In re Estate of Boniface Karumbi Makuri (Deceased) (Family Appeal E016 of 2022) [2024] KEHC 10641 (KLR) (15 August 2024) (Judgment)

Neutral citation: [2024] KEHC 10641 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

FAMILY APPEAL E016 OF 2022

SM MOHOCHI, J

AUGUST 15, 2024

IN THE MATTER OF THE ESTATE OF BONIFACE KARUMBI MAKURI (DECEASED)

BETWEEN

GERALD GIKUHA MAKURI ..... APPELLANT

AND

SALOME WANJUGU KIRAGU ..... RESPONDENT

(Being an Appeal from the Ruling and Orders of Hon. C.N. Ndegwa, Senior Principal Magistrate, Delivered on 10th November,2022 InChief Magistrate's Court at Nakuru Succession CauseNo. 265 of 2020)

JUDGMENT

1. The Appellant herein was a brother to the deceased subject to the probate in the Trial court in In Chief Magistrate's Court at Nakuru Succession Cause No. 265 of 2020. He Moved the Court as a dependant within the meaning of section 29 of the *Law of Succession Act* seeking revocation of grant and the Application was dismissed on the 10th November,2022 on the basis that the Appellant had failed to demonstrate "locus standi" as a "Dependant "within the meaning of Section 29 of the *Law of Succession Act*, and that the Appellant had demonstrated malafide there by defeating the purpose of the probate.

2. Dissatisfied with the decision, the Appellant preferred this appeal vide Memorandum of Appeal dated 9th December, 2022 on the following grounds:-

    i. That the learned Magistrate erred in fact and law by finding that there was falsehood and/or fraud in procuring the grant in relation to the estate of the Deceased yet reached the conclusion that he did not need to issue orders revoking the grant.

ii. That the learned Magistrate erred in fact and law by disregarding all the undisputed evidence pointing to the fact that the grant was procured by well calculated fraud, making of false statements, misrepresentation and concealment of material facts thereby arriving at an erroneous decision.

iii. The learned trial Magistrate erred in fact and law in disinheriting and disregarding rightful beneficiaries of the Deceased and rewarding the fraudulent acts of the estate with the entire legacy of the deceased.

iv. That the learned Magistrate erred in fact by disregarding the Appellant's evidence concerning the Nakuru Civil Case No. 2427/2006 that there had been between the Deceased and the Appellant.

v. The learned Magistrate erred in fact by inferring prejudicial conduct of the Appellant towards the Deceased without evidence.

vi. The learned Magistrate erred in fact and law by finding that the beneficiaries of the estate of the Deceased did not include the Appellant.

vii. The learned trial magistrate erred in law and in fact in disregarding evidence and clear provisions of the law on intestate estates resulting in an erroneous decision.

viii. That the learned magistrate erred in fact and in law by not appreciating that the Appellant's consent was paramount before a grant of representation could be made to the Respondent and lack of it was a ground for revoking the grant.

ix. The learned trial magistrate erred in law and in fact in placing irrelevant factors into consideration while disregarding legitimate factors in his ruling resulting in an erroneous decision.

x. The learned trial magistrate erred in law and in fact in exhibiting serious bias against the appellant who is a rightful beneficiary of the deceased an disinheriting him of the deceased's estate.

3. The Appellant prayed that;

i. The Ruling and Orders of the lower Court be set aside.

ii. Judgment be entered revoking the grant of representation for the estate of the Deceased;

iii. That this honourable court directs to issue, a grant of letters of administration for the estate of the Deceased in the joint names of the Appellant and a representative of Susan Muthoni Kariako besides the Respondent;

iv. That this honourable court directs the distribution of the estate of the Deceased to the Appellant and Susan Muthoni Kariako or her representative and any children of the Deceased's siblings already deceased;

v. This honourable court invokes its inherent power to make such orders as may be necessary for the ends of justice; and

vi. The Appellant be awarded the costs of this appeal and of the lower court.

4. The Appeal was canvassed by way of written submissions. The Respondent filed his submissions on 3rd April, 2024, with the Appellant filing his written submissions on 30th April, 2024.

Appellants Submissions

5. The Appellant submits that, the genesis of this matter is a petition for letters of administration intestate in relation to the estate of Boniface Karumbi Makuri (hereinafter, the Deceased) made some time in August 2020, allegedly, by one Susan Muthoni Kariako referencing page 4 of the Record of Appeal.

6. That, the said Susan was purporting to be the wife of the Deceased and the letters of administration were granted on 21st September, 2020 (referencing page 16 of the Record) and confirmed on 24th September, 2020, vide a Certificate of Rectified Confirmation of Grant dated 21st September, 2020 (referencing page 17 of the Record).

7. According to the Appellant it is not clear what was being rectified or following which application, that, Pages 19-21 of the Record reveal that, thereafter, vide an application dated 24th September, 2020, the Mrs. Kariako allegedly filed an application under certificate of urgency seeking change of the administrator to the Respondent

8. That the Respondent issued a consent on even date in support of that rectification. Curiously, both the Rectification Application and the consent were filed in court on 24th September, 2020. However, the affidavit in support of the Rectification Application is dated 12th October, 2020 and received in court for filing on 24th September, 2020 (referencing page 22 of the Record) and Subsequently, Hon. B.B Limo issued a Certificate of Confirmation of Grant dated 12th October, 2020 to the Respondent as sole administrator and beneficiary of the estate of the Deceased and that when the Appellant became aware of the foregoing, he filed an Application for revocation or annulment of grant dated 19th January, 2022 supported by his Supporting Affidavit of even date; both were filed on 25th January, 2022. He also swore a Supplementary Affidavit dated 30th May, 2022 filed on 13th June, 2022, in further support of the Application.

9. That the court directed that, the matter to be heard by viva voce evidence where the Appellant gave viva voce evidence alongside adopting his Supporting Affidavit dated 19th January, 2022 and his Supplementary Affidavit dated 30th May, 2022 seeking:

    a. That, the Grant of letters of administration intestate of the estate of Boniface Karumbi Makuri made to the Respondent herein and issued to her confirmed on 12th October 2020 by the court be revoked or annulled on the ground that the same was obtained through fraudulent means in that the Respondent rushed to court, obtained the grant of letters of administration and the same confirmed on 12th October, 2020 without his knowledge.

    b. He was not informed of the case or even cited by the Respondent yet he was the only beneficiary of the estate of the late Boniface Karumbi being the only surviving brother and by virtue of the fact that Boniface Karumbi had no family.

    c. The costs of the application be provided for.

