

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUSIA**  
**FAMILY APPEAL NO. E007 OF 2024**

**PATRICK OLWOCH SOSAYI.....APPELLANT**  
**VERSUS**  
**JOSEPH CHARLES WANDERA RENGINA.....RESPONDENT**

**(Appeal from the ruling and orders, of Hon. EA Nyaloti, Chief Magistrate, CM, of 24<sup>th</sup> October 2024, in Busia CMSC No. E520 of 2022)**

**JUDGEMENT**

1. The appeal herein arises from a decision of the trial court, in Busia MCSC No. E520 of 2022, of 24<sup>th</sup> October 2024. The grounds of appeal revolve around the trial court failing to find that the respondent had concealed matter from the court, as consents of beneficiaries were not obtained and not all the beneficiaries were disclosed; the trial court erring in not finding that the failure to obtain the consents of all the beneficiaries and to notify all the beneficiaries of the process were prejudicial; the trial court failing to find that the evidence adduced by the appellant demonstrated fraud and concealment of matter from the court; the trial court failing to find that there was justification for filing the summons for revocation of grant, instead of for review ; among others.
  
2. The deceased person, in Busia MCSC No. E520 of 2022, Petero Opudi alias Petro Opudi, had died on 26<sup>th</sup> January 1999, according to the certificate of death on record, serial number 521359, of 21<sup>st</sup> January 2000. The letter from the Chief of Lwanya Location, dated 19<sup>th</sup> July 2022, introduced the family to the court. The persons said to be the survivors of the deceased were 3 sons, a grandson and a daughter-in-law, being Joseph Charles Wandera Rengina,

Abraham George Omondi, Augustino Rabare Makokha, Patrick Oluoch Sosayi and Millicent Odima. He was said to have had died possessed of Bukhayo/Matayos/927. Patrick Oluoch Sosayi is the appellant in these proceedings, and I shall refer to him in this judgment as such. Joseph Charles Wandera Rengina is named as the respondent, and I shall refer to him as such.

3. Representation to the intestate estate of the deceased was sought by the respondent, vide a petition, that he filed in Busia MCSC No. E520 of 2022, on 26<sup>th</sup> September 2022. He listed the survivors of the deceased as Joseph Charles Wandera Rengina, Abraham George Omondi, Augustino Rabare Makokha, Patrick Oluoch Sosayi and Millicent Odima, the same individuals listed in the Chief's letter. Bukhayo/Matayos/927 was listed as the property that he owned at the point of his death. Letters of administration intestate were made to the respondent, on 7<sup>th</sup> October 2022, and a grant, in those terms, was duly issued to him, dated 22<sup>nd</sup> November 2022.
4. The said grant has not been confirmed, a summons for revocation of grant, dated 6<sup>th</sup> March 2023, was filed on 10<sup>th</sup> March 2023. The foundation of that application were the grounds on its face, as well as the affidavit in support, sworn by the appellant, on 6<sup>th</sup> March 2023. He essentially argued that the grant was obtained through a defective and fraudulent process, for the consent of all the beneficiaries had not been obtained, not all the beneficiaries had been disclosed and there was concealment of material facts.
5. In the affidavit, the appellant deposed that the deceased was his biological father, and Bukhayo/Matayos/927 was the property of the deceased. He identified the children of the deceased as 4 sons and 3 daughters, named as Augustino Rabare Makokha, Patrick Olwoch Sosayi,

Charles Wandera Rengina, Simon Sikuku, Sabina Sosayi, Maneya Sosayi and Rofina Sosayi. He asserted that Abraham George Omondi was not a son of the deceased, as claimed by the respondent in his papers, for he was a son of Sebastian Petro, who had his own land. He claimed that the respondent did not obtain the consent of the other beneficiaries when he sought representation, and did not disclose all the survivors.

