In re Estate of Waithaka Mwaniki (Deceased) (Succession Appeal E010 of 2021) [2022] KEHC 13162 (KLR) (22 September 2022) (Judgment)

Neutral citation: [2022] KEHC 13162 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

SUCCESSION APPEAL E010 OF 2021

FN MUCHEMI, J

SEPTEMBER 22, 2022

BETWEEN

MARGARET WANGU WAITHAKA ..... 1ST APPELLANT

PURITY WAKIURU WAITHAKA ..... 2ND APPELLANT

PETER GACHARI ISAAC ..... 3RD APPELLANT

ANN WACHUKA WAITHAKA ..... 4TH APPELLANT

AND

GRACE NYAGUTHII GATHENDU ..... 1ST RESPONDENT

JOSEPH GATHENDU NYAGUTHII ..... 2ND RESPONDENT

(Being an appeal from the Judgment of Resident Magistrate, Hon. V. S. Kosgei in the Principal Magistrate court in Karatina, Succession Cause No. 77 of 2003 delivered on 16th March 2021)

JUDGMENT

Background facts

1. The appellants were dissatisfied with the judgement of Principal Magistrate Karatina in Succession Cause No. 77 of 2003 delivered on 16th March 2021 and thus lodged this appeal.

2. The subject matter in the Karatina succession cause was the estate of Waithaka Mwaniki who died on 17th August 1974. The two sons of the deceased namely George Maina Waithaka and Peter Gachori filed a petition describing themselves and the 1st appellant herein as the only survivors of the deceased. Thereafter three daughters of the deceased who are the 2nd, 3rd and 4th appellants filed an objection claiming that they had not been informed of the filing of the proceedings. The court heard and determined the objection and appointed the 1st and 2nd appellants as the administrators of the estate.

Subsequently, the property of the deceased LR Magutu/Ragati/11 was distributed equally to the 1st and 2nd, 3rd and 4th appellants.

3. The appellants lodged several grounds of appeal which are summarised herein. It was contended that the learned magistrate erred as follows:-

   a. By granting orders that were not sought or prayed for in the summons dated 24th October 2018

   b. By making a ruling and issuing rectification of grant orders while there existed no formal application for rectification of grant before him;

   c. By presuming a marriage between the deceased and the 1st respondent without sufficient evidence to support the presumption of marriage;

   d. By allowing the respondents' application while they did not possess the locus standi to file the application on behalf of the deceased;

   e. By finding that the respondents had proved their case even when critical facts were not proved;

   f. By failing to take into consideration evidence by the appellants by disregarding it while appreciating evidence by the respondents.

4. By consent parties agreed to dispose of the appeal by written submissions which both parties duly filed.

The Appellants' Submissions

5. The appellants submit that the respondents through their summons dated 24th October 2018 sought to revoke the letters of administration of grant under Rule 44 of the Probate & Administration Rules, issued to the 1st & 2nd appellants on the ground that the same was obtained fraudulently by making false statements and concealment of material facts. The appellants contend that the respondents did not seek to rectify the grant and as such, the court cannot move itself suo moto to give orders not sought by the parties nor can it make orders where no formal or oral application has been made by a party to the suit and all the parties given time to submit on the issue before making a determination. The appellants herein argue that the respondents did not seek for rectification of the grant to automatically make them beneficiaries of the estate of the deceased as the court proceeded to do, but the respondents moved the court seeking annulment of the grant so that succession proceedings can be instituted and proceed afresh and they be involved in the process. The appellants rely on the case of *Nagendra Saxena vs Miwani Sugar Company (1989) Limited (Under Receivership)* Kisumu HCCC No. 225 of 1993 to support their contention.

6. The appellants further submit that the 1st respondent did not adduce any documentary evidence to support that she was married to the deceased nor did she prove the existence of a customary marriage between her and the deceased. She claimed dowry was paid, but could not tell the court who were the people who participated in the dowry ceremony and she did not call any of the elders who attended the ceremony to testify on her behalf. As such, the appellants conclude that no formal steps were taken to start the customary marriage claimed. Moreover, the appellants contend that none of the family members of the deceased took part in the claimed dowry ceremony which is highly unlikely. As such, they argue that no dowry was paid or steps taken to constitute a customary marriage.

