Maina v Mwangi & another (Probate & Administration 5 of 2019) [2022] KEHC 14263 (KLR) (26 October 2022) (Judgment)

Neutral citation: [2022] KEHC 14263 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

PROBATE & ADMINISTRATION 5 OF 2019

JN NJAGI, J

OCTOBER 26, 2022

BETWEEN

AGNES NJERI MAINA ..... APPELLANT

AND

JOSEPH MAINA MWANGI ..... 1ST RESPONDENT

CHARLES MWANGI NJOGU ..... 2ND RESPONDENT

((Being an appeal from the ruling of Hon. F.W. Macharia, SPM, in Karatina PMC Succession Cause No.51 of 2015 delivered on 26/3/2019))

JUDGMENT

1. The appeal herein is on the dismissal of the appellant`s summons for revocation of grant dated February 8, 2017 where the appellant was seeking that the grant of letters of administration issued to the respondents on the February 9, 2016 and confirmed on the June 23, 2016 be revoked and a fresh grant be issued to the appellant. The application was dismissed, first, on the ground that the applicant had no capacity to bring the application as she was not a beneficiary to the estate of the deceased and secondly, on the ground that she had failed to prove grounds of revocation of grant as per section 76 of the *Law of Succession Act*. The appellant was aggrieved by the decision of the learned magistrate and filed the instant appeal.

2. The grounds of appeal are that:

    1. The learned trial magistrate erred in fact and in law in failing to appreciate the principles for granting the order of revocation.

    2. The learned trial magistrate erred in fact and in law in misapprehending the applicant`s claim.

3. The learned trial magistrate erred in fact and in law in taking into account extraneous matters not germaine to the application for revocation hence arrived at the wrong conclusion on the matter.

4. The learned trial magistrate erred in fact and in law in addressing issues of capacity and or failing to address her mind to the fact that the appellant as a dependant ought to be heard on merit in a properly instituted cause thereby occasioning prejudice to the Appellant as well as dependants.

The pleadings and Evidence-

3. The trial before the lower court proceeded by way of viva voce evidence. Those who testified in the case were the appellant and the 1st respondent. The evidence which emerged is that the appellant is the estranged wife to the 1st respondent. That the deceased herein died in 1961 without an heir. He left behind one parcel of land No Konyu/Gachuku/230. The two respondents petitioned for grant of letters of administration on behalf of the estate of the deceased claiming that they were his grandsons. A grant was issued to them and the land subsequently transmitted to the 2nd respondent. The appellant thereupon sought for the grant and the confirmation to be revoked and a fresh grant be issued to her on the grounds that:

    1. The proceedings leading to the confirmation of the grant were defective in substance.

    2. That the grant was obtained fraudulently by making false statements and concealment of the status of the beneficiaries of the deceased as well as safeguarding the beneficiaries` interests.

    3. The 1st respondent has used the grant to sell the subject land to the 2nd respondent who is spelt out as a beneficiary which fact is false.

    4. The application was supported by the affidavit of the appellant where she deposed that she is a granddaughter to the deceased. That the land in issue was gifted to her and the 1st respondent as a family by her late grandfather. That one of her sons resides and lives on the land. That the 2nd respondent is not related to the 1st respondent in any way and he is therefore not a grandson to the deceased. That he is only taking advantage of the 2nd respondent`s alcoholism to buy the land from him. That the 2nd respondent has attempted to gain entry into the land forcefully but they have resisted him.

    5. The application was opposed by the 1st respondent through his replying affidavit sworn on the April 13, 2017 in which he deposed that the deceased herein was his late father`s close relative. That the deceased had sold his father and the father to the 2nd respondent the subject land in the 1960s but the buyers died before transfer could be effected on them. That he and the 2nd respondent filed the succession cause. That upon confirmation of the grant he and the 2nd respondent reached an agreement that the entire land goes to the 2nd respondent. That it was not true that the applicant had a beneficial interest to the land. That it was not true that his son Richard Macharia occupies any part of the land but utilizes Land parcel No Konyu/Gachuku/1868 that is registered in the name of his (1st respondent`s) late mother, Esther Wanjiku Mwangi and adjoins the subject land.