10. The Appellant submits that, in terms of the basis for the Application, the Appellant, in his Application and Supporting and Supplementary Affidavit, included, inter alia, grounds that there:

    a. was fraud emanating from making false statements and concealment of material facts at various stages of obtaining the Grant- in this respect, he contended that the Respondent and her mother, Susan, in the petition and certain other documents, lied that they were daughter and

wife of the Deceased, respectively, to secure issuance of the Grant. The Appellant also urged that there was as a trail of evidence indicating that the Claimant was the mastermind behind the fraud- this was for, among other reasons, the Respondent would sign documents in places intended for signing by her mother, Susan and guarantors (referencing for instance (P & A. 5), P & A 12 and P&A 11 on pages 5-6, 7 and 9 of the Record, respectively).

b. was failure to cite the Appellant and/or obtain his consent or invite him to renounce his right to the Grant; defectiveness in the substance of the proceedings leading to the issue of the Grant. In this respect, the Appellant demonstrated that he was not cited nor asked to give consent to the Respondent, or her mother, as the case may have been, before their proceeding to obtain the Grant without involving him. To this, the Respondent only stated that she was under no obligation to obtain consent or cite the Appellant; and

c. were procedural irregularities in the process of obtaining the Grant- Here, the Appellant drew the court's attention to the fact that the Grant was Grant was confirmed before the expiry of the expiry of the statutory six months, and in the name of the Respondent who had not petitioned for the Grant. He also contended that failure to obtain his consent was un-procedural.

11. That, in opposition to the Application, the Respondent filed a Replying Affidavit sworn on 14th day of April, 2022 and when the matter came up for viva voce hearing, she told the court that she did not want to give evidence. However, the Respondent did not controvert evidence that she was the Deceased's niece and that the said Mrs. Kariako was her mother and a sister to the Deceased. She also acknowledged that, the Appellant was the Deceased's brother but contended that he did not take care of the Deceased while alive and that he had attempted to grab the Deceased's land.

12. That the Hon. C.N Ndegwa, upon considering the application, gave a Ruling on the Application on 10th November, 2022 declining the application to revoke the Grant, holding that, the Appellant had not demonstrated he had interests in the Deceased estate and was therefore not entitled to benefit from his estate. He further held that, since his holding was that the Appellant was not entitled to benefit from the estate of the Deceased, the fact that the Respondent and her mother made false allegations concerning the capacity in which they made the Petition was not a enough ground for revoking the Grant.

13. The Appellant was dissatisfied with the Ruling and therefore instituted the instant Appeal vide a Memorandum of Appeal filed on 9th December, 2022.

14. The Memorandum of Appeal raises ten (10) grounds of Appeal which the Appellant compress to four grounds and argues the same in turn that, the principles guiding the court in the instant appeal being a first appeal, is the Court's duty to analyze and re-assess the evidence on record and reach its own independent decision in the matter as provided by Section 78 of the *Civil Procedure Act*., this is affirmed in the case of Selle v Associated Motor Boat Co. [1968] EA 123 where the Court of Appeal held that;

> " An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan(1955, 22 E. A. C. A. 270).

15. That, in the case of Susan Munyi Keshar Shiani [2013] eKLR, the court summarized the first Appellate Court's role as follows:

'As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions"

16. That, further as the Court determines this Appeal, it takes into account that it will only interfere with the discretion of the trial Court where it is shown that the discretion was exercised contrary to the law or that the trial Magistrate misapprehended the applicable law and failed to take into account a relevant factors or took into account an irrelevant factor or that on the facts and law as known, the decision is plainly wrong. See the case of Ocean Freight Shipping Co. Ltd v Oakdale Commodities Ltd[1997]eKLR, Civil App.No.198 of 1995, where the Court held that:-

> " This is of course not an appeal to us from the decision of the single Judge. The discretion given by Rule 4 is exercised on behalf of the court by a single Judge and for a full bench to interfere with the exercise of the discretion, it must be shown that the discretion was exercised contrary to law, i.e. that the single Judge misapprehended the applicable law, or that he failed to take into account a relevant factor, or took into account an irrelevant one or that on the facts and the law as they are known, the decision is plainly wrong".

17. The Appellant argues, all the ten (10) grounds of appeal which he has compressed into four grounds, and submit that, the final finding of the trial Magistrate was in error as he took into account irrelevant factors while casting aside relevant factors and issues, and misapprehended the law in reaching his decision.

18. That the learned Magistrate erred in fact and law by disregarding all the undisputed evidence pointing to the fact that the grant was procured by well calculated fraud, making of false statements, misrepresentation and concealment of material facts thereby arriving at an erroneous decision.

19. That, Section 76 of the *Law of Succession Act* provides for revocation of Grant on several grounds including fraud. Commenting on this provision in Albert Kithinji Njagi v Jemima Wawira Njagi & another; Simon Nyaga Njeru & another (3rd Respondent/Interested Parties) [2020] eKLR, Honourable Justice W. Musyoka held: -

> " Under Section 76 of the Act, a grant of representation is liable to revocation on three general grounds. The first ground would be where the process of obtaining it was attended by glaring difficulties, such as where the same was defective, say because the person who obtained representation was not qualified to be appointed as personal representative, or the procedural requirements were not met for some reason or other. It could also be because the petitioner used fraud or misrepresentation or concealed important information in order to obtain the grant. ..."

20. That, pertaining to fraud, the Appellant contends that, there was a raft of evidence presented evidencing that the Respondent, in a well calculated fraudulent scheme sought to keep to herself the entire estate of the Deceased and, this started by her fronting the name of her mother, Mrs. Susan Kariako, to the chief as the wife of the Deceased and herself as a daughter of the Deceased. This lie is reiterated under the Petition for Letters of Administration Intestate (P & A. 80) and under the Affidavit in support of the Petition for Letters of Administration Intestate (P & A. 5). The affidavit also states that, the Respondent was the Deceased's daughter. The Appellant's uncontroverted evidence was that Mrs. Kariako was his sister and that of the Deceased while the Respondent was Mrs. Kariako's daughter

and the Deceased's niece. These matters were not controverted by the Respondent despite her having been given opportunity to file an affidavit in response and to give viva voce evidence.

21. That, the lie that the Respondent was a daughter of the Deceased and her mother a wife are clear evidence of intentional fraud. Reference is made to the case of Re Estate of Mathenge Gichobi (Deceased) [2022] eKLR, the court held:

> " Having considered the totality of the evidence it is my finding that the respondent has failed to proof that he was taken in as a son by the deceased. The respondent is a nephew of the deceased and yet in Form P & A 5 he stated that he is a step- son. This was a fraudulent statement which shows that he obtained the grant by the making of a false statement that he was a step-son and concealed a material fact that he was a nephew and not a step-son.
>
> Section 76(b) of the Act provides that a grant may be annulled or revoked if the court finds that;
>
> (b) " That the grant was obtained fraudulently by the way of making false statement or by the concealment of something material to the case."

