



REPUBLIC OF KENYA



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**Tsiktseyi v Indeche & another (Civil Appeal E018 of 2021)
[2023] KEHC 3917 (KLR) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3917 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E018 OF 2021
JRA WANANDA, J
APRIL 28, 2023**

BETWEEN

ELISHA SUMBA TSIKTSEYI APPELLANT

AND

VIOLET KAMAYO INDECHE 1ST RESPONDENT

JANET MUDETSI INDECHE 2ND RESPONDENT

JUDGMENT

1. This Appeal arises from a Ruling delivered in Bungoma Chief Magistrate's Succession Cause No. 16 of 2021. By the said Ruling, having held that he lacked the pecuniary jurisdiction to continue handling the Succession Cause in which he had already issued a Grant of Letters of Administration, the Senior Principal Magistrate referred the matter to the Chief Magistrate for directions.
2. The background of the matter is that by the Petition filed in Court on 8/01/2020, the Respondents applied to be appointed the Administrators of the estate of the deceased, one Emmy Inziani Indeche who died on 27/07/2019. The Respondents described themselves as a sister and mother, respectively, of the deceased.
3. After compliance with the requisite legal processes, including gazettelement thereof, the Court, on 12/02/2020 issued the Grant of Letters of Administration to the Respondents as prayed.
4. Subsequently by the Notice of Appointment filed on 27/07/2020, the Respondents appointed Messrs Anwar & Co. to come on record for them. Together with the Notice, the Respondents also filed a Notice of Motion seeking orders that the Appellant be joined into the proceedings as an interested party and that he be barred by an injunction from accessing, transacting and/or withdrawing monies in a bank account held in the name of a company in which the deceased and the Appellant were joint shareholders.



5. However, before the Notice of Motion could be heard, on 19/08/2020 the Appellant through Messrs Kiarie & Co. Advocates filed his own Application by way of the Summons dated 14/08/2020 seeking revocation of the Grant on the ground that it was issued without jurisdiction as aforesaid. The Appellant alleged that the proceedings to obtain the grant were defective in substance, the monetary value of the assets and liabilities exceeded the monetary jurisdiction of the Court, the Grant was obtained fraudulently by the making of false statements and concealment from the Court of information that was material to the case.
6. In the Supporting Affidavit to the Application, the Appellant deponed that he was not aware of the Succession Cause until he was served with the Application seeking to have him joined thereto, that although the value of the assets comprising the estate was indicated as Kshs 16 million, the real value is in excess of Kshs 60 million and that the Respondents indicated that there were no liabilities over the estate and again that was a deliberate lie. He then exhibited copies of various documents including land search certificates, communication from banks in respect of loans advanced and also on default in repayments, notifications of sale by Auctioneers, valuations from banks, photographs of the properties and a land sale agreement.
7. These documents were meant to demonstrate, inter alia, that the properties were registered in the joint names of the Appellant and the deceased who he alleged to be his wife, that the properties were charged to banks as security for loans including a loan advanced to a company in which both the Appellant and the deceased were the directors, that the banks had threatened to sell the properties for non-repayment of the loans, the value of the properties and that such value was beyond the Court's pecuniary jurisdiction.
8. The Appellant further deponed that the Respondents knew very well that he was the husband of the deceased a fact which they concealed. He exhibited a copy of an agreement alleged to be for dowry and stated that he buried the deceased on land co-owned by himself and the deceased and that he lived with the deceased with effect from 2005 up to 2019 when she died. He also exhibited a copy of a Court Judgment in a suit which dealt with a dispute between himself and the Respondents on where the deceased was to be buried and submitted that he has the right to administer the estate of his late wife as opposed to the Respondents who are a sister and mother, respectively.
9. When the Appellant's said Application came up for hearing, noting that an issue of jurisdiction had been raised, the Magistrate directed the parties to file written Submissions on that issue. Both parties then filed their Submissions.
10. Upon considering the Submissions, the magistrate agreed that indeed, he lacked the pecuniary jurisdiction to deal with the matter. Having made such finding, he then referred it to Court 1 (Chief Magistrate's Court) for directions.
11. Although the decision on lack of jurisdiction was in his favour, the Appellant was dissatisfied with the refusal to revoke the Grant and instead, referring the matter to the Chief Magistrate for directions.
12. On the said basis, the Appellant filed the present appeal vide the Memorandum of Appeal filed on 19/03/2021. The same cited 4 grounds as follows:
 - i. That having reached the correct conclusion that he had no jurisdiction to issue the grant in the succession cause, the learned trial magistrate erred in law in failing to revoke the grant in terms with the appellants prayers in the application dated 14/08/2020.



