



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

CIVIL APPEAL NO. 19 OF 2018

IN THE MATTER OF GILBERT MUTEGI alias MUTEGI JOSPHAT (DECEASED)

NTWIGA JOSPHAT.....1ST APPELLANT

KIRIMI JOSPHAT.....2ND APPELLANT

JANE JOSPHAT.....3RD APPELLANT

ROSE RIUNGU JOSPHAT.....4TH APPELLANT

KATHAMBI KIRUJA.....5TH APPELLANT

VERSUS

MERCY KAMBURA MUCHIRI.....RESPONDENT

(Being an appeal from the Ruling dated 16th October, 2018 by Hon. Sudi,

Senior Resident Magistrate at Chuka CM's Succession Cause No. 352 of 2016)

JUDGMENT

1. This matter relates to the estate of Gilbert Mutegi alias Mutegi Josphat, deceased who died intestate on 26/9/2001. A grant of letters of administration was issued to Esther Gitonga Mukwandegu on 24/1/2012 and was confirmed on 12/7/2017 in the CM'S Court at Chuka Succession Cause No. 352 of 2016.

A summons for revocation of grant under **Section 76(a) and (b) of the Law of Succession Act and Rule 44 (1) of the Probate and Administration Rules** was filed by the Protestor Ntwiga Josphat on 9/2/2018 based on the grounds that:

- i) That the proceedings to obtain the grant were defective in substance.*
- ii) That the grant was obtained fraudulently by the concealment from the court of something material to the case.*
- iii) That the grant was obtained fraudulently by the concealment from this court of a material fact that there was already pending in the SPM succession cause No. 132 of 2011 in Chuka an objection/protest that has yet to be heard and determined.*
- iv) The appellant sought an order of inhibition restraining any dealings whatsoever with LR. MWIMBI/KIRARO/750 until further orders of this court or until this case is heard and determined.*

The court pronounced a ruling on the application on 16/10/2018 and dismissed the application. The learned trial magistrate in dismissing the ruling held that there was no evidence tendered before her to show that the protestors had lived on the land and that there was no prove that the petitioner had committed any fraud. She further found as a fact that the green cards presented before court showed that the father of the deceased and the protestors had during his lifetime apportioned his land to all his four wives and that the protestors had properly been catered for and the court would not encourage double inheritance or bequeathing property to persons who may not be entitle.

The protestors were dissatisfied with this ruling and filed this appeal which raises the following grounds;

- 1. That the learned Senior Resident Magistrate erred in law and fact by dismissing the application dated 9th February 2018.**

2. The learned Senior Resident Magistrate erred in law and fact in not finding that their advocate by then had let them down by not giving any communication.

3. The learned Senior Resident Magistrate erred in law and fact by not finding that the estate was ancestral land thus the protestors were entitled to get share.

4. The learned Senior Resident Magistrate erred in law and fact by not finding that since some of the protestors were listed as dependants in their successions they were entitled to a share of this estate.

5. The learned Senior Resident Magistrate erred in law and fact by finding that there will be double inheritance if the protestors grievances are heard and allowed.

6. The learned Senior Resident Magistrate erred in law and fact by curtailing the protestors constitutional right to fair hearing before condemnation.

It is the appellants prayer that this appeal against ruling and order delivered on 16/10/2018 in Chuka SPM Succession Cause No. 352 of 2016 be allowed.

2. The appeal was disposed off by way of written submissions. The contention by the appellants is that the mother of the deceased that is the respondent was never married to their father and she had nor relationship with the deceased. That logically the appellants have a right to claim the land because the decease is their step-brother and it is their joint father who registered the parcel of land in the deceased's name but the deceased died at the respondent's home and was buried at the respondent's father's land. The appellant's aver that in as much as the respondent has a direct link to his son herein. She has no *iota* of link to the suit land so long as the appellants are alive. The appellants submits that they are not asking for double inheritance but their father's share after the death of their step brother. The appellants submit that some of the appellant who filed notice to withdraw the objection did so due to lack of communication between them and their former counsel.

3. For the respondent it is submitted that the appeal has been overtaken by events and even if it is allowed it will not serve any meaningful purpose. The respondent submits that the appellants are only seeking the setting aside of the ruling and costs. That the question is "**what next**" in the event that the appeal is allowed.

It is submitted that the land parcel in dispute LR. MWIMBI/KIRARO/750 is now registered in the name of Richard Kinyua Mbiuki who purchased the suit land after the confirmation of grant and is protected under **Section 93(1) of the Law of Succession Act**. It is submitted that the appellants did not join him as party in this appeal and the court cannot issue orders which will affect a person who is not a party in this appeal. That Richard Kinyua Mbiuki is the registered proprietor of land parcel No. Mwimbi/Kiraro/750 and ought to have been joined in this appeal.

4. The respondent submit that they are satisfied with the ruling as the appellant benefitted from the estate of their father who gave them land in his lifetime (*inter vivos*) and cannot benefit from the same estate twice by taking what was bequeathed to their step-brother.

5. With respect to the grounds of appeal the respondent submit that the appellant had withdrawn the protest in 2014 and did not prosecute the case for six years until the land changed hands. The respondent submits that equity does not aid the indolent. It is further submitted that the issue of the respondent not being married to the appellant's father did not arise in the lower court and cannot be raised on appeal. The respondent contends that she ranks first in priority in the estate of the deceased. He relies on **Section 66 and 29 of the Law of Succession Act**.

The respondent submits that the finding by the trial magistrate that it would be double inheritance was proper and based on evidence as the father of the protestors and deceased herein had shared out his land to his children and noone was left out. The appellants have no claim on the suit property as it was no longer land belonging to the estate of their deceased father. The respondent submits that the appeal is without merits and ought to be dismissed.

