



REPUBLIC OF KENYA



**In re Estate of Desterio Musinaka Khaoya (Deceased) (Succession Cause
69 of 2014) [2023] KEHC 23477 (KLR) (12 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23477 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
SUCCESSION CAUSE 69 OF 2014
AC MRIMA, J
OCTOBER 12, 2023**

BETWEEN

ALFRED OKUMU MUSINAKA APPLICANT

AND

SALOME NALIKA WABWILE ADMINISTRATRIX

RULING

1. This ruling relates to the Summons dated 6th December, 2022. It was filed by the Applicant herein.
2. The Applicant was appointed by this Court on 12th June, 2014 as the sole Administrator of the estate of Desterio Musinaka Khaoya, the Deceased herein. The Grant was later confirmed and a Certificate of Confirmation of the Grant dated 25th June, 2015 issued.
3. On 26th September, 2022 the Respondent's herein, Salome Naliaka Wabwile, application by way of Summons for Revocation dated 10th September, 2021 was allowed. This Court revoked the Grant issued to the Applicant and the resultant Certificate of Confirmation.
4. The Court further ordered that a new Grant be issued in the name of the Respondent and directed the Respondent to file for confirmation of the fresh grant. The Respondent duly complied with the Court order and filed a Summons for Confirmation of the Grant dated 12th October, 2022. The application is still pending.
5. It is those orders of this Court issued on the 26th September, 2022 that aggrieved the Applicant, hence, the filing of the instant Summons dated 6th December, 2022.
6. The instant application sought the following reliefs: -
 1. That this honourable court be pleased to certify this application urgent and hear the same ex-parte in the first instance.



2. That this honourable court be pleased to stay hearing of the respondent's summons for confirmation of grant dated 12th October, 2022 pending the hearing and determination of this application.
3. That this honourable court be pleased to set aside its ex-parte orders of 26th September, 2022 and all consequential orders.
4. That the costs of this application be provided for.
7. The application was supported by the grounds appearing on the body thereof together with a supporting affidavit evenly sworn by the Applicant. A Supplementary Affidavit sworn by the Applicant on 25th January, 2023 was also filed.
8. The Petitioner opposed the application.
9. The application was heard by way of reliance on the record and parties filed written submissions. Several decisions were referred to by the parties in urging their respective positions.
10. This Court has carefully considered the application, the response, the written submissions and the decisions referred to.
11. There are two principal issues for determination in this matter. The first one is whether the Applicant was duly served for the hearing of the Summons for Revocation which took place on 26th September, 2022. The second issue is whether the instant application is merited.
12. According to the record, when the Summons for Revocation came up for hearing, this Court was duly satisfied that the Applicant was properly served for the hearing. The Court relied on the Affidavit of Service sworn by a Process Server one David Imo on the 22nd August, 2022. The hearing then proceeded after the Court was fully satisfied of the service.
13. This Court has considered the Applicant's response on the contents of the Affidavit of Service. He alleges that on the alleged day of service, he was not at his home in Endebes, but he was in Bungoma town where he had visited his Counsel to instruct him to file for an injunction against the Respondent burying her son who had then died on the estate land.
14. Without much ado, the Applicant did not do much to support the averment. As the Law of Evidence calls, he who alleges must prove. The Applicant just alleged and left it at that. There was no attempt to adduce any evidence of the visit to Counsel. An Affidavit by the Counsel would have gone a long way in proving as much. Further, no pleadings on the alleged suit were annexed, and lastly, there was no attempt to cross-examine the Process Server.
15. By placing the averment by the Applicant and the state of the record side by side, it comes to the fore that the Applicant did not, preliminarily, demonstrate that he was not served as he alleged. All pointers are to the satisfaction of this Court that the Applicant was properly served.
16. The first issue is, therefore, rested in favour of the Respondent.
17. The second issue is whether the instant applicant is merited. Naturally, having found that the Applicant was properly served with the Court process, the application would fail flat. However, this Court is called upon by Article 159(2) of *the Constitution* to ensure that substantive justice is done to all and that the purpose and principles of *the Constitution* are protected and promoted.
18. In pursuit of substantive justice, a Court does not give a lot of weight to procedural technicalities. This Court, however, must clarify that issues of service of Court process are not procedural technicalities.



