Kyenze v Kithini & 3 others (Family Appeal E001 of 2021)
[2024] KEHC 17194 (KLR) (28 August 2024) (Judgment)

Neutral citation: [2024] KEHC 17194 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

FAMILY APPEAL E001 OF 2021

TM MATHEKA, J

AUGUST 28, 2024

BETWEEN

LOISE MUTIO KYENZE ..... APPELLANT

AND

DAVID NDOLO KITHINI ..... 1ST RESPONDENT

MUINDI NDOLO & 2 OTHERS & 2 OTHERS & 2 OTHERS & 2 OTHERS ..... 2ND RESPONDENT

JUDGMENT

1. Ivulu Kithini alias Ibulu Kithini died on 25th February 1972 at the age of 110 years at Kitonyini, in Makueni County

2. On 6th March 2019, Loise Mutio Kyenze filed Makueni Magistrates Court Succession Cause no 29 of 2019. She listed herself and three others as the only survivors of the deceased as his daughters and his assets as Makueni/Mubau/193.

3. On 24th June 2019 she was issued with grant of letters of administration Intestate

4. The respondents moved the trial court, through an application dated 31/10/2019, for revocation of grant issued to the appellant on 24/06/2019 on grounds inter alia that the proceedings to obtain the grant were defective in substance and the grant was obtained fraudulently by making untrue allegations and concealment of material facts.

5. The application was opposed on grounds inter alia that the deceased did not have any other family apart from that of the appellant and was the sole owner of the subject parcel of land.

6. The application was canvassed through viva voce evidence where after the trial magistrate delivered a ruling in favour of the respondents by revoking the grant.

7. Aggrieved by that ruling, the appellant filed this appeal and averred that the learned trial magistrate erred in law and fact by;

    a. Concluding that the respondents herein had a right to claim a share of the deceased estate without any proof that they were beneficiaries.

    b. Ruling that the objectors had a claim against the estate of the deceased despite there being sufficient evidence showing that the objectors were children of Ndolo Kithini and not the deceased Ivulu Kithini hence had no claim against his estate.

    c. Revoking and annulling the grant of letters of administration issued to the appellant on 24/06/2019 without considering the evidence adduced by the appellant together with her witnesses.

    d. Ruling that the appellant had no better claim over all that land registered as Makueni/ Mubau/193 than that of the respondent.

    e. Directing that a fresh grant be applied for by both the appellants and respondents despite there being sufficient evidence tendered in court that the appellants are children of Ivulu Kithini and the respondents are children of Ndolo Kithini.

    f. Ruling against the weight of the evidence.

    g. Considering extraneous matters in arriving at his ruling and disregarding grounds and submissions tendered by the appellant's counsel.

8. The record shows that the respondents were granted leave to file a cross-appeal via the ruling dated 29/06/2022 by Dulu J. Several times thereafter, they got an extension of time to file it but they never did.

9. There were 4 witnesses for the respondents and 3 witnesses for the appellant.

10. PW1 was William Talava Ndolo and he adopted his statement filed on 25/02/2020 as part of his evidence. He stated that his father's name is Ivulu Kithini but when he obtained his national identity card, he mistakenly used his step father's name 'Ndolo' as he was the one who took over leadership of his brother's family after his death. That Ndolo failed to advise him to use his father's name 'Ivulu' when registration of persons was introduced.

11. He stated that they were left on the subjecct land when Ndolo moved to Kalii with his wife Nduume and their children. That he would not have left him behind since 1969 if he was his biological father. He stated that his father Ivulu Kithini and his mother Ngina Ivulu settled on Makueni/ Muvau 193 during the colonial era in 1956 and only married couples were allowed to acquire land in the scheme. That since 1967, he never saw the petitioners with their mother and they never stepped on the land until 2018 when they were smuggled into the land by his elder brother Mr. Muli. That Mr.Muli had sold his share of the land to them (respondents) and proceeded to settle at Kibwezi sub-county.

12. He stated that several family members of Ivulu are buried on the land and he has never seen any of the petitioners or their children attending any of the burials or objecting to burials being done there. That neither the petitioners, their husbands nor relatives attended the burial of Ivulu Kithini and none of them have developments on the land. That the developments on the land belong to the children of Ivulu and have been there for the last 40 years.

13. In his evidence in court, he testified that his family moved to the land in 1963 and lived without interruptions until 2018 when his brother brought the petitioners. That Ndolo was a brother to his

father and they were left under his care when their father died. That in 2017, they acquired a letter from the chief for succession purposes but later on, the area chief changed his mind when his brother brought other people. That their brother who sold his portion is called Joseph Ndolo and he bought land in Kibwezi.

14. He produced sale agreements dated 20/07/2008 as P. Exhibits 1(a) &(b).

15. On cross examination, he said that the name 'Ndolo' in his ID card was erroneously inserted. That he was 62 years at the time of testifying but got his ID when he was 20 years old and has never tried to change the name. That his father had 7 children and Julius Munyao Ivulu is deceased.

16. Further, he stated that Ndolo and Ivulu are step brothers born of different mothers and Ndolo's wife, Ndoome, is alive. That Ivulu had two wives-Muthike and Ngina. That Katile Ivulu was not known to him. That his mother was Ngina and she was Ivulu's wife not Ndolo's. That Ndolo is not his father but uncle.

17. He said that Joseph Muli Ndolo is known to him and is the one behind this whole saga. He said that they(respondents) are in occupation of the land but he (PW1) does not reside on it as he has built elsewhere. He said that Ndolo did not have two wives. He conceded that they have sold a portion of the land through Joseph Muli Ndolo and said that he was not aware that he had been accused at a police station for selling deceased's land.