    6. In her evidence in court, the appellant stated that the deceased owner of the land and her father-in-law died before she was married. That she was told by her mother-in-law that the subject land was bought by her father-in-law from the deceased but that he died before the land was transferred to him. That she lives on land parcel Konyu/Gachuku/230. That there are coffee trees on the land that she was given by her mother in law when she got married. That she was

selling the coffee at Kieni factory. That her son now takes care of the trees. She denied that she lives on land parcel Konyu/Gachuku/1863. She said that the land is currently registered in the name of the 2nd respondent but she does not know the circumstances under which he came to be registered as proprietor of the land. She produced a green card, Pexh 1, showing the registration in the name of the 2nd respondent.

7. In his testimony in court, the 1st respondent stated that he lives on land parcel Konyu/Gachuku/1863 that is registered in the name of his late mother. That the subject land herein belonged to his grandfather and borders his mother`s land. That the land was bought by his father and the father of the 2nd respondent from the deceased. That the father of the 2nd respondent belonged to the same clan with his father. That after they finalized the succession cause he sold his share to the 2nd respondent. He said that he was previously using the land but that his wife never used the land. He said that his son lives on land parcel 1863. That his son is facing a criminal case after he damaged plants on the subject land.

Submissions–

8. The appeal was canvassed by way of written submissions by the advocates for the respective parties, Nderi & Kiingati Advocates appearing for the appellant and Muthigani & Co Advocates representing the respondents. It was submitted on behalf of the appellant that an application for revocation of a grant under section 76 of the *Law of Succession Act* can be brought up by any interested party or by the court on its own motion. That an interested party can even be an intervener as the emphasis is not in the person but the acts of those to whom a grant has been entrusted. That the question of locus in the circumstances where the court has a right to intervene of its own motion must and should have been given the widest of the latitude. That in any event, the issue of distribution would be a subject of an independent inquiry once the annulment or revocation had taken place. That the trial court asked the wrong question and as a result arrived at the wrong conclusion.

9. It was submitted that the trial court in determining the application engaged itself with rules of distribution rather than the principles set out under section 76 of the *Law of Succession Act*. That it emerged during the trial that both the petitioners had mis-described themselves as grandsons to the deceased. That it was clear that the cause did not involve the whole family of the 1st respondent who had sisters who were omitted from the matter. That it was clear that the 2nd respondent paid some money to the 1st respondent in order to have the estate transmitted to him. That the entire history of who was or was not entitled to the estate remained hazy and unclear. That the applicant deposed that the land had been gifted to them in the lifetime of the 1st respondent`s mother. That the appellant had demonstrated that it was her son who was utilizing the parcel of land with the 2nd respondent trying to evict him. That from these facts the court could even have intervened on its own motion for the cause and ends of justice. That the trial court took into account extraneous matters that had no bearing to the application and erred in the application of the law and the principles of revocation of grant under section 76 of the *Law of Succession Act*. Counsel urged the court to allow the appeal.

10. The respondents on the other hand submitted that the issue for determination in the appeal is whether or not the appellant is a beneficiary and or dependant to the estate of the deceased. That the trial court dismissed the application as it was not shown that the appellant was a relative to the deceased within the meaning of section 39 of the *Law of Succession Act*. That neither did she fall within the meaning of a dependant of the estate of the deceased under section 26 of the *Law of Succession Act*.

11. It was submitted that the appellant is a grand-daughter-in-law to the deceased and therefore far removed and remote to the estate of the deceased. Counsel submitted that the law does not recognize

a daughter-in-law to be a dependant in the estate of her father-in-law. Counsel cited the holding in *In Re Estate of Catherine Nduku Malinda (Deceased) (2020) eKLR* where it was opined that:

> ' In my view, a daughter-in- law may lay a claim as a beneficiary not in her own right but as a legal representative of a deceased son. In other words, the legal representatives of a deceased`s dependants may properly stake a claim to the estate of a deceased person on behalf of legally recognized dependants.'

