



REPUBLIC OF KENYA

AT THE HIGH COURT OF KENYA AT SIAYA

CIVIL APPEAL NO. 16 OF 2019

MATHEW OWINO WINJA.....1ST APPELLANT

HEZRON AGOT ODUMAH.....2ND APPELLANT

VERSUS

JOYCE ATIENO OGUDAH.....RESPONDENT

(Appeal from the Ruling and Order of Hon E.N.Wasike, SRM delivered

on 3/5/2019 in Bondo Principal Magistrate's Court Succession Cause No. 356 of 2018)

JUDGMENT

1. This appeal was lodged on 17/5/2019. After the initial hearing which was *ex parte* and judgment date set for 6/4/2020, the Respondent applied for stay of delivery of judgment and sought for leave to be heard. This was also during the Covid 19 pandemic. The judgment was stayed and recalled by a ruling of 6th July 2020 allowing the Respondent to file written submissions to participate in the appeal hence this date.
2. The appeal arises from the Ruling of Hon. E.N. Wasike Senior Resident Magistrate at Bondo in PM Succession Cause No. 356 of 2018 delivered on 3/5/2019.
3. The Ruling which is impugned arose from an application by way of summons for Revocation of grant lodged by the present appellants Mathew Owino Winja and Hezron Agot Odumali, challenging the grant of letters of Administration intestate issued to the Respondent Joyce Atieno Ogudah in respect of the estate of the Late Roselbella Abok Omolo who died at Usigu, in Bondo on 27.1.1989, aged 38 years.
4. From the letter of the Chief Central Yimbo location dated 4/10/2018 introducing the Respondent herein Joyce Atieno Ugudah to the Principal Magistrate's court, Bondo, the deceased Roselbela Abok Omolo died single and with no child. Her parents are also said to have died. The deceased however owned Land Parcel No. Usigu/1658 and that the family had sat and unanimously recommended her sister Joyce Atieno Ugudah ID/No. [particulars withheld] to carry out the Succession of the parcel of land.
5. By a Petition for grant of letters administration intestate dated 11/10/2018 and filed in court on 11/10/2018, the Petitioner/Respondent herein petitioned for grant to administer the estate of the deceased in respect of Siaya/Usigu/1658 measuring 1.77 hectares.
6. The Petition was gazetted on 19/10/2018 vide gazette Notice No. Vol. CXX – No. 127 No. 10896 of 19/10/2018. On 20/11/2018 the Respondent herein/Petitioner was issued with a grant of letters of Administration intestate - P&A 41.
7. On 23/11/2018, the Petitioner, now administrator applied for confirmation of the said grant, under certificate of urgency dated 23/11/2018 on the ground that she was resident of Britain and that some of her relatives were interfering with the land subject of the succession proceedings. The summons for confirmation of the grant also sought waiver of the six months period as she was the only beneficiary and that there was no other dependant of the deceased's estate. The certificate of confirmation was issued on 27/11/2018 as per the court proceedings of 27/11/2018, albeit erroneously typed as 22/11/2018.
8. On the same day that the grant was confirmed in favour of the Petitioner/ Respondent herein, the appellants filed summons for revocation of the confirmed grant and urging the court to issue a fresh grant of letters of Administration to Mathew Owino Winja and Hezron Agot Odumah. They also sought for a restriction to be placed on the land parcel No.Siaya/Usigu/1658 pending hearing and determination of the application. They further asked for costs to be in the cause.
9. The grounds upon which the Summons for revocation of grant was predicated are that (a) the grant was obtained by fraud and concealment of material facts by the Petitioner omitting the names of some of the dependants entitled to a share of the deceased's estate and (b) that the

Petitioner misled the court that she is a sister to the deceased which fact is not true.

10. The summons for revocation of the grant were supported by the affidavit sworn by Mathew Owino Winja the 1st appellant herein sworn on 27/11/2018 deposing on his own behalf and on behalf of the second appellant. The 1st appellant deposed that he was a **nephew** to the deceased while his co-objector was said to be the **grandson** to the deceased.