18. With regard to the sale agreements, he said that one was a continuation of the other. That one does not show the land involved but shows that a balance of Kshs 25,000/= was paid. That it shows the name of the seller but does not show citation of the land. He said that the buyers were him and his brothers.

19. PW2 was Ndangili Mbuvi aged 97 years. In his statement filed on 25/02/2020, he stated that he is a neighbor to the objectors (respondents) and that he settled at Kangondi village, Kithonyoni sub-location Makueni County in 1955. That when he settled, he was enrolled as a village manager and his duty was to record new couples who were eligible to be allotted land in the settlement. That Ivulu was welcomed by the then Chief William Kioko as they served the colonial government in the second world war. That Ivulu was his neighbor since he settled till his death and his family members were known to him. That Ivulu was his close friend and he never disclosed about having another family outside Makueni County.

20. He stated that during the period he lived with Ivulu as neighbors, he never witnessed any person from outside Makueni County visiting him as a family member. That by the time of his death, Ivulu had settled on the suit land for over 16 years. That the only family members of Ivulu known to him are;

    i. Ngina Ivulu-wife of Ivulu (deceased)

    ii. Munyao Ivulu whose wife Agnes Mukonyo (living)

    iii. Mr. Muindi Ndolo

    iv. Mr. David Ndolo

    v. Mr. Talava Ndolo

    vi. Mr. Muli Ndolo

21. He stated that Ivulu had only one wife Ngina who was the mother of the above-named children.

22. In his evidence in court, he said that he was not aware of other children of Ivulu other than the ones by his wife Ngina.

23. On cross examination, he said that he went to Mubau in 1955 and used to keep records which he would take to the chief. That Ivulu came from Tawa in the company of his wife Ngina. That he did not know one Ndolo and only heard of him. He did not know if Ndolo was left to take care of Ivulu's children when Ivulu died. He did not know if Ndolo stayed on the subject land. He did not know if Ivulu had another wife called Katile.

24. Further, he said that he worked in Nairobi for over 30 years and would go home for one month per year. He conceded that he knew Talava who stayed on the land for so many years. Loise and the other respondents (now appellants) were not known to him. He conceded that he did not know all of Ivulu's children.

25. PW3 was Grace Mueni. In her statement filed on 25/02/2020, she stated that Ngina Ivulu was her elder sister and the children she sired with Ivulu Kithini were;

    i. Joseph Munyao Ivulu (deceased)

    ii. Joseph Muli Ndolo

    iii. David Mwau Ndolo

    iv. William Ndolo

    v. Rebecca Kaswili (deceased)

    vi. Rose Kimanthi

26. She stated that her sister Ngina married Ivulu Kithini at Mbooni location during the famine of Mwanga at the end of the first world war. That Ivulu had three wives namely; Muthike Ivulu, Syondanga Ivulu and Ngina Ivulu who replaced Muthike after death. That she never saw Katile Ivulu. That Muthike Ivulu sired two daughters; Kasiwa Musau and Kyevose Kasoli. That Ngina Ivulu cohabited with Ivulu as husband and wife at Mbooni and thereafter at Kitonyini at Makueni and after the death of Muthike Ivulu.

27. She stated that in 1963, Ivulu Kithini shifted to Makueni with Ngina, their children and his step brother Ndolo Kithini whose mother is Syonzulo sister of Muthike Ivulu. That when Syonzulo died, Ndolo was young and was brought up by Muthike Ivulu. That Muthike Ivulu died in Tawa in Mbooni Location where she was buried before Ivulu shifted to Makueni. That when Ivulu Kithini shifted from Tawa to Kitondo, he left the said children at Tawa and after returning to Tawa, he shifted to Makueni with his wife and children.

28. In her evidence in court, she said that Ivulu, Ngina and Muthike stayed together and then Ivulu and Ngina shifted to Wote when Muthike died. That she joined them later and found Munyao son of Ivulu married with one child. She went back to Tawa and when she returned to Wote, she found that the family was big. She would find Muindi Ndolo who was Ivulu's brother on the land.

29. She said that she did not know Loise Kamene, Loise Mutio and never used to see them at Ivulu's home. She would only find Ivulu, his wife Ngina and their children. She did not know if Ivulu sired other children and Ngina never told her about such children.

30. On cross-examination, she said that her husband Kasoli was bereaved (must have meant 'deceased'). That Munyao Ivulu is Ngina's son and not her (PW3's) husband as stated in the statement. She did not know Katile Ivulu but confirmed that she knew Ndolo Kithini and used to see him at Ivulu's home. That Ndolo Kithini and Ivulu were born together and the homestead belonged to Ivulu.

31. PW4 was Agnes Mukonyo Munyao. In her statement filed on 25/02/2020, she stated that her late husband Munyao Ivulu was the eldest son in the family of Ivulu Kithini and she got married to him in 1967. That when she got married, she found her husband's family settled on Makueni/ Muvau/193 with Ndolo Kithini who later on in 1970, moved to Kalii with his wife and children. That in 2018, she saw strangers escorted by Mr. Muli, the young brother to her late husband. That after selling his share of Makueni/ Muvau/193, Mr. Muli moved to live in Kibwezi where he settled. That she was surprised to see Mr. Muli come back with women who claimed to be beneficiaries.