12. Counsel also cited *in Re Estate of Munyua Mbeke (Deceased)* where it was held that:

> ' The clear wording of section 29 of the act does not include daughters-in -law of the deceased. Daughters-in-law are not children of the deceased and therefore they do not fall within the category of the children of the deceased. They therefore cannot mount an application under section 26 of the Act as the applicant has done in this case.'

13. They further cited *in Re Estate of Cecilia Wanjiru Kibicho(Deceased) (2016) eKLR* where the court expressed the view that:

> ' A daughter -in-law is not listed in section 29(B) of the Act as being among persons who may move the court under section 26 for reasonable provisions and who the court may declare to be a dependant.'

14. Counsel concluded that the trial court was correct in declining the application. He urged the court to dismiss the appeal.

Analysis and Determination–

15. This being a first appeal, the duty of the court is to re-evaluate and re-consider the evidence afresh and draw its own conclusions, of course bearing in mind that it did not see the witnesses testifying and therefore give due allowance for that. This duty was well stated by the Court of Appeal in *Gitobu Imanyara & 2 others v Attorney General [2016] e KLR* it stated that;

> ' An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that 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 allowances in this respect.'

16. The trial magistrate dismissed the claim on the ground that the applicant as a daughter-in-law did not come within the degree of consanguinity to the deceased as provided under section 39 of the *Law of Succession Act*. Therefore, that she had no capacity to bring the application as she was not a beneficiary to the estate of the deceased and that she could only lay a claim to the estate through her husband.

17. Section 39 of the *Law of Succession Act* provides as follows:

    1. Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority—

        a. Father; or if dead

        b. Mother; or if dead

c. Brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none

d. Half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none

e. The relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.

2. Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1), the net intestate estate shall devolve upon the state, and be paid into the Consolidated Fund.

18. The issues for determination in the appeal are:

1. Whether the trial court was correct in holding that the applicant had no capacity to bring the application as she was not a beneficiary to the estate of the deceased.

2. Whether grounds for revocation of grant under section 76 of the *Law of Succession Act* were proved.

(1) Whether the appellant had locus standi–

19. The application for revocation of grant was made under section 76 of the *Law of Succession Act* that provides 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;

20. It is clear from the reading of this section that an application for revocation of grant can be brought up by any interested party. The question then is the meaning of 'any interested party' for purposes of section 76 of the *Law of Succession Act*.

21. The Black's Law Dictionary defines an interested party as 'A party who has a recognizable stake in the matter.'

22. In *Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others [2017] eKLR* mativo J held that:

> ' In law, standing or locus standi is the term for ability of a party to demonstrate to the court sufficient connection to and harm from the law or action challenged to support that party's participation in the case. Standing exists from one of the following:-
>
> a. That the party is likely to suffer adverse effect,
>
> b. That the harm suffered is likely to affect others who might not be able to ask the court for relief,
>
> c. That the party is granted standing by the law.

23. In *Ibrahim v Hassan & Charles Kimenyi Macharia, Interested Party [2019] eKLR* the court heard that-

Locus standi is basically the right to appear or be heard in court or other proceedings. That means if one alleges the lack of the same in certain court proceedings, he means that party cannot be heard, despite whether or not he has a case worth listening.