22. That, what is more is that, despite the petition having been expressed as having been filed by Mrs. Kariako, there is clear evidence pointing otherwise. In this respect, the Appellant's uncontroverted affidavit and viva voce evidence was that Mrs. Kariako had been bedridden for over 15 years and incapable of comprehending any matter, opening her eyes, writing or signing any document. It is, therefore, not a wonder that, in additional fraud, the Respondent is clearly seen signing certain documents in her signature with the view to deceive the court that these documents were being filed by Mrs. Kariako.

23. That, in support of the argument that the Respondent was signing documents in presence that Mrs. Kariako was, we draw the courts attention to the following facts. Sometime after the issuance of the Confirmed Grant, the Respondent, then the administrator, made an application for inclusion of a property in the Grant.

24. That, the court will note that the signature appearing on that Affidavit is the same signature appearing on the Affidavit in support of the Petition for Letters of Administration Intestate (P & A. 5) (at pages 5-6 of the Record), together with the Affidavit of Justification of Proposed Administrator (P & A 12) at page 7 of the Record ant that,thes two were documents that were supposed to be signed by the petitioner, Mrs. Kariako- they were, indeed supposedly filed as if signed by Mrs. Kariako. Additionally, the same signature appears on page 9 of the Record, in what was supposed to be the signature of John Gachogu Kambia, one of the sureties.

25. Finally, the Appellant contends that he had evidenced in the Supplementary Affidavit supporting the revocation application, available on pages 49-52 of the Record, which he adopted as his evidence, Mrs. Kariako was a sister of the Deceased and had other children. This evidence remains unchallenged. It begs the question as to why the Respondent, alone, was the sole beneficiary of the estate of the Deceased. If at all the intention was to have Mrs Kariako, especially, to benefit from the estate too, but was incapable of administering her estate, there would have been nothing easier than to state that the share of the estate due to her would be held by the Respondent or her other sisters in trust for Mrs. Kariako. However, this was never the intention and the Respondent does not plead that it was- we invite the court to discern that the intention was for the Respondent to keep the entire estate but using her mother's name

as a pathway to apply for the Grant. In the case of Beatrice Mbeere Njiru v Alexander Nyaga Njiru [2022] eKLR, the court held as follows:

> " According to the respondent, the said appellant is provided for through the share granted to Cecily Wanjuki Njiru... Though this is pleaded, I have not come across any agreement and/or evidence to that effect. I note that thegrant as extracted does not reflect any trust whatsoever and the respective mothers of the households are holding the property in their personal capacities and not in trust for their daughters. (emphasis ours)"

26. The Appellant submits that there is glaring evidence that, the honourable magistrate did not address himself to any of the above issues of evidence except when he stated as follows:

> " The final question the court must deal with is whether the grant should be revoked merely because the Respondent described herself as "daughter" instead of "niece" and her mother SUSAN MUTHONI KARIAKO was described as wife instead of "sister" at the behest of the Applicant who is not supposed to benefit from the estate of the deceased because of his past conduct towards the deceased."

27. As such, the honourable magistrate ran short of finding that there was falsehood and/or fraud in procuring the grant in relation to the estate of the Deceased yet reached the conclusion that he did not need to issue orders revoking the grant because he, misguidedly, found that the Appellant's "conduct towards the Deceased" was wanting- we submit on that conclusion below.

28. That the extensive fraud alone, is sufficient cause for revoking the grant. The matter of whether the Appellant was to benefit from the estate was a distinct issue from whether there was fraud- the question of fraud deals with whether there was a violation of the law that the court ought to remedy and not whether there was a party who was guilty of more sins- which is the approach the court ended up erroneously taking.

29. The evidence of fraud with the Respondent as the mastermind was crucial in the case; had it been given the weight due to it, the court would have reached the conclusion that the Respondent is named as administrator and sole beneficiary of the estate of the Deceased not because she had been a guardian of the Deceased but because of her well calculated extensive criminal conduct. The court would have also reached the conclusion that the Respondent was not drive by the interests of the estate of the Deceased but her selfish interests.

30. That right from the beginning, the Respondent understood that she neither had a right to petition for the Grant nor be a beneficiary of the Deceased. She, however, understood that her mother ranked in equal priority with the Appellant for that purpose. To conceal her fraud, she made the application in her mother's name, signed the documents herself, in pretence that the same were being signed by her mother, and rushed to have the Grant confirmed and rectified- all before the statutorily mandated six months before any protests to confirmation could be filed and, the question remains why, if at all she had the estate's interest at heart, why she ended up being the beneficiary of the entire estate- and not her mother and/or sisters.

31. That, from the foregoing background, based on unambiguous provisions of section 76(b) of the *Law of Succession Act*, this warranted the revocation of the grant; by failing to revoke the Grant, the Magistrate, by dint of the decision in Ocean Freight Shipping Co. Ltd v Oakdale

Commodities Ltd [1997] eKLR, Civil App.No.198 of 1995 made a "plainly wrong" decision that warrants this court to overturn.

32. The learned trial Magistrate erred in fact and law in disinheriting and disregarding rightful beneficiaries of the Deceased and rewarding the fraudulent acts of the Respondent with the entire legacy of the deceased.

33. That, the learned trial magistrate not only exhibited serious bias against the Appellant when he, without evidence, inferred prejudicial conduct of the Appellant towards the Deceased. Thereby, he ended up using the inferred prejudicial conduct as reason for not revoking the grant and disinheriting the Appellant and others who would have been rightfully have been entitled and it resulted in his reaching an erroneous decision where the administration of the estate of the deceased is concerned. The magistrate stated:

> " Although the Applicant would qualify as a beneficiary under section 39 of the Act, his past conduct coupled with the fact that he never took care of the deceased during his last days on earth disqualifies him from benefitting from his estate. The final question the court must deal with is whether the grant should be revoked merely because the Respondent described herself as "daughter" instead of "niece" and her mother SUSAN MUTHONI KARIAKO was described as wife instead of "sister" at the behest of the Applicant who is not supposed to benefit from the estate of the deceased because of his past conduct towards the deceased."

