



**Masibo v Masibo (Miscellaneous Succession Application
E008 of 2021) [2023] KEHC 18608 (KLR) (19 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18608 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
MISCELLANEOUS SUCCESSION APPLICATION E008 OF 2021
WM MUSYOKA, J
JUNE 19, 2023
(FORMERLY BUNGOMA MISCELLANEOUS P&A NO. 116 OF 2018)**

BETWEEN

JOHN BARASA MASIBO APPLICANT

AND

MARCELINE NABWILE MASIBO RESPONDENT

RULING

1. This matter relates to the estate of Salome Nasike Masibo (deceased). Representation was sought and obtained in Bungoma CMCS No 273 of 2017, by Marcelyne Nabwile Masibo. The grant confirmed in 2018, and certificate to that effect was issued, curiously, dated April 26, 2017.
2. A Notice of Motion, dated July 19, 2018, was lodged at the High Court at Bungoma, initiating Bungoma Miscellaneous P&A No 116 of 2018, principally seeking revocation of the grant made in Bungoma CMCS No 273 of 2017, and consequential orders. The said application was resolved by consent on March 12, 2020.
3. The proceedings of March 12, 2020 were recorded as follows:

“ 12/3/2020

Before SN Riechi – Judge

Wilkister/Immaculate – C/A

Appearance:

Ms. Ratemo for applicant

Ms. Olonyi HB Mokhooli for RESP



Olonyi: Kindly record the following consent.

That by consent of both parties

1. The grant issued to the Respondent on 17 (entry cancelled) and confirmed on 26.4.2017 be and is hereby revoked.
2. Fresh grant to be issued to
 1. John Barasa Masibo
 2. Marceline Nabwile Masibo
 3. Benerd Simiyu

Ms Ratemo: This is the consent.

CT: By consent

1. The grant issued to the Respondent and confirmed on 26.4.2017 be and is hereby revoked.
2. Fresh grant to be issued to:
 - 1) John Barasa Masibo
 - 2) Merceline Nabwile Masibo
 - 3) Benard Simiyu

End of Consent

Olonyi Advocate

(signed)

Ratemo Advocate

(signed)

(signed)

SNR”

4. Subsequent to the orders of March 12, 2020, 2 grants of letters of administration intestate were issued, out of Bungoma Miscellaneous P&A No 116 of 2018, one dated July 14, 2020 and the other September 23, 2020.
5. The events of March 12, 2020 provoked the filing of a Motion, dated September 14, 2020, by Marcelyne Nabwile Masibo, the respondent herein, seeking the setting aside of the consent order of March 12, 2020, on grounds that the Advocate who purportedly appeared for her did not have her instructions to record or enter into such a consent, that the said Advocate had no practicing certificate, and that the High Court did not have original jurisdiction to hear and determine an application under section 76 of the *Law of Succession Act*, cap 160, laws of Kenya, for revocation of a grant made by a subordinate court. She has attached documents to show that her principal Advocate, Mukhooli David Khaukha, had not taken out a practicing certificate for the year 2020, and that the Advocate who held his brief on March 12, 2020, Wayne Jethrone Olonyi, had also not taken out a certificate for 2020. Another Motion, dated September 17, 2020, was lodged herein on September 23, 2020, by John Barasa



- Masibo, the applicant herein, seeking injunctive orders, pending the hearing and determination of this cause.
6. Directions were given on October 13, 2020, for disposal of the applications dated September 14, 2020 and September 17, 2020, by way of written submissions. Both sides complied, by filing written submissions. The matter was mentioned several times, and on February 1, 2021, the Judge at Bungoma disqualified himself from the matter, after the respondent expressed reservations. The matter was then referred to the High Court at Busia, and that is how it became Busia Miscellaneous Succession No 8 of 2021.
 7. After the matter was transferred to Busia, directions were given for the highlighting of the submissions. When the matter came up for hearing, on February 19, 2023, only Mr. Wasilwa, for the respondent, was in attendance, and I allowed him to go ahead and highlight his written submissions. I have read through the written submissions and the highlights by Mr Wasilwa, and I shall proceed to determine the matter based on the arguments made.
 8. One of the issues raised in the application, dated September 14, 2020, turns on jurisdiction, that the High Court has no original jurisdiction to revoke grants made by the magistrate's court. I shall proceed to determine that issue first.
 9. Prior to January 2, 2016, the High Court enjoyed exclusive jurisdiction to revoke all grants of representation, whether made by itself or the magistrate's court. The magistrate's court had no jurisdiction to revoke grants that it had power to make. However, all that changed on 2nd January 2016, when the *Law of Succession Act* was amended by the coming into force of the *Magistrates' Courts Act*, No 26 of 2015. Section 23 of the *Magistrates' Courts Act, 2015*, amended section 48(1), which had granted exclusive jurisdiction to the High Court to revoke grants made by the magistrate's court, and extended that jurisdiction to the magistrate's court. That meant that the exclusive jurisdiction conferred on the High Court to revoke all grants was ended, and jurisdiction was extended to the magistrates, who now, effective from January 2, 2016, got jurisdiction to revoke the grant made by them. See *Josiah MR Karuri v Simon Gichangi Kabugi* [2017] eKLR (Ngaah, J), *Turfena Anyango Owuor & another v Mary Akinyi Dengo* [2018] eKLR [2018] 1 EA 374 (Mrima, J), *In re Estate of Meshack Nyangi alias Nyangi Kabuga (Deceased)* [2019] eKLR (Limo, J), *Joseph Odera Ombayo v Robert Ombayo Wambogo* [2019] eKLR (Aburili, J), *In re Estate of Charles Boi (Deceased)* [2020] eKLR (Musyoka, J), *Mwati Kakiti Ngalaka & another v Nzembe Kakiti & another* [2020] eKLR (Mutende, J), *Consolata Ochieng Ogutu & 3 others v Adet Odongo & another* [2021] eKLR (Aburili, J) and *David Khasievera Anusu & 2 others v Evans Khasievera Anusu* [2022] eKLR (FS Amin, J). That meant the High Court could only revoke grants made by itself, but not made by magistrates. The High Court lost the original jurisdiction to revoke grants made by magistrates, and it could only deal with them in exercise of its appellate jurisdiction, with respect to decisions by magistrates revoking grants made by them.
 10. For avoidance of doubt, section 48(1) of the *Law of Succession Act*, prior to January 2, 2016 read as follows:

