



Mukwairu & 2 others v M'Thaara & another (Miscellaneous Succession Cause 12 of 2020) [2022] KEHC 11402 (KLR) (28 July 2022) (Judgment)

Neutral citation: [2022] KEHC 11402 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
MISCELLANEOUS SUCCESSION CAUSE 12 OF 2020**

LW GITARI, J

JULY 28, 2022

BETWEEN

PHILLIS MUKWAIRO 1ST APPLICANT

LUCY NTUE PATRICK 2ND APPLICANT

CECILIA NKINGA BEDFORD 3RD APPLICANT

AND

SILAS NJERU M'THAARA 1ST RESPONDENT

M'RITHAA M'THAARA 2ND RESPONDENT

JUDGMENT

1. This cause relates to the estate of the late Jediel M'Thara alias Ileri Kiao (deceased) who died intestate in 1993.
2. The present application before this court is the one dated February 12, 2020 that seeks for the revocation and/or annulment of the grant of letters of administration intestate that was issued to the 1st respondent on November 18, 2008 and confirmed to both the 1st and 2nd respondents on October 9, 2018 vide Chuka Principal Magistrate's Court Succession Cause No 121 of 2008.
3. The application is premised on the grounds that:
 - a. The trial magistrate that issued the grant acted without jurisdiction making the grant to be null and void for all intent and purposes.
 - b. The procedure to obtain the grant was defective in substance.
 - c. The grant was obtained fraudulently by making a false statement or by the concealment from the court of something material to the case.



- d. 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.
4. The application was supported by the affidavit sworn on February 12, 2020 by the 1st applicant Phillis Mukwairu on behalf of all the three applicants.
5. The 1st applicant deposed that the three applicants herein are daughters of the deceased. She concedes that the applicants were informed of the filing of the Chuka Principal Magistrate's Court Succession Cause No. 121 of 2008 but contends that the respondents failed to engage the applicants in the filing, prosecution, and confirmation of the grant. The applicants further contend that they did not execute form P&A 38 to give authority to the respondents to petition the court for the letters of administration in respect of the deceased's estate and that neither did they consent to the mode of distribution.
6. It is the applicants contention that they were not in court when the grant was being confirmed, a feat that was in contravention of rule 26(1) of the *Probate and Administration Rules* that require all beneficiaries to be present in court at the time of the confirmation of the grant. The applicants further contend that the grant disinherited the daughters which was outright in contravention of the *Law of Succession Act* and the *Constitution* of Kenya (2010). According to the applicants, the failure by the respondents to disclose that they had sisters, who were the deceased's daughters, caused the Estate of the deceased to be distributed fraudulently.
7. The court in Chuka Principal Magistrate's Court Succession Cause No 121 of 2008 at one point advised that all the children of the deceased should retire at home and agree on the mode of distribution. According to the applicants, the meeting failed as the children could not agree on the mode of distribution of the estate. As such, the applicants contend that the grant was made by concealment of material facts and should therefore be revoked.
8. The 1st respondent opted not to respond to the application. On the other hand, the application was opposed by the 2nd respondent vide his replying affidavit sworn on August 3, 2020. He deposed that the Applicants were all long aware of the existence of the instant cause and even participated in the proceedings. According to him, the Applicants never had an interest in the estate and the present application is only meant to defeat the judgments delivered against their brother, the 1st respondent. The 2nd respondent thus prayed for the present application to be dismissed with costs.

Background:

9. This matter was filed in the Principal Magistrate's Court at Chuka, Succession Cause No 121/2008. The 1st respondent Silas Njeru M'Ithara is the one who petitioned the Court for the grant of letters of administration intestate in the estate of the deceased. The estate of the deceased was comprised of Land Parcel No Mwimbi/S Mugumango/139 and Mwimbi /S Mugumango/984. The beneficiaries were listed as follows:-
 - i) Silas Njeru M'Ithara - son
 - ii) Lucy Ntue - daughter
 - iii) Nkonge Jediel - son
 - iv) Philis Mukwairu - daughter
 - v) Cecilia Nkiuga - daughter
 - vi) Lucy Mukwanyaga - daughter