- ii. That the learned trial magistrate erred in law when he referred the matter to the Chief Magistrate for further directions, since the Chief Magistrate could not revoke the grant that had already been issued without jurisdiction by the trial magistrate.
 - iii. That the trial magistrate erred in law when he failed to appreciate and adopt the professional valuations on record, over the properties comprising the estate and opting to accept the estimated value given by the respondents.
 - iv. That the offensive findings of the learned trial magistrate were against weight of the available evidence.
13. It was then directed that the Appeal be canvassed by written Submissions. Pursuant thereto, the Appellant filed his Submissions on 17/01/2023 and the Respondents filed theirs on 23/01/2023.

Appellants Submissions

14. Counsel for the Respondent submitted that the Appellant demonstrated that all the 3 properties showed in the Affidavit in support of the Petition as belonging to the deceased were actually co-owned with the Appellant, the Court accepted the figure of Kshs 16 million as the value of the estate, the magistrate then accepted that the figure exceeded his monetary jurisdiction and which stood at Kshs 10 million, he then held that the Court had to down its tools, but instead of revoking the grant he referred the case to Court No. 1 manned by the Chief Magistrate for directions, having reached the correct conclusion that he had no jurisdiction to issue the grant, he erred in law by failing to revoke the grant, the learned magistrate had the requisite jurisdiction to revoke the grant which he had issued without jurisdiction. He cited the decision in Kakamega HC Succession Cause No. 549 of 2016 (2020) eKLR - *In The Matter Of The Estate of Seth Namiba Ashuma.*
15. Counsel urged that the magistrate erred in law by referring the case to the Chief Magistrate for further directions as he/she would have no jurisdiction to revoke the grant that he had not himself issued, only the High Court could reverse or uphold the decision of the trial magistrate, indeed a right of appeal against the decision lay to the High Court and not to the Chief Magistrate, the order referring the case to the Chief Magistrate for further directions was made in error and should be set aside.
16. He submitted further that the magistrate erred in law when he failed to appreciate and adopt the professional valuations on record over the estate assets, the valuation by National Bank as at 24/4/2014 put the value of the land and development standing on parcel No. 2629 at Kshs. 41,500,000/= once the building was completed, the photograph at page 20 shows that the development was completed, the valuation of parcel No. 7943 by KCB as at 21/8/2019 gave a forced value of Kshs. 12 million and a market value of Kshs. 15 million, the two properties therefore had a value close to 60 million and the learned trial magistrate had no basis or proper basis to reject the professional valuations. He urged that the appeal be allowed and the grant issued on 12/2/2020 by the lower court stand revoked, with costs in both Courts.

Respondent's Submissions

17. On his part, the Respondent's Counsel submitted that a look at the Ruling will indicate that the Magistrate did not hold that he did not have jurisdiction to issue the Grant but only held that since the estimated value of the estate was Kshs 16 million, it surpassed his pecuniary jurisdiction and thus, he opted to refer the case to the Chief Magistrate for directions, a look at the proceedings will indicate that the Magistrate picked the issue of jurisdiction and gave directions to the parties on how the same was to be canvassed and that is – the parties were to file Submissions in respect of the issue of jurisdiction and



thus, being a preliminary issue and not being a substantive hearing, the Magistrate cannot be faulted for downing his tools upon finding that the value of Kshs 16,000,000/- given in the Petition exceeded his pecuniary jurisdiction and thus expecting the Magistrate to revoke the Grant upon making a finding on a preliminary objection is but expecting too much from the Court.

18. Counsel added that in any event, the substantive Application was never heard and determined as only the issue of jurisdiction was determined and thus there was no fault in the Magistrate's downing of tools as immediately he found that he lacked jurisdiction, he could not proceed to make further steps in the matter. He cited the case of *Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd* (1989) and submitted that the Court could not make further orders revoking the Grant as doing so would amount to the Court exercising further jurisdiction on the matter, jurisdiction that it lacked, having reached the correct conclusion that he had no jurisdiction, the magistrate did not err in failing to revoke the grant as the Application was not substantively heard.
19. On whether the magistrate erred when he referred the matter to the Chief Magistrate for further directions, with the magistrate's finding that he did not have the pecuniary jurisdiction to continue with the matter, he did not err as not only is the Chief magistrate vested with the pecuniary jurisdiction to handle estates worth Kshs 16 million and above subject to his limit of Kshs 20 million but also, he is the administrative head of the Magistrates in the station capable of allocating the file to another magistrate with jurisdiction and thus, other than just leaving the matter as it is, he opted to refer the matter to the Chief Magistrate for directions which included - whether the grant should be revoked or otherwise and/or whether to allocate the matter to another magistrate with pecuniary jurisdiction and thus, there was nothing wrong in the magistrate referring the matter to the Chief Magistrate as he did.
20. Counsel added that it should not escape the Court's attention that the Application was never heard and determined as the issue of jurisdiction overshadowed the hearing of the Application and since the Magistrate downed his tools for want of jurisdiction, he cannot be faulted for not revoking the Grant as not only had the Application not been heard but also, revoking the Grant would have meant that he was going against his findings of want of jurisdiction so that instead of downing his tools as he did, revoking the Grant would have meant that he needed to continue hearing the matter as he could only revoke the Grant upon hearing the parties on the Application.