7. The appellants further submit that the evidence of Chief Michael Ngatia testified that despite being the area chief, he had not seen any record that showed that the 1st respondent was married to the deceased. The appellants further argue that the evidence of the chief amounts to hearsay evidence as he knew the 1st respondent based on information he obtained from previous leaders. As such, such evidence

cannot be relied on to infer a marriage existed. The appellants further argue that such inference of marriage would have been clarified with the parties adducing evidence, if the grant was revoked and the succession cause start afresh.

8. The appellants submit that the trial court was wrong and misleading by relying on photos taken during the funeral of the deceased to presume that the 1st respondent was married to the deceased. Moreover, the photos adduced in court were not produced by the maker or the person who took them and as such they can only be considered as hearsay evidence.

9. The appellants argue that the 2nd respondent is not entitled to benefit from the deceased's estate as no sufficient evidence was adduced to show that he was the son of the deceased. The 4th appellant gave evidence in the trial court that shows that the deceased never introduced the respondents as wife and son respectively to the family. Furthermore, the 1st respondent testified that he was born before his mother purportedly married the deceased and he admitted that he was not a biological son of the deceased. Moreover, the 2nd respondent did not produce a birth certificate to show that the deceased was his father. Additionally, the 1st respondent testified that the 2nd respondent was born in 1995 while she married the deceased in 1997 and thus the respondents ought to have shown that the deceased formally adopted the 2nd respondent as a son, entitling him to benefit from the estate. No evidence was adduced to the effect that the deceased had acknowledged the 2nd respondent as his son or even supported and taken care of him before his death.

10. The appellants argue that the court erred in disregarding the evidence given by the 4th appellant indicating that the 1st respondent is currently married and the 2nd respondent is the son to her husband. The appellants contend that the law of succession does not come to the aid of women who get remarried and abandon the homestead of the deceased.

11. The appellants contend that the subject property did not belong to the deceased but to the father of the deceased herein. As such, the respondents cannot challenge the grant of the deceased's father whose estate is the subject of distribution, without obtaining letters of administration of the estate of the deceased. The respondents have no locus standi to challenge the distribution of the estate of the grandfather and father, without first obtaining a grant of letters of the estate of their father and husband respectively. As such, the appellants request the court to set aside the judgment of the trial court in its entirety and revert the matter back to the trial court to enable them ventilate all those issues. Moreover, the appellants contend that the grant was issued by a senior resident magistrate and thus cannot be revoked by a magistrate of the rank of resident magistrate considering the value of the property exceeds 25 million. As such, the appellants submit that the appeal has merit and they pray that it be allowed as prayed.

The Respondents' Submissions

12. The respondents state that the 1st appellant initiated Succession Cause No. 77 of 2003 in Karatina, over the estate of Waithaka Mwaniki who died on 17/8/1974. She relied on an introduction letter by the chief that listed only three survivors of the deceased being the 1st appellant, George Maina Waithaka and Peter Gachari. An objection was filed on 16/2/2004 by Joyce Wambui Waithaka, Purity Wakiuru Waithaka, Ann Wachuka Waithaka, Jane Gathigia Waithaka and Monica Wanjiru Waithaka. The objectors indicated that they were daughters of the deceased and that the petitioner had instituted the proceedings secretly and without any notice to them and the other dependents. The grant was confirmed on 9/9/2009 by which time, George Maina Waithaka was deceased. The respondents state that the appellants did not disclose to the court that George had a family. The respondents submit that they were chased from the homestead in 2012 and 2018 respectively. On conducting an official

search for Land Parcel Number Magutu/ragati/11, it was found that the appellants had finalized the succession cause and were already the registered owners of the said land.

13. The respondents thus filed summons for revocation of the grant on the ground that the grant was obtained fraudulently by concealing the fact that the deceased was married to the 1st respondent and they had three children namely:- Joseph Gathendu, Gladys Wakini and Samuel Waithaka. The learned magistrate revoked the grant and proceeded to distribute the estate of the deceased. The respondents state that they adduced their evidence and the trial court considered all the evidence in making her decision. The appellants did not explain their failure to notify the court that their brother had died in 2005, at the time they applied for the confirmation of grant in 2009. The respondents rely on the case of Albert Imbuga Kisigwa vs Recho Kavai Kisigwa Succession Cause No. 158 of 2000 and submit that the power to revoke a grant is discretionary and the learned magistrate exercised her discretion judiciously and cannot be faulted for the decision reached.

