**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**MISCELLANEOUS SUCCESSION CAUSE NO. 10 OF 2018**

**IN THE MATTER OF THE ESTATE OF CHARLES BOI (DECEASED)**

**RULING**

1. This matter was initiated by way of a miscellaneous cause, for revocation of a grant that had been made in Hamisi SRMCSC No. 29 of 2016. The application also sought confirmation of the grant, that the applicant expected this court to make to her upon revoking the one she was seeking to have revoked, and eviction of all persons occupying Nyangori/Kapsotik/25.

2. Let me start by stating that this cause ought not to have been initiated or brought at the High Court. I say so because the law on revocation of grants, made by a magistrate's court, changed in 2015, to give jurisdiction to magistrates' courts to revoke grants that they have power to make. I am talking about the Magistrates' Courts Act, No. 26 of 2015, which commenced on 2nd January 2016. The said statute amended the provisions of the Law of Succession Act, Cap 160, Laws of Kenya, which provide for jurisdiction of magistrates courts in probate matters, that is to say sections 48 and 49. The changes were effected through sections 23 and 24 of the Magistrates Courts Act.

3. The amendments stated as follows –

> *"23. The Law of Succession Act is amended, by repealing section 48(1) and substituting therefor the following new subsection –*
>
> > *"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."*
>
> *24. Section 49 of the Law of Succession Act is amended –*
>
> > *a) by deleting the words "Resident Magistrate" and substituting therefor the words "Magistrate's Court"; and*
> >
> > *b) by deleting the words "one hundred thousand shillings" and substituting therefor the words "the pecuniary limits set out in section 7(1) of the Magistrates Courts Act, 2015."*

4. To place the amendments in proper perspective, it would be necessary to cite the provision in the old section 48(1) of the Law of Succession Act, that was amended by Act No. 26 of 2015. The old section 48(1) 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:*
>
> *Provided that for the purpose of this section in any place where both the High Court and a resident magistrate's court are available, the High Court shall have exclusive jurisdiction to make all grants of representation and determine all disputes under this Act …"*

5. The first effect, of the amendments, was that the pecuniary jurisdiction of the magistrate's court was enhanced from Kshs. 100, 000.00 to a maximum of Kshs. 20, 000, 000.00. Secondly, where the High Court and the magistrate's court are situated within the same station, the High Court shall no longer enjoy exclusive jurisdiction, for it shall share jurisdiction in succession causes with the magistrate's court, subject, of course, to the pecuniary ceilings and gazettement by the Chief Justice. Finally, the exclusive jurisdiction of the High Court to determine revocation applications, under section 76, was taken away, and the same was extended to the magistrate's court, with respect to grants of representation that such magistrate's court would have power to make.

6. This ruling is concerned with jurisdiction to revoke grants made by the magistrate's court. Under Act No. 26 of 2015, by virtue of the amendment of section 48(1) of the Law of Succession Act, a magistrate's court now has power to revoke a grant of representation that it has

power to make. There is now no need, for a person who wishes to have a grant made by a magistrate's court revoked, to move the High Court. All what that person needs to do is to file a summons for revocation of grant within the cause in which the grant was made by the magistrate's court.

7. Act No. 26 of 2015 commenced on 2nd January 2016, and, therefore, the amendment of section 48(1) of the Law of Succession Act, became effective from that date. The summons for revocation of grant herein, dated 3rd September 2018, was filed in this cause on 4th September 2018, that is after Act No. 26 of 2015 had commenced and the amendment of section 48(1) of the Law of Succession Act had become effective. There was no need for the applicant, in the circumstances, to have initiated a fresh cause, for revocation of the grant made in Hamisi SRMCSC No. 29 of 2016, at the High Court. She should have simply filed the summons for revocation of grant in Hamisi SRMCSC No. 29 of 2016, since the magistrate's court had, by then, been conferred with jurisdiction to revoke the grant made in Hamisi SRMCSC No. 29 of 2016.

8. The taking away of jurisdiction from the High Court, with respect to revocation of grants, made by the magistrate's court, would mean that the High Court no longer has original jurisdiction to address that issue, and that its jurisdiction, over the issue, would be as an appellate court, from a ruling of the magistrate's court, on a summons for revocation of the grant issued by that court. I have no jurisdiction, therefore, sitting as a High Court, to entertain a summons for revocation of grant, where the applicant has not filed such application at the magistrate's court in the first instance, since the Law of Succession Act, as currently framed, does not vest me with such jurisdiction. Secondly, the issue of revocation of the grant made by the magistrate's court has not been placed before me in invocation of my appellate jurisdiction.