32. That to make the matters worse, the strangers illegally applied for the grant of letters of administration to the estate of their late father. That having settled on the land for over 52 years, it was Ivulu Kithini who paid dowry to her in-laws and performed customary rights of marriage as father to her husband. That her husband died on the land and was buried there. She was aware that Ndolo was step brother to her father-in-law (Ivulu Kithini) and he was brought up by Ivulu.

33. She stated that she has known no other father-in-law except Ivulu Kithini and has lived on the land for over 52 years undisturbed.

34. In her evidence in court, she testified that her husband died in 1982 and buried where they stay. That her husband's death certificate shows his father as Ivulu. That Ivulu was alive when she got married and she fed him for 4 years.

35. On cross-examination, she said that Makueni/ Muvau/193 belonged to Ivulu. That Ivulu and Ngina stayed on the land when they came there from Tawa. That Ndolo stayed on the land but she did not know how he was related to Ivulu. That Ndolo has a wife called Ndoome. That the respondents are reffered to in the name of Ivulu. That William Talava Ndolo is known to her and the respondents are referred to in the name of Ndolo. That she stayed on the same land with Ndolo and he was buried on the land. A woman known Katile was not known to her.

36. DW1 was Kawisya Ivaviiya. In her statement filed on 27/11/2019, she stated that Ivulu Kithini alias Ibuli Kithini was their deceased father and he had four daughters namely;

    i. Loise Mutio Kyenze

    ii. Rose Kamene Muthoka

    iii. Kawiisya Ivaviiya Mulili

    iv. Alice Nduko Kioko

37. That their mother's name was Katile Ivulu and the deceased was married to her only. That they were born in Kisau within Makueni County but their father relocated them to Makueni/Mubau/193 in Kitonyoni Makueni County where he did mixed farming. That Ivulu Kithini alias Ibuli Kithini was a son to Kithini who had three wives. That Ivulu Kithini was a child of the first wife and Ndolo Kithini was a child of the third wife hence the two were step brothers.

38. She stated that their mother died in 1960 and left them with their father. That Loise Mutio got married and went to stay with her husband, Rose Kamene got sick and was admitted at Wote hospital and she (DW1) was left with her father and younger sister. That her father got overwhelmed with work and requested Joseph Muli, a step brother to Ndolo Kithini, to assist with the farm work. Joseph Muli agreed but he was also overwhelmed and he went back to Tawa where Ndolo Kithini was staying with his two wives and children. That he picked his mother Ngina Ndolo and younger siblings and went to Ivuli's farm in Kitonyoni to assist with the farming.

39. She stated that sometimes in 1967, Ndolo Kithini allowed his wives and children into Ivulu's farm where he stayed for about one year and then went to Kalie, with his second wife and children, where he had bought land. That Ndolo Kithini left the first wife and children on Ivulu's land. That she (DW1) went to stay with her married sister Loise Mutio and left her father at Kitonyini with Joseph Mule, his mother and siblings who were helping him in the farming.

40. She stated that prior to their father's death in 1972, he called for their elder sister Loise Mutio and told her that she should have the land for taking care of her siblings when they were children. They did not have any objection to her being given the land. That their father has never had children with Ngina Ndolo and all the children arrived with their brother and mother on invitation by Ivulu.

41. On cross-examination, she said that she was born in 1952 but did not have a birth certificate. She did not have any document showing that she is Ivulu's daughter. That she got married in 1972 and resides in Mbooni since her marriage. She did not know when Ivulu acquired the land. That Ivulu resided at Kisau in Mbooni before moving to the land. That her mother died in 1950's and her father in 1972 when his children were on the land. That the objectors grew up on the land but were born at Kiteta at a small portion of land.

    That they went and requested for land from her father but she agreed that she was not present. That her parents are buried on the land. She conceded that by 1972, the objectors were already on the land.

42. She conceded that Joseph Muli is known to her and he is Ndolo's son. That he stays at Kiteta but she did not know when he moved there. She confirmed that the objectors have been on the land for a long time. She said that Muli went to Mbooni and claimed that some people wanted to change ownership of the land.

43. DW2 was Joseph Muli Ndolo. His statement was filed on 27/11/2019. He stated that initially, he was settled in Makueni/Mubau/193 but he migrated to Kibwezi in 1989. That his father Ndolo Kithini had 8 children with the 1st wife and 6 children with the 2nd wife. That before his father died, he called him in the presence of his mother and told him that Makueni/Mubau/193 belongs to his step-brother, Ivulu Kithini. That due to that reason, he decided to buy his land in Kibwezi and informed his brothers what their father had said. That he returned to the land in 2018 and found that his brothers had called a surveyor to survey the land but he objected because he knew the truth.

44. That he reported the issue to the sub-chief who forwarded the dispute to the chief. That the chief told him to avail the children of Ivulu Kithini and he did that. At the chief's office, the chief told them that all his (DW2's) brothers and sisters should leave the land and go to Kalii where their father's land is. That the 2nd house of his father is settled at Kalii.

45. He stated that Willy Talava Ndolo has his own land where he is settled and only goes to graze and cultivate in land No. 193. He stated that the land does not belong to his father and his bothers should be evicted.

46. On cross-examination, he stated that he was born in 1949 in Tawa and his brothers were also born there. That their mother Ngina was married at Tawa. That Ivulu left Tawa alone at around 1956 and went to Kitondo. That he was aware that Ivulu bought land from one Ndolo Mbathi but he had no agreements to that effect. That the land was not given to Ivulu as a settlement scheme and he (DW2) was given that information by his parents. That he was aware that Ivulu acquired title to the land in 1969. That he was the one who took the objectors to the land in 1969. That their mother is buried on the same land. That his elder brother died in 1971 and was buried on the land. That it was not his elder brother who took the objectors to the land.

