



Waige v Waigi (Civil Appeal 53 of 2019) [2022] KEHC 11557 (KLR) (27 July 2022) (Judgment)

Neutral citation: [2022] KEHC 11557 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL 53 OF 2019
MM KASANGO, J
JULY 27, 2022**

BETWEEN

DANIEL NGIGE WAIGE APPELLANT

AND

JOHN MUNGAI WAIGI RESPONDENT

(Being an appeal from the of the Chief Magistrate's Court at Kiambu (Hon. W. Rading, SRM) dated 14th March, 2019 in Succession Cause No. 324 of 2015)

JUDGMENT

1. Daniel Ngigi Waigi, the appellant herein filed a summons for revocation of grant dated March 27, 2018 before Kiambu chief magistrate's court which application was dismissed by the ruling dated March 14, 2019. That dismissal aggrieved the appellant and hence this appeal.

Background

2. The estate the subject of this appeal is of Samuel Waigi Miohe Alias Waigi Miohe(deceased). The deceased died intestate. A petition for grant of letters intestate was filed by John Mungai Waigi, the respondent, before Kiambu magistrate's court hereafter the trial court. In that petition the respondent listed the sons of the deceased as John Mungai Waigi (the respondent) and Michael Njuguna Waigi (herein after Michael). Michael gave his consent to the petition filed by the respondent. The asset of the estate was stated in that petition as Githunguri/Githiga/915. No other asset was listed in the petition. A grant was issued on December 18, 2015.
3. The respondent filed summons dated February 8, 2016 before the trial court. In that application, a lot more assets of the deceased were listed and distributed. The additional assets of the deceased were:- Tigoni/MabroukeBLK 1/354KCB SharesStandard chartered sharesBarclays sharesMoney in aocunt-Barclys bank No. xxxxKTDA sharesK-Unity shares



4. There was also an additional beneficiary who the respondent indicated was to inherit the Tigoni property, above. That additional beneficiary was indicated as Joseph Njuguna Waigi.
5. The grant was confirmed by the Kiambu chief magistrate court as prayed on September 13, 2017.
6. On my perusal of the trial court's file I noticed that the transfer of deceased's shares and cash in bank were transmitted to the persons identified and as sought in the summons or confirmation of grant.
7. The appellant filed summons for revocation of the grant. The prayers in that summons are as follows:- That the grant of letters of administration and confirmed grant herein be annulled and revoked with costs. Those title deeds of LR Nos Githunguri/Githiga/4183 be called and the same revert back to LR No Githunguri/Githiga/915 with the name of Waiga Miohe. That The beneficiaries of the resulting portions that is LR No Githunguri/Githiga/4183-4185 are restrained by temporary injunction from disposing off and or can any destruction either by themselves, agents and/or servants until the hearing determination of the revocation of the grant herein. That five hundred thousand withdrawn from account No xxxx returned to that account.
8. The appellant in his affidavit in support of that application stated he was a son of the deceased; he was not involved in the petition for grant of letters of administration; that he became aware that a succession had been filed when he saw surveyor on the property; that he investigate the issue of the property and found that indeed the respondent had filed a succession cause without involving him; and that he confirmed the original the title of the property Githunguri/Githiga/915 had been closed and the same had been subdivided resulting in their titles namely, Githunguri/Githga/4183-4185. The appellant depend that the said subdivision was effected without surveyor or carrying out survey on the property.
9. The respondent opposed the summon by filing a replying affidavit. The respondent deponed that the deceased had three wives each of those wives had children. The respondent also listed several other properties which he stated all belonged to the deceased. He stated that the deceased distributed his assets amongst his beneficiaries in his lifetime in particular that the appellant was given property Githunguri/Githiga/597 to share with another beneficiary and was also given parcel Olenguruone/ Keringet Block2/467. That the appellant sold the later property.
10. Appellant filed a further affidavit dated November 9, 2018. He reiterated that he is a beneficiary of the estate. He further stated that the respondent introduced into this action "ghost" wives of the deceased to confuse the issues. Appellant denied that the deceased settled or benefited any beneficiary in his lifetime.
11. The trial magistrate W Rading, Senior Resident Magistrate, on hearing the application through affidavit evidence and submissions dismissed the application. In dismissing the application, the learned magistrate stated that the alleged gift to the appellant was a gift *inter vivos* and proceed to rule as follows:-

“From my analysis above, this is a similar case of the applicant attempting a second bite at the cherry which is ill advised and mischievous.”

Analysis

12. The appellant in approaching the trial court sought several orders principally he sought revocation of grant on the ground that the respondent had concealed his presence in the petition. The application



was brought under the provisions of section 76 of the *Law of Succession Act* Cap 160 which provides thus:-

“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by an 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 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 untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.”

13. The issue therefore to consider in this appeal and should have been in the uppermost consideration of the trial court was whether in the petition by the respondent there was any defect; whether there was fraud or false statement or concealment to the court of something material; and whether the grant by means of untrue allegations of fact essential in law.

14. The respondent did not deny that the appellant was a son and therefore a beneficiary of the deceased’s estate. The respondent failed to show that the said appellant a beneficiary of the estate, had given his consent to the petition. Rule 26(1) and (2) of the *Probate and Administration Rules* provides notice of a petition shall be given to a person entitled to the estate either on the same degree or in priority. This is what that rule provides:-

“(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.”