11. The deponent annexed copy of letter dated 22/2/2016 written by the Senior Chief Central Yimbo location introducing the 2nd appellant Hezron Agot Odumah of ID/No [particulars withheld] as the person mandated to administer the said piece of land Parcel No. 1658 Usigu. He also annexed minutes dated 30/9/2018 of a meeting allegedly held at Mama Dinah Winja's home at 2 pm chaired by the 1st appellant Mathew M. Owino attended by the 2nd Appellant and others said to be Winja's family and it is recorded that family members present unanimously agreed to the succession of the land in question by Mr. Hezron Agot Oduma, the second appellant herein.

12. In the said affidavit, the 1st Appellant deponent stated that his co-objector was since in open and actual possession of the deceased's only property and had constructed a house thereon hence the grant issued to the Respondent herein should be revoked.

13. The Respondent/Petitioner filed a Replying affidavit on 11/12/2018 opposing the summons for revocation of grant and deposing that Hezron Agot Odumah has no relations either to the deceased, the Petitioner or her family. She deposed that the deceased never had any children and that prior to her demise, had given the disputed parcel of land to the Petitioner. That the 1st Objector's signature differs on the supporting affidavit and copy of minutes attached, an indication of the falsehoods propagated by the Objectors. She denied the claim by the Objectors that the 2nd Objector had constructed any house on the aforementioned piece of land. She urged the court to dismiss the application and validate the grant issued to her.

14. The summons for revocation of the grant was disposed of by way of written summons following the directions given by the trial court on 13/12/2018, which directions were complied with by both parties and a Ruling was delivered on 3/5/2019. That Ruling is the subject of this appeal.

15. In the subordinate court, the appellant's herein were ably represented by Mr. Okeyo Advocate whereas the Respondent was unrepresented. She acted and filed her submissions in person.

16. In the written submissions filed by the Objector's advocates on 7/2/2019, it was submitted, reiterating the grounds in their application and the deposition in the affidavit citing the provisions of Section 76 of the Law of Succession Act, under which the summons for revocation of the grant was brought.

17. Counsel also cited the case of **Mikielena Kirigo M'Murithi V Mary Gatuku [2014]eKLR** where the court held that failure to comply with Rule 7(7) of the P&A Rules was fatal to the grant issued, for failure to include other dependants of the deceased. Further reliance was placed on **Kiama Gathuri Ngara & Another V. Teresa Wangui Ngara [2015]eKLR** and **Sections 52 & 66 of the Law of Succession Act** on failure to comply with Rule 7(7) of the P&A Rules and the effect of making willful or reckless statements that are false in material.

18. The Objectors reiterated that being the nephew and grandson of the deceased, they were legitimately entitled to seek grant of representation of her estate and maintained that the Respondent herein never informed them of the process to enable them participate in the proceedings hence the grant should be annulled.

19. Further, that the Petitioner supplied wrong information to the court that she is sister to the deceased which fact she knew to be false.

20. On the part of the Petitioner, she filed her written submissions on 14/1/2019 framing two issues for determination: -

(1) Whether to inherit from the deceased; and

(2) Whether the letters of administration made to her should be revoked.

21. On the first issue, the Petitioner submitted that the Objector had not established any sufficient link between them and the deceased during her lifetime to persuade the trial court to grant them the orders sought. She relied on Machakos HC Succession Cause No. 1/2017 and Section 29 of the Law of Succession Act on who a dependant is.

22. On the second issue of whether the grant issued to the Petitioner should be revoked, the Petitioner submitted that the appellants herein had not satisfied the grounds set out in Section 76 of the Law of Succession Act to warrant such revocation the she lied on Re-estate of Naftali - deceased (2002) 2 KLR 684.

23. Further submission was that the Objector had not demonstrated any prejudice suffered from issuance of the impugned grant and relied on the case of **Agnes Mutitu Mwaura & others V Jane Njoki Gachoki [2015] eKLR**.

