



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

SUCCESSION APPEAL NO. E1 OF 2020

IN THE MATTER OF THE ESTATE OF DAVID KIAMBA MULI (DECEASED)

WINROSE EMMAH NDINDA KIAMBA.....APPELLANT

VERSUS

AGNES NTHAMBI KASYOKA.....RESPONDENT

(Being an appeal arising from a Ruling delivered by Hon. Anne Nyoike (Principal Magistrate) at Machakos Chief Magistrate's Court Succession Cause No. 37 of 2020 (Ad litem) delivered on 1st October, 2020)

BETWEEN

AGNES NTHAMBI KASYOKA.....APPLICANT

VERSUS

WINROSE EMMAH NDINDA KIAMBA.....RESPONDENT

JUDGEMENT

1. The Appeal herein arises from the ruling of Hon. Nyoike Principal Magistrate in Machakos Chief Magistrate's Succession Cause No. 37 of 2020 dated 1/10/2020 wherein she revoked a limited grant of letters ad litem issued to the Appellant on the 10/07/2020.

2. Aggrieved by the said decision, the Appellant lodged a Memorandum of Appeal dated 6/10/2020 in which she raised the following grounds of appeal:-

(1) That the learned magistrate erred in law by failing to recognize that the Respondent lacked the locus standi to register the chamber summons dated 24/08/2020.

(2) That the learned magistrate erred in law and fact by finding that the Appellant was required to obtain the consent of all beneficiaries of the deceased while it was not possible in the peculiar circumstances of the cause.

(3) That the learned magistrate erred in law and fact by failing to find that the Appellant could not obtain the consent of all the beneficiaries of the estate of the deceased.

(4) That the learned magistrate erred in law and fact by failing to appreciate the peculiar circumstances and reasons leading to the application for letter of administration ad litem by the Appellant.

(5) That the learned magistrate erred in law and fact by finding that the limited grant of letters of administration ad litem issued on 10/07/2020 was obtained through a false representation made by the Appellant.

(6) That the learned magistrate erred in law and fact by revoking the limited grant of letters of administration ad litem issued to the Appellant on 10/07/2020.

3. The Appellant seeks that the appeal be allowed and that the impugned ruling be set aside and further that the limited grant of letters of administration issued to the Appellant on 10/07/2020 be reinstated.

4. The appeal was canvassed by way of written submissions. The Appellant's submissions are dated 6/07/2021 while those of the Respondent are dated 26/07/2021.

5. Mr. B. M. Musau for the Appellant submitted that the Respondent and her children could not give the Appellant consent to file for a limited grant of letters ad litem due to the Respondent's hostility towards the Appellant as both are co-wives to the deceased. Learned counsel pointed out that the Appellant intended to file suit against the Respondent and her children for meddling with the estate of the deceased and that the said special circumstances had convinced the trial court initially to grant the ad litem only for it to revoke it afterwards. It was also submitted that the Respondent did not have locus standi to file the application seeking revocation of the grant ad litem which was subsequently allowed by the trial court. It was the view of the counsel that the trial court erred in finding that the Respondent by virtue of being a wife to the deceased had locus standi to file the chamber summons as this was not in consonance with the provisions of section 82(a) of the Law of Succession Act. Finally, it was submitted that the revocation of the grant ad litem totally incapacitated the Appellant as she had intended to protect the estate from being wasted by the Respondent and her children who ordinarily could not give the Appellant the requisite consent to secure the grant ad litem and hence there were peculiar circumstances which necessitated that the court departs from the general rule and treat it as an exception so as to prevent the wastage of the estate of the deceased. Counsel urged the court to allow the appeal so as to enable the Appellant proceed with the grant ad litem and register the suit against the Respondent who is wasting the estate of the deceased and purporting to administer the estate without any legal right having been donated to her by the court.

6. Mr. B. M. Nzei for the Respondent submitted that the trial court properly revoked the grant ad litem due to non-disclosure of material facts namely that the Respondent and her family had not been given a chance to take part in the application for the grant ad litem or give their consent. It was also submitted that the appeal has since been overtaken by events in that the Appellant has already been made an administrator of the estate of the deceased vide **HC Succession Cause No. 21 of 2020** wherein the Appellant and Respondent had jointly applied for grant of administration intestate. Finally, it was submitted that the issues raised in this appeal ought to be raised in **Machakos High Court Succession No. 21 of 2020**.