9. The second thing that I wish to address, is that, although the application herein seeks revocation of the grant made in Hamisi SRMCSC No. 29 of 2016, the applicant has not exhibited a copy of the said grant, in her affidavit, sworn on 3rd September 2018, in support of the said summons. Secondly, the court file in Hamisi SRMCSC No. 29 of 2016 was never made available. The applicant should have asked the court to call for that file, at the time she took directions on 15th October 2019. There is, therefore, no evidence or proof that the grant, sought to be revoked, existed as at the time of the filing of the application or even now. A court of law does not act blindly. If it is sought that a grant be revoked, proof must be provided that such grant had been made or existed. It was critical that the trial court file be called for, for it is from the proceedings that were conducted in that file, by the magistrate's court, that this court could assess whether or not the grant made in that cause had been obtained through a defective process, or a process that was attended or tainted by fraud or misrepresentation or through concealment of information.

10. Thirdly, the application, dated 3rd September 2018, is premised on section 76 of the Law of Succession Act. Under that law, a grant of representation may be revoked on three general grounds. The first ground targets the process of the making or obtaining of the grant. Under that ground, a grant may be revoked where the process of obtaining it was defective. That has something to do with defects in the process. Such as where a petition is premised on an invalid will, or where the deceased is alleged to have had died intestate while there was a valid will in existence, or where some fundamental procedural defect occurred, such as where section 51(2)(g) of the Law of Succession Act is not complied with. The second aspect of the first ground, is where the grant is obtained on the basis of some false information or misrepresentation or concealment of facts from the court. The second general ground arises where the grant had been obtained properly, so that the applicant is not raising an issue as to impropriety in the manner the grant was obtained, but, rather, the applicant would be arguing that the grant-holder, after obtaining the grant properly, did not, either obtain confirmation of their grant within the period allowed in law, or did not proceed diligently with administration of the estate, or failed to render accounts as and when required to in law. The last ground is where a grant has become useless or inoperative, due to changed circumstances, such as where the sole grant-holder has died or has been adjudged bankrupt.

11. For avoidance of doubt, section 76 of the Law of Succession Act states as follows:

> "*76. Revocation or annulment of grant*
>
> *A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—*
>
> *(a) that the proceedings to obtain the grant were defective in substance;*
>
> *(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;*
>
> *(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;*
>
> *(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—*
>
> *(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or*
>
> *(ii) to proceed diligently with the administration of the estate; or*
>
> *(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or*
>
> *(e) that the grant has become useless and inoperative through subsequent circumstances."*

12. The ground upon which revocation of grant is sought, in this case, is that the process of obtaining the grant and the title to Nyangori/ Kapsotik/25 was fraudulent and deceitful. The affidavit sworn in support of the application, by the applicant, on 3rd September 2018, does not say a word about the process of the obtaining of the grant in Hamisi SRMCSC No. 29 of 2016. No effort is made to demonstrate that the said process was fraudulent or deceitful, to warrant revocation of the grant. No case, therefore, has been made for revocation of the said grant.

13. I am also invited to confirm the grant; which the applicant anticipates that I would make, upon revoking the grant in Hamisi SRMCSC No. 29 of 2016. In view of what I have stated in paragraph 12, above, a case for revocation of grant has not been made, leave alone its being made out, so the question of the making of a fresh grant should not arise. Secondly, there is no petition in this cause, and, therefore, there would be no basis or foundation for making a fresh grant. If I were persuaded to make a fresh grant, what I would do is to order the magistrate's court, in Hamisi SRMCSC No. 29 of 2016, to make the grant to the applicant, since the petition, which initiated the succession cause, as the originating pleading, is in Hamisi SRMCSC No. 29 of 2016, and that is where any fresh grant ought to be made. As said elsewhere, the file, in Hamisi SRMCSC No. 29 of 2016, was never called for, and, therefore, it never became part of these proceedings. There would be no foundation at all, in the circumstances, upon which a fresh grant can be made from this cause. Even if the making of a fresh grant were to arise, I do not see any basis upon which I could confirm the grant, if I were to appoint new administrators, as the affidavit sworn in support of the application has not identified the survivors of the deceased, nor ascertained their shares in the estate, contrary to what is required by the proviso to section 71(2) of the Law of Succession Act and Rule 40(4) of the Probate and Administration Rules.

14. The proviso to section 71(2) of the Law of Succession Act and Rule 40(4) of the Probate and Administration Rules, state, respectively, as follows:

> "*Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares."*

> "*Where the deceased has died wholly or partially intestate the applicant shall satisfy the court that the identification and shares of all persons entitled to the estate have been ascertained and determined."*

15. I am also invited to order eviction of all the persons in occupation of Nyangori/Kapsotik/25. The cause before me is a probate and administration cause, invoking jurisdiction of the court as set out in the Law of Succession Act. The prayer for eviction revolves around ownership and occupation of land. Eviction is, ostensibly, sought on the basis that the occupants are trespassers, or are in unlawful occupation of land, or are otherwise not entitled to occupy the land in question, and it is sought by a person who asserts ownership of or title to the land in question.

