



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**CIVIL APPEAL NO. E015 OF 2020**

**IN THE MATTER OF THE ESTATE OF THE LATE ALVAN NJERU M'RARIA (DECEASED)**

**SAMUEL NDWIGA ALVAN.....APPELLANT**

**VERSUS**

**NANCY KANINI MWENGA.....RESPONDENT**

*(Being an appeal against the entire Ruling of the Learned Senior*

*Principal Magistrate Hon.J.W.Gichimu delivered on 1.12.2020*

*in Succession Cause No. 232 of 2012 Runyenjes).*

**JUDGMENT**

1. The appeal herein was instituted vide a memorandum of appeal dated 10.12. 2020 wherein the appellant is challenging the ruling of the trial court (Hon. J.W Gichimu) delivered on 1.12.2020 in Runyenjes Succession Cause No. 232 of 2012. The appellant raised the following grounds of appeal;-

- i. The learned magistrate erred in law and in fact by holding that the respondent was a legal wife to the deceased.*
- ii. The learned magistrate erred in law and in fact by holding that the appellant obtained the grant fraudulently and by concealing material facts.*
- iii. The learned magistrate erred in law and in fact by failing to consider that the appellant had finished administering the estate.*
- iv. The learned magistrate erred in law and in fact by failing to consider, evaluate and analyse the testimonies of the appellant's witnesses.*
- v. The learned magistrate erred in law and in fact by making an assumption not supported by any evidence that the respondent was not aware of the succession proceedings in Runyenjes.*
- vi. The learned magistrate erred in law and in fact in the manner he analysed the evidence and the applicable law in the ruling.*
- vii. The learned magistrate erred in law and fact by failing to consider the appellant's submissions on record.*
- viii. The learned magistrate erred in law and in fact by holding that the respondent was not bequeathed any share of the estate.*
- ix. The learned magistrate erred in law and in fact by hearing and determining a case in which he had no jurisdiction offending the provisions of rule 44(1) of the Probate and Administration rule.*

2. Letters of Administration in relation to the estate of deceased herein (Alvan Njeru M'Raria) was issued to the petitioner, a son of the deceased. The grant was issued on 7.01.2013 and a certificate of confirmation of grant was issued on 14.02.2013.

3. The appellant as such prayed that the honourable court be pleased to allow the appeal and set aside the trial magistrate's ruling dated 01.12.2020 and replace it with an order or judgment declaring the grant as properly obtained.

4. The parties took directions to have the application disposed off by way of written submissions to which I shall summarize as follows;

5. The appellant submitted that there was no material placed before the court to suggest that the respondent was ever married to the deceased. That the respondent in her own testimony testified that she had only cohabited with the deceased for four years before he died in 2010 and the fact that no proof of dowry was made, the respondent could not pass as the wife of the deceased herein. They submitted that the appellant did explain in detail how he obtained the grant in his statement and replying affidavit to the summons for revocation in that, he did not list the name of the respondent as a beneficiary since she was never a wife. That the respondent clearly was aware of the proceedings and that she took a long unexplained period of time to file for revocation of the grant.

6. The appellant raised a jurisdictional issue in that the trial court erred in law and in fact by hearing and determining a case in which it had no jurisdiction thus offending provisions of Rule 44 (1) of the Probate and Administration Rules. That the summons filed by the respondent was issued by the Deputy Registrar and therefore are invalid; that these rules have not been amended and failure to comply makes the application incompetent. Further that, the summons for revocation taken did not strictly comply with the rules cited as it falls short of Form 107 provided by the rules which must be issued or signed by the Deputy Registrar. They also argued that the trial court erred in the manner in which it analysed the evidence and the applicable laws.

7. The respondent on the other hand submitted that the court was clothed with jurisdiction to determine the matter and thus it reached a justified conclusion in revoking the grant since the same had been acquired fraudulently. That the process of succession was never conducted properly since the appellant was the only beneficiary of the estate of the deceased. It was her case that, the respondent was the wife of the deceased and yet she had been left out of the whole process.

8. I have certainly perused and understood the contents of the pleadings, proceedings, ruling, grounds of appeal, submissions and the decisions referred to by the appellants. I have indeed re-evaluated the evidence tendered before the trial court and it is my considered view that the main issue for determination is whether the appeal herein has merits. In determining this issue, I will also determine as to whether the trial court erred in arriving at the impugned ruling.

9. Section 50 of the Law of Succession Act gives this court jurisdiction to determine appeals against any order or decree made by a Resident Magistrate in succession causes. As a first appellate court, this court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, before drawing a conclusion from that analysis. The court has, however, to bear in mind the fact that it did not have an opportunity to see and hear the witnesses first hand. This was buttressed by the Court of Appeal in the case of **Peter M. Kariuki –vs- Attorney General [2014] eKLR**. The appellate court further ought not to interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong because it has misdirected itself or because it has acted on matters which it should not have acted or it has failed to take into consideration matters which it should have taken into consideration and in doing so, arrived at a wrong conclusion (See **Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278 and Kiruga –versus- Kiruga & Another (1988) KLR 348**).

