



**Musine v Osamo (Sued as co-administrator of the Estate of Stephen Osamo (Deceased)
(Miscellaneous Application E012 of 2022) [2023] KEHC 20217 (KLR) (17 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20217 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
MISCELLANEOUS APPLICATION E012 OF 2022**

WM MUSYOKA, J

JULY 17, 2023

BETWEEN

COLLINS LINANGA MUSINE APPLICANT

AND

**VINCENT OTIENO OSAMO (SUED AS CO-ADMINISTRATOR OF THE
ESTATE OF STEPHEN OSAMO (DECEASED)) RESPONDENT**

The High Court can only revoke grants made by itself but not those made by magistrates

The instant matter sought the revocation of the grant made by the High Court before the succession proceedings were transferred to the Chief Magistrate's Court. The court found that the exclusive jurisdiction conferred on the High Court, to revoke all grants, regardless of the court that had made them had come to an end and jurisdiction was extended to the magistrates, who, effective from January 2, 2016, got jurisdiction to revoke the grants made by them. The court thus held that the High Court could only revoke grants made by itself, but not those made by magistrates. The court further held that it did not have original jurisdiction to revoke a grant made in a matter that was pending before the Chief Magistrate Court.

Reported by Kakai Toili

Jurisdiction - jurisdiction of the High Court - jurisdiction of the High Court as a probate court - jurisdiction to revoke grants made by magistrates - where a grant was made in a matter that was pending before the Chief Magistrate Court - whether the High Court had the original and exclusive jurisdiction to revoke grants made by magistrates - whether the High Court had original jurisdiction to revoke a grant made in a matter that was pending before the Chief Magistrate Court - what was the process to be followed where a grant was issued by the High Court in a matter that was later on transferred to the Chief Magistrate's Court - Magistrates' Courts Act, 2015, section 23; Law of Succession Act, Cap 160, section 48(1).

Brief facts

The instant proceedings were initiated for the purpose of revoking the grant in made in Busia HCSC No. 85 of 1999, in the matter of the estate of Stephen Osamo. The succession proceedings were initiated at the High Court, then the cause was subsequently transferred to the Chief Magistrate's Court, sometime in 2018, where it became Busia CMSC No. 503 of 2018.



Issues

- i. Whether the High Court had the original and exclusive jurisdiction to revoke grants made by magistrate courts.
- ii. Whether the High Court had original jurisdiction to revoke a grant made in a matter that was pending before the Chief Magistrate Court.
- iii. What was the process to be followed where a grant was issued by the High Court in a matter that was later on transferred to the Chief Magistrate's Court?

Held

1. The matter of the estate of Stephen Osamo was being handled under Busia CMCS No. 503 of 2018, and any application for revocation of the grant, with respect to that estate, ought to be made in Busia CMCS No. 503 of 2018, and be heard and determined by the judicial officer seized of the matter in Busia CMCS No. 503 of 2018.
2. The law, with respect to revocation of grants in succession causes pending before the Magistrate's Courts, had changed. Prior to January 2, 2016, the High Court enjoyed exclusive jurisdiction to revoke all grants of representation, whether made by itself or the Magistrate's Court. The Magistrate's Court had no jurisdiction to revoke grants that it had power to make. However, all that changed on January 2, 2016, when the Law of Succession Act was amended, by the coming into force of the Magistrates' Courts Act, No 26 of 2015.
3. Section 23 of the Magistrates' Courts Act, 2015, amended section 48(1) of the Law of Succession Act, which had granted exclusive jurisdiction to the High Court to revoke grants made by the Magistrate's Court, and extended that jurisdiction to the Magistrate's Court. That meant that the exclusive jurisdiction conferred on the High Court to revoke all grants, regardless of the court that had made them, was ended, and jurisdiction was extended to the magistrates, who, effective from January 2, 2016, got jurisdiction to revoke the grants made by them. That meant the High Court could only revoke grants made by itself, but not those made by magistrates. The High Court lost the original and exclusive jurisdiction to revoke grants made by magistrates, and it could only deal with them in exercise of its appellate jurisdiction with respect to decisions by magistrates revoking grants made by them.
4. The summons for revocation of grant therein, dated November 17, 2021, should be heard and determined within Busia CMCS No. 503 of 2018. The cause in Busia HCSC No. 85 of 1999 ceased to exist when that cause was transferred to the Chief Magistrate's Court, and assigned number Busia CMCS No. 503 of 2018. The instant court did not have original jurisdiction to revoke a grant made in a matter that was pending before the Chief Magistrate. That jurisdiction rested with the Chief Magistrate, by dint of the current law. The instant court could only exercise jurisdiction on revocation of a grant, in a cause being handled by a magistrate, by way of an appeal, from a decision of the magistrate revoking it.
5. It could be that the grant in Busia CMCS No. 503 of 2018 was made by a judge of the High Court in Busia HCSC No. 85 of 1999, and was issued out of Busia HCSC No. 85 of 1999. However, once the matter was transferred to the Chief Magistrate's Court, whatever and whichever orders the judge had made, before the transfer of the matter, became orders of the Chief Magistrate, and any of the other magistrates in that court, and were available for review, setting aside, variation or vacating as any order made thereafter by the magistrates who became seized of the matter. That would include making orders revoking or rectifying any grant made by the judge, and issued out of the High Court registry, prior to the transfer of the matter. There should be no difficulty in dealing with such orders, and there should be no confusion around the orders.
6. What should have happened, after the file in Busia HCSC No. 85 of 1999 was transferred, and became Busia CMCS No. 503 of 2018, was the grant issued in Busia HCSC No. 85 of 1999, and any certificate of confirmation of grant that issued out of Busia HCSC No. 85 of 1999, if at all, should have been re-issued in Busia CMCS No. 503 of 2018, and signed by the magistrate seized of the matter,