16. The promulgation of the Constitution of Kenya, 2010, changed the law with respect to land matters, so that the High Court no longer has jurisdiction to decide questions relating to title to or ownership of land, as well as the right to occupy and use land. The Constitution imagined the creation of a special court to deal with those issues, and directed Parliament to pass a law to establish such a court. The Constitution went on to emphatically state that the High Court was to, henceforth, have no jurisdiction to decide those questions reserved for the special court envisaged by the Constitution.

17. The position that I have stated in paragraph 16 is articulated in Articles 162(2)(3) and 165(5) of the Constitution. The said provisions say as follows:

> "*162. (1) …*
>
> *(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—*
>
> *(a) …*
>
> *(b) the environment and the use and occupation of, and title to, land.*
>
> *(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2)."*
>
> "*165. (1) …*
>
> *(2) …*
>
> *(3) …*
>
> *(4) …*
>
> *(5) The High Court shall not have jurisdiction in respect of matters—*
>
> *(a) …*
>
> *(b) falling within the jurisdiction of the courts contemplated in Article 162 (2)."*

18. Parliament passed the legislation envisaged in Article 162, to establish the special court contemplated in Article 162(2)(3) and 165(5) of the Constitution. The said legislation is the Environment and Land Court Act, No. 19 of 2011, which established the court to exercise the jurisdiction stated in Article 162 and any other specified by Parliament. The scope of the said Act is stated in the preamble to the Act, while the jurisdiction of the court established by the Act is stated in section 13 of the Act, which provide, respectively, as follows:

> *"… to give effect to Article 162(2)(b) of the Constitution; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land; and to make provision for its jurisdiction functions and powers and for connected purposes."*

> *"13. Jurisdiction of the Court*

*1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to the environment and land.*

*2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes –*

*a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;*

*b) relating to compulsory acquisition of land;*

*c) relating to land administration and management;*

*d) relating to public, private, and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and*

*e) any other dispute relating to environment and land."*

19. The court established by the Environment and Land Court Act, that is to say the Environment and Land Court, is the court for purpose of deciding disputes that arise with respect to the matters governed by land legislation, that is to say the Land Registration Act, No. 3 of 2012, and the Land Act, No. 6 of 2012. The relevant provisions are in sections 2 and 101 of the Land Registration Act and sections 2 and 150 of the Land Act.

20. The provisions in the Land Registration Act state as follows:

> *"Interpretation.*
>
> *2. In this Act, unless the context otherwise requires—*
>
> *"Court" means the Environment and Land Court established under the Environment and Land Court Act, 2011, No. 19 of 2011: …*
>
> *Jurisdiction of court.*
>
> *101. The Environment and Land Court established by the Environment and Land Court Act, 2011 No. 19 of 2011 has jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act."*

21. Those in the Land Act state as follows:

> *"2. Interpretation*
>
> *In this Act, unless the context otherwise requires—*
>
> *"Court" means the Environment and Land Court established under the Environment and Land Court Act, 2011 (No. 19 of 2011); …*
>
> *150. Jurisdiction of the Environment and Land Court*
>
> *The Environment and Land Court established in the Environment and Land Court Act and the subordinate courts as empowered by any written law shall have jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act."*

22. Nyangori/ Kapsotik/25 is registered land, and it is, therefore, subject to the Land Registration Act and the Land Act. Any question relating to the ownership of or title to the said property, as well as the right to occupy it, are to be resolved in accordance with the provisions of the said Land Registration Act and the Land Act, and the court with jurisdiction to hear such matters, where those questions are framed, is the Environment and Land Court. The High Court has no jurisdiction, and, therefore, the question as to the ownership of and the right to occupy Nyangori/Kapsotik/25, ought to have been placed before the Environment and Land Court.

23. I am discussing the matter of ownership and occupation of land, because the same is at the heart of the prayer for eviction of "all the persons in occupation" of Nyangori/Kapsotik/25. The question of ownership of property, and the right to occupy it, always arises, in cases where eviction or removal of persons from such land, is sought. Eviction or removal from registered land is regulated by land legislation. The Land Act, in particular, carries elaborate provisions on unlawful occupation of land, and the eviction or removal of persons, who are in such unlawful occupation. These provisions are in sections 152A to 152I of the Land Act.