10. Under Section 78 (2) of the Civil Procedure Act, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of the original jurisdiction in respect of suits instituted therein. The Law of Succession Act having not expressly provided for the procedure on appeal, it is my considered view that the above legal authorities suffices in that respect.

11. The appellant has raised an issue in regard to jurisdiction; as such, it is a rule that such an issue ought to be determined *in limine* as the court cannot exercise jurisdiction which it does not have but can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. (See **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others [2012] eKLR**).

12. The jurisdiction of the magistrate's court in succession matters is so clear and settled. Initially, the jurisdiction of the magistrates in succession matters was provided in Section 48(1) of the Law of Succession Act, Cap. 160 of the Laws of Kenya. The said provision stated as follows: -

***'Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49 of this Act, a Resident Magistrate shall have jurisdiction to entertain any application other than an application under section 76 of this Act and to determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed one hundred thousand shillings:***

***Provided that for the purpose of this section in any place where both the High Court and a Resident Magistrate's Court are available, the High Court shall have exclusive jurisdiction to make all grants of representation and determine all disputes under this Act.'***

13. In 2015 Section 48(1) of the Act was amended by the enactment of the Magistrates' Court Act, Act No. 26 of 2015 (hereinafter referred to as '**the new Act**'). Section 23 of the new Act repealed the said Section 48(1) and substituted it with the following new subsection: -

**'23. The Law of Succession Act is amended, by repealing section 48(1) and substituting therefor the following new subsection –**

***Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49, a magistrate shall have jurisdiction to entertain any application and to determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed the pecuniary limit prescribed under section 7 (1) of the Magistrates' Courts Act, 2015.'***

14. The effect of the aforesaid amendment was to accord jurisdiction to the magistrates to deal with applications under Section 76 of the Act which are for revocation or annulment of the grants issued by the magistrate's courts. I therefore, hold that a Magistrates' Court has

jurisdiction to deal with an application for revocation or annulment of a grant it issued subject to the pecuniary jurisdiction of that court.

15. I must also clarify that **Rule 44** of the **Probate and Administration Rules, 1980** which requires applications seeking the revocation or annulment of grants to be exclusively filed in the High Court was not amended. However, given that the **Probate and Administration Rules, 1980** are subsidiary legislation they cannot override any of the provisions of **the Act** and as such the position remains that the Magistrates' Court have jurisdiction to deal with applications for revocation or annulment of grants issued by those courts subject to their pecuniary jurisdiction.

16. In this matter, the pecuniary value of the estate herein was not given but should the value be estimated at Kshs.20, 000,000.00 and below, then the proper jurisdiction should be the magistrate's court.

17. The appellant faulted the trial court for having reached a finding that the respondent herein was a wife to the deceased via customary law. The Marriage Act of 2014 Section 2 defines **cohabitation to mean:**

*“to hide on an arrangement, in which an unmarried couple lives together in a long term relationship that resembles a marriage.”*

18. In *M W K v A M W [2017] eKLR* the court cited *Hortensia Wanjiku Yawe v The Public Trustees, Civil Appeal 13 of August 6, 1976* where Justice Kneller laid down three important and salutary principles regarding proof of customary marriages in Court. These are:

*i. The onus of proving customary law marriage is generally on the party who claims it;*

*ii. The standard of proof is the usual one for a civil action, namely, the balance of probabilities;*

*iii. Evidence as to the formalities required for a customary law marriage must be proved to that evidential standard.*

19. Dealing with the concept of presumption of marriage the text book on *Family Law by Brunley 5<sup>th</sup> Edition* states:

*“If a man and a woman cohabit and hold themselves out as husband and wife, this in itself raises a presumption that they are legally married and when it is challenged, the burden lies on those challenging it to prove there was no marriage and not on those who rely on it to prove that it was solemnized.”*

20. Kasango J. quoted in the case of *M.M.M. v E.G.M. 2014 eKLR*

*“Proof of presumption of marriage is of importance here; presumption of marriage is a creature of Common Law; it is a child of Judges, and it is a Judge made...The principle states that where a man and a woman have cohabited for such a length of time and in such circumstances as to have acquired the reputation of being man and a wife, a lawful marriage may be presumed, though there may be no positive evidence of any marriage having taken place and the presumption can only be rebutted by evidence to the contrary.”*

21. The appellant further argued that no dowry payment was made to the family of the respondent and further to that, there is no corroborating evidence on the formalities of the customary law agreement or any proof in form of witness statements that prove that the customary marriage process took place between the respondent and the deceased. In my view, the dowry agreement does not prove that there was a marriage to the deceased on a balance of probabilities.

