



REPUBLIC OF KENYA



KENYA LAW
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**Barasa & another v Osinya (Civil Appeal E038 of 2021)
[2023] KEHC 20046 (KLR) (17 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20046 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CIVIL APPEAL E038 OF 2021
WM MUSYOKA, J
JULY 17, 2023**

BETWEEN

PATRICK WABWIRE BARASA 1ST APPELLANT

SILAS BARASA 2ND APPELLANT

AND

ROSALYNE TAABU OSINYA RESPONDENT

*(Appeal from judgment and decree of Hon. Mrs. Lucy Ambasi, Chief
Magistrate, CM, in Busia CMCSC No. 198 of 2020, of 23rd September 2021)*

JUDGMENT

1. The trial court had delivered a ruling, in Busia CMCSC No. 198 of 2020, in the matter of the estate of Elphas Baraza Wadiya, deceased, on an application, under section 76 of the *Law of Succession Act*, cap 160, Laws of Kenya, and dismissed the same on the basis that none of the grounds, set out in section 76 of the *Law of Succession Act*, had been proved. The appellants herein were aggrieved, hence the instant appeal. They raise 2 grounds: that the trial court erred in finding no grounds were laid out for revocation, and the trial court failed to find that the distribution set out was contrary to the dictates of section 40 of the *Law of Succession Act*.
2. Directions were given, on March 6, 2023, for canvassing of the appeal, by way of written submissions. Both sides filed written submissions, which I have read through, and noted the arguments made.
3. The ruling of the trial court was premised on a summons for revocation of grant, dated July 2, 2021, brought at the instance of the appellants herein. It was alleged that the petition was brought without involving them, the grant was obtained in secrecy, the distribution was against the tenets of the Probate and Administration Rules, the confirmation orders ignored the arrangements set by the family, and consents of family members were not obtained at distribution. It was averred that the survivors of the



deceased were 15, spread across 3 houses. It is asserted that the grant was confirmed without involving all the 15 beneficiaries or survivors.

4. The respondent replied to the summons for revocation of grant. She stated that no proof had been provided of the alleged fraud or false statements, for the mother of the 2nd appellant had been cited to take out letters of administration, and she indicated that she had no money, and allowed the administratrices, the respondent herein being one of them, to go ahead and petition. It was further averred that when a summons for confirmation of grant was filed, the mother of the 2nd appellant filed a protest, which was heard, and a ruling was delivered, and no appeal was filed against that ruling. She contended that the 2nd appellant was in court when the said protest was heard and determined.
5. The summons for revocation of grant was canvassed by way of written submissions. The appellants submitted only on the matter of distribution, arguing that they were not involved in the distribution, and that the same was not in line with section 40 of the *Law of Succession Act*. They urged the court to revoke the certificate of confirmation of grant. In her written submissions, the respondent argued that the summons for revocation of grant was not founded on any of the grounds upon which a grant could be revoked, being that the proceedings to obtain the grant were defective, fraud was practiced, there were untrue allegations, there was no diligence in administration, and the grant had become useless and inoperative. On distribution, she argued that the same could not be revisited as the court had confirmed the grant.
6. The discretion given to the courts, by section 76 of the *Law of Succession Act*, is for revocation of grants, based on the grounds or reasons set out in that provision. The grounds are grouped in 4. I would summarize them into 3. The first addresses the process of obtaining the grant, and the issues would be that there were procedural or technical defects in the process of obtaining it, or that there was fraud or misrepresentation or concealment of facts from the court. The second is about the administration process, where the grant had been obtained properly. There are 3 sub-issues here: the failure to apply for confirmation of the grant within the timelines set out in the law, lack of diligence in administration, and the failure to render accounts. The third is where the grant has become useless and inoperative.
7. A defective process is one where the procedure was flawed or not right, such as where a person died testate, and a grant of letters of administration intestate is obtained; or where certain consents ought to have been obtained and filed, but that was not done; or where the cause was not gazetted before the grant was made. Fraud and misrepresentation, and concealment of matter from court, are related. It is all about false or incorrect information being placed before the court, whether innocently or fraudulently. Such acts would be criminal, and no process tainted by criminality ought to be upheld. Failure to apply for confirmation of a grant within the set timelines is self-explanatory. Lack of diligence in administration is about failure of the administration, where the administrators fail to discharge their duties, say by failing to pay debts and settle liabilities, failing to collect and get in assets in readiness for distribution, failing to initiate suits to protect the estate or enforce causes of action which accrue in favour of the estate or to recover debts due to the estate, among others. Failure to render accounts is self-explanatory. It is about accounting for the administration of the estate, in terms of explaining what the administrators have done with the grant, how they have managed the estate, done with debts and liabilities, perfected estate assets, spent estate funds, among others. A grant being useless and inoperative is about the estate being left without an administrator, following the death of the sole administrator or his being adjudged bankrupt and legally incapacitated to hold an office of trust or being too old or ill to be able to administer the estate.
8. When the appellants were given a chance to argue their summons for revocation of grant, they did not say a word about the grant having been obtained in a defective process, or of the respondent having practiced fraud in order to obtain it, or having concealed matter from the court, or having



failed to apply for confirmation of their grant within the required timelines, or having not diligently administered the estate, or failing to render accounts, or the grant having become useless and inoperative. They instead submitted on issues around the confirmation of the grant, that the distribution had not been done properly, and in the end they prayed for revocation of the certificate of confirmation of grant, issued founded on the orders confirming the grant.

9. I agree with the respondent, that the affidavit in support of the revocation application, placed before the trial court, was bare. Although it made allegations of fraud and exclusion, it did not support those contentions, by providing proof. Moreover, when given a chance to submit on revocation of the grant, based on how it was obtained, the appellants abandoned that, and began to complain about distribution, and the certificate of confirmation of grant. Clearly, the appellants were unhappy with confirmation and distribution, and not about how the grant was obtained.
10. Perhaps it should be pointed out that the discretion under section 76 is about revocation of grants, not certificates of confirmation of grant. A certificate for confirmation of a grant is not a grant, and it is not available for revocation under section 76. A certificate of confirmation of grant is a separate document from the grant of representation. It is a certificate on how the estate is to be distributed, drawn from the orders made by the court at confirmation. Revoking a certificate of confirmation of grant is an exercise in futility, for a certificate of confirmation is just a court document or paper issued upon confirmation of the grant. It is an extract from the confirmation orders. Cancelling the certificate is not the same as vacating the confirmation orders, and such cancellation leaves the confirmation orders intact. Section 76 is not a cure or relief for problems with the manner the grant was confirmed or distribution handled. Section 76 is not available to address concerns about what happened at confirmation. Anyone unhappy with that files an appeal against the orders made at confirmation, not a summons for revocation of grant.
11. I am not persuaded that the trial court was at fault, in declining to allow the summons for revocation of grant. I hereby uphold the orders made in Busia CMCS No. 198 of 2020, on September 23, 2021. I confirm those orders. There is no merit in the appeal herein, and I hereby dismiss it. As this is a family matter, let each party bear their own costs.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 17TH DAY OF JULY 2023

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Appearances

Mr. Jumba, instructed by Balongo & Company, Advocates for the appellants.

Mr. Juma, instructed by JV Juma & Company, Advocates for the respondent.

