REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

SUCCESSION APPEAL NO. 02 OF 2019

IN THE MATTER OF THE LATE PRISCA MWIHAKI MUMERA (DECEASED)

BENSON MUMERA MWANGI...1ST APPELLANT

ZIPPORAH WANGARI MWANGI..................................2ND APPELLANT

-VERSUS-

FASTINA WANJIKU KAMURI............... PETITIONER/RESPONDENT

JUDGMENT

1. The Appellant via certificate of urgency dated 28th March, 2018 sought revocation of grant and certificate of confirmation of grant over court, same application was disposed off by submissions, oral evidence and affidavits.

2. By affidavit of 9th January, 2019 the court dismissed application prompting the following of the instant appeal where 6 grounds were set:

> ***i. The learned Magistrate erred in law and fact in failing to find that the Respondent had given false and misleading information with regard to the beneficiaries of the estate of Prisca Mwihaki Mumera.***
>
> ***ii. The learned Magistrate erred in law and fact in failing to find that the Respondent had concealed material information with regard to the beneficiaries of the estate.***
>
> ***iii. The learned Magistrate erred in law and fact by finding that Paul Mwangi Mimera and/or his legal representatives were not entitled to a share in the estate of Prisca Mwihaki Mumera.***
>
> ***iv. The learned Magistrate erred in law and fact by finding that Stephen Kamuri Mimera and/or his legal representatives were the sole beneficiaries of the estate of Prisca Mwihaki Mumera.***
>
> ***v. The learned Magistrate erred in law and fact by failing to find that there were sufficient grounds for revoking the grant of letters of administration and certificate of confirmation issued on 11th August, 1995 and 26th February, 2013 respectively.***
>
> ***vi. The learned Magistrate erred in law and fact by dismissing the summons for revocation dated 28th March, 2018 with each party bearing its own costs.***

3. From the record of appeal, parties were directed to dispose appeal via submissions but only Appellant filed same.

APPELLANTS' SUBMISSIONS:

4. The Appellants main contention before lower court was that there was material non-disclosure when the Respondent conducted the succession matter that ended up with the grant of letters being confirmed solely in her favour. It is evidence from the parties' respective affidavits before the trial court that it was not in dispute that the deceased herein had two children, that is, **Paul Mwangi Mimera** and **Stephen Kamuri Mimera**.

5. It is not also in dispute that Paul Mwangi Mimera predeceased the deceased, and was survived by his wife and 9 children as listed in the affidavit in support of the said summons for revocation. In due course, his wife also died leaving behind the said 9 children.

6. Stephen Kamuri Mimera died some few months after the death of the deceased herein. Stephen Kamuri Mimera was survived by the

Respondent as his wife and children listed in the P&A 5 that was filed by the Respondent.

7. At the time when the succession cause was filed in the lower court, none of the deceased's 2 children were alive. The Appellants contended that during the succession proceedings, the Respondent concealed to the lower court that there were other beneficiaries of the estate in the form of the children of Paul Mwangi Mimera, that is, grandchildren to the deceased herein.

8. The Appellants argument was that they ranked in equality with the children of the Respondent, and as such they were equally entitled to benefit in the estate. The Appellants were pursuing the interest of Paul Mwangi Mimera in their capacity as his legal representatives, and as such their action before the lower court was meant to benefit all the 9 children of Paul Mwangi Mimera.

9. It was the Respondent's main argument before the lower court that during her lifetime the deceased had subdivided her parcel of land (***Parcle No. 475 Kirima***) into two equal portions, and gifted the two portions to his only sons.

10. However, the Respondent did not produce any document to support the alleged subdivision. The Respondent contended that Paul Mwangi Mimera sold his portion during the lifetime of the deceased, and that was reason why she did not include his family members in the said succession cause of the deceased herein.

11. The Respondents produced a letter from Chief, which she purported to be a sale agreement. However, it is evident from the said letter that it was a communication between two chiefs, whereby the deceased was indicated as having sold a portion of land to Gladys Wagechi.