24. In addition, the Petitioner reiterated that she was the sister to the late who had no issues and that she lived with the deceased from her adolescence until marriage having been chased from her home by her father getting pregnant and when she delivered her child, the child died and was buried on the land parcel No. Siaya/Usigu/1658.

25. That she had custody of the deceased and all her valuables and catered for all her expenses when she was alive and dead.

26. She maintained that the land was given to her by the deceased as a *gift inter vivos* which gift is protected by Section 42 of the Law of Succession Act as was held in **Reginah Nyambura Wiatathu V Tarcisia Kagunda Waitathu & 3 Others [2016] eKLR**.

27. The Petitioner concluded that the summons for revocation of grant was an afterthought arrived at stalling the administration of the deceased's estate. Further, that the Objectors had not even proved or established their lineage to help the court establish their relations with the deceased. She maintained that she was the sole beneficiary of the deceased's estate and that the Objectors did not prove their alleged entitlement hence the summons should be dismissed with costs.

28. In his Ruling dated 3/5/2019 the Hon. E.N. Wasike, SRM dismissed the application for revocation of the grant for reasons, among others that apart from describing their relationship with the deceased which had been put into doubt, the objectors failed to demonstrate whether they used to stay with the deceased prior to her death as a family or either they were maintained by the deceased during her lifetime.

29. The court was also concerned about the delay in administering the deceased's estate from 1989 when she died and the fact that the Objectors were conflicted in the 1st Objector chairing the meeting where they decided that his co-objector do inherit the land hence he was a judge in his own cause. He also found that the chief's letter dated 22.2.2016 was unprocedural and fallacious as he was directing on the distribution of the deceased's estate.

30. The trial court found that there was no breach of Section 76 of the Law of Succession Act and proceeded to dismiss the objections proceedings with costs to the Petitioner/Respondent herein.

31. Aggrieved by the Ruling of 3/5/2019, the Objectors filed this appeal on 17/5/2019 setting out the following 5 grounds of Appeal:

1. The learned trial magistrate erred in law and in fact in finding that the appellants had not established grounds for revocation of grant when there was evidence that the Respondent had left out other dependants when petitioning for letters of administration;

2. The learned trial magistrate erred in law and in facts in ignoring evidence on record that confirmed that the appellants were dependants of the deceased.

3. The learned trial magistrate erred in law and in fact in ignoring the facts that the Respondent had recognized the appellants as beneficiaries of the deceased's estate but they had not been included in the Petition for letters of administration hence the grant ought to have been revoked.

4. The learned trial magistrate erred in law and in fact in failing to find that the Respondent had not established her relationship with the deceased hence she was not entitled to the grant of letters with respect.

5. The learned trial magistrate erred in law and in fact in proceeding to base his ruling on matters that were never pleaded, proved and were never raised in the application.

32. The appellants urged this court to allow the appeal, set aside the ruling of 3/5/2019, and allow the summons for revocation of grant dated 27/11/2018 as prayed.

33. The appeal was admitted to hearing on 11/7/2019 and earlier directions given for hearing of the appeal *ex parte* were set aside on application by the Respondent upon discovery that the Respondent was never served with the Memorandum of appeal or record of appeal or even hearing Notice as she was out of the country. This was vide Ruling of this court dated 6/7/2020 and fresh directions given parties to file and serve written submissions to canvass the appeal *inter partes*.

SUBMISSION

34. The appellant's written submission were filed by their counsel on 7/2/2020 whereas the Respondent's counsel submissions were filed on 16/7/2020. All the submissions were adopted as canvassing the appeal prior to this judgment date being given.

35. In the appellant's counsel's written submissions dated 1/2/2020 and filed on 7/2/2020 counsel framed and argued three issues for determination: -

(1) whether the objectors are entitled to inherit from the estate herein being the nephew and the grand child of the deceased.

(2) whether the Respondent is entitled to inherit from the deceased's estate herein:

(3) whether the letters of administration made to the Respondent herein should be revoked and the same be issued to the appellants herein.

