



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERUGOYA**

**HIGH COURT CIVIL APPEAL NO. 226 OF 2013**

**RACHAEL WAIRIMU KAIGURI.....APPELLANT**

**VERSUS**

**MARY NYAWIRA KINYUA.....RESPONDENT**

**JUDGMENT**

1. This appeal arises out of the Judgment in Kerugoya Succession cause No: 189 of 2002 which was before the Senior Resident Magistrate's court at Kerugoya. The matter related to the Estate of Jesse Kinyua Kaiguri ( deceased). A grant of letters of administration was issued on 31<sup>st</sup> October, 2002 to Elizabeth Wanjiku Kinyua and Mary Nyawira Kinyua. Thereafter they applied for confirmation of grant. However, on 14<sup>th</sup> November, 2006 one Reachel Wairimu filed a protest claiming that the estate of the deceased comprised in Mwerua / Mukure/ 106 was originally registered in the names of her late husband one Kaiguri Karuwe and the protestor argued that the deceased Jesse Kinyua Kaigure had obtained the grant in the estate through **Succession case number 77 of 1995** fraudulently, without consulting or informing her being the wife of Kaiguri Karuwe. She alleged that she had filed a revocation of that grant in **Succession cause no. 17 of 1995** at Nyeri High Court vide **Mis. Succ. Cause No. 42 of 1997** and she claimed a whole share of the estate as the only beneficiary of the estate.

2. The protest was heard and judgment was entered. The grant was confirmed and distribution ordered as follows;

*(i) Protestor to take 0.81 Ha*

*(ii) Petitioners each to take 0.35 Ha.*

3. Further that the petitioner is at liberty to move to the High court and prosecute her application for revocation of grant in **Succession cause No. 77 of 1995** which if allowed shall affect the orders in this case.

4. The appellant was aggrieved by the judgment and filed this appeal which has raised the following grounds;

**(i) That the Honourable court erred in law and fact in making judgment against the weight of evidence.**

**(ii) That the Learned magistrate erred in law and fact in disregarding the fact that the appellant had proved her case on a balance of probabilities**

**(iii) That the learned magistrate erred in law and fact in misdirecting himself on the issues before him for determination thereby arriving at a wrong judgment.**

**(iv) That the learned magistrate erred in law and fact in failing to consider and determine whether or not L.R. MWERU/ MUKURE/196 was lawfully acquired by the deceased JESSE KINYUA KAIGURI**

**(v) That the learned magistrate erred in law and fact in failing to have any consideration for the application for revocation of grant in Nyeri High Court Succession Cause NO. 77 of 1995 which was challenging the grant which gave the deceased JESSEE KINYUA KAIGURI L.R. MWERU/MUKURE/196**

5. The appellant prays that the appeal be allowed the judgment made on 8<sup>th</sup> March 1997 be set aside and the appellants' Protest be allowed the respondents' to meet the cost of the appeal.

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

For the appellants' submissions were filed by Joshua Magee LLP Advocate, He submits that the facts that were not in dispute before the trial court were that:

**(a) That L.R MWERUA/ MUKURE/ 196 originally belonged to KAIGURI KARUE ( deceased)**

**(b) That the said KAIGURI KARUE was the husband of the appellant herein whom he had wedded in church. They had no children.**

**(c) That upon the death of KAIGURI KARUE the appellant filed Succession Cause No. 217 of 1995 and the grant was confirmed in her favour and her children.**

**(d) That JESSE KINYUA the deceased in these proceeding and who was the husband of the respondent's herein, also filed a succession in respect of the estate of KAIGURI KARUE vide Succession cause No. 77 of 995 in which the grant was confirmed to him as the sole beneficiary of the land.**

**(e) THAT JESSE KINYU registered his grant at the lands office before the appellant herein and was therefore registered as the sole proprietor of the land. However, the appellant still had the original title deed and produced it in court.**

**(f) That upon learning that the appellant had been registered as the proprietor of the land, she filed an application for revocation of grant vide Nyeri High Court Miscellaneous Succession 42 of 1997, ( Page 89 of the Supplementary record of appeal).**

**(g) That at the time matter was determined the application for revocation had not been determined. It is still yet to be determined.**

7. He submits that the facts which were in dispute were that the respondent had alleged that the deceased was a son of **KAIGURI KARUE** and that his mother Bancy Ngima was his widow and co-wife of the appellant.