- vii) Veronica Kanyua - daughter
10. Vide a certificate of rectified confirmation of grant dated 11/10/2018, the estate was distributed as follows:
- 1) M'Rithaa Thara -Mwimbi/Mugumango/139 - 2.5 acres
 - 2) Patrick Kathenya - Mwimbi/Mugumango/139 – 1 acre
 - 3) Silas Njeru M'Rithaa- Mwimbi/Mugumango/139 - 3 acres
11. This distribution was ordered by NN Murage, Resident Magistrate Chuka, in her Judgment delivered on 23/6/2020. There was an appeal against that Judgment, High Court Civil Appeal No 33/2015 and the Judgment was delivered by Justice Mabeya on 9/6/2016. The Judge upheld the decision of the trial magistrate and did not interfere with the distribution.
12. The applicants have moved to this court seeking orders that the said grant be revoked. I have taken liberty to peruse the lower court file No.121/2008. In the principal Magistrate's Court at Chuka in the matter of the estate of Jediel Thaara alias Ileri Kiao. I have noted that Silas Njeru M'Thara was the Petitioner. A protest was filed by M'Ritha Nkonge, Festus Riungu M'Thaara and Patrick Kathenya Rubara against the confirmation of grant and the mode of distribution of the estate claiming that they were entitled to a share of the estate as sons of the deceased. The protest was allowed and 1st protestor was joined as a co-administrator. The record shows that Phillis (Peris)_Mukwairu 1st applicant testified as a witness in the protest.
13. The record also shows that all the applicants were listed as beneficiaries who survived the deceased. The grant was confirmed as stated above. The court found that the married daughters were not interested in getting a share of the estate the appeal No 33/2015 (Formerly Meru HCCA 68/2010). The appellant was Silas Njeru M'thara and the respondent was M'Rithaa Thaara. The appeal proceeded before Justice Mabeya who pronounced his Judgment on 9/6/2016 dismissing the appeal with costs.
14. It is against this background that the applicants have come to this court. The applicants and the respondents filed submissions.

Applicant's submissions:

15. The applicants have raised the issue of jurisdiction and are contending that the trial magistrate did not have the requisite pecuniary jurisdiction to hear and determine Chuka Principal Magistrate Succession Cause No.121/2008 and that everything accruing from the orders by the trial magistrate are null and void for all intents and purpose. They rely on *Owners of Motor Vessel Lilians- v- Caltex Oil (K) Limited* (1989) KLR where it was held that jurisdiction is everything and without it the court marks no more step. The applicants have also raised the issue that under section 76 of the *Law of Succession Act*, (cap 160 Laws of Kenya) there is no limitation of time within which to file a summons for revocation of grant.
16. The applicant contend that they were involved when the grant sought to be revoked was confirmed. The applicants have also raised the issue of Historical Injustice against the female gender and in particular married daughters who were made to believe that they were not entitled to a share of the estate. The respondent also contend that the principle of res judicata does not apply in this succession cause. The applicants therefore contend that they have made a case for the grant to be revoked.



Respondent's Submissions:

17. The respondent submits that the issues raised by the applicants were heard and determined in Chuka High Court Civil Appeal No 33 of 2015, formerly Meru High Court CA No 68/2010 vide the Judgment dated 9/6/2016 which dismissed the appeal for lack of merits. That the 1st respondent filed an application for review which was dismissed. The respondent had relied on documents which the applicants are relying on this court. That thereafter the 1st respondent file a claim in Magistrate's Court ELC case No 243/2018 which was dismissed and as if that was not enough he appealed to the ELC 05/2019 which was summarily dismissed.

Analysis and Determination:

18. The issues which arises for determination is whether the matter is properly before this court. From the back ground I have given above. This matter was heard by trial court. An appeal was heard by Justice Mabeya who considered the issue of jurisdiction and the claim by the applicants and gave a determination dismissing the contention that the lower court had no jurisdiction. He also held that the applicant had stated that they were married and had no interest in the estate.
19. I have no jurisdiction to enquire into or review the propriety of the decision of a Judge who is of concurrent jurisdiction as myself our system of the court is hierarchical in nature, Judges of concurrent jurisdiction do not possess supervisory jurisdiction over each other. No Judge of the High Court can superintend over a fellow Judge of that court or of the superior courts of equal status. The constitution has expressly stated the supervisory powers of the High Court. At article 165(6) it states:-
- “The High Court has supervisory jurisdiction over the sub-ordinate courts and over any other person or body or authority exercising a juridical or quasi judicial function but not over a superior court.”
20. In Civicon Limited –v- Kenya Revenue, Justice Muriithi while considering a matter where parties were attempting to re-open and re-litigate decided issues stated as follows:-
- “I agree with the judicial policy that is variously set out by the authorities relied by 2nd respondent, Peter Ng'ang'a Muiruri –v- Credit Bank Ltd & another, Court of Appeal Civil Appeal No. 03/2006 and Ventaglio International SA & another -v- The Registration of Companies and Another, Nairobi HC Constitutional Petition No.410 of 2012 (per Lenaola J), that the High Court's Constitutional Division, in deed any other Division, cannot supervise any other superior court of concurrent jurisdiction. The supervisory jurisdiction is over Su-ordinate courts under article 165(6) of the Constitution.
21. I also consider that it is an abuse of court process for a litigant to seek to obtain through a constitutional Petition or in deed any other court process before the same court of concurrent jurisdiction a different decision from one already rendered by the court in other proceedings over the same matter. The aggrieved party must be contented with the devices of appeals or review of the decision already delivered by the court but cannot be permitted to re-agitate the matter through a Constitutional Petition or other originating proceedings see Beta Healthcare International Ltd –v-Commissioner of Customs and 2 others Nairobi H.C Petition No.125 of 2010. (per Majaja J.”
22. I am in agreement in this holding. A Judge of the High Court can not purport to supervise the work of a Judge of the High Court who is a Judge of concurrent jurisdiction.



23. Although the applicants have submitted that res Judicata does not apply in succession matters, what is raised is not res judicata, it is where there was a determination of the issues the applicant have raised and they did not appeal. That Judgment is still valid but the applicant are asking this court to give a determination on issues which were determined by Justice Mabeya. The applicant did not appeal against the Judgment by Justice Mabeya. They are trying to re-open the matter and re-ligate the issues before this court. I find that they cannot do that. To do so is to abuse the process of the court and asking the Judge to do what she is not allowed to do by the law. I find that the applicants are not properly before this court. The issue of jurisdiction of the trial court was determined by Justice Mabeya in Chuka H.C Civil Appeal No.33/2015. The Judge stated.:

“For the foregoing reasons, and for the reason that the issue of jurisdiction was not raised, either before the trial court or in the memorandum of Appeal, I reject the submissions that the trial court did not have jurisdiction to deal with the matter.”

24. As regards the claim by the applicants, the Judge started as follows:-

“In the present case, the court found as a fact which was never challenged that all daughters of the deceased did not wish to participate in the distribution.”

25. From the record the applicant Phillis Mukwairu appeared before the trial magistrate and gave evidence. Her supporting affidavit that she was not involved borders on falsehood. This court cannot re-open the matter by way of a summons under section 76 of the *Law of Succession Act*. The only option that is open after a Judgment on appeal was delivered was to appeal to the Court of Appeal. The application was not brought in good faith as there were material none disclosure and falsehoods in the affidavit of the 1st applicant. The applicants have not come to court of equally with clean hands. The Judgment on appeal determined the rights of the parties in these proceedings. The application is an afterthought which this court cannot entertain. It is not properly before this court.

a. Revocation of grant

26. Revocation of grants is governed by section 76 of the *Law of Succession Act* which 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 order or allow; 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.”
27. In view of the reasons given as to why the present application is not properly before this court, I find that the applicants failed to show or prove that there was any substantive defect in the proceedings to obtain the grant.
28. What has come out clearly on record is that the beneficiaries participated in the proceedings. No evidence has been tendered to prove that the proceeding to obtain the grant were defective. All the parties were heard, a ruling was delivered on December 18, 2002 and final Judgment was delivered on 23/6/2010. There was no prove that the grant was obtained fraudulently or through concealment from court of something material to the case. The beneficiaries were disclosed. The 1st applicant admitted that when she gave her evidence in this court that they were summoned to court by the 1st respondent. They were told to go and agree and when they failed to agree, the protest was heard and determined. There is every indication that the applicants participated in the proceedings.
29. I find that the applicants have not proved any of the grounds under section 76 of the Law of Succession Act to warrant this court to annul or revoke the grant.

Conclusion:

30. I find that:-
- 1) The application is not properly before this court.
 - 2) The summons for revocation of grant is without merits and is dismissed.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 28TH DAY OF JULY 2022.

L.W. GITARI

JUDGE

28/7/2022

Ruling has been delivered in open court.

L.W. GITARI

JUDGE

28/7/2022