34. That, as such, in disinheriting the Appellant, the Honourable Magistrate inferred prejudicial conduct towards the Deceased on two basis.

    a. First, according him, the Appellant, refused to transfer the Property that was the subject of "Nakuru Civil Case No. 2427/2006" that there had been between the Deceased and the Appellant. In the case, the Appellant had been ordered to transfer the property subject of the dispute to the Deceased. The Magistrate took the property still being in the Appellant's name as refusal to transfer. In reaching the conclusion, the court disregarded the extensive evidence adduced by the Appellant explaining the background of the dispute and the reason why the property was still in his name. That, it was the Appellant's evidence that whereas a Decree had been passed ordering transfer of the property subject of that suit to the Deceased, he had not been informed of the passing of the Decree- in fact, the fact of passing of the Decree was only revealed to the Appellant when the Deceased made a court application in the same suit for transfer of the property to himself in 2015. He explained that he did not know because he did not participate in the hearing. The hearing date, was notified to him after the hearing took place. Conveniently the file went missing after the hearing and the Appellant went through pain attempting to trace the court file after he learnt that the matter had been heard in his absence. It continued to miss unless needed by counsel for the Deceased to file some application. When the file was eventually availed, he filed an application to set aside the judgement on 28th September, 2015. It was, however, his uncontroverted evidence that he settled the matter amicably after he refunded, to the Deceased, a certain amount of money advanced to him, which had been the basis for the Deceased's claim on his land. He stated that, once the two settled the matter amicably, both the Deceased and himself were under the mistaken belief that no further action was necessary and that, this is not an unreasonable belief for lay people since the land was still in the Appellant's name. On this background and given the extensive evidence

given on this issue, the honourable magistrate misdirected himself concerning the Respondent's allegation that the Appellant had grabbed the land thereby reaching the wrong conclusion. This wrong conclusion was then used to infer prejudicial conduct on the part of the Appellant to his detriment and interest of the estate.

b. The second form of prejudicial conduct that the court inferred on the part of the Appellant in justifying refusal to revoke the Grant was indicating that the Appellant did not care for the Deceased. In this respect, it beats understanding on what basis the court reached this conclusion. The Respondent, on her part, never gave evidence that the Appellant never cared for the Deceased. It then begs the question how or why the magistrate placed so much weight of that notion to the extent of refusing to revoke the Grant on the face of glaring fraud. This conclusion, your lordship, was reached without a shred of evidence from the Respondent.

35. That be that as it may, it remains a question on whether, prejudicial conduct or not, of which the Appellant submit, there was not bad conduct of the Appellant towards the Deceased, the Honourable court, in light of all evidence, reached the right conclusion when he declined the order to revoke the Grant. We submit that, that must return in the negative. This, we reiterate, is given the avalanche of evidence pointing to the state of mind by the Respondent to defraud the estate of the deceased, the well calculated fraud, including falsehood, forgery, concealment of facts, misrepresentation.

36. That the law is supposed to be impartially and objectively applied and sanctioning one wrong because it is felt that there was a supposedly second wrong by someone else, cannot be proper safeguarding of justice.

37. That court that declines to enforce well established principles of law in light of clear evidence is to be frowned upon in the strongest terms possible. The court is the guardian of the rule of law and God have mercy on us as a society if fraudsters were to ever think that they will find the court's protection because there was allegation that another person did some other wrong.

38. That to revoke the Grant would not have been futile seeing that the Deceased had a sister, the alleged petitioner, Mrs. Kariako. Additionally, the Respondent had sisters it beats understanding why the court thought it would be futile to revoke when there were others (including but not limited to sisters) ranking in equal priority as the Respondent.

39. That, these arguments notwithstanding, there was no reason not to revoke the Grant because the Appellant, as the court appreciated, is entitled to benefit from the estate of the Deceased by dint of section 39 of the *Law of Succession Act*.

40. As to whether the learned trial magistrate erred in law and in fact, in disregarding evidence and clear provisions of the law on intestate estates resulting in an erroneous decision, it is clear that, to the learned Magistrate, the beneficiaries of the estate of the Deceased did not include the Appellant. He used this to justify his not revoking the Grant as, according to him, as the beneficiaries of the Deceased remained the same- it is not clear what the court meant by "the same". As such, according to him that did not include the Appellant and he would not have been entitled to benefit from the estate of the Deceased.

41. The Appellant submits that, there could not be any matter clearer in this case than the fact that, the Appellant is a beneficiary of the estate of the Deceased. As such, it was not in dispute that the Deceased was not succeeded by a child or spouse. By virtue of section 66(b) of the *Law of Succession Act*, the grant of administration is to be issued to other beneficiaries entitled on

intestacy, with priority according to their respective beneficial interests as provided by part V of the *Law of Succession Act* and in particular, section 39. Section 39 provides as follows:

> Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority:
>
> (a) father; or if dead;
>
> (b) mother; or if dead;
>
> (c) brothers and sisters, and any child or children of deceased brothers and sisters in equal shares; or if none;
>
> (d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none;
>
> (e) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none;
>
> (f) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares."

42. That, in light of section 39 of the *Law of Succession Act*, the individuals that were eligible for application of letters of administration intestate in relation to the Estate of the Deceased are those falling under the category in section 39(c) of the Succession Act. The upshot of the same, in accordance with the testimony of the Appellant, is that the estate ought to have devolved to the Appellant and Mrs. Kariako together with the children of the Deceased's siblings who, as evinced by the Appellant, had predeceased the Deceased.

43. As to whether the learned magistrate erred in fact and in law by not appreciating that the Appellant's consent was paramount before a grant of representation could be made to the Respondent and lack of it was a ground for revoking the grant, it is the Appellant's contention that, the learned magistrate completely disregarded the issue of consent and consequently, he did not pronounce himself as to what was the implication of the Appellant's consent not having been obtained. In that respect, Rule 7(7) read together with Rule 26(1) of the Probate and Administration Rules provide that letter of administration shall not be granted to any applicant without notice to ever other person entitled in the same degree or in priority to the Appellant. That, the very essence of the accompanying a petition with the Form 38 under the Rules. The form is supposed to be signed by a person who stands in equal or lesser priority to an Appellant.

44. Flowing from section 39(c) of the *Law of Succession Act*, already submitted on the above, in the absence of a wife, children and parents, siblings of the Decease and children of siblings (who were deceased) had equal right to petition for the Grant. The Appellant testified that there were 6 siblings four of whom were deceased by the time the Deceased died. He further testified that only himself and Mrs. Kariako were alive. These facts were not controverted by the Respondent. Accordingly, the Appellant and Mrs. Kariako were the two known people who were supposed to apply for the grant. Whether it is any of the two or someone else who applied for the grant, the consent or renunciation of the one not applying (between the two) ought to have been obtained. In this case, the Appellant being one of the parties ranking in higher priority (to the Respondent) and in equal priority (to Mrs. Kariako, even assuming for a moment that she was the brain behind the petition) was not asked to give consent or renounce his right to petition. As a matter of fact, he only came to learn later that a Grant had been issued

and almost immediately confirmed. All the Respondent could say in response to this was that, she did not have an obligation to procure the Appellant's consent, a position that was clearly misguided and without legal basis.

