



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Estate of Joseph Akunda Okwabikha alias Joseph Akunda (Deceased)  
(Succession Cause 55 of 1984) [2023] KEHC 18053 (KLR) (2 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18053 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
SUCCESSION CAUSE 55 OF 1984**

**WM MUSYOKA, J**

**JUNE 2, 2023**

**RULING**

1. The application for determination is dated May 26, 2022. It is brought at the instance of Victor O. Osango, advocate, who I shall refer hereto as the applicant. It seeks review of orders that were made herein on May 17, 2022, on grounds that the court was misled, by Ms Masakhwe, advocate for the other party, to believe that the summons for revocation of grant, dated March 16, 2012, had been disposed of.
2. There is a reply to the application, by Obadia Sylvester Ong'anda, *vide* an affidavit sworn on July 18, 2022. I shall refer to him as the respondent. He mentions that the applicant had attended court, in the absence of the advocate for the respondent, on January 27, 2022, and obtained directions and a date for hearing of an allegedly pending summons for revocation of grant, yet the purported application had been disposed of in a ruling that Thurania J delivered.
3. The application was canvassed by way of written submissions, as per the directions of July 20, 2022. I have seen and perused written submissions on record, by both sides, some complete with caselaw. I have read through them, and I have noted the arguments made.
4. What happened on January 27, 2022? This is what the record reflects:

“January 27, 2022

Before Hon WM Musyoka – J

C/A Erick

Mr Osango for objector

Ms Moraa for Ms Masakhwe for petitioner

Mr Osango

There is a pending summons for revocation dated March 16, 2012. We seek directions on that summons. I propose oral evidence.

Ms Moraa



We have no objection. We can have date for hearing.

Court

1. The summons dated March 16, 2012 to be canvassed by way of affidavit and oral evidence.
2. Hearing on May 17, 2022.”

5. This is what transpired on May 17, 2022:

“

“ 17. 5.22

Before Hon WM Musyoka – J

C/A Erick

Ms Masakhwe for petitioner

Ms Masakhwe

Application dated March 16, 2012. We are ready to proceed. The date was taken by the objector. It is a 1994 matter. Objector is not interested in their case. I am praying in this court to have the summons dismissed for want of prosecution. The parties are very old. A 1994 matter should not be lying in court in 2022

Court

1. The application dated March 16, 2012 was dismissed by a ruling that was delivered herein on October 11, 2012, so it is not pending.
2. As the petitioner has been dragged to court over an application that does not exist, he will be entitled to today's costs.”

6. From the record cited, both parties have not been factually correct in the positions articulated in their respective affidavits. The events of January 27, 2022 show that the respondent was represented. Ms Moraa held brief for his advocate, Ms Masakhwe, so it is not correct to say that directions on the application, dated March 16, 2012, were given and taken *ex parte*. His advocate acceded to what the applicant requested. The events of May 17, 2022 demonstrate that Ms Masakhwe did not mislead the court, as alleged by the applicant. She only invited the court to dismiss the application, dated March 16, 2012, she did not submit that it had already been dismissed, for that came from the court itself.

7. So, was the application, dated March 16, 2012, still pending as at May 17, 2022? There is a 5-page ruling that B. Thurania Jaden J delivered on October 11, 2012, determining an application, dated March 16, 2012. That application, dated March 16, 2012, had been filed under certificate of urgency on March 16, 2012. It was placed before B. Thurania Jaden J on March 20, 2012, where it was fixed for inter partes hearing on July 19, 2012, and interim relief was granted. The application was argued on July 19, 2012, by Mr Musiega for the party that the applicant now represents, Ms Masakhwe for the respondent herein, and Mr Chitwah for an interested party, Anna Akhayati. B. Thurania Jaden J reserved the ruling for October 11, 2012, and extended the interim orders. On October 11, 2012, B. Thurania Jaden J delivered the ruling, as scheduled. The opening line of the said ruling reads, “The application by way of chamber summons dated March 16, 2012 applies for orders...,” and the closing line says, “that being the law, the application fails with costs.”



8. I have closely perused the file of papers before me, and I have noted that there were in fact 2 applications dated March 16, 2012. Both were filed on the March 16, 2012. One was a chamber summons, and the other a summons for revocation of grant. It would appear that the chamber summons sought orders to preserve the status quo pending determination of the summons for revocation of grant. What B. Thurania Jaden J heard, on July 19, 2012, was the chamber summons, and not the summons for revocation of grant. After disposing of the chamber summons, B. Thurania Jaden J did not advert to the summons for revocation of grant. After October 11, 2012, the issue of the summons for revocation of grant did not come up, until December 12, 2021, when a date was allocated for directions on its disposal, hence the events of January 27, 2022.
9. So, the parties were right, there was a pending summons for revocation of grant, and the mistake was on the side of the court. There is an error on the face of the record. The ruling of October 11, 2012 had nothing to do with the pending summons for revocation of grant, dated March 16, 2012. Directions on its disposal had been properly given on January 27, 2022, in the circumstances.
10. Should I review the order that I made on May 17, 2012? Yes, partly. I made the order on the basis that the order of October 11, 2012 had dismissed the summons for revocation of grant of March 16, 2012. That was an error on the face of the record, for that order had not made that dismissal. Ms Masakhwe had invited me to dismiss the said summons for revocation of grant, dated March 16, 2012, for non-attendance of the applicant and his client. I should have dismissed the said summons on that ground. The date for May 17, 2022 had been taken in open court, on January 27, 2022, in the presence of the applicant. Indeed, it was the applicant, who first moved the court on December 15, 2021, for a date for directions on January 27, 2022. So, he got a date for the pending application, dated March 16, 2012, but on the due date neither he nor his client were in attendance. The record of May 17, 2022 indicates so. The application, dated March 16, 2012, had been pending since 2012, and no steps had been taken on it until December 2021.
11. The consequence of not attending court, when a matter comes up for hearing, is dismissal of the matter for non-attendance and want of prosecution. The application, dated March 16, 2012, had been filed by the client for the applicant. Neither the applicant nor his client were in court on May 17, 2022 to prosecute the application, and so it should have been dismissed. Accordingly, therefore, I do hereby review the order of May 17, 2022, to read that the summons for revocation of grant, dated March 16, 2012, was dismissed for non-attendance and want of prosecution, on the part of the client for the applicant. The order on costs remains intact. It is so ordered.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS 2ND DAY OF JUNE 2023**

**WM MUSYOKA**

**JUDGE**

**Mr. Erick Zalo, Court Assistant.**

**Appearances**

**Mr. Osango, the applicant, in person.**

**Ms. Masakhwe, instructed by Consolatah Masakhwe & Company, Advocates for the respondent.**

