



REPUBLIC OF KENYA



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**Kanga v Kanga (Succession Appeal 4 of 2021)
[2022] KEHC 14018 (KLR) (21 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14018 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
SUCCESSION APPEAL 4 OF 2021
WM MUSYOKA, J
OCTOBER 21, 2022
(FORMERLY KAKAMEGA HCSA NO. 4 OF 2020)**

BETWEEN

PAUL MALUNGU KANGA APPELLANT

AND

ERICA H LIHANDA KANGA RESPONDENT

*(An appeal arising from the ruling of Hon. M Ochieng, Principal
Magistrate, in Hamisi PMCSC No. 77 of 2017, of 24th November 2020)*

JUDGMENT

1. The appeal herein arises from a decision of the trial court, in Hamisi PMCSC No 77 of 2017 of November 24, 2020. The grounds of appeal revolve around the dependency of the appellant, lack of consideration of the evidence tendered, delay in the delivery of the ruling, and a general lack of merit in the ruling. The appellant would like the said decision set aside and replaced with a finding that he had established his case before the trial court, and an order of distribution be made making provision for him.
2. The impugned ruling, of November 24, 2020, turned on an undated summons for revocation of grant filed in court on February 26, 2019, by the appellant. It had been argued that the grant had been obtained fraudulently, as he and the families of his late brothers had been left out. His case was that the beneficiaries of the deceased were Rodah Musimbi Kanga, Amina Isiji Basweti, Erica Lihanda Kanga, Gladys Khavere Kanga, Susan Khaziga Kanga, Evans Mulusa Kanga, Paul Malungu Kanga, the family of the late David Amwokola Kanga and the family of the late Patrick Makani Kanga. He was said to have died possessed of Tiriki/451 and 1152, and the appellant was proposing that, after revocation of the grant, all the survivors should be reflected in the common tenancy in Kakamega/Tiriki/451, and Tiriki/Shamakhokho/1152 should be shared equally. To that application the respondent filed a reply,