15. Rule 7 of the *Probate and Administration Rules* also provides as follows:-

“(7) where a person who is not a person in the order of preference set out in section 66 of the act seeks a grant of administration intestate he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise. Its discretion under that section and shall also satisfy the court that every person having a prior preference to a grant by virtue of that section has:-

- a) Renounced his right generally to apply for a grant; or
- b) Consented in willing to the making of the grant to the application; or
- c) Been issued with a citation calling upon him either to renounce such right or to apply for a grant.

16. The above rule provides a petitioner should satisfy the court before petitioning for grant of letters of administration that certain and vital steps had been undertaken. The respondent was required to satisfy the court that the appellant, as a son of the deceased of this estate, had renounced his right to



petition for grant of letters of administration or that appellant had consented to the respondent filing the petition; or ought to have filed a citation directed to the appellant.

17. The respondent failed to meet the requirements of rules 7 and 26 of the *Probate Rules* and section 51 of cap 160 section 51 (2)(g) requires disclosure of surviving spouses and children. The respondent most importantly, did not deny that in petitioning for a grant he concealed that fact to the appellant, a beneficiary of the estate, a person who was entitled in the same degree or in priority of the respondent. See the case of In *Re Estate of Hannab Wambui Murigi (Deceased)* (2018) eKLR:-

“...consent from all the deceased’s beneficiaries must be availed as to the appointment of the administrator and an application for grant of Letters of Administration is granted. The applicant herein contends that the grant issued to the respondent is defective in substance. This is attributed to the lack of written consent from the applicant who is a beneficiary of the estate by virtue of being the deceased’s son. In *The Matter of The Estate of Ngaii Gatumbi Alias James Ngaii Gatumbi* (HC Succession Case No 783 Of 1993). The court held that:-
‘A grant will be revoked where a person who is entitled to apply is not notified by the petitioner of his intention to apply and that person’s consent to the petitioner’s application is not sought.’”

18. Out rightly, the concealment of this petition to the appellant is sufficient to lead to the revocation of the grant. I so hold.
19. I am very troubled and concerned with the very superficial manner the trial court handled the evidence presented to it. The trial court failed to determine whether or not the appellant should have consented to the petition, by the respondent. The trial court also failed to determine whether there was concealment of not only beneficiary of the estate but of the extent of the assets of the deceased whose full extent was revealed in the summons for confirmation of grant more troubling is that the respondent himself, in his replying affidavit dated October 9, 2018, admitted that the alleged extent of the beneficiaries was even greater than stated in the petition. Why were those beneficiaries not requested to give their consent to the petition? That answer should have been obtained at the trial.
20. The trial court excused the non-inclusion of those beneficiaries on the basis that they allegedly had benefited from gifts given by the deceased, in his lifetime. That finding by the trial court was a misconception of the law relating to gifts *inter vivos*.
21. Section 42 of cap 160 is the relevant legal provision on gifts *inter vivos*. It provides thus:-

“Where -

- (a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or
- (b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.”

22. That section shows that the trial court ought to have taken into account any gift given to any beneficiary by the deceased, in his lifetime.
23. Undoubtedly, the trial court erred to decline to grant the orders sought by the appellant.



24. As stated before, in my perusal of the trial court's file, I find letters written by Barclays bank registrars of shares which is indicative of the respondent and his brother, Michael Njuguna Waigi having benefited from their illegality of obtaining a grant on the basis of fraud concealment of facts. The deceased died in 1994. The estate of the deceased has been defrauded by the respondent and others at the expense of the appellant. The grant issued to the respondent shall be revoked and because the respondent and Michael Njuguna Waigi have advantageously benefited from the estate in obtaining money from the deceased's account and shares transferred to them, there is need for equity in distribution of the deceased's estate, which distribution should compensate the appellant for the loss he had incurred as a result of the aforesaid fraudulent acts of the respondent.

Disposition

25. Having found that the proceedings leading to issuance of a grant and confirmation of that grant were defective in substance, I am satisfied the grant ought to be revoked.

26. The judgment of the court is as follows:-

- a. The ruling in Kiambu Chief Magistrate's Court Succession Cause No 324 of 2015 is hereby set aside.
- b. The summons dated March 27, 2018 in Kiambu Chief Magistrate's Court Succession Cause No 324 of 2015 is as follows:-
 - i. The grant issued on December 18, 2015 and confirmed on September 13, 2017 is hereby revoked.
 - ii. Titles Githunguri/Githiga/4183, 4184 and 4185 are hereby cancelled. The land registrar is hereby ordered to cancel those titles and reinstate the original title Githunguri/Githiga/915.
 - iii. A grant shall be issued in the name of Daniel Ngigi Waigi.
 - iv. That grant shall be confirmed as follows:-

Githunguri/Githiga/915

Daniel Ngigi Waigito get50%

John Mungai Waigi to get25%

Michael Njuguna Waigito get25%
 - v. The costs of this appeal and the cost of Kiambu Chief Magistrates' Court Succession Cause No 324 of 2015 are awarded to Daniel Ngigi Waigito be paid by John Mungai Waigi.

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

MARY KASANGO

JUDGE

In the presence of:-

Court Assistant:- Mourice

For Appellant:- No appearance

For Respondent:- Ms. Wanyonyi H/B Mr. Kiritha



Court

Judgment delivered virtually,

MARY KASANGO

JUDGE

