



**Mucena & another v M’Mukuthuria (Civil Appeal E053 of 2021)
[2022] KEHC 10712 (KLR) (25 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 10712 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E053 OF 2021
PJO OTIENO, J
MAY 25, 2022**

BETWEEN

JANE KINYA MUCENA 1ST APPELLANT

JAPHET KITHINJI KAIRITHIA 2ND APPELLANT

AND

ROSE KARIMI M’MUKUTHURIA RESPONDENT

*(An appeal from the Ruling of Hon. P.M Wechuli (S.R.M) in
Tigania Succession Cause No. 73 of 2017 delivered on 13/4/2021)*

JUDGMENT

1. The trial court on December 28, 2017 issued letters of administration intestate to the appellants herein, which were confirmed on August 1, 2018. Subsequent to such confirmation, Rose Karimi M’Mukuthuria, the respondent herein, objected to the making of the grant through her application dated March 18, 2021 and the trial court through its decision of April 13, 2021, allowed that objection and annulled the grant.
2. Aggrieved by the said decision annulling the grant, the appellants lodged a memorandum of appeal in this court on April 19, 2021. The complaint therein is threefold that; the trial court erred in law and fact by dealing with the issue of revocation/annulment of grant in total disregard of the provisions of section 76 of the *Law of Succession Act*, yet it lacked the jurisdiction to do so; the trial court erred in law and fact in allowing the applicant to file a cross petition when the letters of administration intestate issued on December 28, 2017 and confirmed on August 1, 2018 were still in place; the trial court erred in law and fact in allowing a notice to objection of a grant to be made when the period for lodging it had since expired.



Submissions

3. Upon the directions by the court on June 29, 2021, the parties filed their submissions in respect to the appeal on November 4, 2021 and November 18, 2021 respectively. The appellants submitted that the period within which the respondent was to file an objection had lapsed, since any objection ought to have been made before the issuance of the letters of administration intestate. In their view, the respondent's application was incompetent and the trial court erred in making a finding that the objection was properly before court. They accused the trial court of adopting a procedure that was contrary to the law as set out in the *Law of Succession Act* and the *Probate and Administration Rules* adding that the trial court lacked the jurisdiction to annul the grant as those powers were a reserve of the High Court, in line with rule 44(1) of the *Probate and Administration Rules*. They termed the trial court's decision as being contradictory as the court annulled the letters of administration confirmed on August 1, 2018 yet the respondent had sought for annulment of the letters of administration issued on December 28, 2017. They faulted the trial court for directing the respondent to file an objection to the making of a grant, cross petition and answer to petition when the letters of administration intestate confirmed on August 1, 2018 were already in place and distribution had also been done. They submitted that the cross petition, objections to the making of a grant and answer ought to have been made before the grant of letters of administration intestate had been issued, in accordance with the provisions rule 17(5)(6) of the *Probate and Administration Rules*. They urged the court to set aside the trial court's decision of April 13, 2021 and reinstate the annulled letters of administration intestate. They relied on *Curryian Okumu v Perez Okumu & 2 others*[2016]eKLR and *In re Estate of Ruth Mwangeli Mutua(Deceased)*[2016]eKLR to support their submissions that the objection was belated and thus incompetent.
4. For the respondent, submissions were offered to the effect that, although the application was styled as a notice of objection to the making of a grant, the main prayer sought therein was for revocation of the grant issued to the appellants, and the trial court had no doubt that it was handling an application for revocation of grant. She submitted that the trial court, being alive to the provisions of article 159 of the *Constitution* on access to justice, rightfully heard the parties on merits notwithstanding the form of the application presented to court, and could not be faulted for exercising its discretion judiciously. She submitted that the trial court derived its jurisdiction to hear an application for revocation of grant from section 48 of the *Law of Succession Act* to which provision, the stipulations of rule 44 of the *Probate and Administration Rules* was subservient then cited *Trufena Anyango Owuor & Anor v Mary Akinyi Deng* (Misc Succ No 18 of 2018)}-[2018] eKLR for the proposition that the magistracy has jurisdiction to entertain and determine applications for revocation and urged the court to dismissed the appeal with costs.

Analysis and Determination.