36. On issue No. 1 counsel for the appellants submitted reiterating Section 39 of the Law of Succession Act and arguing that where the deceased dies and is not survived by spouse or child, the ...estate should devolve on the kindred of the deceased that is, blood relatives in the order set out in the said Section 39 of the Law of Succession Act and where there is no blood relative of the deceased surviving, the estate becomes *bona vacantia* and is liquidated into the Consolidated Fund.

37. It was counsel's submission that the Respondent neither falls in the above mentioned category of persons nor is she a state to expressly

accede to the estate herein.

38. It was counsel's submission that where the siblings of the deceased or other persons related to the deceased claim, the trial court should have given directions that parties do adduce *viva voce* evidence to determine dependency and where the dispute relates to distribution of the estate, the court should invoke mediation process involving beneficiaries and dependants in the distribution of the estate of the deceased.

39. However, counsel submitted that there was evidence on record in the form of Chief's letter and minutes of the members of the clan to the effect that the appellants were entitled to inherit the estate of the deceased. Reliance was placed on **Re-estate of Wamurihiu Murimi (deceased) Nairobi HC Succession No. 460/2002** Koome J where, according to Mr. Okeyo, the deceased died intestate survived by no children but a nephew and three nieces. The court directed the estate fell for distribution under Section 39 of the Act to the nephew and nieces in equal shares.

40. On the 2nd issue, Mr. Okeyo submitted that at page 30 para 30 of the trial court proceedings, the Respondents had in her address to the court recognized the appellants as beneficiaries of the deceased's estate hence the grant should have been revoked. Counsel submitted that the Petitioner is not related to the deceased and that her intention is to amass the entire estate to the exclusion of other persons who would be beneficiaries and or dependants from the estate herein.

41. Counsel maintained that the Petitioner would not fall under Section 39 of the Law of Succession Act.

42. On issue No. 3, it was submitted that the Petitioner misled the trial court in her petition by claiming that she was a sister to the deceased and failed, deliberately, to include other dependants hence she failed to comply with Section 76 of the Law of Succession Act.

43. Further, that albeit the court has discretions to appoint administrators it should not have distributed the property *suo moto* to the exclusion of the appellants.

44. Reliance was placed on the matter **Re Estate of Charles Muigai Ndung'u (deceased) of Karinde Kiambu District, Nairobi HCC 2398/2002 - Kamau J and Estate of Gachii Gatimu (did) Nairobi HCSC 599/1994** on beneficiaries.

45. On where there are competing interests, claimants, counsel relied on Sections 35, 36, 37, 38, 39 & 40 of the Law of Succession Act and in the Estate of **Re Aggrey Makanga Wamira, Mombasa HCSC 59/1996 Waki J** - restating priority in terms of Sections 35 and 39 of the Law of Succession Act.

46. Counsel urged this court to allow the appeal as prayed.

47. Opposing the appeal, the Respondent filed written submissions on 16/7/2020 through the firm of Mukabane Co. Advocates contending that albeit the appellants claim to be nephew and grandson of the deceased, the deceased died without any child and that more so, the chief's letter dated 22.6.2016 does not name the 1st appellant as beneficiary hence the chief's letter and minutes of the clan do not assist the appellants who have no capacity to contest the succession

48. Counsel further framed two issues for determination: -

(1) whether the appeal is competent in law and

(2) whether the grounds of appeal are sufficient to overturn the 52. decision of the lower court.

49. On the first issue, it was submitted that the appeal is incompetent and or defective and or bad in law for reasons that it does not comply with Order 42 of the Civil Procedure Rules as there is no decree extracted and included in the record of appeal filed together with the Memorandum of Appeal.

50. He also cited Section 79 of the Civil Procedure Act and Section 79B of the Civil Procedure Act and urged the court to dismiss the appeal. He relied on **Ndegwa Kamau Vs Side View Garage V Fredrick Isika Kalumbo [2016]eKLR** - Ngaa J.

51. On whether the grounds of Appeal raised are sufficed to overturn the decision of the lower court, Mr. Mukabane submitted that albeit the appellants claimed to be nephew and grandson of the deceased, as the deceased had no child, the 2nd appellant could not have been her grandchild and that there was no proof of dependency. He submitted that the appellants should have adduced additional evidence of how the deceased maintained them during her lifetime. Reliance was placed on Section 29 of the Law of Succession Act on the meaning of 'dependant'.