45. The Appellant submits that in this case, the court will note, the consent issued is allegedly signed by Salome Muthoni Kariako and altered to read Susan Muthoni Kariako. This not only goes to show that the Respondent was the mastermind behind the petition for grant but also that no consent was obtained as, even with the alteration, it would mean that bthe consent was issued by Susan to herself in contravention of the law.

46. That, the failure to obtain the consent of the Appellant is tantamount to failing to meet the procedural requirements for making of the Grant. That failure, as was held in the above cited case of Albert Kithinji Njagi v Jemima Wawira Njagi & another; Simon Nyaga Njeru & another (3rd Respondent/Interested Parties) [2020] eKLR (cited above), renders the grand liable for revocation.

47. That in addition to the foregoing, the Respondent and her mother, Mrs. Kariako, did not disclose both to the court and to the chief about the existence of the Appellant as a brother of the Deceased and any children of the siblings of the siblings of the Deceased (then deceased), amounted to falsehood, fraud by concealment of material facts for which a Grant ought to be revoked. In the same case of Albert Kithinji Njagi v Jemima Wawira Njagi & another; Simon Nyaga Njeru & another (3rd Respondent/Interested Parties) [2020] eKLR, the court held as follows:

> Rule 7(7) of the Probate and Administration Rules requires that a person with equal or lesser right to administration ought to obtain the consent of the person or persons with a greater priority to administration, or get that person or persons to renounce their right to administration or cause citations to issue on them requiring them to either apply for representation in the estate or to renounce their right to so apply. Further under Rule 26(2), where representation is sought by a person with equal right to others who have not petitioned like him or with a lesser right, such a petitioner is expected to notify such persons with equal entitlement with notice. The individuals with entitlement who have not applied for representation would signify that they had been notified of the petition by either executing their renunciation of their right to administration or by signing consents in Forms 38 (for intestacy succession). Where a consent or renunciation is not forthcoming, then the petitioner should file an affidavit, ostensibly dealing with these issues, that is by indicating that notice was given to all the other persons equally entitled, and perhaps demonstrating that such person had failed or refused to renounce their rights or to sign consents to allow him to go ahead with his petition. Section 66 of the *Law of Succession Act* sets out the order of preference with regard to who ought to apply and be appointed administrator in intestacy. Priority is given to surviving spouses, followed by the children of the deceased. A reading of the above provisions together would mean if any one of the four children of the deceased sought representation to the estate, to the exclusion of the other three, there would, then, be need to comply with the requirements of Rules 7(7) and 26 Probate an Administration Rules, since those provisions apply to persons who seek representation while they had an equal or lesser right to administration. The 2nd Respondent herein had equal right to administration with the Appellant herein and his other brother Silas Nyaga. Joyce Rwamba was indicated in the pleadings to be a minor and thus she had no capacity

to consent. As such, he needed to obtain their consents or their renunciation of right to administer or obtained citations to be issued and served on them, before he applied for representation to the estate of their late father (as a co-administrator).

48. That, a look at the said Consent which was filed together with the petition clearly shows that Albert Kithinji and Silas Nyaga did not sign the said consent. It was only Joyce Rwamba and who is indicated to be a minor who signed. It is my opinion therefore that Rules 7(7) and 26 Probate and Administration Rules were not complied with and that the grant was not obtained procedurally. As the court held in Al-Amin Abdulrehman Hatimy v Mohamed Abdulrehman Mohamed & another [2013] eKLR, failure to have an application for issue of a Grant accompanied by a consent duly signed by all persons entitled in the share in the same estate is a discrepancy which renders the issuance of the Grant to the applicants unprocedural.

49. That the matters of consent in relation to failure to meet procedural requirements and as evidence of fraud was well articulated in the case of Albert Kithinji Njagi v Jemima Wawira Njagi & another; Simon Nyaga Njeru & another (3rd Respondent/Interested Parties) [2020] eKLR, where the honourable judge in continuing with the holding captured in the immediately preceding paragraph stated as follows:

> "....failure to have an application for issue of a Grant accompanied by a consent duly signed by all persons entitled in the share in the same estate is a discrepancy which renders the issuance of the Grant to the applicants unprocedural. The same ought to be revoked by virtue of the same having been obtained fraudulently by the making of a false statement and by the concealment from the court of something material to the case and by means of an untrue allegation of a fact essential in point of law to justify the grant and all this was to the effect that all the beneficiaries had consented to the making of grant to the 2nd Respondent as a co-administrator. The Court of Appeal in Samuel Wafula Wasike -Vs- Hudson Simiyu Wafula Ca No.161 Of 1993) (Kwach, Omolo and Tunoib JJA) held that a grant obtained on the strength of false claims,...and on the basis of facts concealed from the court, is liable to revocation. Koome J (as she then was) stated in The Matter Of The Estate Of Ngari Gatumbi Alias James Ngari Gatumbi (Deceased Nairobi High Court Succession Cause No.783 of 1993 (persuasively) that: "A grant will be revoked where a person who is entitled to apply is not notified by the petitioner of their intention to apply and that person's consent to the petitioner's application is not sought. See also Monica Adhiambo v Maurice Odero Koko [2016] eKLR. The issue as to the appellant having not consented to the issuance of grant was raised by the appellant in his witness statement and thus was evidence tendered in court. It is my opinion that the trial court erred in not revoking the grant on that ground. However, even in absence of the issue having been raised, the trial court had jurisdiction to revoke the grant sui moto upon satisfying itself of the evidence as to the grounds under section 76 of the Act (See Matheka and Another v Matheka [2005] 2KLR 455).

50. Further reference is made to the case of In re Estate of Mathenge Gichobi (Deceased) [2022] eKLR, the judge had the following to say of Rule 26 of the Probate and Administration Rules:

> "the rule is couched in mandatory terms and the respondent simply trashed and wants the court to take his word even when there is no evidence to support it. The petition ought to have been accompanied by consent as provided under Rule 26

of the Rules signed by all the beneficiaries or in the alternative a renunciation duly signed as required. In this case, although the Respondent disclosed of the existence of the Applicant and her late sister, there is however no consent that was filed confirming that they were agreeable to the Respondent being the administrator and sole heir to the estate."

51. That, touching on the effect of want of consent or renunciation, the court in In re Estate of Mathenge Gichobi (Deceased) [2022] eKLR held as follows:

The effect of failure to comply with Rule 26 of the Rules was ably discussed by the court in Al-Amin Abdulrehman Hatimy v Mohamed Abdulrehman Mohamed & another [2013] eKLR where it was held that;

> " the law of succession by virtue of Rule 26 requires that any application for issue of a grant must be accompanied by a consent duly signed by all persons entitled in the share in the same estate."

