



**Kimeu & another v Kisoi (Civil Appeal E015 of 2020)
[2024] KEHC 17231 (KLR) (12 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 17231 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL E015 OF 2020
TM MATHEKA, J
AUGUST 12, 2024**

BETWEEN

MBIKI KIMEU 1ST APPELLANT

JOSEPH MULI KIMEU 2ND APPELLANT

AND

JOHNSTONE KKONYO KISOI RESPONDENT

JUDGMENT

1. Kisoi Wali Nthengi died on 7/3/1998
2. The respondents herein filed a petition Tawa SRM Succession Cause 5/2019.
3. According to the letter from the chief Waia location dated 28/11/2016 , he was survived by 2 wives - the 1st house having two sons , the second house - one son.
4. The form P &A s filed in 9/3/2017 confirmed this and also set out the assets of the deceased - being land in Kisau Kyang'ombe and Mbumbuni .
5. A grant of letters of administration intestate was made to the respondents on 19/7/2017.
6. A certificate of confirmation of grant was made on 10/5/2018 distributing the estate to 7 persons namely;
 1. Naomi Kalekye Kisoi Wali
 2. Johnson Kikonyo Kisoi
 3. Gesmark Mutuku Kisoi Wali
 4. Daniel Kyalo Kisoi



5. Burner Kithome Kisoi
7. Mutio Kisoi Wali
8. Shadrack Nzau Kisoi
7. On 28/3/2019, the applicants filed summons for revocation of grant on the grounds that they were the wife and son respectively of the deceased; that one of the properties, Kisau/Usalala/536 was registered in the names of the deceased & another by name David Kisyula Ngovi; that the two had been disinherited through the material non- disclosure by the respondents.
8. Through the supporting affidavit of Muli Kisoi - the applicants exhibited copy of title deed of the said property, Kisau/Usalala/536 and copy of amended plaint in Tawa SRMCC 210/2015 seeking their (applicants) eviction from the said land contending that the same ought to have been distributed in a manner that included them.
9. The summons was opposed by affidavit of Gesmark Mutuku Kisoi Wali - who denied that Mbiki Kimeu was wife of his father but confirmed that Mbiki Kimeu was wife of his father's brother one Kimeu Wali, and Joseph Muli Kimeu - son of Kimeu was his cousin.
10. That the assets in question herein was part of the estate on onE Munai Wali the mother of the deceased, and the husband and father of the applicants. That their father and husband was given his share just like the father of the respondents and that this cause was about the distribution of the share given to the family of the respondent.
11. That it was true that his parcel Kisau/Usalala/536 was registered in the names of their father and another and the facts were known to the family. That the distribution of that parcel of land had nothing to do with the applicants.
12. The summons was canvassed by way of written submissions.
13. On 13/11/2019 , the trial court delivered a ruling in which the learned magistrate determined that the applicants had failed to produce evidence to show they were wife and son of the deceased or any evidence of dependency, that the summons for revocation had no merit, and dismissed the same.
14. Aggrieved the applicants filed this appeal on the grounds;
 1. The learned trial magistrate erred in law and fact and misdirected herself in failing to revoke the grant issued to the respondents herein when it was in clear violation of Section 76 of the *Law of Succession Act*.
 2. The learned magistrate erred in law and fact and misdirected herself by failing to consider the appellants submissions.
 3. The learned trial judge erred in law and fact and misdirected himself by failing to consider the applicable case law.
15. The Appellants prayed for orders that
 - i. That the ruling delivered on 13/11/2019 and all subsequent orders and decrees be set aside and/or quashed.
 - ii. That this court does determine whether the respondents were in violation of section 76 of the *law of succession Act*.
 - iii. That costs of this appeal and the application be borne by he respondents any event.



- iv. Any other or further relief the court deems fit to grant.
16. Parties filed written submission.
17. The appellants framed issues for determination thus:-
1. Whether the respondents were in violation of Section 76 of the *Law of Succession Act*.
 2. Whether the ruling delivered on 13th November, 2019 and all the subsequent orders and decrees should be set aside and/or quashed.
 3. Who should bear the costs of this appeal.
18. Citing Section 76 (b) of the *Law of Succession Act*, in the matter of the Estate of L.A.K (deceased) [2014] eKLR - it was argued that the respondents had concealed that the appellants were dependents of the deceased under Section 29 of the *Law of Succession Act* and ought to have been listed as beneficiaries. That the trial court ought have exercised its discretionary power and revoked the grant as was stated in Albert Imbuga Kisigwa V Recho Kawai Kisigwa Succession Cause 158/2000 as quoted in Re estate of Benjamin Kiregenyi Muri (deceased) [2022]eKLR.
19. It was further argued that the respondent obtained the grant fraudulently and the same should be revoked with costs to the appellant.
20. For the respondents the following issues were framed :-
1. Whether the trial magistrate erred in law and fact in failing to revoke the grant issued to the respondent in when it was in clear violation of Section 76 of the *Law of Succession Act*.
 2. Whether the ruling should be set aside together with the proceedings and this appeal allowed.
21. The respondents argued that the appellant had failed to prove their allegations before the subordinate court - they had failed to prove that they were wife and son of the deceased or that they were indeed - the dependants of the deceased before he died.
22. They relied on Re estate of Prisca Ong'aye Nande (deceased) [2020]eKLR - on that court's rendition on the application of Section 76 of the *Law of Succession Act*. "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.”

23. It is argued that the Summons did not meet any of the grounds set out in Section 76 and for that failure that the appeal should be dismissed with costs.
24. I have carefully set out the background to this appeal. I have carefully considered the record, the rival submissions - and the only issue is whether the appeal has any merit on the grounds set out.
25. To answer to that I must turn to the issue before the subordinate court; whether or not the appellants established the relation of wife and son to the deceased/dependency.
26. It is not denied that the husband of the 1st appellant who is father to 2nd appellant was a brother to the deceased. But that is the far the relationship goes. The appellants did not place before the learned trial magistrate any evidence to support the claim. Proof of this would have been established that indeed the respondents were aware of their existence and that they had concealed the same from court.
27. Clearly that evidence was not laid before the trial court.
28. On the issue of dependency under Section 29 of the *Law of Succession Act* states; 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, grandparents, 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.
29. There was no evidence to bring the applicants within the purview of the provisions of s. 29 of the LOSA above.
30. Once again - that is an issue of facts - the appellants merely made the claim but did not establish it before the trial court to enable the court find in their favour.
31. In the end - I find for the foregoing reasons that the trial court was not in error.
32. The appeal is unmerited and is dismissed with costs to the respondent.

DATED SIGNED AND DELIVERED VIA CTS THIS 12TH AUGUST 2024.

MUMBUA T. MATHEKA

JUDGE

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA

THE JUDICIARY OF KENYA.

MAKUENI HIGH COURT

HIGH COURT DIV

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