12. It is submitted that the said letter does not indicate Paul Mwangi Mimera as the seller, but rather as a witness. There was no document produced before the lower court that would have suggested that the said sale was for the benefit of Paul Mwangi Mimera.

13. The Respondent relied on the affidavit of Margaret Nyaguthi Karimi to prove the alleged sale by Paul Mwangi Mimera. In her affidavit in paragraph 3, the said Margaret Nyaguthi Karimi has clearly deponed that she together with Gladys Wangechi were bona fide purchasers, having purchased their respective portions from the deceased herein in September, 1987.

14. The deposition together with the said Chief's letter completely displaces the Respondent's allegation that it was Paul Mwangi Mimera who was selling his portion of land.

15. There was no sale agreement that was produced before the lower court executed by Paul Mwangi Mimera disposing of his alleged gift of 10 acres to purchasers.

16. It is evident from the P&A 5, which was filed by the Respondent that she did not list any creditor in the form of purchasers from the estate, and yet she alleged that she had knowledge of the alleged purchasers for value.

17. The Appellants produced an abstract of title for ***L.R. Nyandarua/Kirima/472*** (page 35 of Record of Appeal), which indicates that on 18th August, 2010 there was an entry for registration of the Respondent in her capacity as the administrator.

18. On 25th September, 2013, the Respondent caused the said register to be closed on subdivision, and it led to opening of 3 new registers.

19. The Appellants attached copies of the certificate of official searches for the said 3 portions of land, and it is evident that none of them was ever registered in the names of the purported bona fide purchasers, that is, Gladys Wangechi and Margaret Nyaguthi Karimi. This goes out to show that the alleged sale by Paul Mwangi Mimera was purely an afterthought.

20. In addition to the foregoing, if the Respondent's version that the deceased had gifted her two sons parcel No. 472 equally is anything to go by, then why did the Respondent retain a portion (i.e. ***L.R. Nyandarua/Kirima/5265***) with an acreage of 17.5 acres, whereas the other two portions that she transferred to third parties make a total of 10 acres. It thus implies there was no such arrangement by the deceased to subdivide her only asset into two equal portions.

21. The Respondent admitted that she intentionally left out the family members of Paul Mwangi Mimera in the succession cause. It was her thinking that they could not get anything because their father had allegedly sold his portion.

22. It is submitted that the said averment clearly proves the Appellants' contention that there were concealments of the identity of beneficiaries.

23. It is submitted that it was not for the Respondent to determine who was entitled to be listed as beneficiaries in the P&A 5 to benefit from the estate, as that was the domain of the court.

24. In view of the foregoing, it is evident that the Respondent intentionally concealed a material fact, that is, the identify on who ought to have been included in the succession cause for the deceased.

25. It is thus submitted that the lower court erred when it did not find that there was material non-disclosure by the Respondent that would have warranted the revocation of grant of letters of administration and certificate of confirmation.

26. ***Section 29 of the Law of Succession*** provides the list of persons who qualify to be dependents.

27. In ***Re Estate of James Kiani Kiranga (deceased) 2020 eKLR,*** **Justice Majanja** held that the deceased's grandchildren ought to be in priority to the deceased's daughter in-law. It follows that grandchildren are entitled to share equally the portion which their parent would have received.

28. In ***Re Estate of Florence Mukami Kinyua (deceased) [2018] eKLR,***

> ***"A grandchild is a direct heir to the estate of the grandparent where the parent predeceased the grandparent. The grandchildren get into the shoes of their deceased parents and taken the parent's share in the estate of the grandparents."***

29. In ***Re Estate of Wahome Njoki Wakagoto [2013] eKLR,*** where the it was held:

> ***"Under Part V, grandchildren have no right to inherit their grandparents who die intestate after 1st July, 1981. The argument is that such grandchildren should inherit from their own parents."***

30. In ***Re Estate of Joyce Kanjiru Njiru (deceased) [2017] eKLR,***

> ***"My view is that the children are entitled to inherit the share which their deceased parents would have inherited."***

