



**In re Estate of Wandera Adingo Berenge alias Andera Odingo Berenge (Deceased)
(Succession Cause 171 of 2012) [2023] KEHC 23360 (KLR) (13 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23360 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
SUCCESSION CAUSE 171 OF 2012
WM MUSYOKA, J
OCTOBER 13, 2023**

RULING

1. I am tasked with determining a summons for revocation of grant, dated 1st July 2022, which is brought at the instance of Stephen Malingu. I shall refer to him as the applicant. He avers that he purchased 10 acres of estate land from the deceased, and they executed a sale agreement. Part of the purchase price was not paid in cash, but in terms of business stock, worth Kshs. 5,000.00. The deceased inherited the 10 acres from his own father, and it became his property. He said that he attended a meeting of the land control board in 1977, and obtained transfer forms from the deceased, and also paid the requisite stamp duty fees. The deceased, however, died before transferring the property to him. He states that, at the distribution of the estate, he was entitled to get Bukhayo/Mundika/8984, however when the certificate of confirmation of grant was issued, his name was missing. He seeks that the certificate of confirmation of grant, issued on 15th February 2015, be revoked.
2. The applicant has attached a number of documents to his affidavit. There are copies of the grant made herein on 26th July 2012, to the administrator herein, Shaban Wandera Adingo, and the certificate of confirmation of that grant, dated 11th December 2014. There is a document, dated 27th November 1977, purported to be a land sale agreement between Honori Adingo and his children, on one hand, and the applicant on the other. There are copies of a delivery note and petty cash vouchers. There are copies of an application for consent and letter of consent of the land control board, dated 24th November 1977 and 29th November 1977, respectively. There is an application for partition, and a bundle of receipts issued by the lands office.
3. The reply to the application is by the administrator, vide his affidavit, sworn on 31st January 2023. He asserts that the applicant was not a survivor of the deceased, and that he was not recognized as either a beneficiary or liability of the estate in the letter from the Chief. It is further asserted that the applicant has no interest in the estate, for he never lived on it or used or utilized it. He argues that the claim that the applicant was a bona fide purchaser can only be entertained by the Environment and Land Court. He states that the applicant had a suit at the Environment and Land Court, being Busia ELC No. 13 of 2018, where he had sued the individuals listed in the certificate of confirmation of grant. That suit is said to be still pending. He then goes on to say that there is another suit, Busia ELC No. 170 of



- 2014, which was withdrawn by the applicant, on 29th July 2017. He states that the latter suit was filed shortly after the grant was confirmed in 2014, and the applicant should not be heard to say that he only recently discovered that he was not catered for at confirmation. He asserts that the grant ought not be revoked, as the estate has since been distributed, and title deeds issued to the beneficiaries.
4. The administrator has attached several documents to his affidavit. There are copies of the grant made to him, on 26th July 2012, and the certificate of its confirmation, dated 11th December 2014. There is a copy of a letter from the Assistant Chief of Busia Township Sub-Location, dated 22nd March 2012, introducing the estate to the court. There are the pleadings in Busia ELC No. 13 of 2018, for specific performance; and those in Busia ELC No. 170 of 2014, together with the notice withdrawing the said suit.
 5. The applicant filed a supplementary affidavit, on 6th February 2023, sworn on 3rd February 2023. He asserts to be a beneficiary of the estate, on account of having bought land from the deceased. He states that he was in occupation of and utilized the land, up to 2016, when he was forced out. He concedes that he filed Busia ELC No. 13 of 2018, which he says he would be willing to withdraw if the instant application is allowed. He claims only a part or portion of the estate. He states that the court has jurisdiction to revoke the grant. He asserts that the administrator did not disclose to the court that he, the applicant, had bought a portion of the land from the deceased in the 1970s. He urges that the certificate of confirmation of grant be revoked, so that he can get his share of the land he bought.
 6. The matter was disposed of by way of *viva voce* evidence.
 7. The applicant was the first on the stand. He stated that he wanted the grant made in the suit revoked. He confirmed that he was not a child of the deceased, and his claim was based on a purchase. He referred the court to the sale agreements attached to his affidavit. He also cited the application to and the consent of the land control board. He said that he did not get his share of the land, because a fraud happened, which he reported to the police. He said that the problem was at the lands office. He confirmed that there was a suit at the Environment and Land Court, which was still pending. He said that he farmed on the land, but his people were frequently chased away by the administrator. Wilfrida Rosemary Malingu followed. She was a daughter of the applicant, born in 1974. She asserted that the applicant had bought land from the deceased, although she could not tell the year or the date when the land transaction happened. She said that she did not know the registration details of the land, but she could identify it on the ground.
 8. The administrator testified last. He said that he was born in 1971. He said that he was not aware that the applicant had bought land from the deceased. He stated that the applicant lived on land sold to him by his, the administrator, grandfather. He asserted that the deceased never sold land to the applicant. He conceded that he was 5 years old in 1977, and he could not tell what was going on then. He asserted that the land, the subject of the succession, had nothing to do with the land the applicant had bought. He said that he listed, in the petition, the persons who had bought land from the deceased, and since the applicant was not one of them, he did not put him in that list.
 9. At the close of the oral hearings, the parties filed written submissions, which I have read through, and noted the arguments made.
 10. Is there a case for revocation of the grant herein? The application is mounted as one for revocation of grant. However, the applicant appears to be mixed up on what exactly he would like the court to revoke, between the grant itself and the certificate confirming it. Section 76 of the *Law of Succession Act*, Cap 160, Laws of Kenya, gives discretion to the court to revoke grants of representation. A certificate of confirmation of grant is not a grant of representation, but a document which certifies that the grant has



