



**In re Estate of Onesmus Thiongo alias Onesmus Thiongo Kirundo
(Deceased) and Mbutia S/O Karundo alias Daudi Mbutia (Civil Appeal
E085 of 2020) [2022] KEHC 11541 (KLR) (27 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 11541 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E085 OF 2020
MM KASANGO, J
JULY 27, 2022**

BETWEEN

CHARLES KIRAGU MBUTHIA 1ST APPELLANT

JOSEPH KARANU THIONGO 2ND APPELLANT

AND

JAMES NGANGA MBUTHIA 1ST RESPONDENT

VIRGINIA WAMBUI MBUGUA 2ND RESPONDENT

AND

ROSE MBUTHIA WANJIRU INTERESTED PARTY

(Being an appeal from the Ruling of the Chief Magistrate's Court at Kiambu (Hon. S. Atambo, SRM) dated 27th May, 2020 in Kiambu Misc. Application No. Civil Case No. 44 of 2016)

JUDGMENT

1. If there was a case to which the terminology “Let sleeping dogs lie” applied, in my view, this is indeed one such a case. The hearing before the trial court sought revocation of grant which dates back to succession filed in 1970.

Background

2. David (daudi) Kirundo deceased was grandfather of all the parties involved in the matter before me. That grandfather was the owner of the property whose then title number is not disclosed in the proceedings before court. The grandfather was father of Onesmus Thiongo deceased (hereinafter Onesmus). Daudi Mbutia deceased hereinafter Daudi, and Peris Wanjiru Kirundo, deceased



- (hereinafter Peri). Onesmus and Daudi filed a succession in respect to the estate of the grandfather. That succession cause was No. 29 of 1970.
3. Onesmus and Daudi passed away. Two succession causes were filed in respect to their two estates by their children. Kiambu Chief Magistrate's Court Succession /Cause No. 233 of 2011 was in respect of the estate of Onesmus. Kiambu Chief Magistrate's Court Succession Cause No. 234 of 2011 was in respect to the estate of Daudi. Both those succession causes were confirmed before that court.
 4. The children of Peris filed before Kiambu Chief Magistrate's court Misc. Cause No. 44 of 2016. In that cause, they sought revocation of the confirmed grants in succession causes 233 and 234 of 2011, both relating to the estates of Onesmus and Daudi. The application is supported by the affidavit of the children of Peris.
 5. In that affidavit in support of revocation, it is stated that, in 1970, Onesmus and Daudi at the death of the grandfather secretly and fraudulently transferred the property of the estate of the grandfather into their names. That it was not until the death of Daudi on 28th February, 2000 that Peris, their mother discovered "the secret transfer" of the grandfather's property. Peris reported the matter to the chief and the chief convened a family meeting which after deliberations decided the properties be shared equally between the "Natural Children" of the grandfather. That despite the said resolution, the children of Onesmus and Daudi failed to take steps to actualize that resolution.
 6. The children of Onesmus, Charles Kiruga Mbuthia and Daniel Mbuthia Thiongo filed replying affidavit whereby they faulted the revocation application for being directed at the Succession Causes of the estates of Onesmus and Daudi and not at the Succession Cause of the grandfather's estate. They further depend that the succession during the period when their grandfather passed away was governed by customary law.
 7. The learned trial magistrate at the hearing of the revocation received oral evidence in support and in opposition.
 8. The children of Peris relied on the evidence of James Nganga Mbuthia. He confirmed that he seeks revocation of the confirmed grants of Succession Cause Nos. 233 and 234 of 2011 which related to parcels Nos. Ndumberi T.188 and 294.
 9. According to the evidence of James Nganga Mbuthia, those parcels of land should be shared equally between the descendants of Onesmus, Daudi and Peris.
 10. In opposition to the application for revocation, the court received the evidence of Charles Mbuthia. He stated that prior to filing Succession Causes Nos. 233 and 234 of 2011, they held a family meeting where they agreed to allocate Peris part of their father Onesmus and Daudi properties by giving her one acre. That subsequently the family of Peris renegade that agreement.
 11. On being cross examined, Charles Mbuthia stated that the property was originally owned by their grandfather, and on his demise, a succession cause was in 1970 filed by Onesmus and Daudi. When that succession was filed in 1970, their grandmother was alive and neither she nor Peris or other female children of the grandfather were involved in the succession. The titles Ndumberi/294 and T188 were issued to Onesmus and Daudi in 1971. He finally confirmed that no one of the children of Onesmus or Daudi was claiming the portion earmarked for Peris.
 12. The trial court after receiving that evidence delivered a ruling dated 27th May, 2020 which ruling is the subject of this appeal.