Analysis and Determination:

I have considered the grounds of appeal, the submissions and the ruling of the trial magistrate. The issue which arises for determination is whether the appellants are entitled to the estate of the deceased herein. The deceased died in the year 2001. This brings the administration of his estate under the provisions of the Law of Succession Act, to be referred to as the Act. **Section 2(1) of the Act** provides:

"Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after, the commencement of this Act and to the administration of estates of those persons."

The commencement date of the Act is 1st July 1981 and since the deceased died in 2001 long after the commencement of the Act, it is the provisions of the Act which must apply in any dealings with the estate of the deceased. In this case the deceased died intestate and the court is called upon to determine what constitutes the estate of the deceased and make provision for all the rightful beneficiaries and or dependants.

The **Act at Section 3** defines estate to mean 'the free property of a deceased person'. On the other hand **Section 29 of the Act** gives the meaning of a dependant.

It provides;

“Meaning of dependant For the purposes of this Part, “dependant” means—

(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

(b) such of the deceased’s parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and (c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”

It is not in dispute in this case that the respondent is the mother of the deceased herein. It is not in dispute that the deceased had no wife or children. It follows that the respondent was the closest dependant who ranked in priority in the estate of the deceased. It follows that half-brothers have no priority in the estate unless they prove that they were being maintained by the deceased immediately prior to his death.

In this case the appellants are not claiming dependency. The Act gives court discretion to determine the persons to administer the estate of the deceased. **Section 66 of the Act** provides:

“Preference to be given to certain persons to administer where deceased died intestate

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(c) the Public Trustee; and

(d) creditors: Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.”

Having considered these provisions, I will now determine whether the trial magistrate erred in law and fact by holding that there will be double inheritance. The appellants, like the deceased were given land by their deceased’s father in his lifetime. The land in dispute was then registered in the name of the deceased in his lifetime. Upon his death, the respondent filed succession cause and the land parcel No. LR. Mwimbi/Kiraro/750 was transmitted to the respondent vide a grant confirmed on 4/7/2017. The land in dispute having been registered in the name of the deceased herein ceased to form part of the estate of the deceased father of the appellant and deceased.

The appellant’s got a share of the estate of their father. They therefore have no claim over the estate of the deceased. The estate of the deceased herein was no longer ancestral land but formed his free estate as defined under the Act and available for distribution to his beneficiary. The appellants have no claim over the estate of the deceased. Their contention that the mother of deceased was not married to their father is a none issue. The land in dispute devolved to her as the parent (mother) of deceased and not a wife of the deceased father of the appellants.

In view of the foregoing I find that the decision of the trial magistrate was proper. The appellants got their share and could therefore not claim a share of their step-brother’s estate. I have addressed ground 3,4, and 5.

It should not escape the mind of this court that the appellant filed the application for revocation of grant six years after withdrawing their protest. They were indolent. Equity aids the vigilant and not the indolent. An inference can be drawn that they had no good cause to seek revocation of grant. The trial magistrate rightly held that the appellants did not want the mother of the deceased to get land and had come to court with dirty hands. The issue of the trial magistrate not noting the none communication by their advocate does not arise.

6. The respondent has submitted that the appeal has been overtaken by events as the land has been transferred and registered in the name of Richard Kinyua Mbiuki, see title deed at page 70 of the record. The said Richard Kinyua Mbiuki was not joined in as party in this appeal nor was he a party in the lower court and yet he may or may not be affected by the decision of this court. It is a cardinal rule of natural justice that a party who may be affected by a decision of the court must be given opportunity to be heard. The appellants are aware that the respondent sold the land. The right to the title of Richard Kinyua Mbiuki is protected under **Section 93(1) of the Act**.

It provides;

“Validity of transfer not affected by revocation of representation

(1) All transfers of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.

(2) A transfer of immovable property by a personal representative to a purchaser shall not be invalidated by reason only that the

purchaser may have notice that all the debts, liabilities, funeral and testamentary or administration expenses, duties, and legacies of the deceased have not been discharged nor provided for.”

This appeal and the application to revoke the grant are in vain as the title cannot be cancelled. The trial magistrate found that fraud was not proved. This finding has not been challenged in this appeal. It follows that the buyer has a good title. The land in dispute no longer forms the estate of the deceased.

7. I must also comment on the prayer in this appeal. The single prayer is that the appeal against the Ruling and order of the trial magistrate delivered 16/10/2018 be allowed. Looking at this prayer, if granted, it will merely delay the conclusion of the matter as the appellants do say what they wish to do after that. Secondly courts do not act in vain. A party will be stopped from seeking orders for the sake of it. A Court of law will only issue orders which server the ends of justice and not otherwise.

8. This being a first appeal, the court has a duty to re-evaluate the evidence and make its finding and determine whether the decision of the trial court can be supported. Having considered the proceedings in the lower court and the ruling of the trial magistrate, I find that the ruling was property grounded in view of the facts of this case. The trial magistrate found that fraud was not proved and is one of the ground upon which the court may order revocation of grant under **Section 76 of the Act**. The appellants have not challenged that fact. It follows that the application for revocation of grant had no merits.

Conclusion:

1. I find that this appeal lacks merits and is sham in a far as it is asking court to act in vain.
2. The ruling of the learned trial magistrate is upheld.
3. The appeal is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 27TH DAY OF MAY 2021.

L.W. GITARI

JUDGE

27/5/2021

The Judgment has been read out in open court, online, through virtual proceedings.

L.W. GITARI

JUDGE

27/5/2021