5. The duty of this court as the first appellate court is to, revisit the facts as presented in the trial court, analyse the same and arrive at its own independent conclusions, but always remembering that, the trial court had the advantage of seeing the witnesses testify. See *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR.
6. From the grounds of appeal, I discern the issues for determination to be whether the trial court had jurisdiction to handle the application for the annulment of the grant, whether such annulment was merited and if the application was brought within the statutory timelines.
7. On the last issue, I note that although the applicant's application was coached as an objection to the making a grant, the substantive prayer sought therein was for revocation of the grant under section 76



of the Law of Succession Act. This court thus proceeds from the understanding that the prayer before the trial court was the annulment/revocation of the grant. An application for revocation, unlike that for objection, can be brought at any time. Section 76 of the Law of Succession Act dictates so in these words: -

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—

8. I consider the trial court to have been entitled to deal the application as one seeking annulment/revocation. However, having appreciated the application as seeking revocation, the court ought to have stopped at that juncture and not to consider issuing orders purporting to perpetuate an objection. In proceeding as it did the court erred in that the time for lodging an objection was long passed and any such objection was thus incompetent.
9. On the jurisdiction of the court, the Magistrates' Court derives its jurisdiction to hear and determine applications for revocation of grant from section 23 of the Magistrates' Court Act, No 26 of 2015 which provides: -

“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.”

10. From the papers filed before the trial court, it is evident that the estate was estimated to be worth Kshs 1,000,000. From the submissions filed and affidavits sworn, the attack on jurisdiction seems anchored upon the provisions of rule 44 of the Probate and Administrative Rule which demand that applications to revoke a grant issued by the magistrate's courts be handled by the High Court. Such a conclusion can only be drawn if one was to read the rule in isolation from the substantive statute. It is however trite that in the event of a conflict between the statute and a subsidiary legislation, the statute must prevail. It thus follows that the law, as amended, gives to the magistracy full jurisdiction to entertain every matter succession only subject to the statutory prescribed territorial and pecuniary jurisdiction. Here there was no challenge along those lines for which reason, I do find that the trial court had the requisite jurisdiction to hear and determine the application for revocation of the grant.
11. On the standing of the respondent as an objector at trial, it is not in dispute that the 1st appellant and the respondent are the wife and the mother to the deceased herein respectively. A look at the introductory letter from Jeremy Kirema, the chief of Mbeu Location, reveals that the deceased herein was survived by the 1st petitioner, Pamela Kamathi, Mercy Nkatha, Ezekiel Mutui and Lililian Kianira. On December 22, 2017, a notice inviting objections to the making of the grant to the petitioners was published in the Kenya gazette. When no such objection was forthcoming, the trial court proceeded to issue letters of administration intestate to the petitioners on December 28, 2017. The beneficiaries listed in the chief's letter appeared in court on July 17, 2018 and after informing the court that they were all agreeable to the mode of distribution proposed by the petitioners, the trial court duly confirmed the grant.
12. According to the respondent, the sole reason she sought for the annulment of the grant was because land parcel No Meru/mbeu 1/1347 (hereinafter called the estate property), having been registered in the name of the deceased to hold in trust for self and the respondent, was supposed to be shared between herself and the deceased herein. On the other hand, the 1st petitioner contended that the estate



property was to be shared between herself and her children. I do find that in distributing the estate the court was properly guided by relying on the introduction letter by the chief

13. The subject property was registered in the name of the deceased herein on July 27, 2016 and a title deed was subsequently issued to him on September 23, 2016. As at the date of his death, the property was not encumbered and thus was the free property.
14. The contention by the respondent that the estate property was registered in the name of the deceased to hold in trust is in my assessment is a claim to land and title to land which lies not with the succession court but with the Environment and Land Court. It was not within the court's jurisdiction to entertain by inviting proof by way of an objection. If, however the respondent was asserting being entitled as a beneficiary, her claim rested in an application for reasonable provision¹ and not in annulment of the grant
15. The deceased herein died intestate and was survived by a spouse and children. Therefore, the applicable provisions of the law are thus section 35 of the Law of Succession Act. However in this cause, all the beneficiaries signed a consent assenting to the mode of distribution as proposed by the petitioners, which was duly adopted by the court, and the grant was confirmed in line with those terms. I do find that the grant was properly confirmed.
16. The court has said and found that the application was for revocation of the grant. The reasons advanced was that the fact that the respondent was the mother to the deceased and that the cause was filed and pursued secretly besides the fact that the land was held in trust for her. It has been found by the court that the claim for trust does not lie in a succession cause. That leave the other two ground which I consider not to merit annulment of a grant because, the rights of a mother are subservient to those of a spouse.
17. It would appear that the grant was revoked to facilitate the hearing of the respondents claim on the land based on trust. That is what the trial court alluded to at the last paragraph of page 8 of the judgment of the trial court. That was in deed an error in that none of the grounds for revocation was found to have been established. When not established the onus had not been discharged and the application was bound for dismissal.
18. Having said that, I find that the trial court indeed erred when it allowed the respondent's objection whose effect was to revoke the grant, on grounds which were not envisaged under section 76 of the Law of Succession Act.
19. In the end, I find merit in the appeal which is hereby allowed to the extent that the order revoking the grant is set aside entirely but with each party bearing own costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA, ONLINE, THIS 25TH DAY OF MAY 2022.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

No appearance for the Appellants

Ringera for the Respondent

Court Assistant: Mwenda

¹ Section 26, of the Act