6. I have not come across a response by the respondent to the revocation application. I see that he filed written submissions to the application. However, written submissions are not evidence, for evidence is not carried in written submissions, but in an affidavit, or oral evidence. Written submissions, which are not anchored on affidavit or oral evidence, can only address issues of law.
7. The matter was referred to mediation, but the parties were unable to agree.
8. The revocation application was determined on the basis of written submissions. In the ruling of 24<sup>th</sup> October 2024, the court found and held that the conditions for revocation of the grant had not been satisfied, for it was not established that the grant was obtained fraudulently. It was also found and held that the appellant should have sought review of the grant, to include the beneficiaries left out. Authorities were cited, which had held that filing a review application would be the proper approach, after confirmation of grant, to have the confirmation orders reviewed or revised.
9. Was a case for revocation of grant made out by the appellant? I believe that the starting point should be with the fact that the summons for revocation of grant was unopposed, for the respondent did not file any papers in response or opposition to it. The factual background, to

the application, was given in the affidavit in support. The way to counter the facts, set out in that affidavit, could only be by another affidavit, denying those facts, and setting out other facts to the contrary. No such affidavit was filed, going by the original trial court records before me, and the material in the record of appeal. The facts in the supporting affidavit were not controverted.

10. The trial court did not conduct an oral hearing, where the parties could testify on oath. The only material, that the trial court had, was that one affidavit, whose facts were unchallenged. The critical facts deposed in it were that the respondent had not disclosed some of the beneficiaries, being the children of the deceased, that is to say the 3 daughters of the deceased and the children of a dead son of the deceased. The other fact was the allegation that Abraham George Omondi was not a son of the deceased. The other allegation was that not all the beneficiaries had consented to the petition filed by the respondent.
11. Those were the facts to support the case, by the appellant, that the grant was obtained fraudulently, as there was concealment of matter from the court, and it was defective, to the extent that consents were not obtained from all the beneficiaries. Those would be solid grounds, upon which a grant could be revoked, under section 76 of the Law of Succession Act, Cap 160, Laws of Kenya. There was need for the respondent to respond to the facts set out in that supporting affidavit. He did not. In the absence of a response, or counter-evidence, or alternative facts, the trial court could not possibly find in favour of the respondent. The failure to respond to the facts, alleged by the appellant, meant that the respondent conceded, by his silence, to what was alleged.

12. Regarding consents by the beneficiaries, the original trial records have a consent document, that was signed by the respondent and Abraham George Omondi. It was not signed by the other 3 individuals disclosed by the respondent as survivors. The respondent ought not have signed it, given that it was a consent for him to petition. It was meant to be an authority from the other survivors to him, to petition. He could not give an authority to himself. The effect of the consent was waiver or renunciation of the entitlement to petition for representation, by his siblings, to let him apply alone. He was not waiving his entitlement to petition, neither was he renouncing that right, for he was in fact exercising that right or entitlement, by petitioning for representation. There was nothing for him to consent to.

13. The law on that is Rules 7(7) and 26 of the Probate and Administration Rules, which require that a petitioner, who has equal right to apply for representation with others, must obtain the consent of those others, before petitioning. Why? Both he and those others would have an equal right to apply, and the okay or go-ahead, of those not applying for representation, must be obtained by whoever is applying. The respondent should have obtained those consents. He did not. Rules 7(7) and 26 of the Probate and Administration Rules were not complied with. That made the process of obtaining the grant defective, hence liable for revocation. Applying for representation should be a democratic process, where all who are entitled to administration and to a share in the estate must be involved. Obtaining their consents to the process, by the person applying, would be the evidence of that involvement.

14. Regarding Abraham George Omondi, the material on record, with respect to his relationship with the deceased, is not clear. The respondent claimed that he was a

grandson of the deceased, while the appellant asserted that he was not a son of the deceased. Grandchildren have no right to inherit, where their own parents are alive, and, therefore, they are not entitled to participate in the proceedings, and to get a share in the distribution. Grandchildren would only participate where their own parents were dead, so that they step into the shoes of their dead parents, to take the share that would have devolved to their parents. That is the purport of section 41 of the Law of Succession Act. See *In the Matter of the Estate of Veronica Njoki Wakagoto (Deceased)* [2013] eKLR [2013] KEHC 1930 (KLR) (Musyoka, J) and *Martin Munguti Mwonga vs. Damaris Katumbi Mutuku* [2016] eKLR [2016] KEHC 3028 (KLR) (Thande, J).