Analysis & Determination

21. This being a first appeal, the Court is enjoined to analyse and re-assess the evidence afresh and reach its own conclusion (see *Kiruga vs Kiruga & Another* (1988) KLR 348 and *Selle vs Associated Motor Boat Co.* (1968) EA 123).
22. Upon considering the Memorandum of Appeal, the record and Submissions filed by the parties, I find that the following are the issues that arise for determination;
 - i. Whether the Magistrate erred by failing to revoke the grant even after finding that he lacked pecuniary jurisdiction.
 - ii. Whether the Magistrate erred in failing to adopt and appreciate the valuations on record.
23. I now proceed to analyze the issues.



i. Whether the Learned Magistrate erred by failing to revoke the grant

24. As was stated in *The Owners of Motor Vessel "Lilian s" vs. Caltex Oil (K) Ltd* [1989] KLR 1, it would be an act in vain for a Court to hear and determine a matter if it lacks the jurisdiction to do so. In the said case, the Court of Appeal guided as follows:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

25. Similarly, in *Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others* [2012] eKLR, the Supreme Court held as follows:

“A court’s jurisdiction flows from either Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred by law. We agree with counsel for the first and second Respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings Where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution confers power on Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

26. In Kenya, the Subordinate Courts, of which the Magistrates Courts are part of, are set up under Article 169 of the Constitution. In respect to this instant Appeal, the pecuniary jurisdiction of different ranks of Magistrates is spelt out in Section 7(1) of the Magistrates’ Courts Act. Section 7(1) which provides as follows:

“A magistrate’s court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed —

- (a) Twenty million shillings, where the court is presided over by a chief magistrate;
- (b) Fifteen million shillings, where the court is presided over by a senior principal magistrate;
- (c) Ten million shillings, where the court is presided over by a principal magistrate;
- (d) Seven million shillings, where the court is presided over by senior principal magistrate; or
- (e) Five million shillings, where the court is presided over by a resident magistrate.

27. In the instant Appeal, Hon. G.P. Omondi was a Senior Principal Magistrate with a pecuniary jurisdiction of Kshs 10 million. He then found that the value of the estate as pleaded before him was Kshs 16 million. It is therefore not in doubt that he had no jurisdiction to handle the matter. He was



therefore correct when he found it prudent to divest himself of the conduct of the matter for lack of jurisdiction.

28. From the Submissions of the Respondent's Counsel, it is clear that, contrary to his position taken before the lower Court, he now concedes that the Magistrate was right in finding that he had no pecuniary jurisdiction to hear the matter. The only question that therefore remains in dispute is whether, having found that he lacked such pecuniary jurisdiction, should the Magistrate have then referred the matter to the Chief Magistrate for directions as he did, or should he have proceeded to himself revoke the grant?
29. That the Magistrate's Court possesses the power to revoke Grants of Letters of Administration is also not in issue. However, since different Magistrates have different pecuniary jurisdictions depending on their rank, the rider is that first, the value of the estate the subject of the Succession Cause must be within the pecuniary jurisdiction of the particular Magistrate for him to assume the role of revoking the Grant. On this point, I quote the decision of *Mrima J in Turfena Anyango Owuor & another v Mary Akinyi Dengo* [2018] eKLR in which he stated as follows:

“ 6. Turning to the issue of the jurisdiction of the magistrates in succession matters, I believe the law as amended is so clear and settled. Initially the jurisdiction of the magistrates in succession matters was provided by Section 48(1) of the *Law of Succession Act*, Cap. 160 of the Laws of Kenya (hereinafter referred to as ‘the Act’). The said provision stated as follows: -

‘Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49 of this *Act*, a Resident Magistrate shall have jurisdiction to entertain any application other than an application under section 76 of this *Act* and to determine any dispute under this *Act* and pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed one hundred thousand shillings:

Provided that for the purpose of this section in any place where both the High Court and a Resident Magistrate's Court are available, the High Court shall have exclusive jurisdiction to make all grants of representation and determine all disputes under this *Act*.’ (emphasis added).

