



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CIVIL APPEAL NO. 43B OF 2019

ERICK ODINGA.....APPELLANT

VERSUS

CALEB OCHIENG OJUNGA.....RESPONDENT

(Appeal against the Ruling in Siaya Principal Magistrate's Court Succession Cause No. 77 of 2018 delivered by Hon T.M. Olando, Senior Resident Magistrate on 13th September, 2019)

JUDGMENT

Introduction

1. This appeal is against a portion of the Ruling delivered by Hon. T.M. Olando dated 13/9/2019 in the Principal Magistrate's Court Siaya in Succession Cause 77 of 2018 in which the respondent sought revocation of grant issued to the appellant for failure to include all the beneficiaries of the deceased Morris Odera Nyaganga.
2. In his ruling, the trial magistrate despite holding that the respondent was a beneficiary of the deceased found that the respondent had not adduced evidence to prove fraud in obtaining of the grant and as such the trial magistrate declined to revoke the grant but ruled that the respondent be included as one of the deceased's beneficiaries and thus get an equal share with the 7 other beneficiaries.
3. Dissatisfied with the trial court's decision, the appellant filed his memorandum of appeal dated 15th October 2019 setting out the following grounds of appeal:
 - a) *That the learned magistrate erred in law and fact in failing to evaluate and analyse the evidence of PW1 Caleb Ochieng Ojunga.*
 - b) *That the learned magistrate erred in law and fact in holding that the respondent is the son of Patrick Sijenji hence a beneficiary in the estate of the deceased.*
 - c) *That the learned magistrate erred in law and fact in failing to give reasons for his decision that the respondent is a son of Patrick Sijenji hence a beneficiary in the estate of the deceased i.e. the ratio decidendi, as required by law.*
 - d) *That the learned magistrate erred in law and fact in finding that the respondent had proved his case on a balance of probabilities and therefore was a beneficiary of the deceased's estate.*
 - e) *That the learned trial magistrate erred in law and fact in finding in favour of the respondent despite the failure of the respondent to call his mother as a witness in the suit which would have assisted the court in reaching a fair and just verdict.*
 - f) *That the learned trial magistrate erred in law and fact by abdicating his statutory duty of evaluating and analysing the evidence tendered before court by all parties before making a finding.*
 - g) *That the learned trial magistrate erred in law and fact in finding that the respondent is entitled to the estate of the deceased despite failing to prove either through direct evidence/exhibit or availing a witness to corroborate that he was son to Patrick Sijenji hence a beneficiary of the deceased's estate.*
 - h) *That the learned trial magistrate erred in law and fact in failing to award costs of the suit to the appellant and finding that the respondent is a family member which is strenuously opposed and denied by the appellants.*
 - i) *That the learned trial magistrate erred in law and fact in disregarding and failing to consider the evidence of DW1 and DW2*

with regards to the respondent, and or the entire defence evidence/testimony before making his finding.

j) *That the learned trial magistrate erred in law and fact in directing that the certificate of confirmation of grant be amended to include the respondent and also that the respondent does get an equal share with the other beneficiaries which direction was outside the jurisdiction of the court and was a mandate of the administrator and beneficiaries to decide.*

k) *That the learned trial magistrate erred in law and fact in failing to consider the time honoured legal principles that demand that each decision be backed by a reason founded in law and not belief as was the case in the judgement in this matter.*

4. The appellant made an application moving the court to take additional evidence, which application was allowed. The parties agreed to canvass the appeal through written submissions though only the appellant filed their submissions.

Appellant's Submissions

5. It was submitted by the appellant's counsel that the trial court failed to make any analysis of the evidence tendered regarding the paternity of the respondent given that the respondent failed to give any evidence that he was the son of the late Patrick Sijenyi.

6. The appellant further submitted that the respondent had several names and aliases thus raising serious doubts as to his identity and also that the Identity Card produced by the respondent showed that he hailed from a different location, not that of his alleged father.

7. It was submitted that the respondent's failure to call his mother who was married to the deceased Patrick Sijenyi as a witness further raised doubts on the respondent's conduct.

8. The appellant submitted that the trial magistrate erred in failing to give reasons based in law for his decision in his judgement but proceeded to arrive at a conclusion based on belief which the appellant submitted was erroneous and ill advised.

9. It was submitted that the trial magistrate failed to evaluate and analyse the evidence tendered by the appellant's defence witnesses thus switching the burden of proof from the respondent to the appellant.

10. On costs it was submitted that as the trial court had prior awarded the respondent costs of Kshs. 3500 for the appellant's non-attendance in court, the appellant ought to have been awarded costs of the suit as the respondent is not a family member.

Analysis & Determination

11. As the first appellate Court, my role is to revisit the evidence on record, evaluate it and reach my own conclusion in the matter. (See the case of **In re Estate of Joash Arende (Deceased) [2019] eKLR**). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga –versus- Kiruga & Another (1988) KLR 348**.