thereby making them court processes in Busia CMCS No. 503 of 2018. Such re-issuance ought to be made administratively, once the transfer was effected to obviate the need for parties to move the court formally, by way of application in chambers.

7. The file, in Busia CMCS No. 503 of 2018, should be returned to the Chief Magistrate's Court registry, for the re-issuance of the grant and certificate of confirmation of grant, in terms of what was stated in the previous paragraph. Subsequent to the re-issuance, the applicant should be at liberty to file his summons for revocation of grant in Busia CMCS No. 503 of 2018. The summons for revocation of grant therein was misconceived and incompetent.

Summons for revocation of grant struck out; the file therein shall be closed, and the file in Busia CMCS No. 503 of 2018 shall be returned to the Chief Magistrate's Court registry; no order on costs.

Citations

Cases

1. Anus, David Khasievera & 2 others v Evans Khasievera Anusu (Miscellaneous Application 18 of 2019; [2022] KEHC 1385 (KLR)) — Explained
2. In re Estate of Charles Boi (Deceased) (Miscellaneous Succession Cause 10 of 2018; [2020] KEHC 1263 (KLR)) — Mentioned
3. In re Estate of Meshack Nyangi alias Nyangi Kabuga (Deceased) (Civil Appeal 3 of 2019; [2019] KEHC 1997 (KLR)) — Mentioned
4. Karuri, Josiah M R v Simon Gichangi Kabugi (Miscellaneous Civil Application 15 of 2012; [2017] KEHC 2901 (KLR)) — Mentioned
5. Ogotu, Consolata Ochieng & 3 others v Adet Odongo & Fredrick Okoth Owongo (Civil Appeal 4 of 2020; [2021] KEHC 8006 (KLR))
6. Ombayo, Joseph Odera v Robert Ombayo Wambogo (Miscellaneous Succession Cause 1 of 2019; [2019] KEHC 9282 (KLR)) — Mentioned
7. Owuor, Turfena Anyango & Musa Ahmed Owuor v Mary Akinyi Dengo (Miscellaneous Succession Application Application 18 of 2018; [2018] KEHC 5503 (KLR)) — Mentioned

Statutes

1. Law of Succession Act (cap 160) — Section 48(1) — Interpreted
2. Magistrates' Courts Act, 2015 (Act No 26 of 2015) — Section 23 — Interpreted

Advocates

None mentioned

RULING

1. These proceedings were initiated for the purpose of revoking the grant in made in Busia HCSC No. 85 of 1999, in the matter of the estate of Stephen Osamo. The succession proceedings were initiated at the High Court, then the cause was subsequently transferred to the Chief Magistrate's Court, sometime in 2018, where it became Busia CMCS No 503 of 2018. As it is, the matter of the estate of Stephen Osamo is being handled under Busia CMCS No 503 of 2018, and any application for revocation of the grant, with respect to that estate, ought to be made in Busia CMCS No 503 of 2018, and be heard and determined by the judicial officer seized of the matter in Busia CMCS No 503 of 2018.
2. The law, with respect to revocation of grants in succession causes pending before the magistrate's courts, has changed. Prior to January 2, 2016, the High Court enjoyed exclusive jurisdiction to revoke all grants of representation, whether made by itself or the magistrate's court. The Magistrate's Court had no jurisdiction to revoke grants that it had power to make. However, all that changed on January 2, 2016, when the Law of Succession Act was amended, by the coming into force of the Magistrates'