13. The trial court after in-depth consideration of the evidence tendered reproduced section 76 of the Law of Succession Act, Cap 160 and stated thus:-

“Applying the test of law in Section 76 of the Law of Succession Act, there is no dispute whatsoever that the parties herein are related as cousins and that the original registered owner of the suit properties was their grandfather – David Kirundo alias David Karundo who died in the year 1965. The undisputed evidence on record is that their late grandfather had married one wife, their grandmother – the late Rhoda Wambui Kirundo who died in the year 1981. It is also not in dispute that at the time of the death of their grandfather he was survived by his wife Rhoda and their children but his two sons now the late James Mbuthia and the late Onesmus Thiongo went ahead to file Succession Cause No. 29 of 1970 without involving their mother who was alive then, their sister and their other siblings claiming that customary laws did not allow them to inherit in the estate of their husband and father respectively. The evidence on record further reveal that the two concealed the fact of filing the said succession cause and more so, they concealed from the court the fact that their mother was alive hence entitled to be the administrator of her late husband’s estate. The question then is, did the said late James Mbuthia and the late Onesmus Thiongo obtained the certificate of confirmation of grant in succession Cause No. 29 of 1970 fraudulently? Further, did Charlesa Kiragu Mbuthia and Joseph Karanu Thiongo obtain certificate of confirmation of grant in Succession Cause Nos. 233 and 234 of 2011 fraudulently? ...

Under Part V referred under Section 66(b) , the persons given priority over an intestate are the surviving spouse and children. From the above, it is evident that the parties grandfather had been survived by his wife and children, who were in turn survived by their children being the parties herein. I therefore find that by virtue of Section 66 of the Law of Succession Act and rule 26(1) and (2) of the Probate and Administration Rules, late James Mbuthia and the late Onesmus Thiongo did not rank in priority higher than their mother and that they acquired the certificate of confirmation of grant issued to them in Succession Cause No. 29 of 1970 fraudulently. Charles Kiruga Mbuthia and Joseph Karanu Thiongo, the respondents herein in furtherance of the said fraud went ahead to file and obtain certificate of confirmation of grant in Succession Cause Nos. 233 and 234 of 2011 by being dishonest and concealed important information from the court in filing the succession cause. They clearly defrauded the applicants their rightful share in place of their late mother. ”

14. The trial court concluded by ordering the confirmed grant in Succession Cause No. 29 of 1970 and Succession Cause Nos. 233 and 234 of 2011 to be revoked for being obtained fraudulently and by concealment of material facts. The trial court also ordered titles Ndumberi/ndumberi/294 and T.188 to revert to the names of David Kirundo alias David Karundo (the grandfather).
15. This appeal is filed by offsprings of Onesmus and Daudi. They fault the trial court for having revoked the confirmed grant of succession Cause No. 29 of 1970, submitting that that succession was not the subject of the proceedings before the trial court. They also faulted the trial court for having revoked the confirmed grants in Succession Cause Nos. 233 and 234 of 2011 in a Miscellaneous Cause.

Analysis

16. I will start my discussion by considering the latter objection raised in the appeal.
17. From the background outlined above, it becomes obvious that there were three separate succession causes which touched on the properties that were subject of the proceedings before the trial court.



They were succession case No 29 of 1970, in respect to the estate of the grandfather and Nos. 233 and 234 of 2011 in respect of the estate of Onesmus and Daudi respectively. The offspring of Peris in filing the Miscellaneous Cause before trial court sought revocation of Succession Causes Nos. 233 and 234 of 2011. I wholly agree with the submissions of the appellant that the trial court erred to revoke grants in a Miscellaneous Cause. Revocation application was in my view erroneously filed in a miscellaneous cause which had absolutely nothing to do with Succession Causes No. 233 and 234 of 2011, let alone Succession Cause No. 29 of 1970. That error of seeing revocation on miscellaneous cause was fatal to the application and the trial court should have downed its tools there and then. On that ground alone, I find merit in the appeal before this Court.

18. Even if the application for revocation of grant was merited it however ought to have failed. I so hold because the tenets of the revocation of the grants application was that Peris was unfairly denied a portion of her father's land, that is the grandfather's land. The Law of Succession Act cap 160 commenced operation on 1st July, 1981. When the grandfather died, the operative law in succession causes was Customary Law of the deceased. This is the import of section 2 of cap 160. That section proves:-

“The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless, the administration of their estates shall commence or proceed so far as possible in accordance with this Act.”