47. He conceded that he had nothing to show that the respondents (now appellants) were Ivulu's children. He denied that he took them to the land in order to claim it. He confirmed that he was given some money but denied having sold any land. That he wanted to return the money but they declined and took a surveyor to the land to sub-divide it. That the land is near a market place. That Ivulu and Ndolo were brothers but he did not know their parent. Further, he said that his deceased elder brother had a family which still stays on the land. That the families of his siblings stay on the land as well and have been there for over 50 years.

48. In re-examination, he said that the objectors are his siblings and not Ivulu's children. That he lived on the land from 1966-1978. That the respondents also stayed on the land with the father and left when their mother died.

49. DW3 Gregory Musyoki in his statement filed on 27/11/2019 stated that he was the chief of Muvau Location within Makueni County. That Kitonyoni sub-location is one of the two sub-locations of Muvau location. That he was the chief from 2002 and was still the chief at the time of testifying 2020.

50. He stated that a dispute was reported to his office by Joseph Muli Ndolo claiming that his brothers did not want to give him a share of Makueni/Mubau/193 which belonged to their deceased father Ndolo Kithini. He summoned the said brothers who claimed that it belonged to their deceased father. That from the meeting, he found out that the land belonged to Ivulu Kithini alias Ibuli Kithini who was their step-uncle and not their deceased father. He informed them that they had no right to sub-divide the land since they were not the rightful heirs of Ivulu Kithini.

51. He informed them to avail the rightful heirs and they took four women who introduced themselves as the only children of the deceased. Upon enquiry, he discovered that Ivulu Kithini was married to one wife Katile Ivulu with who they were blessed with four daughters. He tried to reconcile them but the children of Ivulu Kithini stood their ground that the land belonged to their deceased father and not Ndolo Kithini. He advised the sons of Ndolo Kithini that they had no claim in the land. Later, he wrote a letter for the daughters of Ivulu Kithini to assist in filing for succussion.

52. In his evidence in court, he said that he had just retired. That he handled the dispute by summoning the parties and the respondents proved to be Ivulu's children but they had not been in occupation. That the objectors never proved to be Ivulu's children.

53. On cross-examination, he said that he was 60 years old and was born in the locality. That initially, there was a chief called William Kioko when the land was demarcated in late fifties before he (DW3) was born. That the land was initially a settlement scheme and changed to an adjudication area. He confirmed before he was born, Ivulu had been allotted the land. That he was the second chief of the area from 2002 and by then, the objectors were residing on the land. He stated that Katile Ivulu was not known to him and he never saw the respondents on the land. That he saw them for the first time in 2019. That they had documentary evidence to show that they are Ivulu's daughters. That he listened to the parties and concluded that they were Ivulu's daughters.

54. Directions were given that the appeal be canvassed through written submissions. Consequently, the parties complied and filed their respective submissions.

Appellant's Submissions

55. Relying on Section 78 of the *Civil Procedure Act* and Peter M. Kariuki -vs- Attorney General [2014] eKLR the appellant reminded this court of its duty to; 're-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions.'

56. She identified the issues for determination to be;

    a. Whether the revocation and/or annulment of the grant of letters of administration issued to the appellant was legally sound.

    b. Whether the appellant is entitled to orders sought in the appeal.

57. She submitted that revocation and/or annulment of a grant is well envisaged under section 76 of the *Law of Succession Act* CAP 160 laws of Kenya and that the section was clearly expounded by the court in re Estate of Prisca Ong'ayo Nande (Deceased) [2020] eKLR where it was stated that:

> " Under section 76, a court may revoke a grant so long as the grounds listed above are disclosed, either on its own motion or on the application of a party. A grant of letters of administration may be revoked on three general grounds. The first is where the process of obtaining the grant was attended by problems. The first would be where the process was defective, either because some mandatory procedural step was omitted, or the persons applying for representation was not competent or suitable for appointment, or the deceased died testate having made a valid will and then a grant or letters of administration intestate was made instead of a grant of probate, or vice versa. It could also be that the process was marred by fraud and misrepresentation or concealment of matter, such as where some survivors are not disclosed or the Applicant lies that he is a survivor when he is not, among other reasons. The second general ground is where the grant was obtained procedurally, but the administrator, thereafter, got into problems with the exercise of administration, such as where he fails to apply for confirmation of grant within the time allowed, or he fails to proceed diligently with administration, or fails to render accounts as and when required. The third general ground is where the grant has become useless and inoperative following subsequent circumstances, such as where a sole administrator dies leaving behind no administrator to carry on the exercise, or where the sole administrator loses the soundness of his mind for whatever reason or even becomes physically infirm to an extent of being unable to carry out his duties as administrator, or the sole administrator is adjudged bankrupt and, therefore, becomes unqualified to hold any office of trust."

58. She submitted that she did not obtain the grant fraudulently and there is no evidence of a false statement made. That the beneficiaries of the deceased are listed in the chief's letter dated 12/2/2019 and the chief who authored the letter testified as DW3.

59. She submitted that the trial court erred in law and fact by ruling that the respondents had a better claim against the estate of the deceased despite there being sufficient evidence showing that the objectors were children of Ndolo Kithini and not the deceased Ivulu Kithini. That the trial court misdirected itself by failing to apply any paternity approach to establish whether the respondents were children of Ivulu Kithini alias Ibulu Kithini. She relied on Wilfred Koinange Gathiomi -vs- Joyce Wambui Mutura & Another, [2016] eKLR where the court stated:

> " If the applicant denies paternity what other quicker way to resolve the dispute exists than to undergo a DNA test."