been confirmed. The certificate of confirmation of grant is often referred to as a confirmed grant. That is misleading. There is provision for only one grant, which is subsequently confirmed. Confirmation of the grant does not result in the making of a fresh grant, the confirmed grant. At confirmation, there is still the one initial grant in place. What the court does, after confirmation, is to certify that that one grant has been confirmed, and to issue a certification to that effect. That certification does not produce a fresh grant. So, section 76 of the [Law of Succession Act](#) is not about revoking certificates of confirmation of grants, but of the grants themselves. The certificate of confirmation of grant is, therefore, not available for revocation, under section 76. If the applicant aims at having the court revoke the certificate of confirmation of grant herein, using the discretion given under section 76, then his application is fatally bad.

11. Section 76 is only relevant to confirmation of grants to the limited extent of failure to apply for such confirmation. Under section 76(2)(d) of the [Law of Succession Act](#), failure to apply for confirmation of grant, within the given timelines, is a ground for revocation of the grant. It is only in that respect that discretion, under section 76, can be exercised regarding confirmation of a grant. Where an application is in fact filed for confirmation of grant, and a party is aggrieved, about what transpires at the confirmation hearing, or is aggrieved about the outcome of the confirmation hearing, section 76 would be of no application. The aggrieved person would have no recourse under section 76, and ought to seek relief under other provisions of the law, or through other processes, such as review and appeal. The relief under section 76 is not available to right wrongs occurring during the confirmation process. It is only relevant where there is failure to apply for confirmation.
12. If the case by the applicant is for revocation of the grant itself, the question would be whether he has the requisite standing to apply for such revocation. Under section 76, a grant may be revoked by the court on its own motion or on application by an interested party. Where the application is by a party, that party ought to demonstrate their interest. The applicant herein asserts that he bought part of the estate land from the deceased, and that is his interest. He has placed documents on record, to demonstrate that interest. There are copies of sale agreements, documents from the land control board, and the lands office. The sale of land allegedly happened in 1977. I have read through the handwritten document of 1977, which was written in Kiswahili. Unfortunately, the same did not identify the land being sold, by reference or registration number. I cannot tell whether the land sold was the same as Bukhayo/Mundika/8984, which the applicant is now claiming in these proceedings. The land control board documents relate to a property described as Bukhayo/Mundika/151. However, no evidence was led to connect the said Bukhayo/Mundika/151 with Bukhayo/Mundika/8984. The documents from the lands office are vague and blurry, and do not carry details or particulars of the property the subject of the transactions. The applicant is asserting an interest in Bukhayo/Mundika/8984, but he has not placed documents on record, which connect him to that property. It is only by placing such documents on record, that it can be concluded that he had an interest in the estate, qualifying him to apply for revocation of the grant herein. That is particularly so as he is not a child nor sibling of the deceased, and because his alleged interest is contested by the administrator of the estate. There is no material, which undoubtedly discloses that the applicant transacted with the deceased over Bukhayo/Mundika/8984, to justify his disclosure as a liability or purchaser.
13. In any event, the issues that the applicant is placing before me, relating to his interest in Bukhayo/Mundika/8984, push the matter way out of my jurisdiction. When I sit as a Judge of the High Court in a probate matter, I have no jurisdiction to make determinations around title to land, and the use and occupation of such land. Such jurisdiction lies exclusively with the Environment and Land Court, by virtue of Articles 162(2) and 165(5) of the [Constitution](#), and the [Environment and Land Court Act](#), No. 19 of 2011, the [Land Registration Act](#), No. 3 of 2012 and the [Land Act](#), No. 6 of 2012. The issue around purchase of an interest in land, touching on the right to own property, is an issue around title to land.