24. The trial court dismissed the case on the ground that the appellant was not a beneficiary to the estate of the deceased as she was excluded from the list of priority persons under section 39 of the Act. *In re Estate of Yusuf Kipkorir Chepkeitany (Deceased) [2021] eKLR*, the Court of Appeal considered the meaning of the words 'any interested party' in 76 of the *Law of Succession Act* and held that:

(6) It is manifest therefore that the Respondents' argument that an application for revocation can only be brought by a dependant of the deceased is unfounded. Indeed, it is now settled that the above provision is wide enough to include a purchaser. Thus, in Musa Nyaribari Gekone & 2 others v Peter Miyienda & another (2015) eKLR for instance, the Court of Appeal sitting in Kisumu held that:

> 'The expression 'any interested party' as used in that provision, in its plain and ordinary meaning, is in our view wide enough to accommodate any person with a right or expectancy in the estate. We are not persuaded, as Mr Oguttu urged, that that expression is limited by or should be construed against the provisions of sections 66 and 39 of the *Law of Succession Act*. Section 66 provides a general guide to the court of the order of preference of the person(s) to whom a grant of letters of administration should be made where the deceased has died intestate. Section 39 provides for the order of priority of persons to whom the net intestate estate shall devolve where the deceased left no surviving spouse or children. Those provisions do not in our view have a bearing on the question of who may be an 'interested party' for purposes of an application for revocation or annulment of grant of letters of administration under section 76 of the *Law of Succession Act*. There is therefore no merit in the complaint that the learned judge paid undue premium or undue regard to section 76 of the *Law of Succession Act* when he held that the 1st respondent has the locus standi to present the application for revocation of the grant. We agree with the learned Judge that the 1st respondent's interest as a purchaser of the property of the deceased qualifies him as an 'interested party' with standing to challenge the grant.'

25. The argument by the appellant is that the land in issue belongs to her family. That she has utilized the land for a long time and currently one of her sons lives there. That the 2nd respondent, contrary to what is stated in the petition, is not related to the deceased in any way and has no entitlement to the estate of the deceased.

26. An interested party is one who has a right or expectancy of the estate. It seems to me that the appellant had all along expected that the estate of the deceased would go to her husband being the only grandson to the deceased and in extension to her family. In my view, the appellant had a stake on the estate of the deceased through her husband. The appellant has shown that she has been utilizing the land that is the subject of the succession cause since when she was married by the 1st respondent and that her son is currently living on the land. It would appear that she has coffee trees on the land. In my view, she had a right to challenge the contention by the 2nd respondent that he is entitled to the land of the deceased as grandson to the deceased. She therefore had locus standi to challenge the issuance of the grant to the

2nd respondent on the basis that he is a grandson to the deceased. She is, in my view, an interested party for the purposes of section 76 of the *Law of Succession Act*.

(2) Whether the grant was obtained fraudulently -

27. I have considered the evidence that was adduced before the trial court, the submissions by the respective advocates for the parties and examined the documents filed in support of the petition. The chief`s letter that accompanied the petition for grant of letters of administration intestate indicated that the two intended petitioners were grandsons to the deceased herein. The petitioners declared in the petition for letters of administration intestate, P & A 80 that they were presenting the petition in their capacity as grandsons to the deceased. They further declared in the petition that -

> ' Every person having an equal or prior right to a grant of representation herein has consented hereto (or has renounced such right or has been issued with a citation to renounce such right and apply for a grant of representation and has not done so)'.

28. The petitioners also declared in the affidavit in support of petition for letters of administration intestate, P & A 5, that the deceased was survived by themselves as his grandsons. They further declared in the affidavit in support of summons for confirmation of grant within six months that the deceased was survived by themselves as his grandsons and that he was not survived by any other dependant apart from themselves.

29. The appellant contended in her evidence that the 2nd respondent was not related to the deceased and therefore that he was not a grandson to the deceased as purported in the petition. The 2nd respondent did not swear an affidavit in reply to the affidavit of the applicant that he was not related to the deceased. Neither did he testify in court to defend his purported relationship with the deceased. The 1st respondent who filed a reply to the supporting affidavit of the applicant was silent on the 2nd respondent`s relationship with the deceased. He instead stated that his late father and the late father of the 2nd respondent had bought the land from the deceased herein. He did not explain why the petition purported that the 2nd respondent was a grandson to the deceased if the only common thing was that the 2nd respondent`s father had bought the land jointly with his father.

