



REPUBLIC OF KENYA



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**Mutali v Manguso (Civil Appeal E001 of 2021)
[2023] KEHC 3664 (KLR) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3664 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E001 OF 2021**

JRA WANANDA, J

APRIL 28, 2023

BETWEEN

MOSES MASINDE MUTALI APPELLANT

AND

WILBERT MECHA MANGUSO RESPONDENT

JUDGMENT

1. This Appeal is against the Ruling of the trial Court allowing an Objection Application that sought the revocation of a Grant of Letters of Administration issued to the Appellant. The Grant relates to the Estate of one Masinde Muhuyu Festo who died in the year 2004 and who is the father of Appellant.
2. The genesis of the matter is that on 10/07/2017 in Bungoma Senior Principal Magistrate's Court Succession Cause No. 38 of 2017, the Appellant petitioned the Court to issue to him a Grant of Letters of Administration as aforesaid. The Petition was supported by the letter dated 27/04/2017 from the local Chief who stated that the deceased was the owner of the said parcel of land and listed the survivors, who included the Appellant. The only property cited in the Estate was Elgon/Chemoge/151 stated to measure 2.2 hectares and to be worth about Kshs 500,000/-.
3. The Grant was duly issued in favour of the Appellant, subsequently confirmed and a Certificate to that effect issued on 30/05/2018.
4. However, "a spanner was thrown into the works" when on 3/07/2020 the Respondent filed the Objection challenging the Grant.

Grounds of the Objection Application

5. The grounds alleged in the Objection were that the Grant was obtained by the Appellant fraudulently and by concealment of material facts, the proceedings were done secretly without the knowledge of the Respondent, the Appellant is not the rightful beneficiary to the land parcel Elgon/Chemoge/151 as



the same belongs to the Respondent's family, the Appellant's late father sold the land parcel in the year 1990 to the Respondent's father, moved away and settled at Sirende in Trans-Nzoia, the Respondent and his family settled on the said land parcel and that the Appellant has no claim over the parcel.

6. Further grounds were that the Appellant upon getting the Grant confirmed sued the Respondent and obtained injunction orders against him, the Appellant basing on the injunction order unlawfully demolished the Respondent's houses contrary to terms of the decree, the Respondent was never made aware about the Succession Cause, the interest of the Respondent in the estate is that he is one of the sons of the late Samwel Kitio Mangusho who purchased the land from Masinde Muhuyi Festo and therefore he is entitled to the deceased's share, the Respondent was never listed as beneficiary of the estate when the Appellant filed the Succession Cause, the Appellant never disclosed all material facts pertaining the estate of the late Masinde Muhuyi Festo and that the Appellant misled the Court into believing that the information the Appellant addressed on oath in the Affidavit was correct yet it is completely not true and or correct.

Respondent's Supporting Affidavit

7. In his Affidavit in support of the Objection, the Respondent reiterated the above matters and also added that his father Samwel Kitio Mangusho died on 15/09/1994, the Appellant filed in Court a letter from a Chief in Sirende who had no knowledge of the existence of the parcel of land and thus he was misled by the Appellant, the Respondent's father left behind one widow and 16 children surviving him, the said Masinde Muhuyi Festo sold 4 acres of land to the Respondent's father in the year 1990, the Respondent also purchased further land measuring 1 acre from one Martin Masinde who was a son of Masinde Muhuyi Festo, total land purchased was therefore 5 acres, the said Masinde Muhuyi Festo then moved out of the land in 1990 and settled at Sirende in Trans Nzoia where he was buried, the Respondent's father took vacant possession until to date where the Respondent's family is settled and that the Respondent's father died in the year 1994 while in the process of obtaining the title deed.
8. He further deponed that the Appellant obtained a letter from the chief of Sirende location in Trans-Nzoia which is not within the jurisdiction where the land is located, the Respondent did not consent to have the Appellant carry out Succession proceedings in respect of the land parcel, the Appellant has already registered the Certificate of the Confirmed Grant at the lands office and obtained a title deed, after the Appellant getting the title deed he filed a suit for permanent injunction against the Respondent and obtained a decree against the Respondent, using the said decree the Appellant went ahead and demolished the Respondent's houses yet there was no order for eviction and or demolition of the houses. In conclusion the Respondent prayed that the Appellant be arrested and prosecuted for demolishing the Respondent's house against the terms of the decree.

Appellant's Preliminary Objection

9. The Appellant opposed the Application and filed a Preliminary Objection to the effect that the Succession Court lacked jurisdiction to entertain the Respondent's Application as the same could not be handled by the probate Court but by the civil Court (Environment & Lands Court) which issue had already been determined vide Kimilili SPMCC No. 25 of 2019. It was also stated that the Respondent had no locus standi and/or lacked capacity to bring the Application as he had no Letters of Administration in respect of his father's estate.

