



REPUBLIC OF KENYA

IN THE HIGH COURT

AT EMBU

CIVIL APPEAL NO. 40 OF 2018

BEATRICE MBEERE NJIRU.....APPELLANT

VERSUS

ALEXANDER NYAGA NJIRU.....RESPONDENT

(Being an appeal against the judgment and decree of Hon S.K.MUTAI (PM))

dated 17.07.18 in Chief Magistrate Succession Cause No. 227 of 2017

(Formerly Misc. Cause No. 137 of 2013)

JUDGMENT

1. This appeal is a contestation of the outcome of the lower court's suit before Hon S.K.MUTAI (PM) in Chief Magistrate Succ. Cause no. 227 of 2017. The application the subject of this appeal sought to revoke the grant issued by the court in Succession Cause No. 161 of 2011, Estate of Njiru Ngarari, on grounds that the grant was acquired fraudulently and by concealment of material facts. It was also argued that the said grant was obtained by means of untrue allegations and that the court that confirmed the grant lacked jurisdiction.

2. In support of the application, it was argued that the applicants had neither been involved in the proceedings nor were they given a share of their father's estate. According to the applicants, some beneficiaries listed in the estate were not related to the deceased. They termed the distribution as unfair and one done in contravention of the law. On those grounds, the court was urged to annul the grant.

3. The respondents defended the application by way of a replying affidavit and whilst denying the averments therein, they insisted that the applicants were aware of the succession proceedings and were present during confirmation of the grant. It was contended that the applicants had been provided for and further that the inclusion of the purported stranger in the estate was by virtue of him having purchased land from the family. The application was set down for hearing and a ruling delivered on 17.07.18 which dismissed the application for revocation of grant and upheld the confirmed grant issued on 21.12.2011.

4. The outcome of the ruling is what gave rise to this appeal. The appeal was instituted by way of a memorandum of appeal dated 14.08.2018 and which raises seven (7) grounds of appeal, as follows:

- 1) *That the learned Principal magistrate erred in law and fact by finding that the applicants failed to prove any of the grounds under which a grant can be revoked.*
- 2) *That the Learned Principal magistrate erred in law and fact by finding that all the beneficiaries were present during the confirmation of grant.*
- 3) *That the Learned Principal magistrate erred in law and fact by holding that the certificate of confirmation of the grant issued on 21/12/2011 attests that the applicants were not left out during the distribution.*
- 4) *That the Learned Principal magistrate erred in law and fact by failing to consider that the name of 3rd applicant did not feature anywhere in the certificate of confirmation.*
- 5) *That the Learned Principal magistrate erred by relying on the respondent's submissions that Cecily Wanjiku Njiru the mother of the 1st and 3rd applicants was to hold in trust for her daughter which fact was never reflected in the summons of confirmation of grant nor the certificate of confirmation grant.*

6) *That the Learned Principal Magistrate failed to consider that the distribution of the estate of the deceased was not equitably shared.*

7) *That the Learned Principal Magistrate failed to consider that the interests of all the twenty three survivors of the deceased were not addressed or reflected in the certificate of confirmation whereas they were all adults.*

5. The appellant thus prayed that the appeal be allowed, the ruling of the Principal Magistrate be set aside and the grant issued on 21/12/2011 be revoked.

6. I find it worthwhile to point out that on the 2/12/2021 the 1st appellant withdrew his appeal. At the same time, the court was informed that the 2nd respondent was deceased. The present appeal is therefore against the 1st respondent only.

7. The parties canvassed the appeal by way of written submissions. The appellant submitted that she is a beneficiary to the estate of Njiru Ngarari alias Kariukumo Ngarari by virtue of being a daughter of the deceased. She contended that the court had erred in failing to revoke the grant which had been issued to the respondent. It was argued that the chief's letter indicated that the deceased has 23 dependants but the respondent had failed to disclose this to the court.

8. On the first ground of appeal, it was submitted that the appellant was neither involved in the succession proceedings nor was she present during confirmation. She submitted that she was not provided for in the certificate of confirmation of grant and that the respondent had failed to disclose to court that the deceased had four wives. The respondent was accused of including strangers in the grant who were said to be buyers but not beneficiaries of the estate and according to the appellant, they ought not to be provided for. It was also contended that the names of the buyer one, James Nyaga Njeru had not featured in the chief's letter or the consent form and further that Form 37 was not signed by all the beneficiaries.

9. On ground 2 of the appeal, the appellant emphasized on her absence during confirmation of the grant and argued that there was no evidence of any recording of her name as according to her, had she been present the grant would not have been confirmed.

10. On ground 3 of the appeal, the court was invited to examine the confirmed grant and ascertain that Beatrice Mbeere Njiru was not provided for, despite being a beneficiary of the deceased. On ground 5 of the appeal, the trial magistrate was faulted for holding that Cecily Wanjuki was to hold her share in trust for the appellant as the issue of trust did not feature on the confirmed grant. On this ground the respondents were accused of giving contradictory information on the fact that the appellant was provided for. Ultimately, the appellant urged the court to allow the appeal.