- vide an affidavit that she swore on April 18, 2019. She averred that due process was used to procure her appointment as administrator, and that she did not collaborate with the Chief to disinherit the appellant and his siblings. She accused him of introducing strangers to the estate, whose effect would be to disinherit other beneficiaries.
3. Directions were taken on August 20, 2020, that the application would be disposed of by way of “affidavit evidence.” Subsequently, a number of affidavits were filed in the cause, which I suppose was following the said directions.
 4. The appellant’s affidavit evidence was sworn on September 7, 2020. He reiterated what he had averred in his affidavit in support of his application for revocation of grant, with regard to who the beneficiaries of the estate of the deceased were according to him. He averred that the deceased was his mother, and she had inherited the assets that comprised her estate from the estate of his late father, the late Reuben Angutsa Anyika, who had died in 1996. He asserted that the deceased had filed a succession cause in the estate of his father. He averred that the deceased died possessed of Tiriki/Shamakhokho/451 and Tiriki/Shamakhokho/1152 were omitted from the assets that the deceased died possessed of, and that Tiriki/Shamakhokho/615 did not form part of the estate. He averred that Tiriki/Shamakhokho/1495 had been gifted to Evans Mulusa Kanga directly. He stated that the respondent had not obtained the consents of other beneficiaries before she petitioned for representation. He attached a copy of certificate of confirmation of grant in Hamisi PM CSC No 77 of 2017; certificates of official search for Kakamega/Shamakhokho/451 and 615, and Tiriki/Shamakhokho/1153 and 1495; and an affidavit in support of petition in Nairobi HCSC No 223 of 1998. There was an affidavit of Purity Mwenje Magani, sworn on an unknown date in 2020. She was a child of the late Patrick Magani Kanga, and claimed to be a granddaughter of the deceased, and asserted entitlement to a share in the estate herein.
 5. The affidavits stating the case of the respondent were sworn on August 31, 2020. The respondent averred that she and the appellant were all biological children of the late Reuben Angusa Anyika, but by different mothers. She averred that the mother of the appellant was not a lawful wife of the Reuben Angusa Anyika, and she described her as a mistress, saying that she got married elsewhere, although the late Reuben Angusa Anyika raised the appellant. She averred that the late Reuben Angusa Anyika then married the deceased herein, who is her other, the respondent. She asserted that the deceased was not the mother of the appellant. She stated that by the time the late Reuben Angusa Anyika died in 1996, the appellant was an adult, and was working as a civil servant. She submitted that the appellant could not have been dependent on the deceased herein, after 1996, as he was already an adult. She stated that the succession to the estate of the late Reuben Angusa Anyika was handled through Kakamega HC/RM Succession Cause No 223 of 1998, and that there was no objection filed in that matter. It was averred that the appellant was allocated a share out of the estate of the late Reuben Angusa Anyika in Kakamega HC/RM 223 of 1998, while the deceased herein was allocated Kakamega/Shamakhokho/451 and 615, both of which were transferred to her as absolute proprietor. The deceased then made an oral will/declaration, devising Kakamega/Shamakhokho/615 to the appellant and the late Patrick Makani equally. Subsequent to that will, the appellant and the family of the late Patrick Makani erected houses on Kakamega/Shamakhokho/615. Restrictions were subsequently registered against the title by the appellant and Flora Ambalwa Meusi. The deceased thereafter died without disposing of or transferring or bequeathing Kakamega/Shamakhokho/451 and Tiriki/Shamakhokho/1152 to anyone. She averred that she omitted Kakamega/Shamakhokho/615 from the instant succession cause on grounds that it had been bequeathed orally to the appellant and the family of the late Patrick Makani by the deceased. She averred that Tiriki/Shamakhokho/1152 was an asset purchased with monies that the respondent and her sister had contributed, and, therefore, the same was held by the deceased in trust for them. She attached copies of a guarantee of personal sureties in Kakamega HC/RM 223 of 1998; copy of a tenancy agreement between Josphene



Omocho and Rosemary Malungu; title deeds for Kakamega/Shamakhokho/451 and 615, and Tiriki/Shamakhokho/1152; and search certificates for Kakamega/Shamkhokho/451 and 615. The other affidavit was by Paul Jiseve Mbuni, on August 31, 2020, essentially stating that he was a tenant of a rental space on Kakamega/Shamakhokho/451, from Flora Ambalwa Meusi, Daglas Amuni Amogola, Newton Luvuga Amogola and Godfrey Jumba Amogola. There was also an affidavit by Godfrey Jumba Amogola, sworn on August 31, 2020, confirming that Paul Jiseve Mbuni was their tenant on Kakamega/Shamakhokho/451, and that mode of distribution in the certificate of confirmation of grant did not affect their interests in the property. Modline Imbayi's affidavit was sworn on August 31, 2020. He was the Chief of Shamakhokho Location, and averred that the appellant was not a biological child of the deceased person, whose estate was the subject of the proceedings, the late Jonifa Shilisia Reuben.

6. Directions were given on September 24, 2020, for filing of written submissions. The only submissions that I have come across are by appellant. He largely regurgitated the facts set out in the affidavits, save that he cited the application for review, dated May 20, 2019, which the court allowed, whose effect was to introduce Kakamega/Shamakhokho/615 and the appellant and Florah Ambalwa, Evans Mulusa Kanga and Beatrice Kagonya into the matter, as an asset in the estate and beneficiaries of that asset. He submitted that he was a dependant of the deceased under section 29(b) of the Law of Succession Act, cap 160, Laws of Kenya.
7. In the end, the trial court delivered a two-page ruling on the application for revocation of grant, where it merely recited the two affidavits by the appellant and the respondent, in support and reply to the application, respectively. The evidence affidavits filed by both sides were not recited nor analyzed. The conclusion by the court, which is not based on any recorded analysis of the evidence, is in the fourth and penultimate paragraph of the ruling, where the court wrote:

“On September 24, 2020 when this matter came up for directions on hearing of this Application, it was directed that the matter do proceed via Affidavit evidence and written submissions to be filed in Court which this court has carefully considered. This Court finds not a single concrete evidence that Paul Malungu, David Amwokola (dec'd) and Patrick Makani (dec'd) were children and/or dependants of the deceased person in this Cause, as provided for under provisions of the Laws of Succession Act. Without such evidence, this court finds that the summons for revocation of grant filed on February 26, 2020 is bereft of merit. The applicant's application for revocation of grant is therefore dismissed with costs.”

8. The respondent filed written submissions to the appeal. I have read through the same and noted the arguments made. I have not seen written submissions from the appellant.
9. I would start by stating that a summons for revocation of grant, where issues arise relating to composition of the family of the deceased, it would be prudent not to dispose of that application by affidavit evidence. The more prudent thing would be to subject the matter to a oral hearing, where the parties would have a chance to cross-examine each other, and their witnesses, on the contents of the filings that they rely on, and where appropriate disclosures are likely to be made on the composition of the said family.
10. The dispute framed by the parties, in the revocation application, was clearly one about the composition of the family of the deceased, whether the appellant and his siblings were members of the family of the deceased, to warrant their being involved in the succession cause relating to the estate of the deceased. In his filings, the appellant asserted that the deceased was his mother, while the respondent countered that he was not. Her case was that the appellant and herself were siblings, being children of the same father, but of different mothers. She asserted that the mother of the appellant was never married to the



deceased, and the legal wife was her own mother, the deceased herein. In her affidavit, she described the mother of the appellant as having been a mistress of her father. Then she left and got married elsewhere, whereupon her father married the deceased. She acknowledged the appellant and his two brothers as children of their late father, and one would wonder how her father got up to three children with a woman to whom he was not married. Evidence around such issues should be taken orally, and not by way of affidavit, and the trial court should have taken oral evidence for that reason. Indeed, it would appear that the appellant and his siblings were raised on the estate, presumably by the deceased, and it could be a basis for them claiming that she was their mother. They never referred to her as a stepmother in their filings.

11. Secondly, the way the respondent handled the issue of the property, variously referred to as Kakamega/Shamakhokho/615 and Tiriki/Shamakhokho/615, should raise eyebrows. She conceded that the property was registered in the name of the deceased, and that the appellant and his siblings resided there. Indeed, she appeared to take the position that the appellant and his siblings were entitled to that property. Indeed, she avers that the deceased had made an oral will or declaration willing the said property to them. So, if the appellant and his siblings were entitled to this property, which was registered in the name of the deceased, how were they to have property transmitted to them other than through a succession cause in the estate of the deceased herein? Indeed, the appellant's papers asserted that he and his siblings were beneficiaries rather than children of the deceased. A beneficiary was a person who is entitled to benefit from a certain property. If the appellant and his siblings were entitled to benefit from Kakamega/Shamakhokho/615 or Tiriki/Shamakhokho/615, then that makes them beneficiaries of that estate. What was more, the deceased was said to have had orally bequeathed Kakamega/Shamakhokho/615 or Tiriki/Shamakhokho/615 to them. How or why was she bequeathing that property to the appellant and his siblings if she had no connection to them? And, if there was a connection between them and the deceased through Kakamega/Shamakhokho/615 or Tiriki/Shamakhokho/615, did that not make them have an interest of a beneficial nature in her estate, to warrant their involvement in the cause?
12. Then there was the application dated May 20, 2019, that the respondent lodged at the trial court, to have the orders that had confirmed the grant herein reviewed. The review was sought to primarily achieve two objectives. One, to introduce a property, which formed part of the estate, but which had not been listed in the petition and which was not distributed at confirmation, that is to say Tiriki/Shamakhokho/615, also known as Kakamega/Shamakhokho/615. Two, to introduce the appellant and members of the families of his two late brothers, as beneficiaries of that property, Tiriki/Shamakhokho/615, also known as Kakamega/Shamakhokho/615. The effect of that application was confirmation by the respondent that Tiriki/Shamakhokho/615, also known as Kakamega/Shamakhokho/615, registered in the name of the deceased, and occupied by the appellant and the families of his siblings, was in fact an asset in the estate of the deceased, and that the appellant and the families of his siblings were in fact beneficiaries of the estate, for an asset in the estate of a dead person cannot be devolved upon persons who have no beneficial interest in it. It would be ironic, therefore, against that background, to say that the appellant and his siblings had no beneficial interest in the estate of the deceased herein. The review application was a revisionary approach to correcting mistakes that were made when the respondent initiated the succession cause leaving out some of the assets registered in the name of the deceased and some of the persons who were beneficially entitled to those assets. It was an indication that something was fundamentally wrong with the process that had been conducted thus far. The issues that arose at that review were the same issues that were raised in the revocation application. In fact the review application was a response to the revocation application, an admission that the appellant was justified in what he was raising.