31. ***Rule 26 of Probate and Administration Rules*** state that letters of administration shall not be granted to any Applicant without notice to every person entitled in the same degree as or in priority to the Applicant. In ***Re Estate of Wahome Mwenje Ngonoro [2016] eKLR.***

DUTY OF FIRST APPELLATE COURT

32. This appeal is against both liability and damages. As a first appellate court, this court's role is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. This duty was well stated in ***Selle & Another v Associated Motor Boat Co. Ltd. & Others (1968) EA 123*** in the following terms:

> ***"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).***
>
> ***4. The Court of Appeal for East Africa took the same position in Peters v Sunday Post Limited [1958] EA 424 where Sir Kenneth O'Connor stated as follows:***
>
> ***It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt v Thomas (1), [1947] A.C. 484.***
>
> ***"My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."***
>
> ***5. From these cases, the appropriate standard of review to be established can be stated in three complementary principles:***
>
> > ***i. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;***
> >
> > ***ii. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due***

allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and

iii. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

6. In Odongo and Another vs. Bonge Supreme Court Uganda Civil Appeal 10 of 1987 (UR), Odoki, JSC (as he then was) said:

"While the length of the analysis may be indicative of a comprehensive evaluation of evidence, nevertheless the test of adequacy remains a question of substance."

LOWER COURT JUDGMENT:

33. Margaret Nyaguthi Karimi who swore an affidavit on her own behalf and on behalf of Gladys Wangechi were bona fide purchasers having bought the land from the deceased in 1987 and this was done in the presence of Paul Mwangi Mimera and the 1st Applicant.

34. That they have stayed in that land for 31 years together with the Petitioner/Respondent Faustina Wanjiku Kamuri. She depones that she could not produce the sale agreement because her documents got burned. She urged the court to disallow the application to revoke the grant.

35. The Respondent depones that Paul Mwangi sold his portion and moved away. She was therefore not obliged to include the children or family of Paul Mwangi in her petition for letters of administration. There are two purchasers namely Margaret Nyaguthi and Gladys Wangeci who bought land in 1987.

36. Paul Mwangi Mimera died in the year 1992 and was buried in a public cemetery. Evidence shows that the mother of the Applicants also died in the year 2017 and was not buried in the estate of the deceased.

37. The Applicants have not stated that they stay in the land of the deceased. This to me confirms that Paul Mwangi Mimera had moved away from the estate the deceased.

38. According to the Petitioner/Respondent Paul Mwangi sold his portion and moved away. That time the land was in the names of the deceased Prisca Mwihaki who signed the sale agreement as the seller. Paul Mwangi Mimera and the 1st Applicant also signed the letter before the chief acknowledging sale of land.

39. It is my considered view that the Applicants have not adduced sufficient reasons to cause this court to revoke the grant of letters of administration and annul the same.

ISSUES, ANALYSS AND DETERMINATION

40. after going through the material before me, I find the issues are;

a) whether the appellant established that the trial court ignored the law on revocation of grant by dismissing the application?

b) Which is the appropriate order to make in the circumstances and then order as to costs?

41. The Appellants main contention before lower court was that there was material non-disclosure when the Respondent conducted the succession matter that ended up with the grant of letters being confirmed solely in her favour. It is evidence from the parties' respective affidavits before the trial court that it was not in dispute that the deceased herein had two children, that is, Paul Mwangi Mimera and Stephen Kamuri Mimera.

42. It is not also in dispute that Paul Mwangi Mimera predeceased the deceased, and was survived by his wife and 9 children as listed in the affidavit in support of the said summons for revocation. In due course, his wife also died leaving behind the said 9 children.

43. Stephen Kamuri Mimera died some few months after the death of the deceased herein. Stephen Kamuri Mimera was survived by the Respondent as his wife and children listed in the P&A 5 that was filed by the Respondent.