24. For avoidance of doubt, the said provisions state as follows:

*"152A. Prohibition to unlawful occupation of land*

*A person shall not unlawfully occupy private, community or public land.*

*152B. Evictions to be undertaken in accordance with the Act*

*An unlawful occupant of private, community or public land shall be evicted in accordance with this Act.*

*152C. …*

*152D.*

*152E. Eviction Notice to unlawful occupiers of private land*

*(1) if, with respect to private land the owner or the person in charge is of the opinion that a person is in occupation of his or her land without consent, the owner or the person in charge may serve on that person a notice, of not less than three months before the date of the intended eviction.*

*(2) the notice under subsection (1) shall—*

*(a) be in writing and in a national and official language;*

*(b) in the case of a large group of persons, be published in at least two daily newspapers of nationwide circulation and be displayed in not less than five strategic locations within the occupied land;*

*(c) specify any terms and conditions as to the removal of buildings, the reaping of growing crops and any other matters as the case may require; and*

*(d) be served on the deputy county commissioner in charge of the area as well as the officer commanding the police division of the area.*

*152F. Application to Court for relief*

*(1) Any person or persons served with a notice in terms of sections 152C, 152D and 152E may apply to Court for relief against the notice.*

*(2) The Court, after considering the matters set out in sections 152C, 152D and 152E, may—*

*(a) confirm the notice and order the person to vacate;*

*(b) cancel, vary, alter or make additions to the notice on such terms as it deems equitable and just;*

*(c) suspend the operation of the notice for any period which the court shall determine; or*

*(d) order for compensation.*

*152G. Mandatory procedures during eviction*

*(1) Notwithstanding any provisions to the contrary in this Act or in any other written law, all evictions shall be carried out in strict accordance with the following procedures —*

*(a) be preceded by the proper identification of those taking part in the eviction or demolitions;*

*(b) be preceded by the presentation of the formal authorizations for the action;*

*(c) where groups of people are involved, government officials or their representatives to be present during an eviction;*

*(d) be carried out in a manner that respects the dignity, right to life and security of those affected;*

*(e) include special measures to ensure effective protection to groups and people who are vulnerable such as women, children, the elderly, and persons with disabilities;*

*(f) include special measures to ensure that there is no arbitrary deprivation of property or possessions as a result of the eviction; '*

*(g) include mechanisms to protect property and possessions left behind involuntarily from destruction;*

*(h) respect the principles of necessity and proportionality during the use of force; and*

*(i) give the affected persons the first priority to demolish and salvage their property.*

*(2) The Cabinet Secretary shall prescribe regulations to give effect to this section.*

*152H. Disposal of property left after eviction*

*The competent officer of the Commission or County Government, community owning a registered community land or owner of private land shall at least seven days from the date of the eviction, remove or cause to be removed or disposed by public auction, any unclaimed property that was left behind after an eviction from private, community or public land.*

*152I. Demolition of unauthorized structures*

*Where the erection of any building or execution of any works has commenced or been completed on any land without authority, the competent officer shall order the person in whose instance the erection or work began or was carried, to demolish the building or works, within such period as may be specified in the order."*

25. The High Court has jurisdiction over probate and administration matters, by dint of the Law of Succession Act, but it has no jurisdiction over land disputes, inclusive of questions revolving around eviction or removal of persons from registered land. The jurisdiction, relating to the latter matters, lies with the Environment and Land Court, and it should be before that court that the applicant should be asking for eviction of the persons in occupation of Nyangori/Kapsotik/25.

26. In view of what I have stated above, there can be no doubt, whatsoever, that there is no merit in the application, dated 3rd September 2018. The same is incompetent for lack of jurisdiction on the part of the High Court to entertain it. The same is for striking out, and I hereby strike out the same. Any person, aggrieved by the order above, is hereby granted leave to appeal at the Court of Appeal, within twenty-eight days. The person named in the application as petitioner/respondent shall have the costs. It is so ordered.

27. There are, on record, two applications, dated 3rd September 2018. One is the summons for revocation of grant, while the other is a chamber summons for injunctions. The directions, that the court gave on 15th October 2019, were vague on which of the two was to be disposed of by way of written submissions. The applicant did not file written submissions, while the petitioner/respondent filed written submissions on the summons for injunctions. I elected to determine the primary application, for revocation of grant, given that there was a jurisdiction issue, and it would have been academic to determine the summons for injunctions, were I to find, in the long run, as I have done above, that the summons for revocation of grant was incompetent for want of jurisdiction. The decision, in *Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd* [1989] eKLR, is clear, that where there is no jurisdiction, the court should waste no time, but should stop promptly on its tracks, and let the matter go.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 4TH DAY OF DECEMBER 2020**

**W. MUSYOKA**

**JUDGE**