

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 549 OF 2016

(Formerly HCMISC No. 12 of 2013)

IN THE MATTER OF THE ESTATE OF JOSEPH OMALA alias OMARA BIREMBWA, DECEASED

RULING

1. After the deceased herein died, a petition for representation to his estate was initiated in Vihiga SPMCSC No. 64 of 2010. Representation was subsequently granted and the grant confirmed. The cause herein was commenced in 2013 for the purpose of having the said, grant revoked and for other consequential orders.
2. The practice has been, where an application is filed at the High Court to have a grant of representation made by a magistrate's court revoked, to call for the original record from the lower court. The reason for this is of course that the file in the lower court would be the principal file as it has the original pleadings, that is to say the petition and the cross-petition and objections, if any, and the grant sought to be revoked and the certificate of confirmation of the said grant, among others. The court file at the High Court would only comprise of the application to revoke the grant made by the lower court. That would make the lower court file, for all practical purposes, the main succession cause. Ideally, therefore, the High Court cannot proceed without the main or original or principal file held by the lower court. It would be on that basis then that the High Court would call for the lower court file.
3. When the High Court herein was seized of this matter in 2013, among the very initial orders made in the matter was that calling for the court file in Vihiga SPMCSC No. 64 of 2010. That order was made on 25th February 2013 by Chitembwe J. I have scrupulously perused through the record before me, and I am satisfied that the Deputy Registrar of this court never complied with that order by calling for the original records in Vihiga SPMCSC No. 64 of 2010. There is no letter on record by the Deputy Registrar to the Principal Magistrate Vihiga law courts calling for the said file in line with the orders of 17th July 2018. Little wonder therefore that the matter has remained in limbo ever since. The record also does not reflect any efforts by either of the parties to have the lower court file made available in terms of the said order. It would appear that the parties were more interested in the interim orders granted rather than on the substance of the cause herein, which is revocation of the grant.
4. When the matter was placed before me on 17th July 2018 I equally directed that the court file in Vihiga SPMCSC No. 64 of 2010 be made available. I have again perused the record and noted that the Deputy Registrar again took no steps to call for the said file. There is no letter on record by the Deputy Registrar to the Principal Magistrate Vihiga law courts calling for the said file in line with the orders of 17th July 2018. I find it curious that when the Deputy Registrar formally extracted the orders that I had made on 17th July 2018 no reference was made to the order that the Deputy Registrar do cause the file in Vihiga SPMCSC No. 64 of 2010 to be put together with the instant.
5. This matter has been handled in a rather causal manner in my very humble view. I would agree with counsel for the applicant in the Motion dated 12th July 2013 that the orders obtained in this matter are being abused for it would appear that they were obtained for a purpose other than to advance the course of the instant cause, to facilitate the hearing and disposal of the application herein dated 22nd January 2013 for revocation of grant.
6. The applicant in the application of 22nd January 2013 must be holding onto a formal order that is totally unenforceable for it refers to proceedings that did not happen. It purports to be an extract from orders that were made by Chitembwe J on 21st February 2013, yet the record before me does not reflect that any proceedings were ever conducted before the Judge on the said date and that no such orders were ever recorded in the file on the said date. The record reflects that the file was placed before the Deputy Registrar on 20th February 2013, who then directed on the same day that the file be placed before the Judge for consideration of the certificate of urgency dated 18th February 2013. The next minute is that on 25th February 2013 Chitembwe J then made orders to the effect that the application of 22nd February 2013 had been certified urgent, interim orders were granted and the file in Vihiga SPMCSC No. 64 of 2010 called for.
7. The law has since changed so that the Magistrates Courts now has jurisdiction to revoke grants that are within their jurisdiction to make. The order that appeals to me to make on the application dated 12th July 2018 is to transfer the pending revocation application to the Vihiga law courts to be handled within Vihiga SPMCSC No. 64 of 2010. However, I note that the respondent has been singularly lethargic in having the said application prosecuted since it was filed in court herein sometime in February 2013. There is clear evidence that there has been want of prosecution of the said application of 22nd January 2013.
8. I shall, in the circumstances, order as follows: -
 - (a) That the application dated 22nd January 2013 be and is hereby dismissed for want of prosecution;
 - (b) That the inevitable consequence of the order in (a) above is that all the orders made herein automatically fall with the said application;

(c) That the cause herein has thereby terminated, and the Deputy Registrar shall cause the file herein to be closed and removed to the archives;

(d) That the applicant in the application dated 12th January 2018 shall have the costs of the suit; and

(e) That the parties shall pursue their various claims and remedies through Vihiga SPMSC No. 64 of 2010 henceforth.

DATED, SIGNED and DELIVERED at KAKAMEGA this....3RDDAY OF.....DECEMBER.....,2018

W. MUSYOKA

JUDGE