



REPUBLIC OF KENYA



KENYA LAW
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**Njagi v Mbae (Civil Appeal E019 of 2021)
[2022] KEHC 15612 (KLR) (17 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15612 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CIVIL APPEAL E019 OF 2021**

LW GITARI, J

NOVEMBER 17, 2022

BETWEEN

CATHERINE GAKURIE NJAGI APPELLANT

AND

TIRICHIA KANYUA MBAE RESPONDENT

JUDGMENT

1. The appellant has instituted this appeal *vide* a memorandum of appeal dated October 4, 2021 and filed on even date. The appeal is against the ruling made in the Chief Magistrate’s Court Succession Cause No 286 of 2012 on September 16, 2021 in respect of the application dated February 17, 2020 filed therein (hereinafter the “impugned ruling”).
2. The appeal raises 10 grounds of appeal, to wit:
 - a. The learned trial magistrates erred in law and fact by rendering a ruling regarding the summons for revocation dated February 17, 2020 when the canvassed issues before court as per the pleadings and submissions was for prayers that the summons for revocation of grant dated February 17, 2020 be marked as withdrawn, That the court be pleased to grant the applicant leave to file fresh summons for revocation of grant issued to the petitioner/respondent on September 25, 2013 and that the summons for revocation of grant dated February 17, 2020 and filed herewith be admitted by the court as duly filed and served.
 - b. The learned trial magistrate erred in law and fact by rendering a ruling in regards to the summons for revocation of grant dated February 17, 2020 before the same was adopted by court and paid for to form part of the record particularly noting that the trial magistrates was only enjoined whether or not the summons for revocation of grant dated 17th February could be adopted as the summons for revocation of grant and the same be deemed as duly filed and served.



- c. That the learned trial magistrates erred in law and fact by failing to either adopt or reject the summons for revocation of grant dated February 17, 2020 and erroneously proceeded to render a ruling regarding the said summons for revocation of grant when the summons were not the canvassed issues in the application dated February 17, 2020.
 - d. That the learned trial magistrates erred in law and fact by rendering a ruling in respect of the summons for revocation of grant dated February 17, 2020 when the issues in the said summons were not canvassed by parties and therefore an affront to the principles of natural justice that require that a person should not be condemned unheard and particularly noting that the appellant lost in the decision of the court.
 - e. That the learned trial magistrates erred in law and facts by holding that section 76 of the *Law of Succession Act* has any limitation of time within which an interested party must file summons for revocation of grant thereby making the learned trial magistrates to render a ruling that was not supported by law.
 - f. That the learned trial magistrates erred in law and fact by holding that lapse of time, transfer of part of the estate of a deceased person to a 3rd party upon purchase after confirmation of grant donated jurisdiction where it was not there and therefore transaction consequential to unlawful order were validated by the learned trial magistrates.
 - g. That the learned trial magistrates erred in law and fact by failing to make a finding that interest of a purchaser purchasing part of the estate of a deceased's person after confirmation of grant was protected under section 93(1) of the *Law of Succession Act*, consequently the trial magistrates ought not to have declined the appellant's claim on that ground only.
 - h. That the learned trial magistrates erred in law and fact by holding that the appellants were aware of the administration and distribution of the estate of deceased when no evidence was adduced by any party to that effect and particularly noting that the appellant is a married woman and married away from the homestead of the deceased.
 - i. That the learned trial magistrates erred in law and fact by making a finding that the appellant was party to the summons for revocation of grant by Jane Mugai Maganadated October 5, 2018 when there was no evidence to show that the said Jane Mugai Magana was holding brief or was making the application on behalf or in conjunction with the appellant.
 - j. That the learned trial magistrates erred in law and fact by holding that the principle of larches is applicable in the *Law of Succession of Act*.
3. Based on the above grounds, the appellant prayed that the appeal be allowed by setting aside and/or vacation of the impugned ruling and giving of the directions that the application dated February 17, 2020 be heard and determined on merits. The appellant also prayed that costs to be in cause.
 4. Directions were given that the appeal be canvassed by way of written submissions. The appellant filed his written submissions on May 16, 2022. On the other hand, the respondent, who was represented by a Mr. Murithi, has to date not filed his written submissions. Hereunder is a summary of the appellant's Submissions.

Appellant's Submissions

5. It was the appellant's submissions that the application dated February 17, 2020 was not meant to discuss or interrogate the merit or demerits of the summons for revocation of grant dated February 17, 2020. That this is where the learned trial magistrates and the respondent fell into error. According



to the appellant, the learned trial magistrate ought to have either refused to admit the summons dated 17th February or in the alternative, admit the summons as duly filed and served. The appellant states that after such a decision then that is when the procedure for disposing summons for revocation of grant should have followed.

Issue for determination

6. As noted herein above, the respondent did not file their submissions in respect to this appeal. I have thus considered the grounds of appeal raised and the submissions of the appellant. The main issue for determination by this court is whether the impugned ruling was erroneous to warrant this court to set it aside, and if found to be erroneous, then which orders should this court issue.

Analysis

7. This being an appeal against a ruling given in a succession cause, the law on the setting aside and review of orders issued by the subordinate court by this court is Order 45 of the *Civil Procedure Rules*. The said Order 45 is one of the provisions applicable under the *Law of Succession Act* expressly stipulated in Rule 63(1) of the *Probate and Administration Rules*.

8. Order 45(1) of the *Civil Procedure Rules* provides:

- “(1) Any person considering himself aggrieved—
- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

9. The conditions to be satisfied under Order 45 of the *Civil Procedure Rules* before an order or a decree can be reviewed are:-

- i. The order or decree sought to be reviewed must be one from which an appeal is allowed as of right but from which no appeal has been preferred, or one from which no appeal is allowed.
- ii. The applicant must demonstrate that he has discovered new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced when the order was made, or
- iii. That some mistake or error is apparent on the face of the record, or
- iv. The court may review an order for any other sufficient reason.