8. On the other hand the appellant averred that the deceased was not a son of **KAIGURI KARUE** and that his mother Bancy Ngima was not his wife.

9. That whereas the respondent averred that they were entitled to have a share of the land the appellant's case is that they were not entitled. The appellant's case was that registration of the deceased as the proprietor of the land was fraudulent and the court ought to have waited for application of revocation of grant to be determined.

10. The respondents' position is that the grant should be confirmed without having to wait for application for revocation of grant.

11. The appellant further submits that the appeal has merit and he contends that the trial magistrate found that the application for revocation of grant was an important step in determining how the distribution would be done.

12. That he considered the issue of registration of the deceased herein as proprietor of land was questionable.

13. That the trial magistrate erred by confirming the grant and stating that the orders issued in the application for revocation would affect his orders.

14. That the application for revocation of grant at Nyeri has not been heard and determined and they pray that the Appeal be allowed.

15. The appellant further submits that the Court ought to have made a finding that there is clear evidence that 'grant' gave the deceased ownership of the suit land was fraudulent and was amenable to revocation. The court ought to have waited for the revocation proceedings to be finalized.

### **RESPONDENTS SUBMISSIONS**

16. It Is submitted that; This appeal is Principally hinged on the equal division of Mweru/ Mukure/ 96 after confirmation of grant in the lower court.

17. He submits that the appellant contends that the sharing of land at 50/50 was unfair, unreasonable and unlawful and she further contends the registration of the deceased one Jesse Kinyua was fraudulent and that the court should have waited for the application for revocation of grant to be determined.

18. That the appellant maintains that the grant issued to the respondent - deceased husband is unlawfully procured. He submits that this is however, not there in the lower court proceedings and is not adduced in this claim.

19. It is clear that the deceased was the son for the appellant's deceased husband and that he applied for letters of

administration shortly after his father's death and the same was confirmed in succession cause number 77 of 1995 making the deceased the registered owner of Mweru/ Mukure /96.

20. He submits that the grant obtained in Succession 1842/99 was properly obtained and there was no fraud committed or concealment of any material fact or information.

21. That the issue which this court has to determine is whether the respondents have a right to inherit from the deceased Jesse Kinyua and if yes, what is their share.

22. That from the onset the respondent produced a green card attached to their petition that clearly indicated that their husband Jesse Kinyua was the registered owner of the aforementioned property and it follows that the respondent's as wives are automatically entitled to inherit the property of their late husband as provided under **Section 40 of Law of succession Act.**

Which provides;

**“ (i) where an intestate was polygamous**

**(ii) Where inter estate has married more than once under any system of law permitting polygamy, his personal and household effect and the residue of the net Intestate estate shall in the first instance be divided among the houses, among the number of children, but also adding any wife surviving him as an additional unit to the number of children.**

**(iii) The distribution of the personal and household effect and the residue of the net intestate estate within each house shall then be in accordance with the Laws set out in Section 35 to 38.”**

23. That it follows that the respondents are the only true and legal persons set to inherit from the estate of the deceased, and as it stands the appellant is then excluded from claiming from the said estate as she does not fall within the context of **Section 40 of the Act.** The respondent were gracious enough to offer her a half of the estate of the appellant which she still found unfair.

24. That the appellant had filed an affidavit of revocation of grant given to Jesse Kinyua in Succession cause No. 77 of 1995, sometimes in 1997 in Nyeri Misc. Succession number 42 of 1997. The said application was never been prosecuted and similarly there were no stay orders until the death of the respondent's husband.

25. That the appellant stated that the appellant was at liberty to move to the High court and prosecute her application in Succession Number 77 of 1995 and filed this appeal which is an abuse of the court process and he further submits that the proceedings in the lower court related specifically to the confirmation of grant issued to the respondent.