12. The evidence adduced in the trial court was as follows: The respondent testified as PW1 and stated that he was the son of Patrick Sijenyi who was a son to the deceased Morris Odera. It was his testimony that he left his father's home as a child to live with his maternal grandmother.

13. PW2 and PW3 testified that they were both previously married to the respondent's uncles but had both left their husbands and moved on with their lives. PW2 further testified that she had already received land from the estate of the deceased which had been given to her late husband by the deceased prior to his death, which land she was now in occupation and she was threatened with eviction by the appellant.

14. The evidence adduced by the appellant and his witnesses before the trial court was similar. They contended that the respondent was not a child of the late Patrick Sijenyi. They based their assertion on the facts that Patrick Sijenyi did not inform them that he had another family, that further during the burial of the late Patrick Sijenyi, nobody showed up claiming to be his son.

15. The additional evidence adduced by the respondent during this appeal consisted of official public documents such as letters from the chief, and certificate of examination from the Kenya National Examination Council, death certificate of Patrick Sijenyi, affidavit of change of name as well as a baptismal card.

16. The evidence of Christine Achieng, the respondent's mother corroborates, the respondent's testimony that she left Patrick Sijenyi when the respondent was still young due to marital disputes and the respondent ended up being raised by his maternal grandparents of whom he took the surname, Ojugah, of his maternal grandfather. The KCPE certificate produced shows the name of the respondent as Sijenyi Ochieng Caleb. I also note that the respondent made efforts to change his name so as to bear the surname Sijenyi and this was not during the pendency of these succession proceedings, but before.

17. The evidence of one Joseph Mwamba who claims to be a nephew of the deceased Morris Odera further revealed that the deceased had six children, the senior most being one Domtila Agola, who was still alive and who had not been included in the list of beneficiaries by the appellant herein.

18. The appellant states that he is only dissatisfied with the trial court's decision as regards the addition of the respondent as a beneficiary and the order to provide for him equally as a beneficiary of the deceased.

19. The role of this court is to revisit the evidence on record, evaluate it and reach my own conclusion in the matter. Further to this, section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules cloth this court with wide powers to do what is necessary to ensure that the ends of justice are met. Accordingly, the issue for determination herein is ***whether the application for revocation of grant issued to the appellant was merited.***

20. Under section 76 of the Law of Succession Act-

“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 order or allow; 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

(e) that the grant has become useless and inoperative through subsequent circumstances.”

21. In the Matter of the Estate of L A K – (Deceased) [2014] eKLR the court held that:

“Revocation of grants in governed by Section 76 of the Law of Succession Act. The relevant portions of Section 76 are paragraphs (a), (b) and (c) since the issues raised relate to the process of the making of a grant. A grant may be revoked where the proceedings leading up to its making were defective, or were attended by fraud and concealment of important matter, or was obtained by an untrue allegation of a fact essential to the point.”

22. In order for the orders sought to be granted, the objectors must prove that the grounds for revocation have been satisfied.

23. It was the respondent’s case that the appellant fraudulently misrepresented himself and his siblings as the only surviving beneficiaries to the deceased’s estate to the exclusion of the respondent as well as one Domtila Agola who was the deceased’s daughter who was still alive.

24. From the evidence adduced by the respondent, it is the view of this court that he proved on a balance of probabilities that he was a son to the late Patrick Sijenyi who was the deceased’s son. The evidence of the respondent’s mother regarding the moving away from her marital home and raising of the respondent by his maternal grandparents corroborates that of the respondent and when weighed against that evidence by the appellant, in my view, is more believable.

25. I also note that the respondent’s KCPE certificate clearly lists him as Sijenyi Ochieng Caleb. This in my view points towards the respondent being a child of Patrick Sijenyi and is far believable than the evidence tendered by the appellant that Patrick did not tell them that he had a son prior to his death or that the respondent failed to attend Patrick’s burial.

26. Accordingly, I find and hold that the respondent should have been included as a beneficiary of the deceased’s estate. That notwithstanding, it is noteworthy that the omission of the inclusion of Domtila Agola who is the deceased’s daughter and who had priority over the appellant to petition for grant of letters of administration intestate was not explained by the appellant. The affidavit in support of the petition for letters of administration intestate has not listed Domtila but lists the appellant and his siblings as the only beneficiaries. The letter from the chief also does not provide for Domtila Agola or the respondent as a beneficiary.

27. In my humble view, this material non-disclosure by the appellant of the beneficiaries of the deceased’s estate is sufficient to sustain revocation of the grant issued to the appellant.

28. Accordingly, I find and hold that the trial magistrate’s judgment be and is hereby set aside and substituted with an order revoking the grant issued to the appellant, so that a fresh grant is sought after all the assets of the deceased and his bonafide beneficiaries are identified and listed and involved in the succession process.

29. Each party to bear their own costs of the appeal.

Dated, Signed and Delivered at Siaya this 16th Day of February, 2021 via email to the parties' advocates

R.E.ABURILI

JUDGE