14. The respondents rely on Section 76 of the *Law of Succession Act* and submit that the law provides that any interested party or the court on its own motion may make an application for revocation of grant. They did so as the widow and the son of the deceased and as such, their interest in the estate of the deceased is lawful. The respondents further rely on the case of *Ibrahim vs Hassan & Charles Kimenyi Machari*a (2019) eKLR and submits that the evidence on record showed that the 1st respondent was married to the deceased and they had three children. As such, the learned magistrate was right in making a presumption of marriage. Consequently, the respondents contend that they had locus standi in presenting summons for revocation of grant.

15. The respondents argue that the learned magistrate considered the evidence of the appellants and the respondents, summarized the evidence of both parties and their submissions before identifying the issues of determination. In analysing the issues for determination, the learned magistrate made reference to the evidence adduced by both parties and the law thus arriving at the correct decision.

16. The respondents contend that on the issue of jurisdiction raised by the appellants in their submissions, there is no evidence on record to suggest the estate is valued at Kshs. 25 million. The respondents further rely on the case of *Estate of Charles Boi (Deceased)* (2020) eKLR and submits that the 1st appellant indicated that the estate of the deceased is estimated at Kshs. 100,000/- and moreover, the decision of the trial court cannot be impeached on the evidence that was not present at the trial. The respondents thus argue that the appeal lacks merit and pray that it be dismissed with costs.

Issue for determination

17. The main issue for determination is whether the appeal has merit.

The Law

18. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another vs Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:

> "…..this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular,, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence."

19. It was also held in *Mwangi vs Wambugu* [1984] KLR 453 that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence.

20. Dealing with the same point, the Court of Appeal in *Kiruga vs Kiruga & Another* [1988] KLR 348, observed that:-

> " An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand."

21. Therefore this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering and giving allowance for it, that the trial court had the advantage of hearing the parties.

Whether the appeal has merit

22. The estate of the deceased comprising of L.R No. Magutu/Ragati/11 was distributed to the 1st, 2nd, 3rd and 4th appellants equally on 09/09/2009. This was after the death of George Maina Waithaka a son of the deceased and husband to the 1st respondent and also the father to 2nd respondent and two other children namely Gladys Wakini and Samuel Waithaka.

23. The respondents thereafter filed Summons for Revocation of grant dated 24/10/2018 based on the grounds that the grant was obtained fraudulently by making of false statement of concealment from the court something material to the cause by failing to disclose that George Maina Waithaka, a son to the deceased was married to the 1st respondent and they had three children.

24. The Section 76 of the *Law of Succession Act* gives the court the powers to revoke a grant provided the conditions stipulated therein have been met. It states that:-

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 has ordered or allowed; 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

iv. The grant has become useless and inoperative through subsequent circumstances.

25. The issue of jurisdiction was raised that the grant issued by a Senior Resident Magistrate could not be revoked by a Resident Magistrate Section 76 of the Act and Rule 44 of the *Probate and Administration Rules* empower the court that issued the grant to revoke it. Section 48 clearly sets out the jurisdiction of a magistrate as follows:-

> " to entertain any application and to determine any dispute under the Act and to 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 in relation to such estates"

26. In this cause, the pecuniary jurisdiction of a Resident Magistrate is limited to Kshs.5,000,000/-. The 1st appellants filed this cause on 24th September 2003 and indicated the value of the estate as Kshs.100,000/= In form P&A5, it is argued by the appellants that the estate is now valued at over Kshs.25,000,000/=. It is not in dispute that the estate must have appreciated over the years since the filing of the case but the court relies on the value at the time of filing unless new evidence of value is presented before it for a good cause. The appellants did not avail any valuation report to demonstrate that the estate is valued at over Kshs.25,000,000/=. It is noted that the appellants did not raise this argument before the trial magistrate for determination. It is therefore improper to raise it as a new issue on appeal. However, it is my finding that Section 48 confers jurisdiction to the Resident Magistrate to revoke the grant whose known value is what was presented in the petition of the 1st appellant during filling of this cause.