52. Further submission on grounds 2,3,4 and 5 was that the appellants did not prove the grounds Section 76 of the Law of Succession Act to warrant revocation of the grant issued to the Respondent/Petitioner that they never proved any fraud, misrepresentation or prejudice suffered from issuance of the grant as they are not dependants under Section 29 of the Act.

53. It was submitted, reiterating affidavit evidence of the Respondent that the deceased was her sister, she died single and with no child as corroborated by the chief's letter dated and that she lived with the deceased and supported her during her lifetime until death and that her child was buried on Parcel No. Siaya/Usigu/1658 and she had custody of the deceased's estate and all valuables and she was given the land by her late sister which is a *gift intervivos*.

54. Reliance was placed on Section 39 of the Law of Succession Act on the benefits where the intestate has no surviving spouse and children.

Counsel for Respondent submitted that this appeal is an afterthought and that the appellants disclosed or proved no filial link with the deceased to warrant revocation of the confirmed grant. He urged the court to dismiss the appeal with costs.

DETERMINATION

55. I have considered all the evidence adduced before the trial court by both the appellants and the Respondent, the submissions therein, the grounds of appeal and written submissions citing statutory and case law. In my humble view, the issues for determination in this appeal emanate from each of the grounds of appeal as argued by the parties which I will frame as follow:

(1) Whether the appeal herein is incompetent and or defective and or bad in law for reasons that it does not comply with Order 42 or the Civil Procedure Rules as there is no decree extracted and included in the record of appeal or filed simultaneous with the Memorandum of appeal.

I have perused the record of appeal. There is no decree extracted and included therein as required by Order 42 Rule 13(4) of the Civil Procedure Rules which stipulates that:

“Before allowing the appeal for hearing the Judge shall be satisfied that the following documents are on the court record, and such of them as are nit in the possession of either party have been served on that party, that is to say: -

(a) The Memorandum of Appeal

(b) The Pleadings

(c) The notes of the trial magistrate.

(d) The transcript of any official shorthand, typist notes, electronic recording or plan typist notes made at the hearing;

(e) All affidavits, maps and other documents whatsoever put in evidence before the magistrate.

(f) The judgment, order or decree appealed from and where appropriate, the order (if any) giving leave to appeal”.

56. In the instant case, the appellant only included in the record of appeal, a Ruling giving rise to this appeal. No Decree or order was extracted and included in the record of appeal.

57. However, the wordings in Order 42 Rule 13(f) speak in the alternatives i.e. the ***judgment, Order or Decree appealed from.*** It does not say judgment and decree or judgment and Order appealed from.

58. That being the case, as the appellant included in the record of appeal the Ruling appealed from, failure to extract Decree or Order derived from the impugned Ruling is not fata to this appeal.

59. Furthermore, inclusion of a decree or order extract is not substantive issue as the main Ruling appealed from is in the record of appeal.

60. The omission of decree or order appealed from is a mere procedural defect/irregularity and technicality which is curable by application of Article 159(2)(d) of the Constitution which abhors procedural technicality in favour of substantive justice.

61. Furthermore the Court of Appeal in **Kilonzo David T/A Silver Bullet Bus Company Vs Kyalo Kiliku & Another[2018]eKLR** held this:

62. “It is very clear that the appellant’s omission to seek leave to file a supplementary record of appeal to attach a copy of the decree he was appealing from rendered his appeal incompetent. Having said so, whereas in the cases of **Ndegwa Kamau T/A Side View Garage Vs Isika Kalumbo[2016]eKLR; Kulwant Singh Roopa V. James Nzilii Muswii[2014](supra) and Joseph Kamau Ndungu Vs Peter Njuguna Kamau[2014]** supra, Ngaa J struck out the appeals therein because the decrees that were being appealed from had not been annexed in the respective records of Appeal, this court took a different position that it would be too draconian to strike the appeal herein.