7. I have considered the submissions of the learned counsels for the parties herein as well as the grounds of appeal. It is not in dispute that the Appellant did cite the Respondent vide **Machakos Chief Magistrate's Court citation No. 55 of 2020** which culminated in the filing of **Machakos High Court Succession Cause No. 21 of 2020** wherein both the Appellant and Respondent plus two beneficiaries have been appointed as administrators of the estate of the deceased herein and a full grant duly issued. I find the only issue for determination is whether the appeal has merit.

This being a first appeal, the role of this court is well spelt in that it must evaluate and subject the evidence tendered before the trial court to a fresh analysis and arrive at an independent conclusion as to whether to uphold the decision of the trial court (see **Sele -vs- Associated Motor Boat [1968] EA 123**).

8. The impugned ruling dated 1/10/2020 is found in page 103 of the Record of Appeal where the learned magistrate stated thus:-

"..... for all intent and purposes, the Applicant has the locus standi as a widow of the deceased concerning his free estate. This court has powers under section 76 of the Law of Succession Act to revoke a grant issued on the basis of misrepresentation, fraud on application by an interested party on its own motion. The Respondent herein obtained the grant by a false representation, she did not notify the other beneficiaries. The application for revocation of the grant is with merit. The widows and beneficiaries of the deceased should apply to court for grant of representation and avoid acts that may further delay the correct distribution of the deceased person's free estate..... the limited grant of letters ad litem issued on 10/07/2020 in favour of the Respondent, Winrose Emmah Ndinda Kiamba be and is hereby revoked."

It is therefore the Appellant's contention that she was entitled to seek for letters of grant ad litem without the consent of the Respondent and her family since they could not give her the requisite consent as she intended to sue them in an intended civil suit meant to protect the estate from wastage. It was further the Appellant's contention that the Respondent did not have locus standi to file the application dated 24/08/2020 challenging the Appellant's letters of grant ad litem that was subsequently allowed by the trial court in error on the ground that the Respondent was entitled to do so as a widow of the deceased.

It is noted that the trial court held that the Appellant had obtained the grant ad litem by false representation as she did not notify the other beneficiaries. The trial court proceeded to revoke the said grant ad litem. Revocation or annulment of grant is provided for under section 76 of the Law of Succession act as follows:-

"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 on 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 grant within one (1) year from the date thereof or such longer period as the court has ordered or allowed;

(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 paragraph (c) and (g) of section 83 or has produced any such inventory or account which is false in any material particulars; or

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

The Appellant confirmed before the trial court that indeed she was under obligation to secure the consent of the Respondent and her children in her quest for the grant of an ad litem so as to enable her file suit against the Respondent who was meddling with the estate of the deceased but for the sole reason that they could not do so and hence she felt that the circumstances were peculiar to warrant her being issued with the said limited grant. Indeed, the trial court at the ex parte stage issued her with the said letters of administration ad litem on 10/07/2020 but which prompted the Respondent to file an application dated 24/08/2020 seeking to have the said limited grant revoked. Rule 26 (1) of the Probate and Administration Rules provides that no grant of representation shall be granted unless notice is given to every person entitled in the same degree as or in priority to an Applicant. Section 66 of the Law of Succession Act provides for the category of persons in the family tree who can apply for a grant of representation as follows:-

“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 representation 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 interest; a provided by part V:

(c)

(d)

(e)