- Those are substantive processes anchored in law and without which Courts' business would for sure come to a halt.
19. A Court must, therefore, look at the issue of service in light of the wider provisions on the purpose and principles of *the Constitution*. In this case, to achieve that balance, a look at the nature and the contents of the instant application becomes paramount.
 20. The application introduced a new issue which was not brought to the attention of this Court at the hearing of the Summons for Revocation. The issue relates to the proceedings on the estate property before the Environment and Land Court at Bungoma Land Case No. 107 of 2017 *Salome Naliaka Wabwile vs. Alfred Okumu Musinaka* (hereinafter referred to as 'the Land Case').
 21. The instant application revealed that judgment in the Land Case was rendered on 27th May, 2020 by Hon. Justice B. N. Olao. By a decree of that Court, the Respondent herein was ordered to vacate the suit land which was Bungoma/Kabisi/61 and which is the estate land in this succession cause.
 22. The Respondent thereafter challenged her eviction from the suit land before the said Environment and Land Court. By a ruling delivered on 1st February, 2022 the Respondent was granted a further 2 months to vacate the land or she be evicted.
 23. It is, hence, the case that when the Respondent filed and prosecuted the Summons for Revocation, she was fully aware of the judgment in the Environment and Land Court. She, however, chose not to bring that to the attention of this Court, of course for obvious reasons.
 24. The prevailing state of affairs in this matter is, hence, confusing and unnecessarily complicates the dispute. The effect of the orders made by this Court on the 26th September, 2022 is that they majorly and unnecessarily cause confusion and uncalled for complications.
 25. The orders also outrightly negate and totally disregard the decree and orders in the Land Case. Needless to say, this Court is constitutionally at par with the Environment and Land Court, and as such, it may not be acting correctly in not considering the decisions of the Environment and Land Court in the Land Case.
 26. The foregoing is the turning point and the distinguishing factor in this matter. In such a case, this Court is called upon to look beyond the issue of service of the Court process and deal with the substantive dispute as litigated in Courts over time.
 27. It is for that reason that this Court finds that although the Applicant was properly served for the hearing of the Summons for Revocation on the 26th September, 2022 and opted not to attend Court, this is a matter where the orders made on that day ought to be set aside. In doing so, this Court will have an opportunity to hear the parties especially in light of the Land case and another case before the Senior Resident Magistrates Court at Kimilili Land Case No. 20 of 2000 *Salome Naliaka Wabwile vs. Alfred Okumu Musinaka* which, according to a copy of a Vesting Order annexed in the Respondent's Affidavit in support of the Summons for Confirmation of the Grant, there seems to have been other proceedings before the Magistracy Court and a decree issued.
 28. The Applicant will, however, not walk away scot-free. He must shoulder the costs of the Summons for Revocation and the instant application.
 29. This Court now believes that it has fully rendered itself on the instant application and that this matter can now come to an end.
 30. Consequently, the following final orders do hereby issue: -



- a. The orders made on 26th September, 2022 allowing the Respondent's Summons for Revocation dated 10th September, 2021 among others, be and are hereby set-aside.
- b. The Summons for Revocation dated 10th September, 2021 shall be heard afresh.
- c. The Respondent's Summons for Confirmation of Grant dated 12th October, 2022 shall be held in abeyance pending the determination of the Summons for Revocation dated 10th September, 2021.
- d. The Applicant is hereby granted leave to file a response to the Summons for Revocation dated 10th September, 2021 within 14 days of this order.
- e. Once served, the Respondent will be at liberty to file and serve any supplementary responses thereto, if need be, within 14 days of the service.
- f. This matter shall be fixed for further directions on a date to issue.
- g. On costs, the Applicant shall pay the Respondent the sum of Kshs. 30,000/= (Read: Kenya Shillings Thirty Thousand Only) being throw-away costs in respect to the Summons for Revocation as well as the instant application. The said amount shall be paid within 14 days of this order failure to which all the orders herein shall stand set-aside and the Summons dated 6th December, 2022 shall be deemed dismissed with costs.
- h. Leave to appeal, if need be, is hereby granted.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS 12TH DAY OF OCTOBER, 2023.

A. C. MRIMA

JUDGE

Ruling No. 1 delivered virtually in the presence of:

Miss. Nafula, Learned Counsel for the Applicant.

Mr. Maloba, Learned Counsel for the Respondent.

