



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CIVIL APPEAL NO. 10 OF 2020

PETER OWINO ANINO.....APPELLANT

VERSUS

JOHN ORIEDO ANINO.....RESPONDENT

(Appeal from the Ruling for confirmation of grant dated 31/7/2019 by Hon. T.M. Olando, SRM in Siaya PM Succession Cause No. 21 of 2005)

JUDGMENT

Introduction

1. The appellant, **PETER OWINO ANINO** having been dissatisfied with the decision of the Honourable trial magistrate, T.M. Olando lodged this appeal on 30.7.2020 seeking inter alia that the appeal herein be allowed with costs and the ruling of the trial court be set aside. The appellant relied on the following grounds: -

- a. That the learned trial Magistrate erred in law and in fact in failing to evaluate and analyse the evidence of the objector on record.
- b. That the learned trial magistrate erred in law and in fact in failing to evaluate the proceedings on record in which it was clearly stated by the administrator that he was the one who withdrew the Kshs. 366,899.30 from Post Bank but it was interchanged in the ruling to indicate that it was the objector who withdrew the cash.
- c. That the learned trial magistrate erred in law and in fact in failing to revoke the grant and to issue it in the objectors favour after analysing the evidence on record but instead confirmed the grant in the petitioners favour.
- d. That the learned trial magistrate erred in law and in fact by abdicating his statutory duty of evaluating the evidence tendered before the court by all the parties before making a finding.

2. The genesis of the dispute between the parties hereto who are brothers is that the appellant had sought revocation of the grant of letters of administration intestate issued to the respondent on the 4th day of April 2005 and confirmed on 17th November 2005 and rectified on the 21st March 2019. The application for revocation was based on the grounds that the grant issued to the respondent was obtained by misleading the court through presentation of false information and further that the respondent concealed vital information and material facts from the court.

3. The appellant asserted that the grant of letters of administration issued to the respondent were improperly confirmed as the mode of distribution failed to capture the wishes of all the beneficiaries to the estate as the beneficiaries failed to give their consent.

4. The parties agreed to dispose of the appeal by way of written submissions.

Appellant's Submissions

5. The appellant submitted that as the son of the deceased herein, he had the requisite locus standi to institute the application for revocation of grant. He relied on the case of **Re Estate of Jackson Mugo Maathai (2001) eKLR**.

6. The appellant further submitted that the grant herein was obtained as a result of misstatement of facts or concealing from court of material facts making it defective. The appellant cited the distribution of property known as North Gem/Lundah/161 measuring 8.4 hectares which

was to be subdivided amongst the deceased's beneficiaries but which eventually devolved in favour of the respondent. It was the appellant's submission that this court has jurisdiction to annul/voke a grant as was established in the case of **Albert Imbuga Kisigwa v Recho Kawai Kisigwa**.

Respondent's Submissions

7. It was submitted that the documents produced in court did not indicate who withdrew funds from the deceased's account and further that when the said money was withdrawn, the respondent had not yet filed the succession proceedings. It was the respondent's submission that he did not list the accounts held by the deceased in his petition for letters of grant as all the Bank documents were in the possession of the appellant's mother.

8. It was submitted that the court's ruling that the mode of distribution to be used be the one dated 24th July 2019 was not clear as the said mode of distribution did not provide for all the deceased's assets but only for property known as North Gem/Lundah/161. The respondent further submitted that he had listed all the deceased's beneficiaries whereas the appellant only listed 3 out of 5 beneficiaries of the deceased.

Analysis & Determination

9. 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 **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 v Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga v Kiruga & Another (1988) KLR 348**.

10. Having considered the evidence adduced before the trial court, the grounds of appeal and submissions for and against the appeal herein, the issue for determination is whether the appellant adduced sufficient evidence to meet the threshold for the revocation of a grant within the meaning of Section 76 of the Law of Succession Act and if the answer to this is in the affirmative, the court will proceed to determine whether the mode of distribution as presented by the appellant should be adopted.

11. Section 76 of the Law of Succession provides:

“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

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

12. The applicant has a duty to prove that any of the grounds set out in section 76 of the Law of Succession Act before the grant issued is revoked. In the case of **Albert Imbuga Kisigwa v Recho Kawai Kisigwa, Succession Cause No.158 of 2000**, Mwita J. in a decision rendered on 15th November, 2016, noted thus:

“[13] Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the court to invoke section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased's estate and ensure that the action taken will be for the interest of justice.”

13. The gravamen of the appellant's case is that the grant was fraudulently obtained through material concealment and making of a false statement to the detriment of himself and other beneficiaries as the mode of distribution agreed was not presented by the respondent before court.

14. On his part, the respondent stated that monies withdrawn from the deceased's account were done before he initiated the succession proceedings and that in any case it was not clear from the documents adduced as to who withdrew the said sums. The respondent further admitted that indeed he did not include the deceased's bank accounts as assets as all the documents in relation to the bank accounts were in the custody of the appellant's mother. The respondent countered by stating that the direction of court that the mode of distribution to be used be the one dated 24th July 2019 was not clear as the said mode only provided for one of the deceased's assets, LR No. North Gem/Lundah/161.

15. I have perused the record of appeal and I do note that in the Affidavit in Support of Petition for Letters of Administration Intestate, the respondent herein listed all of the deceased's beneficiaries consisting of 5 widows and 21 children. I however observe and as admitted by the respondent, he failed to list the deceased's bank accounts and he subsequently admitted before the trial court to have received Kshs. 366,899.30 from the deceased's Post Bank account. The status of the deceased's Barclays Bank account was not disclosed to either the trial court or to this court.