I have seen the Chief’s introductory letter dated 15/03/2020 found on page 32 of the record of appeal and which reveals the Respondent as the first wife of the deceased and that she has (5) five children while the Appellant is the second wife with two (2) children. The mother of the deceased is also listed. This therefore leaves no doubt that the Appellant knew the rest of the beneficiaries of the estate. The Appellant claimed before the trial court while responding to the Respondents application for revocation of the grant that there was hostility between her and the Respondent and hence she could not secure the Respondent’s consent to the making of the grant. There is no evidence presented by the Appellant that she ever attempted to serve the Respondent with a list of the beneficiaries required to append their signatures regarding the Appellant’s application for letters of administration ad litem. There is no affidavit of service filed in that regard so as to convince the trial court that indeed the Respondent and her children had declined to give their consent so as to entitle the trial court to consider the circumstances to be peculiar to the Appellant and to proceed to depart from the general rule and treat the same as an exception and in the interest of justice. Even though the trial court had initially issued the Appellant with the grant ad litem, the said court was still seized with inherent powers to revoke the same if circumstances warrant the same. The trial court did direct the widows and beneficiaries of the deceased should apply to court for full grant of administration and avoid acts that could further delay the correct distribution of the estate of the deceased. The record of appeal also reveals that the Appellant cited the Respondent and her family vide **Machakos Chief Magistrate’s Court Citation No. 55 of 2020** which culminated in the filing of **Machakos High Court succession Cause No. 21 of 2020** wherein both the Appellant and Respondent plus two other beneficiaries have been appointed as administrators of the estate of the deceased. It would therefore appear to me that this appeal has been overtaken by events since the purpose of the letters of grant ad litem has been achieved in that the issue of preservation of the estate of the deceased as well as requiring any of the administrators to render accounts regarding the estate can be dealt with appropriately in the said succession cause. The quest by the Appellant to pursue a suit against the Respondent who is her co-administrator will not be in the best interest of the estate as it will polarize their already frosty relationship as widows of the deceased. It will look very messy and untidy for the appellant who is already an administrator to sue her co-administrator in a civil suit when their issues could be addressed by the succession court that has appointed them as administrators. The appellant and respondent having been appointed administrators have no choice but to tolerate each other and work together in the administration of the estate of the deceased husband. Any issues pertaining to the estate such as wasting and or interference must be addressed with the succession court which has power to make such orders as appropriate for the ends of justice and for the interest of the estate of the deceased. To that extent, the learned trial magistrate’s finding that the Appellant had obtained the limited grant while concealing some material facts from the court was sound.

9. Finally, the Appellant had challenged the Respondent’s capacity in lodging the application dated 24/08/2020 that led to the impugned ruling on the grounds that she did not have a limited grant of letters of administration ad litem. It is noted that the Respondent is the first wife to the deceased and is thus entitled to a share in the estate as a beneficiary. Both Appellant and Respondent have already been appointed as administrators of the estate of the deceased. Even though the Respondent is a widow and a beneficiary she is required by law to apply to the court for a limited grant of letters ad litem to enable her file the application seeking for revocation of the limited grant. The Respondent could only clothe herself with locus standi upon obtaining letters of grant ad litem and be in a position to file the application dated 24/08/2020. At the time the Respondent filed the said application she was not a personal representative of the estate of the deceased and had no grant limited or otherwise to sustain any cause of action regarding the estate of the deceased. The position of the law is as stated by the Court of Appeal in the case of **Touristick & Another –vs- Jane Mbeyu & Another [1993] eKLR** where it held that the administrator is not entitled to bring an action as administrator before he has taken letters of administration and that if he does the action is incompetent at the date of its inception. It is therefore clear that the estate of a deceased person can only be represented in any legal proceedings by a person who is duly authorized to do so on behalf of the estate. Hence, I am inclined to agree with the Appellant’s counsels submissions that the mere fact that the Respondent was a wife to the deceased did not give her a locus standi to file the said application dated

24/08/2020. Indeed, the Respondent was under a legal obligation to apply to the court for a limited grant ad litem just like the Appellant did in order for her to address the court on the issue of revocation of the limited grant issued to the Appellant. It is therefore my finding that the learned trial magistrate went into error in finding that the Respondent being a wife to the deceased had locus standi to file the application dated 24/08/2020. Hence, the trial court's order dated 1/10/2020 must be set aside. Even though the finding by the trial magistrate regarding the fact that the Appellant had concealed material facts from the court leading to the issuance of the limited grant has been found to be sound as hereinabove noted, the lack of locus standi on the part of the Respondent to file the application dated 24/08/2020 must warrant a reversal of the trial court's orders dated 1/10/2020.

10. In view of the foregoing observations, it is my finding that the Appellant's appeal has merit. The same is allowed as follows:-

(a) The Ruling of the trial court dated 1/10/2020 is hereby set aside in its entirety.

(b) The limited grant of letters of administration ad litem issued to the appellant on 10/07/2020 is reinstated.

(c) Each party to bear their own costs.

It is so ordered.

Dated and delivered at **Machakos** this **28th** day of **September, 2021**.

D. K. Kemei

Judge