44. At the time when the succession cause was filed in the lower court, none of the deceased's 2 children were alive. The Appellants contended that during the succession proceedings, the Respondent concealed to the lower court that there were other beneficiaries of the estate in the form of the children of Paul Mwangi Mimera, that is, grandchildren to the deceased herein.

45. The Appellants argument was that they ranked in equality with the children of the Respondent, and as such they were equally entitled to benefit in the estate. The Appellants were pursuing the interest of Paul Mwangi Mimera in their capacity as his legal representatives, and as such their action before the lower court was meant to benefit all the 9 children of Paul Mwangi Mimera.

46. It was the Respondent's main argument before the lower court that during her lifetime the deceased had subdivided her parcel of land (Parcle No. 475 Kirima) into two equal portions, and gifted the two portions to his only sons.

47. However, the Respondent did not produce any document to support the alleged subdivision. The Respondent contended that Paul Mwangi Mimera sold his portion during the lifetime of the deceased, and that was reason why she did not include his family members in the

said succession cause of the deceased herein.

48. The Respondents produced a letter from Chief, which she claimed to be a sale agreement. However, it is evident from the said letter that it was a communication between two chiefs, whereby the deceased was indicated as having sold a portion of land to Gladys Wagechi.

49. The said letter does not indicate Paul Mwangi Mimera as the seller, but rather as a witness. There was no document produced before the lower court that would have suggested that the said sale was for the benefit of Paul Mwangi Mimera.

50. The Respondent relied on the affidavit of Margaret Nyaguthi Karimi to prove the alleged sale by Paul Mwangi Mimera. In her affidavit in paragraph 3, the said Margaret Nyaguthi Karimi has clearly deponed that she together with Gladys Wangechi were bona fide purchasers, having purchased their respective portions from the deceased herein in September, 1987.

51. The deposition together with the said Chief's letter completely displaces the Respondent's allegation that it was Paul Mwangi Mimera who was selling his portion of land.

52. There was no sale agreement that was produced before the lower court executed by Paul Mwangi Mimera disposing of his alleged gift of 10 acres to purchasers.

53. It is evident from the P&A 5, which was filed by the Respondent that she did not list any creditor in the form of purchasers from the estate, and yet she alleged that she had knowledge of the alleged purchasers for value.

54. The Appellants produced an abstract of title for L.R. Nyandarua/Kirima/472 (page 35 of Record of Appeal), which indicates that on 18th August, 2010 there was an entry for registration of the Respondent in her capacity as the administrator.

55. On 25th September, 2013, the Respondent caused the said register to be closed on subdivision, and it led to opening of 3 new registers.

56. The Appellants attached copies of the certificate of official searches for the said 3 portions of land, and it is evident that none of them was ever registered in the names of the alleged bona fide purchasers, that is, Gladys Wangechi and Margaret Nyaguthi Karimi. This goes out to show that the alleged sale by Paul Mwangi Mimera was purely an afterthought.

57. In addition to the foregoing, if the Respondent's version that the deceased had gifted her two sons parcel No. 472 equally is anything to go by, then why did the Respondent retain a portion (i.e. L.R. Nyandarua/Kirima/5265) with an acreage of 17.5 acres, whereas the other two portions that she transferred to third parties make a total of 10 acres. It thus implies there was no such arrangement by the deceased to subdivide her only asset into two equal portions.

58. The Respondent admitted that she intentionally left out the family members of Paul Mwangi Mimera in the succession cause. It was her thinking that they could not get anything because their father had allegedly sold his portion.

59. Thus the court agrees with appellant averment that there were concealments of the identity of beneficiaries. It was not for the Respondent to determine who was entitled to be listed as beneficiaries in the P&A 5 to benefit from the estate, as that was the domain of the court.

60. In view of the foregoing, it is evident that the Respondent intentionally concealed a material fact, that is, the identify on who ought to have been included in the succession cause for the deceased.

61. Thus the lower court erred when it did not find that there was material non-disclosure by the Respondent that would have warranted the revocation of grant of letters of administration and certificate of confirmation.