63. The court’s thinking was informed by the fact that it inadvertently admitted the appeal before it had satisfied itself that the decree the appellant was appealing from had been filed and it would thus be unfair to visit its omission on the appellant for no fault of his own. For the foregoing reasons, the court’s decision was that although the appellant’s Petition of Appeal that was lodged on 27th July 2017 was incompetent for want of annexing of the certified copy of the decree to his record of appeal, he was directed to file and serve a supplementary Record of Appeal annexing the necessary documentation by 26th June 2018.”

64. In the instant case, as earlier stated, Order 42 Rule 13(f) is clear that an appellant is expected to include in the record of appeal copy of judgment, decree or order appeal from. The appellants did not include decree or appealed from but they included copy of the Ruling appealed from which in my humble view is sufficient and even if it was not sufficient.

65. Article 159(2)(d) of the Constitution affords the appellants refuge on the basis that the omission is a procedural technicality which does not go to the root of the matter.

66. For all the foregoing reasons, the objection to the competence of this appeal is found to be devoid and is hereby decline.

67. I now proceed to determine the merits of the grounds of appeal as argued by both parties' advocates and which can be summarized below:

(i) Whether the trial magistrate erred in finding that the appellants had not established grounds for revocation of grant.

(ii) Whether there was evidence that the Respondent had left out other dependants when petitioning for grant of letters of administration.

68. To resolve the above two main issues, the question is whether the appellants established or presented before the trial court evidence, on a balance of probabilities, that they were dependants of the deceased and that therefore having been omitted from being beneficiaries, the grant issued to the Respondent should be revoked.

69. Section 76 of the Law of Succession permits any party to move the court for revocation of grant on the grounds set out namely:

(a) Defect in the proceedings to obtain the ground.

(b) Fraud and concealment by a petitioner.

(c) False allegation

(d) Failure to diligently carry out the administration of the deceased's estate;

(e) When a grant becomes in operate or useless through subsequent circumstances.

70. The Appellants claimed that they were nephews of the deceased hence entitled inherit her estate. They claimed that the Respondent Petitioner is not related to the deceased.

71. I have perused P&A 80 form which is the petition filed on 11/10/2018 by the Respondent. She presented the petition in her capacity as the sister of the deceased Rosebella Abok Omolo alias Roselbela Abok Omolo.

72. The Petitioner also swore an affidavit P&A 5, on 11/10/2018 depositing that the deceased was her sister and that the Respondent herein was the only person surviving her.

73. She also annexed death Certificate No. 0595829 dated 3/10/2018 showing that the deceased died on 27/11/1989 at Usigu aged 38 years.

74. The Petitioner/Respondent herein also filed a letter from the Chief Yimbo location introducing her as the sister to the deceased. The letter is clear that the deceased died without leaving behind any child and that the family had sat and unanimously recommended her sister Joyce Atieno Ugudah ID/No. [particulars withheld] to carry out succession of the land left behind by the deceased who died on 27/1/1989 and that her parents too had died.

75. The applicants claim to be nephews and grandson to the deceased. They do not and have not told the court whether they are son to the deceased's sister or brother or in the case of 2nd appellant, son to the daughter or son of the deceased.

76. That therefore remains a mystery to this court as far as the filial relationship is concerned. They also claim that the Petitioner is not related to the deceased and that is all that they have to say against her, yet she swore an affidavit stating that she was the sister to the deceased and she has consistently sworn that she is the sister to the deceased.

77. If as stated by the letter of the chief Central Yimbo location and deposed by the appellant, that the deceased died childless, no doubt she could not have left behind a grandson and if there was any such grandsons, he could have disclosed whether he was a child to the son or daughter of the deceased.

78. Similarly the 1st appellant could have disclosed in which manner he is a nephew to the deceased. He who alleges must proof and it was not upon the Respondent to proof and it was not upon the Respondent to prove for the appellants their relation to the deceased. Neither was it open to the court as suggested by counsel for the appellants that the court should have called for *viva voce* evidence to establish how the parties hereto were related to the deceased.