13. The issue of succession to the estate of the late Reuben Angusa Anyika was another matter of some relevance here. The appellant did not articulate the connection between the said estate and that of the deceased herein. It was the respondent who has brought it out. The late Reuben Angusa Anyika was the father of both the appellant and the respondent. It would appear that the assets that make up the estate of the deceased herein devolved to that estate in succession proceedings in the estate of the late Reuben Angusa Anyika, in a cause that appears to be either Kakamega HCSC No 223 of 1998 or Nairobi HCSC No 223 of 1998, where the deceased herein, as surviving widow, was the administratrix, and the appellant was listed as a survivor. Kakamega/Shamakhokho/615 was listed as one of the assets in Kakamega HCSC No 223 of 1998 or Nairobi HCSC No 223 of 1998. None of the parties placed on record the documents relating to the distribution of the estate in Kakamega HCSC No 223 of 1998 or Nairobi HCSC No 223 of 1998. There was no clarity on how the estate of the late Reuben Angusa Anyika was distributed in that cause, and particularly how the appellant and the deceased benefitted from the same. What has emerged was that Kakamega/Shamakhokho/615 somehow moved from the estate of the late Reuben Angusa Anyika to the name of the deceased herein, hence its being distributed as an asset in the instant estate. It would appear that the entire estate of the late Reuben Angusa Anyika was devolved upon the deceased herein. If that was the case, then the appellant herein and his siblings were entitled to access their shares of what they were entitled to from the estate of the late Reuben Angusa Anyika through the deceased herein, and failure to involve them in the instant cause, and to treat them as non-beneficiaries could lead to their inheritance in their father's estate being lost. It could be that the deceased herein was not their biological mother, but she had inherited assets from the estate of the late Reuben Angusa Anyika in which the appellant and his siblings had beneficial interest, and that made him and his siblings beneficiaries in the estate of the deceased herein. The trial court should have looked at this matter broadly, so that once the issue of Kakamega HCSC No 223 of 1998 or Nairobi HCSC No 223 of 1998 came up, it ought to have probed further. What was that succession cause all about? How was the estate the subject of that succession cause distributed? How was the interest of the appellant in that succession cause handled? Again, these are issues that could only be properly canvassed by way of oral evidence.
14. The issue as to whether the deceased was the biological mother of the appellant is still moot. But even presuming that the respondent was right, from the material that was on record in the file of papers before the trial court, there is ample demonstration that the appellant and his siblings are entitled to some of the assets that make up her estate, something that the respondent admits, to the extent of Tiriki/Shamakhokho/615, also known as Kakamega/Shamakhokho/615. If her conviction was that the appellant was not a biological son of the deceased, but was entitled, one way or the other to Tiriki/Shamakhokho/615, also known as Kakamega/Shamakhokho/615, which was registered in the name of the deceased, she should have treated him as a person with beneficial interest, and should have listed him and his siblings as liabilities of the estate, and not survivors. Excluding them altogether, knowing that they were entitled to Tiriki/Shamakhokho/615, also known as Kakamega/Shamakhokho/615, suggested mischief, with an intent to disinherit them.
15. Just for clarity sake, I am not at all suggesting that the appellant and his siblings were only entitled to Tiriki/Shamakhokho/615, also known as Kakamega/Shamakhokho/615. The appellant appeared to suggest that they were entitled to more. That should be an issue to be thrashed out before the trial court in a full hearing. I have made no findings at all on whether the deceased was a mother of the appellants and his siblings, whether biological or otherwise, and whether their mother was someone else. Again, these issues are for the trial court to determine after it has taken evidence from the parties, for it appears to be a highly contested matter. I have also not concluded that the mother of the appellants, if she happened to be someone other than the deceased, was married to the deceased, for that is an issue for the trial court to decide on based on evidence. Whether there was an oral will, or some individuals