30. It is clear from the pleadings and the evidence adduced before the trial court that the 2nd respondent is not a grandson to the deceased as purported in the petition. That would explain why he did not file any document in opposition to the application. It is clear to me that the grant and the confirmation in this matter were procured through conspiracy between the two respondents. They first alleged that both of them were grand children to the deceased and when this seemed not to work they changed the story to that the land had been bought jointly by their fathers from the deceased. No evidence was availed to the court to that end. What was evident was that the 2nd respondent wanted to buy the land from the 1st respondent. They made false statements and concealed vital information from the court so as to achieve their goal. It is clear to me that the 2nd respondent had no capacity to file the petition as he was not a grandson to the deceased.

31. The 1st respondent admitted that he has sisters. The law grants him and his sisters equal right in applying for grant of letters of administration to the estate of the deceased. The 1st respondent declared in form P & A 80 that all persons who had an equal right to apply for the grant of representation had consented or renounced their right to do so. There was no document filed to support the statement that his sisters had consented or renounced their right to apply for grant of letters of administration in respect to the estate of the deceased. It is then clear, yet again, that the grant was obtained by making of

a false statement that all persons who had equal right to apply for the grant of letters of administration in respect to the estate of the deceased had consented or renounced their right to do so.

32. It is my considered view that a petitioner for grant of letters of administration should disclose all the relevant information relating to the estate of a deceased person. Where such information is in the knowledge of a petitioner and he/she hides the information from the court, the court has power to revoke the grant under section 76 of the *Law of Succession Act*. Similarly, where a petitioner gives false information in respect to a deceased`s estate, the court has power to revoke the grant under the stated section. In this matter it has been shown that the grant was obtained by making of false statements and concealment of material information from the court.

33. Even if I were wrong on whether the appellant lacked locus standi to bring up the application for revocation, this is a matter that the court should revoke the grant on its own motion under the provisions of section 76 of the *Law of Succession Act* since the grant was procured fraudulently. The trial court failed to examine whether the documents filed in the matter were in order.

34. Rule 73 of the *Probate and Administration Rules* gives a Probate court power to make any such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. The appellant has shown that the proceedings leading to the confirmation of the grant in this matter were defective in substance and that the grant was obtained fraudulently by making false statements and concealment of the status of the beneficiaries of the deceased. In the premises, the whole process of obtaining the grant amounted to an abuse of the process of the court which a court of law should not countenance.

35. On my analysis of the evidence, I find that the trial magistrate erred in holding that the appellant did not have locus standi to challenge the grant. The court did not interrogate on whether the grant was procedurally obtained. I therefore find merit in the appeal and do hereby set aside the ruling of the trial magistrate and make the following orders:

    1. The grant of letters of administration intestate issued to the petitioners/respondents on the February 9, 2016 are hereby revoked.

    2. The certificate of confirmation of grant issued to the petitioners/respondents on the June 23, 2016 is similarly revoked.

    3. The registration of land parcel No Konyu/Gachuku/230 in the name of the 2nd Respondent, Charles Mwangi Njogu, is hereby cancelled and the Land Registrar Nyeri is hereby ordered to revert the title to the name of the deceased herein, Kabugu s/o Kabanya.

    4. The 1st Respondent is ordered to start the process afresh, safe for the filing of the Chief`s letter, and is ordered to comply with the procedure of issuing grants as set out in the *Law of Succession Act*.

    5. The 2nd respondent is not a grandson to the deceased herein and he is therefore excluded as a petitioner in the succession cause.

36. Each party to bear its own costs to the appeal.

SIGNED THIS 14TH SEPTEMBER 2022.

J.N. NJAGI

JUDGE

Delivered, dated and signed at Nyeri this 26th day of October, 2022.

By:

HON. JUSTICE M. MUYA

JUDGE

In the presence of:

Mr. Nderi: for Appellant

Muthigaine: for Respondents

Court Assistant: Kinyua

30 days R/A.