52. In the Appellant's view, the deliberate failure by the Respondent to involve all the beneficiaries at the time of filing the succession cause; or seek their consent or renunciation amounts to concealment of material facts. For that reason, it is my view that the present application is merited

53. That, sitting on appeal in which the court revoked the Grant in question- for failure to obtain consent and provide for certain beneficiaries- the court in the case of Beatrice Mbeere Njiru v Alexander Nyaga Njiru [2022] eKLR held as follows:

> " I agree with the court herein that the filing of a consent under provisions of Rule 40(8) is mandatory, and before a court can proceed to hear an application for confirmation of the grant, there is need to have a written consent duly executed by all beneficiaries consenting to the confirmation of the grant....It is my finding that the entire succession proceedings are defective for want execution of Form 37 by all beneficiaries and for failure to file consent as required under Rule 40(8) of the Probate and Administration Rules.

54. In conclusion, the Appellant contends that is he entitled to the following orders that: -

i. The Ruling and Orders of the lower Court be set aside.

ii. Judgment be entered revoking the grant of representation for the estate of the Deceased;

iii. That this honourable court directs to issue, a grant of letters of administration for the estate of the Deceased in the joint names of the Appellant and a representative of Susan Muthoni Kariako besides the Respondent;

iv. That this honourable court directs the distribution of the estate of the Deceased to the Appellant and Susan Muthoni Kariako or her representative and any children of the Deceased's siblings already deceased;

v. This honourable court invokes its inherent power to make such orders as may be necessary for the ends of justice; and

vi. The Appellant be awarded the costs of this appeal and of the lower court

Respondent's Submissions.

55. The appeal before the court relates to the refusal by the trial magistrate in Nakuru Succession Cause number 265 of 2020 to revoke the grant. The record of appeal by the Appellant is incomplete since it has deliberately omitted to submissions made by the Respondent. The facts antecedent to the filing of the application for revocation are relevant since they establish the Appellant's bad motives. It is the Respondent's submissions that, prima facie, the application for revocation of the grant was an abuse of the court process in the classical sense and does not merit the courts consideration.

56. That the Appellant makes fetish in his submissions, of the fact that his viva voce evidence was not controverted. The Respondent seek to demonstrate that the Appellant has conflated the burden of proof and incidence of proof. And that she support the findings made by the trial magistrate primarily on the ground that the Appellant renounced the fact that he was a beneficiary of the estate of the deceased.

57. That, as early as the year 2006, the Appellant illegally transferred a parcel of land known as Bahati/Kabatini Block1/4074 to himself. That parcel of land is the prime asset of the estate of the deceased and the motivation behind the relentless litigation that the Appellant mounted. Upon learning of the illegal transfer, the deceased filed a civil suit against the Appellant and the suit was serialized as case number 2427 of 2006.

58. That matter was concluded in 2006 and the Appellant herein was ordered to re-transfer the land to the deceased. The Respondent referred the court to the decree at page 34 of the record of appeal. Unfortunately, the deceased died before the transfer. Even after his death, the Appellant attempted to transfer and vest the land to himself but he was discovered and stopped in his tracks. He confirmed all these facts in cross-examination. At page 89 and 90 of the record of appeal, the Appellant stated as follows in cross-examination: -by Githui

> .....in 2006 I had a case against my brother in respect to Bahati/KabatiniBLOCK 1/4074. My claim then was that the land was mine. The court directed that the land should be given back to my deceased brother Boniface.....
>
> By the time of his death, the land had not been retransferred back. I attempted to remove the caution which had been lodged by my brother. I named my brother as the respondent. He was dead by then. I did not disclose that the court had ordered me to retransfer back the land to my brother.

59. That the time of the death of the deceased, the Appellant was entangled in a land case over the parcel of land known as Bahati/Kabatini Block1/4074. The court had decreed the land in favor of the deceased and the Appellant had been ordered to pay costs of the suit. Therefore, the Appellant was indebted to the estate to the extent of costs

60. That, before his demise, the deceased was under the care of the Respondent. In fact, it is not in doubt that the deceased had issued a power of attorney when he had the ability to do so and eventually, an order for the management of the estate of the deceased was made by the court. At all times the deceased lived in Nakuru with the Respondent. Upon his demise, the Respondent applied for the grant of letters of administration and having satisfied the court that she was the right person to be issued with the letters of administration; the letters were issued to her.

61. That, in his summons for the revocation of grant, the Appellant challenged the letters of administration on three major grounds: -

i. Substantive defects;

ii. Procedural defects;

iii. Falsehood, fraud, misrepresentation concealment of material facts.

62. The court considered the summons and dismissed the same on two principal grounds. First the Appellant fell short of the requirements of Section 29 of the *Law of Succession Act* and secondly that the appellant was disqualified by his conduct from being a beneficiary of the estate of the deceased. The two findings of the court addressed the issue of locus of the Appellant to file the application.

63. The Respondent addresses the two issues of want of locus and abuse of process as threshold questions. That a court of law has an inherent power to protect its procedures and processes from abuse. What constitutes abuse of the court process is not capable of being exhaustively defined. But in a nutshell it constitutes use of the court process to achieve an oblique purpose. The court in the case of Satya Bhama Gandhi v Director of Public Prosecutions & 3 others [2018] KLR outlined a variation of circumstances which may give rise to an inference of abuse of the court process. In pertinent, the court observed as follows: -

> 26. Its settled law that a litigant has no right to purse pari pasu two processes which will have the same effect in two courts either at the same time or at different times with a view of obtaining victory in one of the process or in both. Litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks.
>
> 27. It is not open for the applicant herein to institute these Judicial Review proceedings after losing the Petition challenging the same criminal trial. The two processes are in law not available to the applicant. He ought to have appealed against the above-mentioned decision if he was dissatisfied. The Applicant cannot lawfully file these Judicial Review proceedings and seek similar reliefs relying on substantially the same grounds as the Petition referred to above. The pursuit of the second process, that is this Judicial Review Application constitutes and amounts to abuse of court/legal process.
>
> 28. Multiplicity of actions on the same matter between the same parties even where there exists a right to bring the action is regarded as an abuse. The abuse lies in the multiplicity and manner of the exercise of the right rather than exercise of right per se. The abuse consists in the intention, purpose and aim of person exercising the right, so harass, irritate, and annoy the adversary and interface with the administration of justice. 1 find no difficulty in concluding that this Judicial Review Application is based on similar grounds as the Petition referred to above.
>
> 29. This obstacle to the efficient administration of justice is mot immovable. Courts need not and should not wait for lawyers and litigants to initiate proceedings where there is substantial reason to believe that the processes of the court have been abused. Tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which such abuse cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception. fraud and blatant abuse of judicial processes.