Ruling on Preliminary Objection

10. Upon considering the matter and the respective Submissions filed by the parties, the trial Court on 14/10/2020 delivered a Ruling dismissing the Preliminary Objection.



Appellant's Affidavit

11. Upon dismissal of his Preliminary Objection, the Appellant filed a Replying Affidavit in which he deponed that the Respondent was not a beneficiary nor a dependent of the estate of the said Masinde Muhuyi Festo under section 29 of the Law of Succession Act, before the Grant was issued the same was duly gazetted and a 30 days' notice given, at the time of filing the Succession Cause the land belonged to the estate of the deceased Masinde Muhuyi Festo, there was no dispute as to ownership thereof, if there was a dispute the same should be filed in the normal civil case and not in the Succession Cause.
12. Counsel added that indeed the issue of ownership has been heard and determined by a competent Court vide Kimilili Principal Magistrate's Civil Case No. 25 of 2019, there is no appeal preferred against the Judgment therein, the Respondent wanted the Succession Court to sit on Appeal against the decision, the Respondent testified in the said Kimilili Principal Magistrates Civil Case No. 25 of 2009 and did not raise any issue as to the validity of the Grant and that the orders sought are indirectly seeking to set aside and/or nullify the eviction orders issued in Kimilili Principal Magistrates Civil Case No. 25 of 2009 through the back door yet there is no appeal preferred.

Ruling on substantive Application

13. Upon considering the Affidavits and the respective Submissions filed by the parties, the trial Court on 14/10/2020 delivered its substantive Ruling whereof it found that the Appellant had concealed material facts. The Court therefore allowed the Application, revoked the Grant and directed the Land Registrar Bungoma to ensure Land parcel No. Elgon/Chemoge/151 reverts to the previous owner.

Appeal

14. Being dissatisfied with the Ruling, the Appellant instituted this Appeal vide the Memorandum of Appeal filed on 24/06/2021. 8 Grounds of Appeal were cited as follows: grounds;
 - i. That the learned trial magistrate erred in law and in fact in dismissing the Appellant's Preliminary Objection.
 - ii. That the learned trial magistrate erred in law and in fact in cancelling the title in relation to parcel No. Elgon/Chemoge/151 hence the issue of ownership had already been determined vide Kimilili Principal Magistrate Court Civil Suit No. 25 of 2019.
 - iii. That the learned trial magistrate erred in law and in fact in failing to appreciate that the Respondents were not beneficiaries of the estate of the deceased hence an erroneous decision.
 - iv. That the learned trial magistrate erred in law and in fact in failing to appreciate that the Law of Succession Act was envisaged as a complete regime of law complete with its own procedure for purposes of administering the estate of a deceased person and the distribution of the estate to the beneficiaries.
 - v. That the learned trial magistrate erred in law and in fact in failing to appreciate, interpret and apply the provisions of section 76 of the Succession Act hence an erroneous decision.
 - vi. That the learned trial magistrate erred in law and in fact in failing to hold and/or find that Succession Court lacks jurisdiction to hear this matter.
 - vii. That the learned trial magistrate erred in law and in fact in failing to consider the Appellant's Submissions and the authorities supplied to Court hence an erroneous decision.



- viii. That the learned trial magistrate erred in law and in fact in overruling the Civil Court decision in Kimilili Principal Magistrate Court Civil Suit No. 25 of 2019 hence an erroneous decision in the circumstances.

Hearing of the Appeal

15. It was then directed that this appeal be canvassed by way of written submissions. The Appellant, through Tunoi & Co. Advocates filed his submissions on 21/11/2022 and the Respondent, through P.L. Natwati & Co. Advocates filed his on 19/01/2023.

Appellant's submissions

16. Counsel for the Appellant submitted that the Summons for revocation was fatally defective and incompetent since the Court lacked jurisdiction, the Summons ought to have been in accordance with rule 44(1) of the *Probate & Administration Rules* which prescribes the Form which must be used as a matter of practice, the Respondent is a stranger to the estate of the late Masinde Muhunyi Festo hence he lacked capacity to bring the Application, under section 29 of the *Law of Succession Act* the Respondent is not a beneficiary of the estate of the late Masinde Muhunyi Festo, all the genuine beneficiaries consented to the Administration of the estate and eventual confirmation of the Grant and that before the Grant was issued the same was duly gazetted, 30 days' notice issued.
17. Counsel added that at the time of filing the Succession Cause the parcel of land belonged to the estate of Masinde Muhunyi Festo, there was no dispute as to ownership of the land, even if there was a dispute the same should be filed in the normal civil case and not this Succession Cause, indeed the issue of ownership of the land as between the Appellant and the Respondent was heard and determined by a competent Court vide Kimilili Principal Magistrates Civil Case No. 25 of 2019, the existence of parallel proceedings before the civil Court at Kimilili raises the issue of the appropriate forum for determination of this dispute, although the Succession Court has in matters of administration and distribution or Succession of estates of deceased persons, jurisdiction to deal with land as an asset for purposes of Succession the proper Court is the Environment & Land Court which has the constitutional mandate under article 162(2)(b) of the *Constitution* to hear and determine the dispute. He cited the decision in *Re Estate of Wilson Mutyauvu Ndunda*, Machakos H.C. Succession Cause No. 321 of 2003.
18. In conclusion, Counsel submitted that the Respondent testified in Kimilili Principal Magistrates Civil Case No. 25 of 2019 and did not raise any issue as to the validity of the Grant, the trial Court thus indirectly purported to set aside and/or nullify the eviction orders issued by the Court in that suit through the back door yet there was no appeal preferred.