Courts Act, No 26 of 2015. Section 23 of the *Magistrates' Courts Act, 2015*, amended section 48(1) of the *Law of Succession Act*, which had granted exclusive jurisdiction to the High Court to revoke grants made by the magistrate's court, and extended that jurisdiction to the magistrate's court. That meant that the exclusive jurisdiction conferred on the High Court, to revoke all grants, regardless of the court that had made them, was ended, and jurisdiction was extended to the magistrates, who now, effective from January 2, 2016, got jurisdiction to revoke the grants made by them. See *Josiah MR Karuri v Simon Gichangi Kabugi* [2017] eKLR (Ngaah, J), *Turfena Anyango Owuor & another v Mary Akinyi Dengo* [2018] eKLR [2018] 1 EA 374 (Mrima, J), *In re Estate of Meshack Nyangi alias Nyangi Kabuga (Deceased)* [2019] eKLR (Limo, J), *Joseph Odera Ombayo v Robert Ombayo Wambogo* [2019] eKLR (Aburili, J), *In re Estate of Charles Boi (Deceased)* [2020] eKLR (Musyoka, J), *Mwati Kakiti Ngalaka & another v Nzembe Kakiti & another* [2020] eKLR (Mutende, J), *Consolata Ochieng Ogutu & 3 others v Adet Odongo & another* [2021] eKLR (Aburili, J) and *David Khasievera Anusu & 2 others v Evans Khasievera Anusu* [2022] eKLR (FS Amin, J). That meant the High Court could only revoke grants made by itself, but not those made by magistrates. The High Court lost the original and exclusive jurisdiction to revoke grants made by magistrates, and it could only deal with them in exercise of its appellate jurisdiction, with respect to decisions by magistrates revoking grants made by them.

3. For avoidance of doubt, section 48(1) of the *Law of Succession Act*, prior to January 2, 2016, 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 ...”

4. From January 2, 2016, the same provision, section 48(1) reads as follows:

“48. Jurisdiction of Magistrates

- (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*, (Act No. 26 of 2015).
- (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*, (Act No 26 of 2015).
- (2) ...”

5. Section 23 of the *Magistrates Courts Act, 2015*, which effected the amendments, reads:

“23. Amendment of section 48 of cap 160

The *Law of Succession Act* (cap 160) 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.”

6. The effect of the above discussion is that the summons for revocation of grant herein, dated November 17, 2021, should be heard and determined within Busia CM CSC No 503 of 2018. The cause in Busia HCSC No 85 of 1999 ceased to exist when that cause was transfer to the Chief Magistrate’s Court, and assigned number Busia CM CSC No 503 of 2018. I have no original jurisdiction to revoke a grant made in a matter that is pending before the Chief Magistrate. That jurisdiction now rests with the Chief Magistrate, by dint of the current law. I can only exercise jurisdiction on revocation of a grant, in a cause being handled by a magistrate, by way of an appeal, from a decision of the magistrate revoking it.
7. It could be that the grant in Busia CM CSC No 503 of 2018 was made by a Judge of the High Court in Busia HCSC No 85 of 1999, and was issued out of Busia HCSC No 85 of 1999. However, once the matter was transferred to the Chief Magistrate’s Court, whatever and whichever orders the Judge had made, before the transfer of the matter, became orders of the Chief Magistrate, and any of the other magistrates in that court, and are available for review, setting aside, variation or vacating as any order made thereafter by the magistrates who became seized of the matter. That would include making orders revoking or rectifying any grant made by the Judge, and issued out of the High Court registry, prior to the transfer of the matter. There should be no difficulty in dealing with such orders, and there should be no confusion around the orders.
8. What should have happened, after the file in Busia HCSC No 85 of 1999 was transferred, and became Busia CM CSC No 503 of 2018, is the grant issued in Busia HCSC No 85 of 1999, and any certificate of confirmation of grant that issued out of Busia HCSC No 85 of 1999, if at all, should have been re-issued in Busia CM CSC No 503 of 2018, and signed by the magistrate seized of the matter, thereby making them court processes in Busia CM CSC No 503 of 2018. Such re-issuance ought to be made administratively, once the transfer is effected, to obviate the need for parties to move the court formally, by way of application in chambers.
9. The way forward is that I should order, that the file, in Busia CM CSC No 503 of 2018, be returned to the Chief Magistrate’s Court registry, for the re-issuance of the grant and certificate of confirmation of grant, in terms of what I have stated in paragraph 8, foregoing. Subsequent to the re-issuance, the applicant should be at liberty to file his summons for revocation of grant in Busia CM CSC No 503 of 2018. The summons for revocation of grant herein is misconceived and incompetent, for the foregoing reasons. It is hereby struck out. The file herein shall be closed, and the file in Busia CM CSC No 503 of 2018 shall be returned to the Chief Magistrate’s Court registry. There shall be no order on costs. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 17TH DAY OF JULY 2023

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Appearances



Mr. Were, instructed by Gabriel Fwaya, Advocate for the applicant.

Mr. Okeyo, instructed by Okeyo Ochiel & Company, Advocates for the respondent.