16. Accordingly, it was only proper that the respondent makes this disclosure in his filing before the trial court. The respondent in my view was economical with the truth in alleging that the bank details of the deceased's accounts were in the possession of the appellant's mother whereas he admitted in his testimony before the trial court to have received money from the Post Bank account. This, in my view amounts to a non-disclosure of the deceased's assets and having admitted in court to have received money from Post Bank, an account of the deceased, without first obtaining consent of all beneficiaries and grant of letters of administration intestate, he was intermeddling with the estate of the deceased, which act is criminal in nature.

17. The evidence adduced by the appellant before the trial court was not rebutted by the respondent. Statute law is clear that concealment of material facts from the court is a ground for the revocation of a grant which had been issued to a party in a succession matter. In the case of **Jamleck Maina Njoroge v Mary Wanjiru Mwangi (2015) eKLR** at paragraph 11 of its ruling, in revoking a grant, the court reiterated the grounds upon which a grant can be revoked. It stated as follows: -

“11. The circumstances that can lead to the revocation of grant have been set out in Section 76 Law of Succession. For a grant to be revoked either on the Application of an interested party or on the court's own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.” (Emphasis added.)

18. I align myself with the opinion of Gikonyo J in **Re Estate of Julius Ndubi Javan (Deceased) [2018] eKLR** where he stated:

“[13] Applying the test of law in section 76 of the Law of Succession Act, the fact that there was an agreement between the deceased and the Applicant for sale of the suit land is important to these proceedings. It seems also that consideration may have passed between the two parties. I am aware that this court does not have jurisdiction to determine the validity or enforceability of the said agreement. Environment and Land Court does; it is the court which is constitutionally mandated to determine such matters. But of relevance in these proceedings is that such material facts were never disclosed to this court during confirmation of the grant so as to enable the court make an informed decision on distribution of the estate. Needless to state that, in any judicial proceeding, parties must make full disclosures to the court of all material facts to the case including succession cases. This general rule of law emphasizes utmost good faith (uberimae fidei) from parties who take out or are subject of the court proceedings. The said responsibility is part of justice itself. Accordingly, non-disclosure of material facts undermines justice and introduces festering waters into the pure streams of justice; such must, immediately be subjected to serious reverse osmosis to purify the streams of justice, if society is to be accordingly regulated by law.”

19. In the absence of evidence to contest and rebut the evidence of the appellant, and on the respondent's own admission that he did not include the deceased's bank accounts as part of the assets of the deceased, and the fact that the mode of distribution allowed by the trial court was not clear, according to both the appellant and respondent, it is my humble view that the evidence on a balance of probability discloses the grant obtained and confirmed with regard to the deceased's estate was irregularly done due to material concealment of all of the deceased's assets.

20. I note further that even the so called consent for the proposed distribution of the estate dated 25th June 2019 was not signed by all the beneficiaries. Of the named 29 beneficiaries, only 16 were listed and **Prisca Oyombo** and **Magdalena Aoko Anino** never signed the consent.

21. In addition, the Certificate of Confirmation of grant made on 17/11/2005 as rectified placed in the Petitioner /Respondent herein 100% of all the assets of the deceased. No sharing or distribution of the estate was done. Even when the distribution was done through a rectification, not all the assets of the deceased and the beneficiaries were listed or given shares in the estate of the deceased.

22. In the premises and for the reasons advanced above, I find justifiable cause for the grant of letters of administration issued to the Respondent on the 4th day of April 2005 and confirmed on the 17th November 2005 and rectified on the 21st March 2019 and reconfirmed on 31/7/2019 to be revoked forthwith and all subsequent transactions involving herein nullified. Accordingly, the said grant is hereby revoked.

23. On whether the mode of distribution to be adopted by the court be that dated 24/7/2019, I have perused the trial record and note that the mode of distribution adopted by the trial court does not provide for all the deceased's beneficiaries who were listed in FORM 9 and P&A 5 filed on 7/11/2005 where 29 beneficiaries are listed but only a few are listed in the schedule of distribution. Neither does the schedule list all the assets of the estate of the deceased. Furthermore, P&A 5 does not list any assets with Barclays Bank or Post Bank.

24. Accordingly, this appeal is found to be meritorious. The same is hereby allowed in the following terms:

a. The grant of letters administration intestate issued to the Respondent **John Oriedo Awino** on 4th day of April 2005 to administer the estate of the late **Daniel Anino Oriedo** and as confirmed by the trial court on 17th November 2005 and rectified on the 21st March 2019 and further reconfirmed on 31/7/2019 be and is hereby revoked and any the certificate of confirmation thereof is hereby invalidated;

b. The parties are directed to approach the succession court afresh seeking for a fresh grant of letters of administration intestate and identify and list all beneficiaries and assets of the deceased **Daniel Anino Oriedo** before the grant can issue and before such grant is confirmed, a schedule of distribution shall be filed in court and in the event of failure by the beneficiaries to agree on the mode of distribution, the court shall distribute the estate in accordance with the established law. As parties are brothers, each shall bear their own costs of this appeal.

c. As parties are siblings, I order that each shall bear their own costs of this successful appeal.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 22ND DAY OF MARCH, 2021

R.E.ABURILI

JUDGE

In the presence of:

Both Appellant and Respondent

CA: Modestar and Mboya