



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

MISCELLANEOUS SUCCESSION CAUSE NO. 1 OF 2019

IN THE MATTER OF THE ESTATE OF THE LATE ELLY ROBERT WAMBOGO ALIAS OMBAYO WAMBOGO

AND IN THE MATTER OF THE APPLICATION BY JOSEPH ODERA OMBAYO FOR REVOCATION OF GRANT ISSUED ON 7TH DECEMBER 2017 IN SIAYA PRINCIPAL MAGISTRATE'S COURT SUCCESSION CAUSE NO. 244 OF 2017 TO ROBERT OMBAYO WAMBOGO

BETWEEN

JOSEPH ODERA OMBAYO.....APPLICANT/PETRITIONER

VERSUS

ROBERT OMBAYO WAMBOGO.....RESPONDENT/OBJECTOR

JUDGMENT

1. This judgment determines the summons for revocation of grant dated 3rd January 2019 filed by the firm of D.B. OSORO & Company Advocates on behalf of the applicant Joseph Odera Ombayo seeking orders that the grant of letters of administration intestate issued to the Respondent herein Robert Ombayo Ombogo in Siaya Principal Magistrates Court Succession Cause No 244 of 2017 and confirmed on 21st November 2018 be revoked.

2. The grounds upon which the application is based are, among others, that the grant and certificate of confirmation of grant were issued through fraud and nondisclosure of material facts to the court. That the applicant being a son to the deceased was never involved in the succession proceedings, that he never signed any consent to allow the respondent to petition for the grant and that his signatures on the consents and other forms used in the succession proceedings including consent of distribution of the estate were forgeries and that he has reported to the police station at Siaya for investigations to commence, as it is further alleged that the certificate of death used in the petition was forged as the place of death and cause of death of the deceased is not correct. The applicant annexed a certificate of death showing different particulars on the place of death and the cause of death of the deceased. He also filed a further supporting affidavit on 22nd February 2019 setting out further alleged acts of fraud by the respondent.

3. The respondent Joseph Odera Ombayo filed a preliminary objection dated 20th February 2019 contending that this court has no jurisdiction to revoke the grant issued by the lower court and that therefore the summons for revocation of the grant are bad in law, incompetent and an abuse of the court process and improperly before the court.

4. The parties advocates Mr Osoro for the applicant and Mr Simiyu for the respondent urged the application by way of oral submissions, reiterating their respective client's pleadings.

DETERMINATION:

5. The main issue for determination in this matter from the arguments by both counsel for the parties is whether this court or the magistrate's court has the necessary jurisdiction to hear and determine the summons for revocation of grant issued by the magistrate's court.

6. It is trite law that where the question of jurisdiction is raised then the court must first and foremost investigate and establish whether it has the requisite jurisdiction to hear and determine the matter. This is so because jurisdiction is everything without which a court of law acts in vain. See **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR** where the Court of Appeal was clear that:

" It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined."

7. The petitioner's counsel filed a preliminary objection contending that this court is bereft of the jurisdiction to hear and revoke a grant issued by the lower court and cited section 48 of the Law of Succession Act, Cap 160 Laws of Kenya. On the part of the applicant/objector's advocate he maintained that this court has jurisdiction to revoke the grant and that the cited section 48 and section 76 of the said Act expressly deprives the magistrates court of jurisdiction to hear and determine summons for revocation of grant.

8. In my humble view, the law as amended is so clear and settled. Initially, the jurisdiction of the magistrates courts in succession matters was provided by **Section 48(1) of the Law of Succession Act, Cap. 160** of the Laws of Kenya. The said provision stated as follows: -

'Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49 of this Act, a Resident Magistrate shall have jurisdiction to entertain any application other than an application under section 76 of this Act 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.'** (emphasis added).*

9. In 2015, **Section 48(1) of the Act** was amended by the enactment of the **Magistrates' Court Act, Act No. 26 of 2015**. **Section 23 of the new Act** repealed the said **Section 48(1) of the Act** and substituted it with the following new subsection: -

'23. The Law of Succession Act 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.'** (emphasis added).*

10. The effect of the aforesaid amendment was to accord jurisdiction to the magistrates to deal with applications under **Section 76 of the Law of Succession Act** which are for revocation or annulment of the grants issued by the magistrates' courts.

11. Therefore, in view of the above law, this court has no doubt in holding that a Magistrates' Court has jurisdiction to deal with an application for revocation or annulment of a grant it issued subject to the pecuniary jurisdiction of that court. In the same vein, therefore, I find and hold that this court has no jurisdiction to hear and determine summons for revocation of a grant issued by the lower court where the value of subject matter is within the pecuniary jurisdiction of the subordinate court. Jurisdiction is conferred by the Constitution and statutory enactment and this court has no power to arrogate itself jurisdiction that is vested in another court of competent jurisdiction.

12. On pecuniary jurisdiction, in the instant case, I have examined P&A 5 which is the affidavit in support of petition for letters of administration intestate and the declared value of the assets forming the estate of the deceased **Elly Robert Ombayo Ombogo** is Kshs 1,000,000 One Million Kenya Shillings. It cannot, therefore be said that within a year or so, the said assets have appreciated in value to exceed 20,000,000 twenty Million. There is no valuation report presented before this court to show that the estate has since appreciated in value by over nineteen million Kenya shillings, from the value disclosed in the **P & A 5** of one million Kenya shillings in the petition before the lower court.

13. Before I conclude this judgment I must also clarify that **Rule 44 of the Probate and Administration Rules, 1980** which requires applications seeking the revocation or annulment of grants to be exclusively filed in the High Court was not amended. However, given that the **Probate and Administration Rules, 1980** are subsidiary legislation, they cannot override any of the provisions of **the Act** and as such the position remains that the Magistrates' Court have jurisdiction to deal with applications for revocation or annulment of grants issued by those courts subject to their pecuniary jurisdiction. Having said that, there is need for the Rules Committee to amend **Rule 44 of the Probate and Administration Rules, 1980**.

14. Accordingly, the merits of this application cannot be delved into as this court lacks jurisdiction to do so.

15. I find and hold that the summons for revocation of grant issued to the petitioner/applicant herein shall be filed in the magistrate's court which issued the grant for hearing and final determination.

16. The application dated 3rd February 2019 by way of Summons for revocation of grant be and is hereby struck out.

17. Costs shall be in the cause in the lower court succession cause file.

18. This file is therefore marked as closed for archiving purposes.

Dated, signed and delivered in open court at Siaya this 4th Day of March 2019.

R.E.ABURILI

JUDGE