“ 48

- (1). Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49, a resident magistrate shall have jurisdiction to entertain any application other than an application under section 76 and to determine any dispute under this Act and pronounce such decrees and make such orders



therein as may be expedient in respect of any estate the gross value of which does not exceed one hundred thousand shillings ...”

11. From January 2, 2016, the same provision, section 48(1) reads as follows:

“48. Jurisdiction of Magistrates

(1) Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49, a magistrate shall have jurisdiction to entertain any application and to determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed the pecuniary limit prescribed under section 7(1) of the Magistrates’ Courts Act, Act (No 26 of 2015).

(2) ...”

12. Section 23 of the Magistrates Courts Act, 2015, which effected the amendments, reads:

“23. Amendment of section 48 of Cap. 160

The Law of Succession Act (Cap. 160) is amended, by repealing section 48(1) and substituting therefor the following new subsection

(1) Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49, a magistrate shall have jurisdiction to entertain any application and to determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed the pecuniary limit prescribed under section 7(1) of the Magistrates’ Courts Act, 2015.”

13. So, what does that mean, with respect to the instant matter before me? The cause herein, seeking revocation of the grant made in Bungoma CM CSC No 273 of 2017, was lodged on July 19, 2018, long after the Magistrates’ Courts Act, 2015, had come into force on January 2, 2016. Indeed, Bungoma CM CSC No 273 of 2017 itself was initiated after the Magistrates’ Courts Act, 2015, had commenced. The instant cause was initiated after section 48(1) of the Law of Succession Act had been amended, to take away jurisdiction from the High Court, and to confer it on the magistrate’s court. As at July 19, 2018, the High Court had no original jurisdiction to revoke the grant made in Bungoma CM CSC No 273 of 2017. An issue relating to revocation of the grant in Bungoma CM CSC No 273 of 2017 could only come to the High Court on appeal. Consequently, the cause herein, initiated by the Motion, dated July 14, 2018, was void ab initio, to the extent that it sought orders that were no longer available from the High Court. A court exercises jurisdiction as conferred upon it by the law. The Law of Succession Act does not confer jurisdiction on the High Court to revoke grants made by magistrates, and any cause initiated at the High Court, asking for orders to revoke such grants, is incompetent.

14. As the cause was incompetent ab initio, all the proceedings conducted in it, inclusive of the recording of the consent of March 12, 2020 and the grant of letters of administration intestate, issued on the strength of the said consent, are all invalid, and null and void. The application, dated September 14, 2020, is merited. It would be academic to address my mind to the matter of the Advocates, who were then acting for the respondent, Mr Mukhooli and Mr Olonyi, not having practicing certificates at the time they entered into the impugned consent.

15. On the application dated September 17, 2020, the same should meet a similar fate. These proceedings are incompetent, and cannot support interlocutory applications of any kind.



16. The file in Bungoma CMCSC No 273 of 2017 was never called up and consolidated, or made part of the proceedings herein or in Bungoma Miscellaneous P&A No 116 of 2018. A grant or representation is made on the basis of a petition for representation. A grant made in a cause where no petition exists would be hanging and without foundation. The petition was filed in Bungoma CMCSC No 273 of 2017, none was filed in Bungoma Miscellaneous P&A No 116 of 2018. There was no foundation at all for the making and issuance of the grant of March 12, 2020, when there was no petition before the High Court. The court file in Bungoma CMCSC No 273 of 2017 should have been called for first, and made part of the proceedings herein, before the making of the grant of March 12, 2020. Of course, I say this without prejudice to my earlier holding, that the High Court has no jurisdiction, whatsoever, to revoke a grant made by a magistrate's court.
17. Secondly, and at the risk of repeating myself, a grant of representation can only be made and issued out of a substantive cause, initiated by a petition. There is no petition in this cause. This is not a substantive cause, where a grant a representation is sought, but a miscellaneous cause for revocation of a grant. The court can only, in this miscellaneous cause, revoke a grant, for that is what is sought in the Motion, which initiated the cause, but not make a grant, for there is no petition in the miscellaneous cause, which can be the basis for the making of such a grant.
18. In view of the foregoing, I find merit in the application, dated September 14, 2020, and I hereby allow it. I find no merit in that dated September 17, 2020, and I hereby strike it out. The entire Miscellaneous Cause is without foundation, and, therefore, incompetent, and I hereby strike it out. The respondent shall have the costs. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 19TH DAY OF JUNE 2023

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Appearances

Mr. Ocharo, instructed by Ocharo Kebira & Company, Advocates for the applicant.

Mr. Wasilwa, instructed by Wasilwa Makhakara & Company, Advocates for the respondent.