60. She also relied on re Estate of Philis Wairuri Maina (Deceased) [2021] eKLR where the court issued the following orders:

> " I. The court orders that the applicant and the remains of Benson Nderitu Maina shall undergo DNA test to confirm applicant's paternity.

II. The parties to share costs equally and that in event applicant is not son of Benson Nderitu Maina, he shall refund respondent his contributed expenses and if he is son of same person, then applicant will be refunded the expenses by the respondent"

61. She submitted that no evidence was adduced to prove the grounds for revocation of grant and the reasons for revocation of grant as provided by law were not established at all during the entire hearing of the summons for confirmation of grant. She concluded that the revocation was erroneous.

62. Further, she submitted that the power to revoke a grant is discretionary and should be used judiciously and only on sound grounds. She relied on the persuasive decision of Albert Imbuga Kisigwa -vs- Recho Kavai Kisigwa Succession Cause No. 158 of 2000 where the judge stated: -

> " Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not discretion to be exercised whimsically or capriciously.
>
> There must be evidence of wrong doing for the court to invoke section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased's estate and ensure that the action taken will be for the interest of justice."

Respondents' Submissions

63. The respondents identified the issues for determination to be;

a. Whether the grant was rightfully revoked and/or annulled.

b. Who are the rightful beneficiaries of the deceased's estate?

c. Whether new issues can be raised on appeal.

64. They submitted that while obtaining the grant herein, the appellant concealed and suppressed material facts to the effect that they(respondents) were the rightful beneficiaries. That the appellant and her siblings deliberately and intentionally failed to disclose to the trial court that the respondents have been in continuous occupation and possession of the suit property from the year 1963 to date. They submitted that the trial court was very right in revoking the grant. They relied on re Estate of Angelo Titita Kilungu (DCD) [2020] eKLR where the court stated;

> " 57. I agree with the holding in the case of Monica Adhiambo vs. Maurice Odero Koko [2016] eKLR in which the court stated as follows:
>
> "In the instant case it is undisputed that the petitioner only transferred the suit property to the interested party after the grant of letters of administration were confirmed which is legally in order. However, a closer look at the process she took in applying for the said grant of letters of administration reveal that the said grant was obtained through fraudulent non-disclosure of material facts. The petitioner in form P & A 5 stated that she was the only beneficiary/ survivor of the deceased estate while in reality the deceased had 3 children in total. It turns out that the deceased actually had 2 other children who were Margaret Ouko and Maurice Odero Koko. None of these two beneficiaries had given the petitioner consent in terms of Rule 7(7) (a) (b) and (c) of the Probate and Administration Rules...The petitioner in the instant case cause did not rank higher than the objector in priority in seeking a grant of administration intestate and was required before making of the grant to

furnish this court with information and satisfy the court that the objectors having prior preferences to a grant being all children of the deceased, had renounced their right generally to apply for the grant or had consented with making of the grant to the petitioner or that they had been issued with a citation calling upon them either to renounce such right or to apply for a grant. The petitioner therefore acted contrary to the mandatory provisions of Rule 7(7) of the Probate and Administration Rules and it's no wonder my sister Sitati J had to revoke the petitioner's grant for non-disclosure of material facts...With that said, the fact that the petitioners title over the original suit land was revoked will automatically affect the interested parties ownership over the suit property because it will be a corruption of the law to validate how the original suit property belonging to the deceased was transferred to the petitioner. The fact remains that the petitioner stole a march over the other beneficiaries who were also to benefit on equal status on the property of the deceased and it would be unfair to validate the illegal actions of the petitioner by invoking Section 93 of the *Law of Succession Act*. The reality of the situation is that provisions of Section 93 do not validate unlawful acts and what was intended by Section 93 was where a grant is properly and lawful issued then, Section 93 can come to the rescue of such a purchaser. In my humble view the underlying objective of the *law of Succession Act* is to ensure that beneficiaries of deceased persons inherit the property."

58. In the premises, I am satisfied that the grant herein was obtained and confirmed by the making of a false statement or by the concealment from the court of something material to the case and that further the same was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently."

65. They submitted that they are the rightful beneficiaries of the deceased and that the evidence of PW1, 2, 3 and 4 confirmed without any shadow of doubt that the appellant and her siblings are not children of the deceased. That the same witnesses also confirmed that the respondents have been in continuous occupation of the property from 1963. That DW1 and 2 buttressed the position by stating that the respondents have lived on the property for over 50 years.

66. Further, they submitted that according to the evidence of PW1, 2, 3 and 4, the appellant and her siblings were only seen in the suit property in 2018 and 2019 and they started laying claim over the same at around the same time. They relied on re Estate of Mule Kitavi (Deceased) [2019] eKLR where the court stated;

"41. PW2 was the only witness called by the petitioner. His evidence crumbled on cross examination and he ended up denying crucial contents of his affidavit. It turned out that the deceased was not his classmate, they were not age mates, he did not know whether the deceased went to school or when he married and got children. He did not know when the deceased died and did not even attend his burial. In my view, this witness could not authoritatively speak about the deceased's life and any information from him to the local administration should have been treated cautiously.

