



REPUBLIC OF KENYA



**Nyaga & 3 others v Nyaga & another (Civil Appeal E025 of 2024)  
[2024] KEHC 16276 (KLR) (19 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16276 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CIVIL APPEAL E025 OF 2024  
LM NJUGUNA, J  
DECEMBER 19, 2024**

**BETWEEN**

**TERESIA RWERU NYAGA ..... 1<sup>ST</sup> APPELLANT  
NANCY NDEGI NYAGA ..... 2<sup>ND</sup> APPELLANT  
AGNES NJERI NJIRU ..... 3<sup>RD</sup> APPELLANT  
JOSEPH NJERU NYAGA ..... 4<sup>TH</sup> APPELLANT**

**AND**

**IRENE NJUTHE NYAGA ..... 1<sup>ST</sup> RESPONDENT  
DOMINIC MBOGO ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal arising from the decision of Hon. N.Kabara SRM in  
Siakago Succession Cause No. 164 of 2019 delivered on 21st February 2024)*

**RULING**

1. The appellants have filed a memorandum of appeal dated 19<sup>th</sup> March 2024 through which they seek the following orders:
  - a) That the Ruling in Siakago Succession Cause No 164 of 2019 delivered on the 21<sup>st</sup> February 2024 be set aside;
  - b) That the honourable court do allow the summons for revocation of grant dated 15<sup>th</sup> December 2023; and
  - c) That the costs of the appeal and the lower court be awarded to the appellant.
2. The appeal is premised on grounds that:



1. The learned Trial Magistrate erred in Law and in fact when she dismissed the summons for revocation of grant dated 18<sup>th</sup> December 2023 filed by the Appellants without according them an opportunity to be heard in court;
  2. The learned trial Magistrate erred in Law and in fact when she dismissed the appellants' summons for revocation of grant whereas the respondent had not obtained the requisite consents to have the estate distributed and to have the grant confirmed;
  3. The Learned trial Magistrate erred in both Law and in fact by relying on false information that the appellants were aware of the date for confirmation of grant and holding that they had previously been notified of court proceedings but refused to attend court;
  4. The Learned trial Magistrate erred in both Law and in fact by disregarding the appellants' affidavit in support of the summons for revocation of grant on the basis that there was no authority to swear the affidavit, whereas the appellants did not dispute the supporting affidavit and did not submit that they didn't give the 1<sup>st</sup> appellant authority to swear the affidavit;
  5. The Learned trial Magistrate erred in both Law and in fact by failing to find that the deceased Nyaga Murunguma had already given out land parcel no Nthawa/Gitiburi/419 to the 4<sup>th</sup> appellant, therefore not available for distribution and had already expressed his wishes that land parcel no Nthawa/Gitiburi/509 be inherited by the 3 houses equally; and
  6. The learned trial Magistrate erred in Law and in fact when she dismissed the appellants' summons for revocation of grant and found that the summons did not meet the threshold as per section 76 of the Law of Succession Act whereas the proceedings to obtain the grant were defective in substance and grant was obtained fraudulently by making a false statement and there were concealment of material facts crucial to the case.
3. When the memorandum of appeal was filed, the court wrote an email dated 16<sup>th</sup> April 2024 at 10:57am, to the 4<sup>th</sup> appellant communicating the following:
- “...kindly note that this appeal has been admitted. The appellant to file and serve the record of appeal within 21 days from today. The matter shall be mentioned on the 15/5/2024 for directions....”
4. On the next scheduled date, the parties were absent in court and the matter was rescheduled to 16<sup>th</sup> October 2024 for directions. On this date, the court directed the parties to file their written submissions and later, the court gave a date for judgment. No record of appeal was filed as directed by the court. This being a civil appeal, the court is guided by the provisions of Order 42 Rule 13 which states:
- “(1) Upon notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal the registrar shall cause the appeal to be listed for the giving of directions by a judge in chambers.
  - (2) Any objection to the jurisdiction of the appellate court shall be raised before the judge before he gives directions under this rule.
  - (3) The judge in chambers may give directions concerning the appeal generally and in particular directions as to the manner in which the evidence and exhibits presented to the court below shall be put before the appellate court and as to the typing of any record or part thereof and any exhibits or other necessary



documents and the payment of the costs of such typing whether in advance or otherwise.

- (4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—
- (a) the memorandum of appeal;
  - (b) the pleadings;
  - (c) the notes of the trial magistrate made at the hearing;
  - (d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
  - (e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
  - (f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:

Provided that—

- (i) a translation into English shall be provided of any document not in that language;
- (ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).”

5. In the absence of a record of appeal, the court erroneously gave directions for filing of submissions given that the court’s initial orders to file the same were not complied with. It has been stated time and time again that court orders are not made in vain. In this kind of scenario, even the discretion of the court cannot cure the flaw in the procedure and the situation should be remedied by a review of this court’s directions of the appeal.
6. Therefore, the following orders are hereby issued:
- a. The appellant to comply with the orders of the court issued on 16<sup>th</sup> April 2024, to wit; the appellant to file and serve a complete record of appeal within 45 days of this ruling; and
  - b. The court shall give further directions on the appeal upon filing of the record of appeal.
7. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 19<sup>TH</sup> DAY OF DECEMBER, 2024.**

**L. NJUGUNA**

**JUDGE**

..... for the 1<sup>st</sup> Appellant

..... for the 2<sup>nd</sup> Appellant

..... for the 3<sup>rd</sup> Appellant



..... for the 4<sup>th</sup> Appellant

..... for the 1<sup>st</sup> Respondent

..... for the 2<sup>nd</sup> Respondent