10. In this case, the application dated February 17, 2020 (the “impugned application”) that was before the trial court was seeking for orders:-

- a. That the summons for revocation of grant dated September 12, 2019 be marked as withdrawn.



- b. That the court be pleased to grant the applicant (the appellant herein) leave to file fresh summons for revocation of grant issued to the petitioner/respondent on September 25, 2013.
- c. That the summons for revocation of grant dated February 17, 2020 and filed herewith be admitted by court as duly filed and served.
11. The impugned application was based on the grounds on the face of it and supported by the affidavit sworn by the appellant herein on February 17, 2020. The contention by the applicant was that the summons for revocation of grant dated September 20, 2019 was dismissed with costs with the result that the summons for revocation of grant dated September 12, 2019 remained on record and was pending hearing and determination.
12. The Appellant has based his appeal on the third condition set out under Order 45 of the Civil Procedure Rules, that is, that there is some mistake or error apparent on the record.
13. The mistake, according to the appellant, is that the learned trial magistrate misapprehended the procedure to be taken by interrogating and determining on the issues raised over impugned application. According to the appellant, the respondent lured the trial magistrate into the error stated above by prematurely submitting on the merits and demerits of impugned application before directions were taken on how the said impugned application would proceed. The appellant submitted that by the trial court determining the application dated February 17, 2020 at the said point denied the appellant to champion its case on the same, which was a clear affront of the principles of natural justice that provides that a person should not be condemned unheard.
14. Rule 44 of the Probate and Administration deals with Revocation or annulment of grant. Under Rule 44 (3) requires that directions be given. Rule 44 (3) (4) (5) provides as follows:

“(3)	The summons and affidavit shall without delay be placed by the registrar before the High Court on notice in Form 70 to the applicant for the giving of directions as to what persons (if any) shall be served by the applicant with a copy of the summons and affidavit and as to the manner of effecting service; and the applicant, upon the giving of directions, shall serve each of the persons so directed to be served with a notice in Form 68, and every person so served may file an affidavit stating whether he supports or opposes the application and his grounds therefore.
(4)	When the persons (if any) so directed to be served (or such of them as the applicant has been able to serve) have been served with a copy of the proceedings, the matter shall be placed before the High Court on notice by the court to the applicant and to every person so served, and the court may either proceed to determine the application or make such other order as it sees fit.

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Where the High Court requires that notice shall be given to any person of its intention of its own motion to revoke or annual a grant on any of the grounds set out in section 76 of the Act the notice shall be in Form 69 and shall be served on such persons as the court may direct.”

The rule is couched in mandatory terms. It is meant to ensure that all persons who may be affected by the revocation of grant are notified and where possible be given an opportunity to be heard. The court has a duty to ensure compliance with this rule.

15. In the impugned ruling, I note that the trial court allowed prayer no. 1 in the impugned application which sought for the withdrawal of the summons application for revocation dated September 12, 2019 and the same was marked as withdrawn. On the prayer no. 2 seeking leave to file fresh summons for revocation of grant the trial court relied on the case of *the Estate of Wambui Ngurio Ng'ethe (deceased)* [2021] eKLR for same holding that an application for revocation of grant can never be time barred. Finally on, prayer No 3 of the impugned application, the trial court allowed the same and summons for revocation of grant dated February 17, 2020 was admitted as having been duly filed and served. The trial court then noted that the parties had filed their respective submissions in respect of the application for revocation of grant dated February 17, 2020 and proceeded to determine the same.
16. I have gone through the applicant’s submissions on the impugned application that are dated August 28, 2020 and were filed on September 4, 2020. The submissions are indeed only towards the allowing of the impugned application in terms of prayers no. 1, 2, and 3 therein. The applicant did not file submissions on the merit of summons for revocation of grant application dated February 17, 2020. I am of the considered view that the trial magistrate did error in proceeding with determining the said summons on merit, since all what the applicant was seeking was to file the summons or have the summons to be deemed as filed.
17. The right to be heard is a well-protected right in our Constitution and is also the cornerstone of the rule of law. This right should therefore not be taken away by the stroke of a pen, where sufficient cause has been shown. (See: *Richard Ncharpi Leiyagu vs Independent Electoral Boundaries Commission & 2 Others* Civil Appeal No 18 of 2013 [2013] eKLR).
18. In *Union Insurance Co of Kenya Ltd vs Ramzan Abdul Dhanji* Civil Application No Nai 179 of 1998 the Court of Appeal held that:

“Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it.”



19. In the circumstances of this case, I agree with the submissions of the appellant that the parties ought to have been given an opportunity to submit on their respective cases on merit. By allowing summons for revocation of grant dated February 17, 2020 to be admitted as duly filed and served, and proceeding to determine the same, it is evident that the appellant was condemned unheard in the impugned ruling.

Conclusion

20. The upshot is that the present appeal is merited.

I therefore allow the appeal. I order that:-

1. The ruling by the trial magistrate dated September 16, 2021 is set aside to the extent that the ruling dismissing the application for revocation of grant dated February 17, 2020 is vacated.
2. The summons for revocation of grant dated February 17, 2020 shall be heard and determined on merits.
3. The summons shall be served on all the interested parties and the court shall give directions on how the summons will be heard.
4. The file be returned to the trial court for hearing and determination of the summons.
5. I make no orders as to costs.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 17TH DAY OF NOVEMBER 2022.

L.W. GITARI

JUDGE

17/11/2022

The Judgment has been read out in open court.

L.W. GITARI

JUDGE

17/11/2022