22. In his submissions, the appellant urged the court to consider the period allegedly stated by the respondent that she cohabited with the deceased. On the other hand, the respondent asked the court to consider that the appellant has given her land belonging to the estate though it is registered under the names of the appellant's sister together with the respondent. Why would an administrator give a 'stranger' a part of the estate of his deceased father without any proper cause? From the court record, it is quite evident that the appellant herein not only admitted but also recognized the respondent as his father's wife and that is why the appellant/petitioner in his submissions in the lower court pleaded that the grant ought not be revoked since they were ready to sit down with the respondent/objector to share with her the estate as long as she promises not to sell the same.

23. It is indeed a well settled principle of law that parties are bound by their pleadings and that unless amended, the evidence adduced shall not deviate from the pleadings. This legal position was reaffirmed by the Court of Appeal in the case of *David Sironga Ole Tukai v Francis Arap Muge & 2 others Civil Appeal No. 76 of 2014 [2014] eKLR* thus;

*“In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other's case is as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense.”*

24. The appellant/petitioner and his witnesses confirmed that the respondent was their step mother. In that regard, the appellant is estopped from alleging otherwise since he is bound by his pleadings.

25. In relation to revocation of grant, the same is provided for under section 76(a) – (e) of the Act. The circumstances under which a grant of representation may be revoked as provided under the said section are;-

*i. If the proceedings to obtain the grant were defective in substance.*

*ii. If 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;*

*iii. If 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;*

*iv. If the person to whom the grant was made has failed, after due notice and without reasonable cause either 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 to proceed diligently with the administration of the estate; or 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*

*v. If the grant has become useless and inoperative through subsequent circumstances.*

26. The Court of Appeal in the case of Matheka and Another vs Matheka [2005] 2 KLR 455 laid down the following guiding principles;-

*“i. A grant may be revoked either by application by an interested party or by the court on its own motion.*

*ii. Even when revocation is by the court upon its 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 the making of a false statement or by concealment of something material to the case or that the grant was obtained by means of untrue allegation of facts essential in point of law or that the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the estate.”*

27. It is clear therefore that the grounds upon which a grant may be revoked or annulled are statutory and it is incumbent upon any party making an application for revocation or annulment of a grant to demonstrate the existence of any, some or all the above grounds.

28. As the applicant deposed and which fact is not in dispute, he is a son to the deceased. Rule 7 of the Probate and Administration Rules 1980 provides that application for grant of representation in relation to an estate of a deceased person to whose estate no grant or no grant other than one under section 49 or a limited grant under section 67 of the Act has been made, the application shall be by petition supported by an affidavit. The said affidavit must contain amongst other details, the names, addresses, marital status and description of all surviving spouses and children of the deceased, or, where the deceased left no surviving spouse or child, like particulars of such person or persons who would succeed in accordance with section 39(1) of the Act {Rule 17(e)(i)}.

29. In the case at hand, as much as the appellant later subdivided the estate to the other beneficiaries, from the filed documents it could easily pass that the appellant was the only beneficiary of the state of the deceased whereas as anticipated by the law, the shares of the beneficiaries should pass to them seamlessly through transmission.

30. Rule 26 provides that letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant. Further that in an application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.

31. The effects of the above provisions is that where a person is applying for a grant of letters of administration intestate, he must get consent from persons of equal or lower priority than him. (in this case, the alleged beneficiaries never signed against their names). The applicant deposed that he is the son of the deceased. As per the order of priority provided for under section 66 as read together with section 29 of the Act, he ranks lower than the respondent herein (who is the wife of the deceased).

32. The provision of law in regard to the procedure of acquiring grants [sections 67 – 71]. The Cause was filed on 30.11.2012 and Gazetted on 07.12.2012 and thereafter he was issued with letters of administration intestate on 09.01.2013. He applied for confirmation of the grant before the expiry of the six months as there was no dispute in the mode of distribution and the parties were in agreement. Thus, the grant was confirmed on 14.02.2013. The period was shorter than the usual and also after having perused the court record, there are no orders issued by the court to justify the same.

33. My conclusion is that this appeal is without merits and it is hereby dismissed and the following orders are made;

*a) The grant that was issued to the appellant is hereby revoked.*

*b) The title deeds that were issued subsequent upon the confirmation of the grant are hereby cancelled.*

*c) The matter is hereby remitted to the Senior Principal Magistrate’s Court at Runyenjes for the parties to commence the process of administration of the estate.*

*d) Each party shall bear its costs of the appeal.*

34. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 24<sup>TH</sup> DAY OF NOVEMBER, 2021.**

**L. NJUGUNA**

**JUDGE**

.....for the Applicant

.....for the Respondent