26. The appellant was aggrieved right avenue was to prosecute the summons for revocation of grant in Nyeri Mis. Succession number. 42 of 1997.

#### **ANALYSIS AND DETERMINATION;**

I have considered the appeal and the submissions. The issue for determination is whether the respondents has a right to inherit from the deceased JESSE KINYUA.

What share are the respondents entitled to get.

This being a 1<sup>st</sup> appeal this court has a duty to evaluate the evidence and the law and come up with its own independent finding. This was stated in the case of; **MWANA SOKONI -VERSUS- KENYA BUS SERVICE LIMITED (1982 -88) KAR 278 and KIRUGA -VERSUS- KIRUGA (1988) KLR 716.**

**“On a 1<sup>st</sup> appeal, it is now well settled the role of the Court is to revisit the evidence on record, evaluate it and reach its own conclusion. However, the court will not interfere with findings of facts 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 its findings”**

The proceedings before the trial magistrate related to JESSE KINYUA KAIGURI. The petitioners who are the respondents in this appeal were the wives of the deceased, while the appellant is a step-mother of the deceased. The contention by the protestor was that the deceased JESSE KINYUA KAIGURI had obtained the estate that is the land fraudulently by filing Succession cause No. 77 of 1995 without informing her being the wife of KAIGURI KARUE. The allegation that the deceased had obtained the grant fraudulently is just that, it is not supported by any evidence.

This is because though she filed the appeal in Succession cause number 77 of 1995 she has never prosecuted the application for revocation of grant.

What is a fact is that the deceased filed Succession in the estate of his late father in a competent court, the court gave a decision and confirmed the grant. Therefore, the grant issued to the deceased remains valid until the contrary is proved.

Furthermore there was no application for a stay of execution of the said grant and therefore, there was nothing to stop the court from relying on that grant.

It is trite that the mere filing of an appeal cannot operate as a stay of execution.

(1) The appellant has not only been lax but also indolent. Order 42 Rule 6(1) of the Civil Procedure Rules provides that;

*“ No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”*

By the time the trial magistrate entered the judgment this were the facts appertaining to the appeal which the appellant had filed.

The trial magistrate found that the deceased JESSE KINYUA was the registered owner of the land. That he was the husband of the petitioners' and that after having died in 1981 in which case the Law of Succession Act was applicable to his estate, the petitioners' were automatically entitled to a share of his estate.

The trial magistrate made a finding of fact that the applicant was not truthful when she stated that she did not know JESSE KINYUA as a son of Nancy Ngima alias Wanjiru.

The trial magistrate found that Nancy Ngima alias Wanjiru who was the mother of Jesse Kinyua was a co-wife of the protestor. Jesse Kinyua the deceased had filed Succession in the Estate of his father KAGUIRI KARUE and husband of protestor and succeeded the whole estate in Succession cause No. 77 of 1995. The protestor had also filed a Succession cause of 217 of 1995 in the Estate of **KAGUIRI KARUE**.

The trial magistrate found that the respondents' had a right to inherit the estate of the deceased who was their husband.

27. Having considered the facts that were before the trial magistrate, I find that the trial magistrate properly addressed his mind to the issues before him and reached a decision which was based on the weight of the evidence and supported by the Law.

28. The appellant did not prosecute her application for revocation of grant a delay of 20 years in prosecuting the application for revocation of grant can only lead to the evitable conclusion that the summons for revocation of grant is not well grounded, and the proceedings I cannot be held back on presumptions which have not taken place.

29. The trial magistrate properly addressed his mind to the facts and the law and arrived at a proper finding.

30. The appellant is a Step-mother of the deceased. The late KAGUIRI had two wives and the distribution of the estate was that it was divided equally with the appellant getting half and the petitioners' half. So the distribution was fair in the circumstances of the case and its sanctioned under Section 40 of The Law of Succession Act.

31. In conclusion, I find that this appeal is without merit, and it is dismissed with costs.

**Dated at Kerugoya this 29<sup>th</sup> day of May 2020.**

**L.W. GITARI**

**JUDGE**