7. In 2015 Section 48(1) of the *Act* was amended by the enactment of the *Magistrates' Court Act*, Act No. 26 of 2015 (hereinafter referred to as ‘the new Act’). Section 23 of the new *Act* repealed the said Section 48(1) of the *Act* and substituted it with the following new subsection: -

“ 23. The *Law of Succession Act* is amended, by repealing section 48(1) and substituting therefor the following new subsection –

1. Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49, a magistrate shall have jurisdiction to entertain any application and to determine any dispute under this *Act* and pronounce such decrees and make such orders therein



as may be expedient in respect of any estate the gross value of which does not exceed the pecuniary limit prescribed under section 7 (1) of the *Magistrates' Courts Act*, 2015.' (emphasis added).

8. The effect of the aforesaid amendment was to accord jurisdiction to the magistrates to deal with applications under Section 76 of the *Act* which are for revocation or annulment of the grants issued by the magistrates' courts. I therefore hold that a Magistrates' Court has jurisdiction to deal with an application for revocation or annulment of a grant it issued subject to the pecuniary jurisdiction of that court. Since the value of the estate in Form P & A 5 was disclosed as Kshs. 200,000/= the application must be determined by the lower court."

30. Regarding revocation of Grants, Section 76 of the *Law of Succession Act* provides as follows;

"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-

- (a) that the proceedings to obtain the grant were defective in substance;
- (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;
- (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
- (d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either-
 - (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) to proceed diligently with the administration of the estate; or
 - (iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
- (e) that the grant has become useless and inoperative through subsequent circumstances."

31. The Application before the Magistrate sought for revocation of the Grant on grounds (a) and (b) above, respectively, first, that the proceedings to obtain the grant were defective in substance since the Grant was issued in the absence of pecuniary jurisdiction and secondly, that the same was obtained fraudulently by the making of false statements and concealment from the Court of information that was material to the case.



32. Noting that a challenge on his jurisdiction had been raised, the Magistrate, in his wisdom, directed the parties to first address him on the issue. My understanding is that had he not upheld the challenge on jurisdiction, then he would have permitted the parties to come back and canvass the second limb of the grounds of the Application.
33. The question is, since in this case the Magistrate upheld the challenge on jurisdiction and agreed that he lacked jurisdiction, what then did the law require him to do next? In this case, rather than there and then revoke the grant, the Magistrate opted to refer the file to the Chief Magistrate for what he described as “directions”. He did not however specify what nature of “directions” he had in mind. Was he right in doing so?
34. The Appellant’s arguments is basically that the Magistrate having held that he did not possess the jurisdiction to hear the matter and the Grant having been issued by himself earlier, it follows that the proceedings leading to issuance of the Grant were wholly “defective in substance” ab initio and the whole process was tainted with illegality. According to the Appellant therefore, the Grant was clearly for revocation, not to be referred elsewhere for directions.
35. However as already stated, under the *Magistrates’ Court Act*, Act No. 26 of 2015, a Magistrate’s Court’s power to annul or revoke the Grant is “subject to the pecuniary jurisdiction of that Court”. Technically therefore, although in this case the Magistrate is the one who had issued the Grant in the first place, it appears that the *Act* does not vest upon him the corresponding power to also annul or revoke it since his pecuniary jurisdiction was below the value of the estate. It appears therefore that the actual role of pronouncing the annulment or revocation can only be done by another Magistrate with a higher pecuniary jurisdiction.
36. From this point of view, I take the position that the Magistrate was correct in referring the file to the Chief Magistrate to give directions on the matter. The Chief Magistrate is therefore at liberty to take conduct of the matter and issue any lawful directions thereof, including, but not limited to eventually revoking the Grant. This is all within his/her powers.
37. In light of the foregoing, I find that this Appeal is premature since the Chief Magistrate is yet to give her directions. The Appellant should wait for such directions to be given. If aggrieved by the Chief Magistrate’s directions, then that will be the correct time for him to file an Appeal.
38. In the circumstances, I find that the Learned Magistrate did not err in failing to revoke the grant and instead, referring the file to the Chief Magistrate for directions.

iii. Whether the Magistrate erred in failing to adopt and appreciate the valuations on record

39. To avoid usurping the powers of the Chief Magistrate in giving directions or prejudging the outcome of his/her directions, this Court will not at this stage take a position or comment on this second issue.
40. For similar reasons, this Court also refrains from commenting on whether the proceedings leading to issuance of the Grant were defective in substance.

Final Orders

41. In view of the foregoing, this Court orders as follows:
 - i. This Appeal is hereby dismissed.
 - ii. The Chief Magistrate, Bungoma Chief Magistrate’s Court, is at liberty to take up the Court file the subject of this Appeal, namely, Bungoma Chief Magistrate’s Court Succession Cause



No. 16 of 2020 and proceed to give directions thereon as per the Ruling dated 19/02/2021 and delivered by Hon. G. P. Omondi, Senior Resident Magistrate.

iii. Each party shall bear his/her own costs of this Appeal.

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

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JOHN R. ANURO WANANDA

JUDGE