15. Abraham George Omondi was not entitled to play any role in the succession proceedings to the estate of his grandfather, if, indeed, the deceased was his grandfather, for the right person to participate was his own father, if he was alive. The respondent did not demonstrate that the father of Abraham George Omondi was a son of the deceased, and was dead. Consequently, to that extent, the consent of Abraham George Omondi was not necessary, and his signature, to the document, dated 26<sup>th</sup> September 2022, was of no effect. It did not amount to a compliance with Rules 7(7) and 26 of the Probate and Administration Rules.
16. One of the reasons, given by the trial court, in declining to allow the revocation application, was that the appellant ought to have sought review, of the exclusion of the beneficiaries. With respect, that was a misapprehension of the remedy of review. Review targets errors made by the court. The trial court did not exclude the beneficiaries, in the grant it made or in some ruling, it is the respondent who did, in his petition for representation. Review can only correct a mistake of the court, and, in this case, the

court did not make any error of mistake, which could lead to exclusion of beneficiaries. That was a mistake by the respondent, which could not be remedied by review.

17. Secondly, review is of an order or determination of the court. There was no order or determination that the trial court had made, which could be reviewed. It had, as at the date the revocation application was filed, only made a grant to the respondent. The grant does not list beneficiaries, and it cannot be said that the grant, issued herein, omitted the names of the beneficiaries. The grant would, therefore, not be available for review, on that account. It could, though, be reviewed or rectified on other parameters. See section 74 of the Law of Succession Act and Rule 43 of the Probate and Administration Rules.
18. The argument, therefore, that the appellant should have moved for review, rather than revocation, was not properly founded in law. A revocation application is the only remedy for addressing the issues upon which the instant application was founded. Whether a grant ought to be revoked, on the evidence on those grounds, would be another matter, for revocation is at the discretion of the court.
19. The trial court expressed reluctance to revoke a grant after confirmation. Indeed, that is a proper approach, where revocation is sought shortly after the grant had been confirmed. The argument would be that the issues raised in the revocation application ought to have been raised and litigated in the confirmation proceedings. The cases, cited by the trial court, were apt on that.
20. However, there has been no confirmation of grant in this case. The grant herein was made on 7<sup>th</sup> October 2022, and issued on 22<sup>nd</sup> November 2022. No application for confirmation, of that grant, was filed, and determined, as

at 10<sup>th</sup> March 2023, when the revocation application was filed. The issue of a review application being mounted, instead of a revocation application, on account of confirmation proceedings, as ruled by the trial court, did not and could not arise, in the circumstances.

21. I find merit in the appeal herein, for the reasons given above. The revocation application should have been allowed. I shall, as I hereby do, allow the appeal herein. The consequence shall be that the orders made, in Busia MCSC No. E520 of 2024, on 24<sup>th</sup> October 2024, are hereby set aside, and substituted with an order allowing the application, dated 6<sup>th</sup> March 2023. The grant, made on 7<sup>th</sup> October 2022, and issued on 22<sup>nd</sup> November 2022, is hereby revoked. The original trial records shall be returned to the trial court, for appointment of new administrators, and conduct of the subsequent proceedings. There shall be no order on costs. The appeal herein is disposed of in those terms. Let the instant appeal file be closed. It is so ordered.

**DELIVERED, VIA EMAIL, DATED, AND SIGNED IN CHAMBERS,  
AT BUSIA, THIS 9<sup>TH</sup> DAY OF MARCH 2026.**

**W MUSYOKA  
JUDGE**

**Mr. Arthur Etyang, Court Assistant.**

**Advocates**

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

**Mr. Okutta, instructed by Ouma-Okutta & Associates, Advocates for the respondent.**