42. Further, it was PW2's evidence that the petitioner was his employee at some point and even at the time of testifying, he confirmed that he was the one taking care of the petitioner who had become disabled after an accident. It is therefore evident that there was a close relationship between PW1 and PW2 and it is only natural for people in close relationships to be biased for each other. Then there is the issue of the petitioner's identity card which he changed 53 years after being born. This is not only suspicious but it buttresses the objector's case that indeed, when the petitioner's mother got married to the deceased, the petitioner and his siblings were already in existence.

43. There is no evidence to show that the deceased adopted the petitioner as his son. The petitioner testified that when his siblings followed their mother after the divorce, he stayed with the deceased and took care of the land. It is however my considered view that the petitioner's evidence could not stand on it's own and required corroboration. PW2's evidence could not be considered as corroborative as I have already opined that he was not a credible witness.

44. The upshot of the foregoing is that in the absence of medical evidence, the petitioner did not prove on a balance of probability that he is a biological or adopted son of the deceased...

45. It is not in dispute that the objector is a nephew of the deceased and that there are other nephews and nieces in existence. It is therefore my considered view that the surviving children of the deceased's siblings are the rightful heirs."

67. As to whether new issues can be raised on appeal, they submitted that issues which were neither raised nor canvassed before the trial court could not be introduced on appeal. That the appellant has introduced the concept of DNA tests which were never pleaded or ventilated in the trial court. That the issue was put forward for the first time in the submissions and that is untenable in law. They relied on Attorney General -vs- Revolving Tower Restaurant (1988) KLR where the Court of Appeal stated;

> " In this case, the concept of a monthly tenancy had not been included in the pleadings an it was put forward for the first time in this court.
>
> The facts had not been fully explored to show the relevance of the new point of law and this was a case where this court would not allow that new point. Accordingly, the point was to be deleted by striking out the grounds of appeal in which it was embodied. Preliminary point allowed...."

68. With regard to costs, they relied on Rule 69 of the Probate and Administration Rules for the submission that; 'costs incidental to any matter shall be at the discretion of the Judge or court.'

Duty of Court

69. An appeal to this court is by way of re-trial and it is now settled that the duty of a first appellate Court is to analyze and re-evaluate the evidence on record in order to reach its own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses. (Selle & another –vs- Associated Motor Boat Co. Ltd. & others (1968) EA 123).

70. I have carefully considered the grounds of appeal, the record of appeal and the rival submissions and the following issues arise for determination;

a. Who are the rightful beneficiaries of the deceased's estate?

b. Have new issues been raised on appeal?

c. Whether the trial court erred by revoking the grant.

Analysis

Who are the rightful beneficiaries of the deceased's estate?

71. There are several facts which have come out clearly from the evidence of the appellants and respondents. Firstly, Ivulu Kithini and Ndolo Kithini were step brothers, secondly, Makueni/ Mubau/193 is the only asset of the deceased's estate, thirdly, the families of the respondents have been in occupation of Makueni/ Mubau/193 for more than 50 years, fourthly, DW2 and the respondents are siblings and fifthly, the appellant and her siblings were seen on the land at around 2018-2019 for the first time.

72. DW1, Kawisya Ivaviiya, claimed that they initially stayed on the land as a family but shortly after the death of their mother in 1960, she left with her sisters and their father remained on the land. It appears that they never went back until around 2018 when they were taken by DW2, Joseph Muli. This is buttressed by the uncontroverted evidence of PW1 to the effect that the appellant, her siblings and their families did not attend the burial of Ivulu Kithini in 1972. The appellant did not give any indication that they attended the said burial in her statement or evidence in court.

73. In her replying affidavit Loise Mutio Kyenze deponed that all the neighbors of Ivulu Kithini knew her and her sisters as the only surviving children of the deceased, however, they did not call any witness who was an inhabitant of the area to confirm that indeed they were known in the locality. It is expected that these neighbors would still have a relationship with their father even though they got married and moved to other places. Indeed, it is strange that the appellant and her siblings claim to be children of Ivulu Kithini but they did not even attend his burial. The appellant's witness DW3, has been the area chief since 2002 but he also saw them for the first time in 2019.

74. According to the evidence of DW3, he relied on what the parties were telling him and did not conduct any independent investigations. He said that the appellants produced documentary evidence to prove that they were the rightful heirs of Ivulu Kithini but no such evidence was produced in court. DW3 became Chief of the area 30 years after the death of Ivulu Kithini and as such, he cannot be considered to be a person who is knowledgeable about the deceased and his family. Further, it is my considered view that the introductory letter which he wrote for purposes of Ivulu Kithini's succession is not reliable and was made on the information from the informants who went for the letter and not from his own investigations/knowledge.

75. It is necessary to cite s. 46 of the Law of Succesion Act:

> 46. Duties of officers in relation to protection, etc., of deceased's property
>
> 1. Whenever it becomes known to any police officer or administrative officer that any person has died, he shall, unless aware that a report has already been made, forthwith report the fact of the death to the sub-chief of the sub-location or to the chief or administrative officer of the area where the deceased had his last known place of residence.
>
> 2. Any person to whom a report is made under subsection (1) shall –

a. at the request of any person who appears to have a legitimate interest in the estate of the deceased; or

b. if no application for representation in respect of the estate has been made within one month after the date of the death of the deceased, forthwith proceed to the last known place of residence of the deceased, and take all necessary steps for the protection of his free property found there, for ascertainment of his other free properties (if any), for ascertainment of all persons appearing to have any legitimate interest in succession to or administration of his estate, and for the guidance of prospective executors or administrators as to formalities and duties:

Provided that if the last known place of residence of the deceased is situated in a municipality, or when the deceased dies outside Kenya wherever his property is situated, the person to whom a report is made under subsection (1) shall not take the action which he is required to take under this subsection unless and until he has first reported the death to the Public Trustee, who may if he so wishes himself take the action instead of that person;

3. If any person to whom a report is made under subsection (1) finds that there is any free property of the deceased, or that the person appearing to have the greatest legitimate interest in succession to or administration of his estate are resident in any other sub- location or area, he shall forthwith report those facts to the sub-chief, chief or administrative officer of that other sub-location or area, who shall thereupon take, in respect of the property or persons, the steps are prescribed by subsection (2).

