



**Oduory v Eunice (Family Appeal E001 of 2022)
[2024] KEHC 5984 (KLR) (28 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5984 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
FAMILY APPEAL E001 OF 2022
WM MUSYOKA, J
MAY 28, 2024**

BETWEEN

PATRICK OUNDO ODUORY APPELLANT

AND

AJIAMBO EUNICE RESPONDENT

(an appeal arising from orders made in the ruling of Hon. Lucy Ambasi, Chief Magistrate, CM, in Busia CM Misc. SC No. E024 of 2022, of 2nd March 2022)

JUDGMENT

1. The appeal herein arises from a decision of the trial court, in Busia CMC Misc. SC No E024 of 2022, of 2nd March 2022. The grounds of appeal revolve around the trial court not appreciating that a certain property was an asset in the estate of the father of the respondent; that the said property could not be distributed as an asset in the estate of the father of the appellant so long as it was registered in the name of the father of the respondent; the trial court failed to appreciate that the certificate of confirmation of grant resulted from a court order which needed to be annulled or set aside or revoked; the trial court misapprehended the purpose of the filing of the application; among others.
2. The cause, in Busia CM Misc. SC No E024 of 2022, was miscellaneous, where an application, dated 28th February 2022, was lodged, seeking to have a grant made, and confirmed, in Busia CMSC No 166 of 2016, revoked. When that file was placed before the Chief Magistrate, for directions, the trial court remarked, as follows:

“ This should be filed in the substantive Succession Cause of 166/2016.
C/S dismissed with no orders as to costs.”
3. From the directions given on 2nd March 2022, the application in question, dated 28th February 2022, was not considered on its merits. It could not be considered on merit because it was not up for hearing,



but for directions. Its dismissal was, therefore, not on merit. In view of that no appeal, along the lines of the instant one, could arise. The grounds listed in the memorandum of appeal, dated 28th March 2022, touch on the merits of that application, which merits the trial court did not go into. It cannot, therefore, be said that the trial court did not appreciate the issues raised in it, or erred in the manner it considered them, for the trial court did not go into those merits in the first place.

4. Was the trial court wrong in the manner it dealt with the application? I do not think so. From what is see from the record, the matter was placed before the Chief Magistrate for directions, and not for hearing. She gave directions, and did not purport to hear the application, or dispose of it on its merits. The remarks were that the application was wrongly filed, for it should have been filed in the substantive succession cause, which was Busia CM CSC No 166 of 2016.
5. The approach taken by the trial court was proper, right and correct. The matter was before the court for directions, nothing more. Directions were given. The directions given did not give rise to a ruling on merits, and no appeal could arise from those directions on the merits of the application. The court directed that the application should have been filed in Busia CM CSC No 166 of 2016, and that was where the appellant should have headed to, instead of filing this hugely incompetent appeal.
6. Upon the Law of Succession Act, Cap 160, Laws of Kenya, being amended, through the Magistrates Courts Act, Cap 10, Laws of Kenya, to empower the magistrates court to revoke its own grants, the summons for revocation of grant, envisaged under section 76 of the Law of Succession Act, ought to be filed within the succession cause, where the grant, sought to be revoked, was made. That application should, therefore, be interlocutory. There would be no necessity of initiating a separate independent or distinct cause, limited to revocation of the grant. The cause, in Busia CM Misc. SC No E024 of 2022, was, therefore, misconceived, and an abuse of process. The trial court had discretion, to either dismiss the unnecessary miscellaneous cause, or to consolidate it with Busia CM CSC No 166 of 2016. The trial court chose, within its discretion, to dismiss. That should have been the end of the matter.
7. There can be no merit at all in the appeal herein. I hereby dismiss it, with the contempt that it deserves. This appeal file shall be closed. The respondent has not been attending court over it, so I shall not award any costs. It is so ordered.

DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA THIS 28TH DAY OF MAY 2024

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Jumba, instructed by Balongo & Company, Advocates for the appellant.

