



REPUBLIC OF KENYA



KENYA LAW
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**Juma v Shivachi (Succession Appeal 2 of 2021)
[2023] KEHC 3508 (KLR) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3508 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION APPEAL 2 OF 2021**

WM MUSYOKA, J

APRIL 28, 2023

BETWEEN

ELIUD GEORGE JUMA APPELLANT

AND

LEONIDA ASENWA SHIVACHI RESPONDENT

*(an appeal arising from the ruling by Hon. F. Makoyo, Principal
Magistrate, in Butere PMSCSC No. 12 of 2019, of 17th February 2021)*

JUDGMENT

1. The appeal herein arises from a decision of the trial court, in Butere SPMSCSC No. 12 of 2019, of 17th January 2021. The grounds of appeal revolve around the consent on distribution not being executed by the appellant and members of his side of the family; the estate being distributed equally amongst the houses or widows without considering the number of children in each house; considering the sale agreement of 16th November 2016 without inquiring on the capacity of the deceased to enter into the said agreement; failing to consider that the deceased could not have sold his homestead; and the court erring in finding that the threshold for revoking the grant had not been reached.
2. The impugned ruling, of January 17, 2021, turned on a summons for revocation of grant, dated 4th September 2020, filed in court on September 7, 2020, by the appellant. It had been argued that the grant had been obtained through defective and fraudulent proceedings, as facts were concealed from the court, members of the family were not informed when representation was sought, the letter from the Chief and the death certificate were obtained without informing family members, strangers were listed as beneficiaries of the estate, the appellant was not included as a petitioner in the petition, and some assets were left out. The additional allegation, in the supporting affidavit, was that at confirmation the estate was shared out amongst the widows, and other beneficiaries were left without a share.



3. The reply to the summons for revocation of grant was by way of affidavit, sworn on October 14, 2020, by the respondent and another. It was averred that the appellant did not have the consent of his mother and sister to bring the revocation application. It was denied that beneficiaries had been excluded, and it was asserted that all had been disclosed, in the letter from the Chief and in the petition. It was added that liabilities of the estate had also been factored, as they had bought portions of the estate from the deceased. It was denied that the letter from the Chief and the certificate of death were obtained secretly. It was asserted that the persons that the appellant was referring to as strangers, were the persons who had purchased land from the deceased, and included David Sakwa Okongo. On the property allegedly omitted, it was explained that it never was registered in the name of the deceased. .
4. Directions were taken on October 15, 2020, that the application would be disposed of by way of written submissions. Both sides complied with the directions, by filing their respective written submissions.
5. In the ruling of January 17, 2021, the trial court analyzed the filings by both sides, including the submissions. The trial court recited the provisions of section 76 of the Law of Succession Act, Cap 160, Laws of Kenya, and considered the application as against those provisions with respect to the process of obtaining representation. The court noted that the appellant had not provided proof that the assets that he was claiming were omitted in fact belonged to the deceased. It was also noted that all the 3 widows and all the children of the deceased were listed in the letter from the Chief, and David Sakwa Okongo had been listed as a liability. It was further noted that all the beneficiaries had been duly served with notice for the confirmation hearing, but the appellant omitted to attend court. It was concluded that the material placed on record did not reach the threshold for revocation of the grant.
6. Directions were given on April 27, 2022, for disposal of the appeal by way of written submissions. The written submissions that I see on record were filed by the respondent, on July 10, 2022, and are dated June 8, 2022. On the first ground of appeal, it is submitted that the appellant might not have consented to the distribution of the estate proposed at confirmation, but he was aware of the succession proceedings. Although he had not signed the consent on distribution, it is submitted that he did not agree with the proposals, and should have filed a protest affidavit, which he did not do. It is submitted that all the beneficiaries had been listed, including the appellant and members of his side of the family. On the second ground of appeal, it is submitted that the issue of section 40 of the Law of Succession Act was not raised at the hearing of the revocation application before the trial court, and it is being raised for the first time on appeal. It is argued that the distribution was in compliance with that provision. On the third ground of appeal, it is submitted that the appellant did not challenge the sale agreement dated November 8, 2016 before the trial court, and that, in any event, this may not be the proper forum for that sort of challenge. It is submitted that the personal representatives of the deceased have a duty to settle debts and liabilities. The fourth and fifth grounds of appeal are argued together. It is submitted that the appellant did not tender evidence to the trial court on sale of the homestead, and no proof was provided that the purchaser was claiming to have bought a portion of the land where the homestead stood. It is argued that the revocation application was properly dismissed.
7. I will start by stating that the appellant in the appeal appears to be raising issues around confirmation of the grant. To the very best of my understanding, the appeal herein arises from a ruling on the summons for revocation of grant, dated September 4, 2020, and not from the summons for confirmation of grant, dated February 8, 2020. The confirmation hearing happened on September 6, 2020; the appeal herein is not on the events of September 6, 2020. If the appellant was unhappy with what happened at confirmation of the grant and distribution of the estate, then he ought to have filed an appeal against the orders made on September 6, 2020. The appeal herein is on the dismissal of his summons for revocation



of grant, and he should have limited his case to the issues that were before the trial court at revocation of the grant, and not at confirmation of the grant.