4. Any assistant chief, chief or administrative officer becoming aware that there is in his sub-location or area any free property of a deceased person, or that there are resident in his sub-location or area any persons appearing to have the greatest legitimate interest in succession to or administration of the estate of a deceased person, but that no grant of representation in respect of that estate has yet been made, shall, at the request of any person who appears to have any legitimate interest in that estate, and without waiting for a report under this section, forthwith take, in respect of the property or persons, the steps prescribed by subsection (2).

5. A person who is required to take the steps referred to in subsection (2) –

a. shall forthwith report to the Public Trustee the death of the person concerned; and

b. notify the Public Trustee of the steps taken by him pursuant to that subsection.

76. According to the respondents, this whole saga was brought about by their brother DW2 who had sold his share in the land and was now trying to claim through the appellant. The respondents produced some documents showing some transactions between them and on cross examination, DW2 conceded that he was given some money but denied having sold any part of the land. Further, DW2 stated that; "I left in 1989 and wanted to return the money but they declined and brought surveyor to sub-divide the land." In my view, that statement alone is a clear indication that DW2 had some dealing with his siblings with regard to land. I am aware that any such dealings amounted to intermeddling with the estate of the deceased as per section 45 of the *Law of Succession Act*, however, this court cannot turn a blind eye to the reality that these things do happen.

77. According to DW2, his father Ndolo Kithini told him about the ownership of the land before he died hence his decision to move to Kibwezi in 1989. He also said that he informed his brothers on the same. The documents showing the transactions between him and his brothers are dated 2008 and the only land that is the subject matter in these proceedings is Makueni/Mubau/193. It therefore defies logic that DW2 and his brothers would know that the land does not belong to their father and still proceed to transact on it.

78. As for the evidence given by the respondents, PW2 stated that the chief of the area at the time Ivulu Kithini settled there was known as William Kioko and that evidence was corroborated by DW3 who said that the chief before him was William Kioko. The evidence of PW1,2,3 and DW2 was in agreement that the family of Ivulu Kithini was in Tawa before shifting to Wote and according to Ngina's elder sister PW3, the other wife of Ivulu Kithini was called Muthike and she died while they were in Tawa. In my view, that explains why the village manager, PW2, testified that he only knew the wife called Ngina as she was the one who moved with Ivulu to Tawa.

79. As for PW4, there was consensus that she was married to Munyao Ivulu who was a deceased brother to the respondents and DW2. Her evidence, that Ivulu Kithini was her father-in-law and that he performed marriage customary rights for his son Munyao, was not controverted. She testified that Ivulu Kithini was alive when she got married and that she fed him for 4 years. This statement was made in court and is in agreement with the evidence showing that she got married in 1967 and Ivulu Kithini died in 1972. Further, her husband's certificate of death indicates his name as Julius Munyao Ivulu.

80. As for the use of the name 'Ndolo' by the respondents, the evidence shows that they lived with him on the land and considering that he was a step brother to Ivulu Kithini, it was only natural for them to consider him as a father figure. The evidence also shows that Ivulu Kithini pre-deceased Ndolo Kithini and according to PW1, Ndolo Kithini took up the role of a father according to Kamba customs. In my view, the explanation is plausible. Further, the evidence of PW1 shows that at some point, Ndolo Kithini left them in Makueni/Mubau/ 193 and went to settle in Kalii. This evidence was not controverted by the appellant and DW2 hence my view that there would have been no need to relocate if indeed the land belonged to him.

81. Other evidence on record includes the minutes of the 'Meeting of the family of Ivulu' (marked WTN 6 in the summons for revocation of grant). The same is signed by the respondents herein as well as DW2. In my view, this is yet another indication that indeed the probability of the respondents being the beneficiaries of Ivulu is higher than that of the appellant and her sisters.

82. Having re-evaluated the evidence on record, my considered view is that the respondent's case was credible and consistent. On the other hand, the appellant's case was incredible and lacked independent witnesses.

83. It was suggested that DW2 knowing that he could not go back to claim anything, hatched a plot to claim through the appellant. In fact, the evidence of the chief (DW3) was that it was DW2 who went to his office and reported that his brothers had refused to give him a share of Makueni/Mubau/193. Firstly, DW2's statement shows that he lied to DW3 that the land belonged to Ndolo Kithini and secondly, it raises the question as to why he wanted a share yet the land does not belong to his father 'Ndolo Kithini'.

84. The totality of the evidence shows that Ivulu Kithini was a polygamous man but the woman called Katile was not one of the wives. Going by the evidence of PW3 which I found to be credible, the wives of the deceased were Muthike, Syondugo and Ngina. The respondents herein are the children of Ivulu

Kithini and Ngina hence beneficiaries to the estate of Ivulu Kithini. Any other surviving children from the other wives are also beneficiaries of the estate.