11. The respondent filed his submissions on 6.01.2022. On grounds 1 and 2 he submitted that there was full disclosure of all beneficiaries and relied on the consent and chief's letter to support this. He further refuted the appellant's allegations of being absent and stated that not only was she present during confirmation of grant but also at the chief's office when the chief's letter was being issued. To him, the summons for revocation of grant was an afterthought as there was nothing fraudulent in the succession process.

12. The respondent is of the view that there was no error in having Cecily Wanjuki hold land in trust for the appellant. He submitted that the deceased had 8 daughters and all the 8, were not given land with the exception of Mbeere Njiru, the eldest who had been given 1½ acres, during the deceased lifetime. The respondent made reference to pages 9 to 11 of the record of appeal in which he argued that there was an agreement by the family to have daughters of the deceased get land through their mothers and that the appellant was therefore provided for through her mother's share.

13. The respondent contended that the estate had been distributed fairly and that the parties had even consented to the distribution during confirmation of the grant. It was argued that the interest of all the 23 beneficiaries had been taken into consideration and that was the reason why only the appellant was complaining. The summons for revocation of grant is said to have raised three grounds and the appellant is said not to have proven any of the grounds as per the provisions of Section 76 of the Law of Succession Act and according to the respondent the court was right in not dismissing the application for revocation. The court has been urged to dismiss the appeal as it lacks merit.

14. I have considered the appeal as filed, the lower court record, and the rival submissions filed by both parties. The suit before the lower court involved beneficiaries to the estate of Njiru Ngarari alias Kariukumo Ngarari alias Njiru Ngarari. The deceased is said to have had four wives and 19 children in total 23 dependants. From the court record, an application for grant of letters of administration intestate was filed on 21st September 2011 to which letters of administration were issued to Alexander Nyaga Njiru and Annah Weveti Njiru. The grant was subsequently confirmed on 21st December 2011 and the estate was distributed and the beneficiaries given their respective shares. The appellant denied her involvement in the succession process and the mode of distribution of the estate.

15. This being a first appellate court, it is duty bound to re-evaluate, reanalyse and reconsider the evidence before it and come up with independent findings of course bearing in mind that it did not have the advantage to see witnesses testifying, unlike the trial court and therefore give due allowance for that. See: **Selle & Another V Associated Motor Boat Company Ltd & Others, [1968] EA 123** and **Peters V Sunday Post Limited, [1958] EA 424**.

16. The appeal before me raises seven grounds of appeal. On the first ground the appellant faulted the court for failing to find that she had proven the grounds for revocation of grant. The threshold for revocation of grant is provided under Section 76 of the law of Succession which states 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;

17. From the above provision it is clear that a party seeking to have a grant revoked must prove either, or, all the grounds listed under Section 76 of the Law of Succession Act. The applicants before the trial court had sought for revocation of grant on grounds that the grant had been obtained fraudulently and on concealment of material facts. They also argued that they had not been involved in the succession process, had not signed the documents before the courts and were not present during confirmation of the grant.

18. On the issue of fraud, it is trite law that allegations of fraud are serious allegations which need not only be pleaded but be strictly proven. A party alleging fraud has the burden of proving such fraud and the standard of proof is higher than that in civil cases, which is on a balance of probability but lower than that in criminal cases which is beyond reasonable doubt.

19. The suit before the lower court had proceeded by way of oral hearing where one Joseph Kithome Njiru testified in support of the summons for revocation of grant. I have perused his testimony, the court record in its entirety and the submissions filed before me in the appeal, I note that despite the allegations of fraud having been made by the appellant, no evidence has been adduced to prove such fraud. I therefore find that the grant was not obtained fraudulently.

20. The appellant has further submitted that there was concealment of material fact by the respondent who is said to have failed to disclose all the beneficiaries before the court. I have come across a chief's letter dated 15th September 2011, which lists 23 dependents of the said estate. The same dependants are equally listed in the summons for confirmation of grant and in the letters of administration intestate. I also find that this ground too has not been proven to warrant revocation of the grant.

21. The other ground for revocation of the grant was that the appellant was not involved in the succession proceedings and did not sign the documents granting consent for issuance of the letters of administration or the consent for confirmation of grant. Joseph Kithome Njiru who had testified before the lower court had stated that his family, the fourth house had discovered that the estate had been distributed after the succession proceedings had been concluded. It was his testimony that he never signed any of the documents before the court and was not present during confirmation of the grant.

22. The law under Rule 26(a) and (2) of the Probate and Administration Rules provides as follows:-

26. (1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.

(2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require."

23. From the reading of the above rule, it is mandatory for every applicant who wishes to be an administrator to an estate to give notice to every person entitled in the same degree as or in priority to the applicant. Further that, such person of equal or lower priority must give consent or renunciation during filing of succession cause.

24. The appellant has denied giving her consent under Form 38. I have perused the consent form and indeed the appellant together with other beneficiaries did not sign the said form. That notwithstanding, it is clear that the beneficiaries including the appellant herein though being of same degree or equal to the administrators by virtue of Rule 26(2) of the Probate and Administration Rules, did not give their consent or renounce their rights to petition for the grant.