62. ***Section 29 of the Law of Succession*** provides the list of persons who qualify to be dependents.

63. In ***Re Estate of James Kiani Kiranga (deceased) 2020 eKLR,*** court held that the deceased's grandchildren ought to be in priority to the deceased's daughter in-law. It follows that grandchildren are entitled to share equally the portion which their parent would have received.

64. In ***Re Estate of Florence Mukami Kinyua (deceased) [2018] eKLR,***

> ***"A grandchild is a direct heir to the estate of the grandparent where the parent predeceased the grandparent. The grandchildren get into the shoes of their deceased parents and taken the parent's share in the estate of the grandparents."***

65. In ***Re Estate of Wahome Njoki Wakagoto [2013] eKLR,*** where the it was held:

> ***"Under Part V, grandchildren have no right to inherit their grandparents who die intestate after 1st July, 1981. The argument is that such grandchildren should inherit from their own parents."***

66. In ***Re Estate of Joyce Kanjiru Njiru (deceased) [2017] eKLR,***

> ***"My view is that the children are entitled to inherit the share which their deceased parents would have inherited."***

67. ***Rule 26 of Probate and Administration Rules*** state that letters of administration shall not be granted to any Applicant without notice to every person entitled in the same degree as or in priority to the Applicant. In ***Re Estate of Wahome Mwenje Ngonoro [2016] eKLR.***

68. ***Section 76 of the Law of Succession Act***. For avoidance of doubt, ***Section 76 of the Law of Succession Act*** states as follows:

"76. Revocation or annulment of grant

> ***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—that the proceedings to obtain the grant were defective in substance; 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; 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; that 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 that the grant has become useless and inoperative through subsequent circumstances."***

69. ***Section 76*** was clearly expounded on by the court In re Estate of ***Prisca Ong'ayo Nande (Deceased) [2020] eKLR*** where it was stated that:

> ***"Under Section 76, a court may revoke a grant so long as the grounds listed above are disclosed, either on its own motion or on the application of a party. A grant of letters of administration may be revoked on three general grounds. The first is where the process of obtaining the grant was attended by problems. The first would be where the process was defective, either because some mandatory procedural step was omitted, or the persons applying for representation was not competent or suitable for appointment, or the deceased died testate having made a valid will and then a grant or letters of administration intestate was made instead of a grant of probate, or vice versa. It could also be that the process was marred by fraud and misrepresentation or concealment of matter, such as where some survivors are not disclosed or the Applicant lies that he is a survivor when he is not, among other reasons. The second general ground is where the grant was obtained procedurally, but the administrator, thereafter, got into problems with the exercise of administration, such as where he fails to apply for confirmation of grant within the time allowed, or he fails to proceed diligently with administration, or fails to render accounts as and when required. The third general ground is where the grant has become useless and inoperative following subsequent circumstances, such as where a sole administrator dies leaving behind no administrator to carry on the exercise, or where the sole administrator loses the soundness of his mind for whatever reason or even becomes physically infirm to an extent of being unable to carry out his duties as administrator, or the sole administrator is adjudged bankrupt and, therefore, becomes unqualified to hold any office of trust."***

70. Thus the court allows the appeal and makes the following orders;

> ***(i) The appeal is allowed that the lower court ruling and orders are set aside.***
>
> ***(ii) the grant of letters of administration and certificate of confirmation issued on 11th August, 1995 and 26th February, 2013 by the lower court respectively are annulled and revoked.***
>
> ***(iii) The title number L.R. Nyandarua/Kirima/472 is to be reverted to in names of deceased as all subdivisions and /or transfers are cancelled.***
>
> ***(iv) Petitioner to apply for grants jointly with representative of appellant jointly and thereafter agree on distribution and or each side to file separate proposals on sub-division for court to decide.***
>
> ***(v) No orders as to costs.***

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 20TH DAY OF DECEMBER, 2021.

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CHARLES KARIUKI

JUDGE