8. I note that the revocation application was filed on September 7, 2020, a day after the confirmation orders were made, on 6th September 2020. It probably may need to be underscored that the discretion given to the court, at section 76 of the *Law of Succession Act*, is not equivalent to appellate or review jurisdiction. Section 76 does not enable a person, who is aggrieved of an order made at confirmation of grant, to challenge the confirmation orders by way of having the grant revoked. The jurisdiction to revoke a grant is limited to 3 instances. One, where the process of obtaining the grant had problems, either because it was defective in some material way, or fraud was practiced. Two, where there is maladministration or failure of administration of the estate, that is after the grant is made, on account of failure to apply for confirmation of grant within the timelines given in the law, or there is lack of diligence in administration, or there is failure to render an account of the administration within the timelines given or when ordered to by the court. Three, where the grant has become useless or inoperative, because the sole administrator has died, or has suffered a mental or physical disability, or has been adjudged bankrupt. Instead of resorting to section 76, when unhappy with what has happened at confirmation, the aggrieved party ought to appeal to the higher court.
9. The other thing that needs to be said is that problems at confirmation of the grant do not justify revocation of the grant, for section 76 of the *Law of Succession Act* mentions confirmation of grants only at paragraph (d)(i), with respect to failure to apply for confirmation of grant within the timelines given. Where a confirmation application is filed, and confirmation proceedings conducted, there would be no justification whatsoever to invoke section 76.
10. For avoidance of doubt, section 76(d)(i) says:

“ that the person to whom the grant was made has failed, after due notice and without reasonable cause –

 - i. to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or
 - ii. ...”
11. The revocation application, the subject of these appeal proceedings, is dated September 4, 2020, and it is supported by an affidavit that the appellant sworn on September 4, 2020. That would mean that it was prepared during the pendency of the confirmation application. The confirmation hearing happened on September 6, 2020, and that is to say that instead of the appellant preparing to attend court on September 6, 2020, and state his position on the distribution proposed, he was busy working on defeating that process by filing a revocation application. If he were a diligent person, rather than being a clever one, or, to put it differently, if he had received proper legal advice, what he should have done, should have been to file an affidavit of protest, in terms of rule 40(8) of the Probate and Administration Rules, for there is no doubt in my mind that he was aware of the pendency of the confirmation proceedings. Alternatively, he should have attended court, on September 6, 2020, even without having filed an affidavit of protest, and the court would have dealt with him, in terms of rule 41(1) of the *Probate and Administration Rules*, which requires the court to hear the parties on the confirmation application. He lost that opportunity to be heard. He adopted a foolhardy strategy, which he thought would defeat or thwart the confirmation proceedings, instead of doing the right thing. He had opportunity to raise the issues he is now raising on appeal, but he passed up that chance. The application, dated September 7, 2020, was, no doubt, filed in abuse of court process.



12. A revocation application, filed in court during the pendency of a confirmation application, or shortly after determination of a confirmation application, by a person who had notice of the confirmation application, or who had participated in the confirmation application, and which raises issues that were or could have been raised at the confirmation hearing, ought to be disregarded. The issues raised in the revocation application, the subject of these proceedings, are that the grant was not obtained properly. Those are issues that ought to come up at confirmation, for, under section 71(2)(a)(b) of the Law of Succession Act, the court confirms the grant “if satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law...” The court will not confirm the grant “if not satisfied,” and has power to “issue to some other person or persons ... a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be unadministered...” The appellant’s case, in the application, dated September 4, 2020, was that the grant was not properly made. That was an issue that the court could deal with at confirmation of grant, if the appellant had raised it there, which he had a chance to, and, there was, therefore, no need to file the application, dated September 4, 2020, when that issue could have been dealt with at the hearing of the pending confirmation application. See Mburu Njoroge vs. Frederick Mburu Njoroge [2014] eKLR (Ngaah, J). It would be duplicitous, therefore, and abusive of process of the court, for a party to bring a revocation application during the pendency of a confirmation application, or shortly after determination of such an application, raising issues that would have been ideally dealt with within that confirmation application.
13. These issues on distribution of the estate, that the appellant is raising in his grounds of appeal, were not raised in the revocation application, dated September 4, 2020, and, they were, therefore, not before the trial court, and should not be raised on appeal. A party is bound by its pleadings and filings. As those issues were not placed before the trial court, they ought not be raised on appeal, for they are new issues. The grounds on the face of the revocation application were 6, and they revolved around concealment of facts and beneficiaries at the time of petitioning, not informing family members of the petition, not involving family members when obtaining the letter from the Chief and the certificate of death, introducing strangers into the petition, not including family members in the petition, and not listing some items in the petition. The averments in the affidavit of September 4, 2020 were around these issues. Clearly the dispute that was placed before the trial court was not on distribution, and the said issues on distribution cannot now be raised on appeal, when they were not the issues that were before the trial court. None of the 5 grounds of appeal are founded on the grounds on the face of the application, dated September 4, 2020, and the facts deposed in the supporting affidavit. The issues that the appellant now wants me to address are different from what his application, dated September 4, 2020, was about, or are different from the issues that he had placed before the trial court.
14. There is no merit in the appeal herein, and I hereby dismiss it. It is so lacking in merit that costs ought to be ordered against the appellant, for needlessly dragging the respondent to the High Court, but I shall refrain from making that order, for the sake of peace within the family. Each party shall bear their own costs. It is so ordered.

**JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS
28TH DAY OF APRIL 2023**

WM MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Appearance



Mr. Luchivya, instructed by Marisio Luchivya & Company, Advocates for the appellant.

Ms. Andia, instructed by Andia & Company, Advocates for the respondent.