Whether new issues can be raised on appeal.

85. The appellant accused the trial court of failing to apply any paternity approach to establish whether the respondents were children of Ivulu Kithini alias Ibulu Kithini. Notably, the appellant introduced the issue of DNA test in her submissions as it was neither in the pleadings nor proceedings before the trial court.

86. Jurisprudence from our jurisdiction and outside shows that courts are very reluctant to entertain new issues on appeal. In the case of Hassan Bundala Swaga -vs- R; Criminal Appeal No. 386 of 2015 (UR), the Court of Appeal of Tanzania stated that;

> " It is now settled that as a matter of general principle this court will only look into matters which came up in the lower courts and were decided; and not on new matters which were not raised or decided by the trial court."

87. In Ontario Energy Savings LP -vs- 767269 Ontario Ltd., the Ontario Court of Appeal stated that; "it is unfair to permit a new argument on appeal in relation to which evidence might have been led at trial had it been known the issue would be raised".

88. In Kaiman -vs- Graham, 2009 ONCA 77 involved a dispute over a family cottage. The appellants alleged that since the death of one of the cottage's owners, they were shut out of the use and enjoyment of the cottage. They brought an action in the Ontario Superior Court alleging, amongst other things, that they had an equitable interest in the cottage property and a valid unsigned lease over the property. After losing at trial, they advanced a new argument at the Court of Appeal that the Residential Tenancies Act ("RTA") applied to their case, such that the matter ought to have been adjudicated by the Landlord and Tenant Board, not the Superior Court. Notably, the appellants did not raise this argument at trial. The Court of Appeal declined to entertain the issue of the applicability of the RTA.

89. In Prudential Assurance Co Ltd -vs- HMRC [2016] EWCA Civ 376, [2017] 1 WLR 4031, the Court of Appeal of England and Wales stated that;

> [20]: "Our procedural system is and remains an adversarial one. It is for the parties (subject to the control of the court) to define the issues on which the court is invited to adjudicate. This function is the purpose of statements of case. The setting out of a party's case in a statement of case enables the other party to know what points are in issue, what documents to disclose, what evidence to call and how to prepare for trial. It is inimical to a fair hearing that a party should be exposed to issues and arguments of which he has had no fair warning. If a party wishes to raise a new point, he should do so by amending a statement of case."
>
> 23. In our procedural law a trial is intended to be the final resolution of all matters in dispute between the parties. Although a party who is dissatisfied with the outcome of a trial may appeal to this court (usually with permission) the appellate process is, in general, limited to a review of the first instance decision. It is thus the starting point that parties are expected to put before the trial judge all questions both of fact and of law upon which they wish to have an adjudication.
>
> 24. There are a number of reasons for this. First, parties to litigation are entitled to know where they stand and to tailor their expenditure and efforts in dealing with (and only with) what is known to be in dispute.... Second, it is a disproportionate allocation of court resources for the Court of Appeal (which usually sits in panels of three judges) to consider for the first time

a point which could have been considered, and correctly answered, by a single judge at first instance. Moreover, if the Court of Appeal deals with a point for the first time, it is neither a review nor a rehearing; which are the two processes contemplated by the CPR. Third, if resolution of a new point entails the re-opening of the trial it not only entails inevitable further delay, which is itself a reproach to the administration of justice, but is also wasteful of both the parties' and the court's resources and unfair to a party who conducted a trial on what has turned out to be a false basis. Fourth, there is a general public interest in the finality of litigation. It is for similar reasons that the Court of Appeal applies stringent criteria for the reception of fresh evidence on appeal.

25. If the point is a pure point of law, and especially where the point of law goes to the jurisdiction of the court, an appeal court may permit it to be taken for the first time on appeal. But where the point, if successful, would require further findings of fact to be made it is a very rare case indeed in which an appeal court would permit the point to be taken. In addition, before an appeal court permits a new point to be taken, it will require a cogent explanation of the omission to take the point below."

90. Consequently, the issue of the paternity test cannot be not be entertained at this stage considering that the same was never raised before the trial court.

Whether the trial court erred by revoking the grant

91. Section 76 of the *Law of Succession Act* provides the grounds upon which a court can revoke/annul a grant. One of the grounds is if; 'the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;'

92. In this case, the appellant obtained the grant by falsely stating that she is a daughter of the deceased and concealing the real beneficiaries and as such, the trial court was right in revoking it.

93. However, it is my finding that the trial court erred by holding that; "The respondents do not appear to hold better claim on the land than that of the objectors." This position is not supported by the evidence on record and the evidence does not show that the appellants are beneficiaries of the estate. That holding is accordingly set aside.

94. In the circumstances I find that the appeal is not merited and is dismissed and each party to bear its own costs.

95. The order of Revocation of the grant issued to Loise Mutio Kyenze be and is hereby upheld.

96. Considering the age of the matter, the order that the parties apply for a fresh grant be and is hereby set aside and substituted with an order that a fresh grant to issue to the respondents in Makueni Magistrate's Court Succession Cause no 29 of 2019.

    David Ndolo Kithini Muindi Ndolo

    William T Ndolo alias Ivulu

    Agnes Mukonyo wife of Julius Munyao Ivululu

97. These administrators to proceed to file summons for confirmation of grant before the trial court within 45 days from the date of issue of the grant.

DATED, SIGNED AND DELIVERED VIA CTS THIS 28TH AUGUST 2024

JUDGE

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA

The Judiciary Of Kenya.

Makueni High Court

High Court Div

Date: 2024-08-28 16:29:10