benefitted from inter vivos gifts are also issues for the trial court to decide upon after taking oral evidence. All these are contentious or contested issues, that the trial court should have addressed, and they could only be fairly dealt with if oral evidence had been taken. Viva voce evidence is the way to go, with respect to matters that are highly contested, whether they arise at confirmation or at revocation of grant. The parties herein do not have to go through another revocation application for those issues to be addressed, for matters that ought to be determined in a revocation application, regarding who should be appointed as administrators and the identification of persons who are beneficially entitled to a share in the estate and their respective shares, can be squarely handled in a confirmation application, by dint of section 71(2)(a)(b) and the proviso to section 71(2) of the *Law of Succession Act*, respectively.

16. I believe that I have said enough to demonstrate that there was enough material, in the file of papers that was before the trial court, to persuade that court to have the revocation application dated February 26, 2019 canvassed by way of viva voce evidence, in view of the issues in controversy. Even without the oral testimonies, there was enough material for the trial court to find that the appellant and his siblings had a beneficial interest in the estate of the deceased, to warrant their being notified of the proceedings and involved in the process.
17. I am persuaded that there is merit in the appeal herein, and I hereby allow the same in the terms hereunder:
 - a. That the letters of administration intestate, made to the respondent herein on April 25, 2018 are hereby revoked, and the grant issued on April 26, 2018, in Hamisi PM CSC No 77 of 2017, is hereby cancelled;
 - b. That I hereby appoint both the appellant and the respondent, that is to say Paul Malungu Kanga and Ericah Lihanda Kanga, administrators of the estate of the deceased herein, and a fresh grant of letters of administration intestate shall issue to them out of Hamisi PM CSC No 77 of 2017;
 - c. That the orders made on February 19, 2019, in Hamisi PM CSC No 77 of 2017, confirming the grant of April 25, 2018, are hereby set aside, and the certificate of confirmation of grant, issued on even date, is hereby cancelled;
 - d. That the new administrators shall, either jointly or severally, file an application for the confirmation of their grant, where they shall include and involve all the members of the family of the appellant and the respondent;
 - e. That, should any of the beneficiaries, including an administrator not applying, disagree with the proposals made in that application, there shall be liberty, under rule 40(6) of the *Probate and Administration Rules*, to file an affidavit or affidavits of protest, and to canvass, in the protest or protests, issues that include those raised in the revocation application the subject of this judgment;
 - f. That each party shall bear their own costs; and
 - g. That the trial court records, in Hamisi PM CSC No 77 of 2017, shall be returned to the Hamisi law courts for further action.

18. It is so ordered.

**JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS
21ST DAY OF OCTOBER 2022**

WM MUSYOKA



JUDGE

Mr. Erick Zalo, Court Assistant.

Mr. Okoth, instructed by OJ Okoth & Company, Advocates for the appellant.

Mr. Godia, instructed by Godia & Associates, Advocates for the respondent.

