmation ruling, and confirm the grant straightaway. That way there would be no delay in the administration of the estate, and it would avoid the back and forth that the applicants are now taking us back to.
8. What I am talking about is provided for in section 71(2)(a)b)(c) of the [Law of Succession Act](#), which provides as follows:

“71. Confirmation of grants

 - (2) the court to which application is made, or to which any dispute in respect thereof is referred, may –



- (a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or
- (b) if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 inclusive, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be unadministered; or
- (c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other all assets of the estate then in his hands or under his control; or
- (d) ..."

9. What section 71(2)(a) requires the court to do at confirmation is what section 76 of the *Law of Succession* covers. That would mean, it is unnecessary to file an application for revocation of grant where there is a pending application for confirmation of grant. Where there is no pending application for confirmation, but directions have been given for filing of one, rather than the administrators filing to have the grant revoked to remove one of them, they would be better of killing 2 birds with 1 stone, by filing for confirmation of their grant, where they raise the issues that they would propose to make in a revocation of grant.
10. Where an application for revocation of grant pends alongside another for confirmation of grant, the ideal thing should be to have both disposed of simultaneously, since the revocation application can be subsumed in the confirmation application. A party need not wait until a confirmation application is disposed of to file his revocation application. The ideal position should be that the applicant, in the revocation application, ought to file an affidavit of protest, and raise his issues there, rather than wait to mount a revocation application thereafter. A court, faced with a revocation application, mounted shortly after determination of a confirmation application, by party who participated in the confirmation application, or who should have so participated, should not entertain such a revocation application.
11. I have said enough to demonstrate that we are dancing at the same spot. We should move forward. The way to move forward is not to file a revocation application, so soon after another revocation application was disposed of. Directions have been given for the filing of a confirmation application, let either of the 3 administrators file it, and those who do not support it ought to file their affidavits of protest, where the issues raised in the 2 revocation applications can be raised, and considered, in the context of section 71(2)(a) of the *Law of Succession Act*, and thereafter the court may make orders guided by section 71(2)(b)(c) of the *Law of Succession Act*.
12. I find no merit in the application, dated March 6, 2023. I hereby dismiss it. Let the parties proceed in terms of what I have directed under paragraph 11 above. I shall allocate a date to confirm whether that such an application has been filed. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS 4TH DAY OF MAY 2023

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Appearances



Mr. Magina, instructed by Kibet Adoli & Magina, Advocates for the applicants.

Mr. Bogonko, instructed by Bogonko Otanga & Company, Advocates for the respondent.