27. The appellants challenged the finding of the magistrate court that there existed a marriage between the 1st respondent and the late George Maina Waithaka a beneficiary to the estate. The 1st respondent testified that she married George in 1997 and had a matrimonial home on the land of the deceased L.R Magutu/Ragati/11 where they lived together until his demise in 2005. In 2012, the 1st respondent and her children were chased away but the 2nd respondent was then working and remained in occupation of the home. In 2018, the 2nd respondent was forcefully evicted by the appellants who damaged his property. The matter was reported to the police and two extracts of the report from the Occurrence Book(O.B) were produced by the 2nd respondent, one for malicious damage to property and the other for forceful eviction. The home was leased to a 3rd party making it impossible for the 2nd respondent to re-occupy the house.

28. The evidence of the respondents was corroborated by that of the area chief who said he knew the 1st respondent and George as husband and wife and that their 2nd and 3rd children were named after the parents of George in accordance with Kikuyu traditions. The 1st respondent produced photographs one of which showed that she and her children were present at the burial of George and sat with other members of the family next to the coffin. The evidence of the respondents and that of the chief is convincing that the 1st respondent and George Maina though not formally married cohabited together for about seven years and were blessed with two children. The 1st born of the 1st respondent was born two (2) years before she got married, in 1995. He moved with his mother to the home of George and lived with them. As such, the 1st respondent was provided for and educated by the deceased in his early age till the deceased passed on. It is important to mention that the magistrate relied on the evidence of the respondents and their witnesses to arrive at her decision on the presumption of marriage.

There being no evidence to controvert that of the 1st and 2nd respondent, it is my considered view that the magistrate rightly held that there was presumption of marriage.

29. I have perused the record and noted that from the proceedings dated 9/9/2009, the matter came up for confirmation of grant and all the parties were present save for George Maina who was deceased by then. The court confirmed the grant and none of the appellants present informed the court that George Maina was deceased or that he left behind a spouse or children. There being no objection and the court having no further information of the death of George Maina proceeded to confirm the grant. It is therefore my considered view that there was concealment of facts material to the case. Had the court been informed of the death of George and that he was a beneficiary survived by a family it would not have confirmed the grant. In my considered view the trial court did not error in finding that the appellants concealed facts material to the case yet the grant was confirmed four(4) years after the death of George.

30. It was also within the knowledge of the four appellants that the respondents were widow and son of their late brother George Maina and ought to have included them in the distribution of the estate. The 1st appellant being the administrator ought to have taken steps to substitute or cause to be substituted the name of the 1st respondent as a beneficiary in the estate in place of her late husband. The appellants concealed facts material to the case before the court. This was therefore a sound ground of revoking the said grant. It is my considered view that the grant was revoked judiciously after hearing all the parties and analysing the evidence on record.

31. The appellants alleged that the 1st respondent has now remained and ought not to inherit the share of her late husband because she was not married to him and that she had remarried. In regard to this allegation, no evidence was produced by the appellant to controvert that of the respondents. As for the 3rd respondent, he was adopted by George when he married his mother as a child of 1st respondent. A child is described under Section 3 of the Act as including:-

> " .....a child whom he has expressly recognized or infact accepted as a child of his own, or for whom he has permanently assumed responsibility"
>
> There is evidence that the deceased had accepted the 2nd respondent as his child and assumed full responsibility. He lived in the home of the deceased and remained there till 2018 wherein he was evicted by the appellants. The 2nd respondent was under the Law a child of the deceased and therefore entitled to inherit from him.

32. On distribution of the estate the magistrate complied with Section 38 of the Act that all the beneficiaries get equal shares out of the only asset of the deceased L.R Magutu/Ragati/11. The 1st respondent was not allocated any share of her late husband George Maina but was to hold it in trust for her three (3) children. I find that the distribution was based on the law.

33. The 1st respondent shall hold the share of George Maina in trust for her children Joseph Gathendu Nyathuthii, Gladys Wakiini and Samuel Waithaka until the children who may be under age of majority attain the age of eighteen (18) years.

34. It is my finding that this appeal has no merit and it is hereby dismissed.

35. Each party to meet their own costs of this appeal.

It is hereby so ordered.

DATED AND SIGNED AT NYERI THIS 22ND DAY OF SEPTEMBER, 2022.

F. MUCHEMI

JUDGE

Judgement delivered through video link this 22nd day of September 2022