Contracts relating to disposal of interests in land are governed by the Land Act, and the jurisdiction over disputes and actions relating to them is conferred on the Environment and Land Court, by the Environment and Land Court Act and the Land Act. It was not lost on me, that in their filings and at the oral hearing, the parties addressed me on whether the applicant ever occupied or used the land in question, in an effort to establish his interest or lack of it in the land. These are issues that are beyond my jurisdiction, and I shall not even venture to attempt to deal with them.

14. The applicant appears to be well aware of what I have discussed in paragraph 13, hereabove, for he initiated 2 suits before the Environment and Land Court around that issue. One of the suits is pending, the other was withdrawn. That is where the applicant should be. That is where he should get answers as to whether he acquired an interest in the property of the deceased herein or not, and specifically whether that interest had anything to do with Bukhayo/Mundika/8984.
15. Finally, I note that the sale agreement was allegedly executed in 1977. The deceased died on 30th August 2010. There are, roughly, 33 years, between 1977 and 2010. One would wonder why the applicant did not pursue the issue of transfer of the interest that he had purchased from the deceased, with the deceased, during that 33 years that he lived after signing the sale agreement. If the deceased was difficult, and refused or neglected to effect the transfers within the 33 years, what stopped the applicant from suing him, for a determination and enforcement of his interests in the land. Why did he have to wait for him to die, and then start chasing his children, who were just toddlers at the material time of the alleged transactions.
16. As stated above, the deceased died on 30th August 2010. Representation herein was sought on 18th May 2012, and obtained on 26th July 2012. The grant was confirmed on 26th June 2014, on an application dated 16th May 2014. As a creditor or purchaser or liability, the applicant had a right to object to representation being granted to the administrator, and to protest to the grant made to him being confirmed. Why did he not object to the grant being made to the administrator, or, after the grant was made, why did he not protest when an application was mounted for its confirmation. Although there is, strictly speaking, no limitation period for filing an application for revocation of grant, the test of reasonableness applies. Confirmation was done in 2014, while the revocation was applied for in July 2022. What was the applicant waiting for? Why allow passage of time, which would enable the administrator to have the assets transmitted as per the certificate of confirmation, only to throw a spanner into the works, thereafter. Why did the applicant not utilize the time, when he was filing Busia ELC No. 170 of 2014 and ELC No. 13 of 2018, to challenge the confirmation process by filing a protest affidavit, or by seeking revocation of the grant?
17. In view of everything that I have discussed above, I am not persuaded that I have a case before me for revocation of the grant herein. I find no merit in the application, dated 1st July 2022, and I hereby dismiss the same. I shall award costs to the administrator, seeing that the applicant has been filing suits all over the place, after sleeping on his rights for an unreasonable period of time. Should the applicant be aggrieved by the outcome herein, there shall be leave, of 30 days, to challenge this decision at the Court of Appeal. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA ON THIS 13TH DAY OF OCTOBER 2023

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates



Mr. Ouma, instructed by BM Ouma & Company, Advocates for the applicant.

Ms. Achala, instructed by Abalo & Company, Advocates for the administrator.