64. That the same position was upheld in the case of Nancy Musili v Jovce Mbete Katisi [2018] eKLR

65. That, early as 2006, the Appellant had a single-minded resolve to take land from his brother, the deceased and he filed civil case number 2427 of 2006 claiming entitlement to the parcel of land known as BAHATI/KABATINI BLOCK 1/4074. The matter was heard and dismissed and he was directed to transfer the land back to his brother (the deceased herein). All along while his brother (the deceased) was ailing, he never took care of him. After his death, the appellant filed an application before the magistrate's court to remove a caution that had been lodged on the said parcel of land. In making that application, the appellant never disclosed that his brother was deceased. He admitted as much at page 90 of the record of appeal.

66. The Respondent submit that, this is the classic case of abuse of the court process. The Appellant, having failed to dispossess his late brother, of the land through a civil process pursued him in death. He filed the summons for revocation of grant on claims that he was excluded as a beneficiary of the estate. He has been resolute at vexing his brother posthumously.

67. The trial magistrate detected the appellant's motives and dismissed the summons. This appeal does not stand in any better stead. It is the textbook illustration of abuse of the court process and the same ought to be dismissed with costs.

68. That, the Appellant challenged the summons for revocation on the principal ground that he was a dependant of the estate of the deceased and entitled to a share of the net estate. An applicant under section 76 of the *Law of Succession Act* and rule 44 must demonstrate the nature of his interest and more particularly fall in the purview of section 29 of the Act. But did the appellant demonstrate that he was a dependant?

69. That, for the person to qualify as an interested party under section 76 of the *Law of Succession Act* for the purposes of a summons for the annulment or revocation of a grant, he must fit within the definition of a dependant or beneficiary under Section 29 of the Act. Section 29 provides as follows: -

> 29. Meaning of dependant
>
> For the purposes of this Part, "dependant" means-
>
> (a) The wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death:
>
> (b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half- sisters, as were being maintained by the deceased immediately prior to his death;

70. Spouses of deceased persons are dependant in the primary sense and they need not prove dependency. Therefore, they are directly interested in the estate of a deceased person. Siblings of a deceased (brothers and sisters) are dependants in the secondary sense and they ought to prove dependency as a prerequisite to distribution of the estate. The same position applies to whenever any such secondary dependants seek to challenge issuance of a grant.

71. That, the Appellant claimed that, he was a brother to the deceased. On cross-examination, he stated that, he was not depending on the deceased for his daily subsistence prior to his death.

72. Clearly, the Appellant fell outside the purview of section 29(b) of the Act. He was not being maintained by the deceased immediately prior to his death. We submit that the applicant is not an interested party and he has no locus standi to present the summons for revocation of grant.

73. That, the Appellant 's relationship with the deceased was clearly caustic. He vexed the deceased during his lifetime. He never took care of him when he was ailing. In his death he surreptitiously attempted to remove a caution lodged against the title contrary to the court order. Under section 28 (e) and (g) of the Act, the trial magistrate was entitled to take into account those circumstances. The court found that the conduct of the Appellant disentitled him from any inheritance. It was therefore vain to revoke the grant in an application by a party who was not entitled to inherit. In the case of Thomas Kowalczyk v Agnes Silantoi Kolii [2020] eKLR, the court observed as follows:-

> "Ultimately, the conduct of the applicant in relation to the deceased and engaging in an illegality led to his being excluded in the Will. By dint of section 28 (e) and (g) of the act therefore, the applicant would not be eligible for reasonable provision of the estate".

74. That, Courts do not act in vain and this is a sound legal principle. The appellant has not assailed this position in his submission. The court cannot be faulted to upholding the correct legal principle and applying the law.

75. That, Prima facie, the court has the discretion to determine who gets appointed as the personal representative. Where the court decides to appoint a personal representative, that determination is an exercise of discretion. It can only be challenged if it was exercised illegally or capriciously. The application seeks to challenge an exercise of discretion. It is our submission that this challenge is misplaced.

76. That, has been demonstrated that the Appellant by his own admission, was not a beneficiary of the estate of the deceased. Further, by his own conduct in relation to the deceased, he fell outside persons who were entitled to beneficial interest in respect to the estate. He cannot sustain a case that he ought to have been consulted as a beneficiary.

77. That, the Appellant submitted that the grant was confirmed before the expiry of six months. This argument was advanced as evidence of substantive defect in the grant. Section 71 of the Act provides that a grant may be confirmed after the expiry of six months or such a shorter period as the court may direct. At the time of confirmation of the grant, the court was satisfied that the grant could be confirmed inside of six months. Such a confirmation, without any more cannot be said to be evidence of substantive defect. We urge the court to reject that submission and that, Susan Muthoni Kairako was bedridden and incapable of filing an application for confirmation of grant. He invited the court to compare the signature appearing in the petition for letters of administration and the replying affidavit and concluded and urged that the court should find that the said Susan Muthoni Kairako was incapable of filing the application. In this regard we wish to submit as follows: illness and the fact that a litigant is bedridden are questions of fact to be proved by the party who wishes the court to find in his favor. Ideally, a party ought to call medical evidence or produce medical report to prove that fact. In the matter at hand, the applicant never called any medical evidence to prove that Susan Muthoni Kairako was bedridden. A party cannot supplement evidence with submissions. That submission ought to be rejected.

78. The Appellant did not prove fraud notwithstanding submitting extensively that the impugned grant was procured through fraud. He highlighted the following? as his perceived aspects of fraud. First, that the petitioner was described as the wife of the deceased in the chief's letter yet she was a sister. Secondly that the petitioner was bedridden for 15 years and could not have filed the petition and the application

for confirmation of the grant. Thirdly, the appellant claimed that the petitioner had other children who were not included as beneficiary. On the basis of the submission the appellant invited the court to make an inference of fraud.

79. Fraud as a ground for challenging a grant cannot be based on an inference. It must be strictly proved. In the case of Evans Kidero v Speaker of Nairobi City County Assembly & another [20158] eKLR, the court of appeal observed as follows: -

> " It is trite law that he who alleges fraud must prove it. Allegations of fraud must strictly be proved. Great care needs to be taken in pleading allegations of fraud or dishonesty. In particular the pleader needs to be sure that there is sufficient evidence to justify the pleading. This was considered in some detail by Lewison J in Mullarkey v Broad. [17] In Central Bank of Kenya Ltd v Trust Bank Ltd & 4 Others [18] the Court of Appeal in considering the standard of proof required where fraud is alleged had this to say-
>
> "The Appellant has made vague and very general allegations of fraud against the Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the Appellant in this case than in an ordinary Civil case Vague allegations and sparse evidence cannot suffice as evidence of fraud. Further the court cannot make a finding of fraud based on inferences.