Respondent's Submissions

19. Counsel for the Respondent opposed the Appeal. In regard to the objection raised under section 48(1) of the *Law of Succession Act*, he submitted that the trial Magistrate correctly held that the law had been amended to allow the Magistrates Court to assume jurisdiction over the Succession Cause before the Court, regarding jurisdiction of the Environment & Land Court to determine validity or enforceability of the agreements before the Court, he submitted that the trial Court was alive to that jurisdiction and because of that only applied the provisions of section 76 of the *Law of Succession Act*, revocation of the Grant was not guided by the said Kimilili Principal Magistrates Court Civil Suit No. 25 of 2019 but rather section 76 of the *Law of Succession Act*, what was in issue before the trial Court was revocation based on concealment of material facts and that the Court cannot sanction what is illegal. He relied on the decision in *Moses Wachira Kimotho (Decesaed)* Succession Cause No. 122 of 2022.



Analysis & Determination

20. This being a first appeal, the Court is enjoined to analyse and re-assess the evidence afresh and reach its own conclusion (see *Kiruga v Kiruga & Another* (1988) KLR 348 and also *Selle v Associated Motor Boat Co.* (1968) EA 123).

Issues for determination

21. Although the parties have delved into matters relating to the Preliminary Objection that was filed before the trial Court and which the trial Court dismissed vide its Ruling delivered on 14/10/2020, I hasten to state that this Appeal is strictly against the subsequent Ruling delivered by the trial Court on 26/05/2021. Ground 1 of the Grounds of Appeal therefore fails on this ground.
22. Further, Counsel for the Appellant has submitted that the Summons for revocation was fatally defective and incompetent because it was not in accordance with rule 44(1) of the *Probate & Administration Rules* which prescribes the Form to be used as a matter of practice. I also decline to entertain this Submission since it does not anywhere appear in the Grounds of Appeal. Our procedures do not afford a party the luxury of raising an issue which has not been raised in the Memorandum of Appeal.
23. In my view therefore, the only issue that arises for determination in this appeal is the following;

i. Whether the trial Court was justified in revoking the Grant of Letters of Administration

24. I now proceed to analyze and answer the said Issue.
25. Section 76 of the *Law of Succession Act* clothes the Court with the powers to revoke a Grant of Letters of Administration and sets out the various grounds upon which such revocation can be made. Of relevance to this Appeal is sub-Section (b) which provides as follows:

“76. Revocation or annulment of grant

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any Interested Party or of its own motion—

.....

(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

.....

26. In *Matheka and another v Matheka* [2005] 2 KLR 455, the Court of Appeal set out the following guiding principles.
- i. A grant may be revoked either by application by an interested party or by the court on its own motion.
 - ii. Even when revocation is by the court upon its own motion, there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by the making of a false statement or by concealment of something material to the case or that the grant was obtained by means of untrue allegation of facts essential in point



of law or that the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the estate.”

27. In this matter, the Respondent asked the trial court to revoke the Grant of letters of administration for the reason that the Appellant obtained the confirmed grant by way of concealment of a material fact, namely, that the sole estate property parcel No. Elgon/Chemoge/151 had been sold by the Appellant’s father to the Respondent’s father in the year 1990 and that the Respondent’s family has been in occupation thereof ever since.
28. My perusal of the record reveals that the Appellant did not seriously challenge the allegation that the said land parcel had in fact been sold to the Respondent’s family long before the Appellant took out the Succession proceedings in 2017. The Appellant did not seriously deny his knowledge of the sale and also his knowledge of the fact that the Respondent’s family were in occupation thereof. The Appellant’s response was basically based on points of law and legal technicalities. The moment his Preliminary Objection was dismissed, it became clear that he remained with no serious challenge to the Application.
29. Although under the *Law of Succession Act* the Respondent would not qualify strictly as a “beneficiary” of the estate or as a “dependent”, not being a member of the family of the deceased, the allegations that he made and the evidence that he produced, particularly the Agreements for sale, established a valid presumption that the land parcel having possibly been sold to the Respondent’s family, did not and does not form part of the estate of the deceased. *Prima facie* therefore, the land parcel may not have been available for distribution as a property in the estate. If the Appellant felt otherwise, then the honest thing was for him to disclose that fact to the Court when filing the Succession proceedings, notify the Respondent’s family and place the issue before the Court for determination.
30. Commencing the Succession proceedings in the year 2017 without notifying the Respondent’s family while fully aware that that there was credible evidence that his father had way back in 1990 (27 years earlier) already sold the land to the Respondent’s family and while also fully aware that the Respondent’s family was in occupation thereof smacks of dishonesty and possible case of fraud on the part of the Appellant.
31. *In Re Estate of Moses Wachira Kimotho (Deceased)* Succession Cause 122 of 2002 [2009] eKLR, the Court made pronouncements on the importance of disclosing all material facts to the Court when applying for Letters of Administration and confirmation thereof. The following was observed:

“I am certain that had the Applicants been made aware of the application for the confirmation of grant by being served they would have brought to the fore their aforesaid interest in the estate of the deceased and the resultant grant would have taken care of those interests. Further had the Respondent been forthright and candid and included the Applicants as beneficiaries of a portion of the estate of the deceased as purchasers for value, the court in confirming the grant would have taken into account their interest in the estate of the deceased. As it is therefore the grant was obtained fraudulently by making of a false statement and or concealment from court of something material to the cause. The Respondent knew of the Applicants’ interest in the estate of the deceased yet she chose to ignore them completely in her petition of letters of administration intestate. She also ignored them completely when she applied for the confirmation of the grant.”
32. In the circumstances, I am satisfied that indeed the Appellant was guilty of deliberate concealment and/or non-disclosure of a material fact.



33. Counsel for the Appellant submitted even if there was a dispute over ownership of the land parcel the same should have been filed in the Environment & Land Court and not in the Succession Cause, that indeed the issue of ownership of the land as between the Appellant and the Respondent was heard and determined by a competent Court vide Kimilili Principal Magistrates Civil Case No. 25 of 2019, that the existence of parallel proceedings before the civil Court at Kimilili raises the issue of the appropriate forum for determination of the dispute, although the Succession Court has in matters of administration and distribution or Succession of estates of deceased persons, jurisdiction to deal with land as an asset for purposes of Succession the proper Court is the Environment & Land Court which has the constitutional mandate under Article 162(2)(b) of the *Constitution* to hear and determine the dispute.
34. While the said submissions reflect the correct position of the law, I have perused the Ruling of the trial Court and find that nowhere did the trial Magistrate make any determination over ownership of the land. In fact, the Magistrate stated that she was alive to the boundaries in jurisdiction between the Succession Court that she was presiding over and the Environment & Land Court. I therefore find that Magistrate was careful not to overstep her jurisdiction. This is how she pronounced herself:
- “I am aware that this Court does not have jurisdiction to determine the validity or enforceability of the said agreement. Environment & Lands Court does, it is the Court which is mandated to determine such matters. However, of relevance in these proceedings is that such material facts were never disclosed to this Court during the confirmation of the grant to enable the Court to make an informed decision on the distribution of the estate. That amounts to concealment of a material fact. That alone is sufficient to warrant an order for revocation of grants.”
35. In any event, although the Appellant has submitted that the issue of ownership of the land had already been heard and determined in Kimilili Principal Magistrates Civil Case No. 25 of 2019, strangely and curiously he did not produce the proceedings or the Judgment from that suit. All he produced was the Decree.
36. Further, the Decree produced reveals that the Defendant in that suit was one “Major Samuel Mangusho” which name is different from the name of the Respondent herein. From the evidence produced, there is indication that the said Defendant may have been the Respondent’s father. However, in these proceedings the Respondent’s father has been named as “Samuel Kitio Mangusho”. There is therefore no certainty whether the two descriptions refer to one and the same person.
37. I also notice that the Decree produced does not contain any express declaration over ownership of the land parcel. All it does is to issue a permanent injunction against the Defendant therein from encroaching and/or dealing with the parcel land.
38. As a result, I find that no sufficient material was placed before the trial Magistrate to enable her verify or confirm the allegation that the issue of ownership of the land had already been heard and determined in Kimilili Principal Magistrates Civil Case No. 25 of 2019.
39. Having found as above, I am not persuaded that the trial Court erred in any way. I will therefore not interfere with the decision.

Final Orders

40. In the premises, the Appeal is found to be devoid of merits and is hereby dismissed with costs to the Respondent.



**DELIVERED VIRTUALLY, DATED AND SIGNED AT ELDORET THIS 28TH DAY OF APRIL
2023**

.....

JOHN R. ANURO WANANDA

JUDGE