19. In the case of In re Estate Of Peter Gathogo (deceased) (2020) eKLR that statutory provision was considered when the court held:-

“15. Thus, whereas this cause was filed under the Law of Succession Act and the procedure therein applies thereto, the distribution of the estate of the deceased herein is not governed by the Law of Succession Act of 1972 but by written laws and customs applying at the time of the death of the deceased. As observed by Musyoka J. in Re Nduati Mbutia (Deceased) (2015) eKLR:

‘Section 2(2) of the Law of Succession Act defines the application of the Law of Succession Act with respect to persons who died before the said Act commenced on 1st July 1981. The provision is categorical that the substantive provisions of the said Act are not applicable to the estates of persons who died before the said Act commenced. The substantive provisions of the Act are those governing devolution or distribution of the estate of the dead person, whether such person died testate or intestate. These provisions are to be found in Parts II, III, IV, V and VI of the Law of Succession Act. The substantive law of Succession for estates of persons who died before 1st July 1981 is not found in Parts II, III, IV, V and VI of the Law of Succession Act, but in the written laws and customs that applied at the date of the death of the person in question.’”

20. For the applicants to competently challenge the succession cause that related to the estate of grandfather, they ought to have adduced evidence on the applicable customary law, of the grandfather's tribe. This was not provided to the trial court and it brings to mind what was stated in the case In re Estate of Peter Gathogo (deceased) (supra) as follows:-

“17. The parties herein did not attempt prove the Kikuyu customary inheritance law but such is documented, and is notorious for the fact, in Eugene Cotran's Restatement of African law, Kenya Volume 2: The Law of Succession 1969



(London, Sweet & Maxwell). The Kikuyu customary law of inheritance provided that only sons of the deceased person could inherit his land. However, if a daughter remained unmarried past the marriage age, the “Muramati”, usually the eldest son of the deceased, could allocate a piece of land for her use during her lifetime. Thus, succession was based on the patriarchal system and favoured male beneficiaries over females.”

21. The grandfather from his name would seem to have been a Kikuyu. What was stated in that case that under Kikuyu custom, an unmarried daughter could be allocated land by the eldest son would seem to be what happened to Peris. The appellant before the trial court stated that his father allocated Peris ½ acre of the grandfather’s property. Peris’ offspring however in seeking revocation of grant wanted larger piece of land than what was given to their mother.
22. From the above discussion, I hold that the appeal is merited.
23. Before concluding, I wish to respond to the submissions by the appellant that the trial court, being a magistrate court, erred in revoking a grant. The law changed and the magistrate can now hear and determine revocation of grant applications. The change of law as well discussed in the case *In re Estate of Seth Namiba A Shuma (deceased)* (2020) eKLR where the court stated:-
 - “9. The law on jurisdiction has changed so that the magistrate’s court now has jurisdiction to revoke grants that it has power to make, like that one in Butere SPMCSC No. 56 of 2012. Parliament passed the Magistrates’ Courts Act, No. 26 of 2015, to align it to *the Constitution*, 2010. The new legislation amended the *Law of Succession Act*, Cap 160, Laws of Kenya. The said amendments were effected through sections 23 and 24 of the Magistrates Courts Act, and affected sections 48 and 49 of the *Law of Succession Act*. The amendments state as follows: –
24. The *Law of Succession Act* is amended, by repealing section 48(1) and substituting therefor the following new subsection –

“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.”
25. Section 49 of the *Law of Succession Act* is amended –
 - a. by deleting the words “Resident Magistrate” and substituting therefor the words “Magistrate’s Court”; and
 - b. by deleting the words “one hundred thousand shillings” and substituting therefor the words “the pecuniary limits set out in section 7(1) of the *Magistrates Courts Act*, 2015.” ...
26. The amendment to section 48(1) of the *Law of Succession Act*, effected through section 23 of the Magistrates Courts Act, 2015, was to remove the portion of that provision which referred to section 76 of the *Law of Succession Act*, and that meant that the jurisdiction to revoke grants of representation was no longer the preserve of the High Court. The amendment extended jurisdiction to the magistrates’ courts, so that they could, henceforth, revoke grants that they had power to make.”



27. The trial court, bearing the above in mind did not err in entertaining the revocation of grant application.

Disposition

28. For the above reasons by this judgment, it is ordered as follows:-

- (a) The Ruling dated 27th May, 2020 in Kiambu Chief Magistrate’s Court Miscellaneous Application No. 44 of 2016 is hereby set aside.
- (b) The confirmed grants in Kiambu Magistrate’s court Succession Causes Nos. 29 of 1970 and 233 and 234 of 2011 are hereby reinstated.
- (c) The appellant is awarded costs of this appeal.

JUDGMENT DATED AND DELIVERED AT KIAMBU THIS 27TH JULY, 2022.

MARY KASANGO

JUDGE

In the presence of:-

Coram:

Court Assistant:- Mourice

For Appellant:- No appearance

For Respondent:- No appearance

Court

Judgment delivered virtually,

MARY KASANGO

JUDGE