80. Further reference is made to the case of Denis Noel Mukhulo Ochwada & another v Elizabeth Murungari Njoroge & another [2018] eKLR the court reiterated the onus and the burden of proof where allegations of fraud are made. The court observed thus: -

> " Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required. The same position was upheld in the case of Kuria Kiarie & 2 others v Sammy Magera [2018] e-KLR.

81. The Appellant alleged that the Respondent's mother fraudulently misrepresented to the chief that she was the wife of the deceased. He never called the chief or any other person to prove those allegations. He stated that Susan Muthoni Kariako was bedridden for 15 years and lacked capacity to petition for letters of administration or file an application for confirmation of grant. Sickness is a question of fact. The Appellant never called any evidence to prove that fact. The Appellant accused one Susan Muthoni Kairoko for pleading to be the wife of the deceased. However, he never sought to have the said person joined in the proceedings to controvert the allegation. Therefore, those were allegations made against a stranger to the proceedings. He alleged that there were discrepancies in the signatures which would lead to an inference of fraud. He never called a signature or handwriting expert as a witness.

82. Under Section 107 of the *Evidence Act*, the Appellant had the burden of proof to prove the allegation of fraud. He is the party who desired that the court should enter judgment in his favour. He abdicated his duty and chose to invite the court to make inferences. The Respondent submit that on a re-evaluation of the evidence, the Appellant never proved a case based on fraud.

83. That each of the parties to this matter had the freedom to determine how to prosecute the matter. The Appellant chose to prosecute the matter by way of affidavits coupled with oral evidence. The Respondent chose to controvert the affidavit evidence but not tender oral evidence. It is therefore misguided for the Appellant to submit, as he did that the Respondent never filed an affidavit in response. The Respondent filed a replying affidavit on 14th April 2022 and the same is part of the court record.

84. That all the depositions of fact were controverted by the Respondent. The Appellant had a legal and evidential burden to prove that the deceased died without a wife. His depositions and submissions were at large.

85. The Appellant proceeded on the presumption that the court knew his siblings and that Susan Muthoni Kairako was one such sibling. He proceeded on the presumption the court knew that all his other siblings were deceased and that only him and the said Susan were alive. Courts do not give judgments as a matter of magnanimity; proof is central. In this case, all the issues of facts which were controverted were not proved on a balance of probability. It is our submission that the appellant failed to prove his case and the summons were rightfully dismissed.

86. The Respondent accordingly prayed that the court finds the Appeal to be without merit and dismiss the same with costs.

Analysis and Determination

Issues for determination

87. Having considered the Appeal, the motions in support of and in opposing the Appeal as well as the rival submissions filed by the counsels of the parties, it is my view that the main issues for determination revolves on the exercise of judicial discretion as:

    a. Whether the Trial magistrate exercised his discretion judiciously?

    b. Whether the instant Appeal is merited.

88. This being a first appeal, our duty was well stated in Abok James Odera T/A A.J. Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, where this Court held:

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way."

89. Likewise, in Selle and Another v Associated Motor Boat Co. Ltd [1968] E.A. 123, the Court observed as follows:

> "An appeal to this Court from a trial by the High Court is by way of a retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mhamed Sholan, [1955] E.A.C.A. 270)."

90. The general principles on when an appellate court may interfere with a discretionary power of a trial are now well settled. In the case of Mbogo & Another vs Shah, [1968] EA, these principles were set out as follows: -

> " An appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice."
>
> "The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice."

91. In Patel v E.A. Cargo Handling Services Limited [1974] E.A. 75, this Court held as follows:

> " There are no limits or restrictions on the judge's discretion except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose condition on itself or fetter wide discretion given to it by the rules: the principle obviously is that unless and until the count has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure."

92. Guided by the foregoing principles, the record of appeal as well as submissions by parties to the appeal, I am called upon to re-evaluate the evidence tendered before the superior court and determine whether the learned Magistrate erred in finding that the Deceased had failed to demonstrate that he was a dependant of the deceased.

93. This Court is of the view that the Hon. Trial magistrate was right to find that the Appellant lacked "locus standi" to move the court as he had done and that he dialed to demonstrate that he was a dependant of the late Boniface Karumbi Makuri within the meaning of section 29. of the *law of succession Act*.

For the purposes of this Part, "dependant" means—

(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

(c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.

94. The Appellant notwithstanding having demonstrated he was a brother to the deceased, he failed on the second limb thereof to demonstrate that, the late Boniface Karumbi Makuri maintained himimmediately prior to his death.

95. I find no fault as to the reasoning of the Hon. Trial Magistrate's observations that the late Boniface Karumbi Makuri had immediately prior to his death been involved in a protracted land dispute relating to Bahati/Kabatini Block1/4074 with the Appellant, the court had decreed the land in favor of the deceased and the Appellant had been ordered to pay costs of the suit. Therefore, the Appellant is indebted to the estate to the extent of costs of case number 2427 of 2006.

96. Section 76 of the *Law of Succession Act* gives the Court discretion whether to revoke or annul a grant. It is not therefore the position that any breach or violation must always or automatically lead to revocation of a Grant.

97. Power to revoke a Grant is a discretionary power that must be exercised judiciously and only on sound grounds. The Court 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. The discretion must therefore not be exercised whimsically or capriciously (see decision of Mwita J in the case of Albert Imbuga Kisigwa v Recho Kavai Kisigwa [2016] eKLR).

98. In this instance the revocation of grant sought was anchored on malafide and a pre-existing land dispute between the deceased and the Appellant.

99. "Any interested party" moving the court under Section 76 of the *law of Succession Act* must come with bonafide and clean hands in this instance it is more than apparent that the deceased had a land dispute with the Appellant which dispute had judicial determination for the Appellant to transfer to the deceased. It appears the Appellant has a quest to reverse the determination in succession.

Final Disposition

100. Having considered this case in its entirety, this Court finds:

i. This Appeal to be lacking in Merit and the same is Accordingly dismissed.

ii. The Appellant shall bear the costs of this suit.

iii. The Deputy Registrar shall ensure the Nakuru Chief Magistrate's Succession Cause No. 265 of 2020 is concluded and settled and closed.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU

ON THIS 15TH DAY OF AUGUST, 2024.

.....

MOHOCHI S.M.

JUDGE