25. The court in the case of Antony Karukenya Njeru v Thomas M. Njeru [2014] eKLR in Meru Succession Cause No. 663 of 2011 held that where persons of equal priority by virtue of Rule 26(2) of the Probate and Administration Rules do not give consent or renounce their rights to petition for the grant then the proceedings to obtain the grant are rendered defective in substance and the grant becomes one obtained by means of untrue allegation of facts essential in point of law.

26. There is also the issue that the appellant has raised of not giving consent during confirmation of grant. Under Rule 40 (8) of the Probate and Administration Rules, it is also a requirement for summons for confirmation of grant to be filed together with Form 37 in which parties give consent to confirmation of the grant. From the pleadings before the court I have not seen such consent filed together with the summons for confirmation of grant as required by the law. I, however, note that the court record indicates that all beneficiaries were present during confirmation of the grant. Assuming that the beneficiaries were indeed present as indicated by the court what is the implication of such presence in the absence of the consent as is required under Rule 40(8) of the Probate and Administration rules? Is the filing of the consent mandatory under the law?

27. The provisions of **Rule 40(8) of the Probate and Administration** rules provide as follows;

"Where no affidavit of protest has been filed the summons and affidavit shall without delay be placed by the registrar before the court by which the grant was issued which may, on receipt of the consent in writing in Form 37 of all dependants or other persons who may be beneficially entitled, allow the application without the attendance of any person; but where an affidavit of

protest has been filed or any of the persons beneficially entitled has not consented in writing the court shall order that the matter be set down as soon as may be for directions in chambers on notice in Form 74 to the applicant, the protester and to such other persons as the court thinks fit”.

28. In **Succession Cause No. 172 OF 2008, Estate Ibrahim Likabo Miheso (Deceased) [2020] eKLR** the court while addressing the issue on failure to file Form 37 stated as follows:

“I have looked at the record,the administrator did not file a consent on distribution, in Form 37, as contemplated by Rule 40(8), duly signed by all the survivors. Rule 40(8) is in mandatory terms. The filing of Form 37, duly executed by survivors guides the court as to whether the survivors are aware of the application for confirmation of grant, and if they are, it gives an indication of those who support the application, and who do not. It is from the contents of Form 37 that the court is able to pick out the survivors who it may have to direct to file affidavits of protest. The administrator did not comply with Rule 40(8).

29. I agree with the court herein that the filing of a consent under provisions of Rule 40(8) is mandatory, and before a court can proceed to hear an application for confirmation of the grant, there is need to have a written consent duly executed by all beneficiaries consenting to the confirmation of the grant. In my view, proceeding to confirm the grant in the absence of Form 37, is simply unprocedural and against the law as it is a mandatory requirement before hearing of the confirmation for grant. The filing of Form 37 aids the court in determining whether the beneficiaries are aware of the proceedings before it and whether they have consented to the said proceedings.

30. Further, the court in **Succession Cause No. 878 OF 2014, Estate of Aomo Oyowe (Deceased) [2017] eKLR** opined that failure to observe the mandatory provisions of Rule 26 (1) and (2) and Rule 40 (8) of the Probate and Administration Rules rendered the proceedings to obtain the grant defective in substance.

31. It is my finding that the entire succession proceedings are defective for want execution of Form 37 by all beneficiaries and for failure to file consent as required under Rule 40(8) of the Probate and Administration Rules. The court though having stated that all beneficiaries were present during confirmation of the grant, did not note down the names of the said beneficiaries and considering that the appellant herein has denied being present during confirmation of the grant, with all the shortcomings in the process occasioned by failure to obtain consent of all beneficiaries in the two occasions as elaborated above, I find that the grant herein is a good candidate for revocation as the proceedings were defective in substance.

32. In the grounds of appeal, the appellant has also argued that the court erred in holding that she was not left out during distribution of the estate and that the court ought to have considered that she did not feature in the certificate of confirmation of grant. I have looked at the certificate of confirmation of grant, which is the subject of dispute in this appeal, I agree that the appellant, Beatrice Mbeere Njiru has not been provided for.

33. According to the respondent, the said appellant is provided for through the share granted to Cecily Wanjuki Njiru. It is said that the family had agreed that the respective mothers to each home are to hold the land given to them in trust for their daughters. Though this is pleaded, I have not come across any agreement and/or evidence to that effect. I note that the grant as extracted does not reflect any trust whatsoever and the respective mothers of the households are holding the property in their personal capacities and not in trust for their daughters.

34. For the reason that the confirmed grant does not entitle the daughters to any share of the properties held by their mothers, I find that, indeed Beatrice Mbeere Njiru and all other daughters with the exception of Annah Wambeti Njiru have not been provided for in the estate.

35. In the end, I hereby allow the appeal and set aside the ruling of the principal magistrate delivered on 17.7.2018. The effect of this is that the grant is hereby revoked. Each party shall bear its own costs of the appeal.

36. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 16TH DAY OF FEBRUARY, 2022.

L. NJUGUNA

JUDGE

.....for the Appellants

.....for the Respondent