79. The Appellants having sworn affidavits challenging the issuance of grant to the Petitioner, it was upon them to disclose truly how the Petitioner was, as alleged, an impostor sister of the deceased and how they were the personals legally beneficiary entitled to petition and inherit the assets of the deceased.

80. The appellants claims that the Respondent left out other dependants of the deceased. What was therefore required of the appellants was to adduce evidence disclosing who these other dependants were and to further prove their dependency on the deceased.

81. Dependency is defined under Section 29 of the Law of Succession Act as follows: -

“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, grandparents, grandchildren, step 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/her 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.”

82. The appellants claimed that the Respondent/Petitioner made false statement or concealed materials facts in that the Petitioner is not a related to the deceased and that she failed to disclose other dependants but as stated above, the statements made by the appellant are barren of any material upon which this court and the trial court can or could have concluded that indeed the Petitioner was at fault as alleged.

83. Albeit the trial magistrate was faulted for ignoring evidence on record that confirmed that the appellant were dependants of the deceased, and that they were therefore entitled to inherit from her estate, the submissions in support of that allegation e so bare that they do not provide any material upon which this court can make a finding of fact or law. The appellant’s counsel simply quoted Section 39 of the Law of Succession Act on where the intestate leaves no surviving spouse or children and address that the Respondent did not fall in the categories of relatives mentioned in the sad section nor is she a state to expressly accede on the estate of the deceased.

84. No attempt was made to disclose the filial relationship between the appellants and how they became dependants of the deceased.

85. Albeit the appellants further claims that the chief’s letter and minutes of the members of the clan gave appellants the right to inherit the estate of the deceased, the question I must pose is, why the appellants waited from 1989 to 2018 to claim the estate of the deceased aunt and grandmother.

86. The name of the clan is not disclosed and neither did they provide any family tree by which they would prove their relationship with the deceased to warrant an Order being made in their favour.

87. Furthermore, the Minutes of 30/9/2018 show that the chairman of the meeting was the 1st appellant herein who called the special meeting to discuss the agenda of the succession of parcel No. 1658-Usigu formerly owned by his grandmother Rosebella Abok Omollo of Orom Village – Usigu sub-location. From the way the said minutes were recorded on page 2, the meeting approved the 2nd appellant to carry out succession of the said land. How the 1st appellant came to be one of those Objector yet he was not approved to succeed the land in question by the said meeting is not explained.

88. In the said meeting, there is no explanation why the 2nd appellant was being fronted to succeed the land and how he would distribute it to the supposed beneficiaries was never discussed.

89. Surprisingly, the letter from Chief, Yimbo Central location Mr. Odindo dated 22/2/2016 addressed to the Registrar, High Court, Kisumu claims that the deceased died and left Hezron Agot Odumah who was mandated to admister the said piece of land.

90. The death certificate dated 3/10/2018 was issued to Joyce Atieno as the informant and sister.

91. The appellants merely claimed that the Respondent was not related to the deceased and that they were her nephew and grandson respectively but no explanation was given as to how the deceased who died childless and unmarried became such a close blood relative to them.

92. In my humble view the appellants failed to prove their case that they were related to the deceased as nephew and grandson. They also failed to prove that they were dependants of the deceased.

93. In addition, they failed to dislodge or displace the sworn affidavit evidence adduced by the Respondent that she was the sister to the deceased and therefore entitled to Petition for grant of letters of administration of her estate.

94. The Respondent went further and deposed that she lived with the deceased ad even her (Respondent’s) child died and was buried on the deceased’s land. She further disclosed that she used to care for the deceased during her illness and provided her with all her basic needs during her lifetime.

95. This evidence was never displaced by the appellant. The appellants merely claimed that their Respondent was not related to the deceased. They did not bother to establish that they were dependants of the deceased, or as claimed, that they were her nephew or grandchild and neither did they prove that the Respondent was not the sister to the deceased.

96. Albeit the appellant’s counsel alleged in ground 5 of the Memorandum of appeal that the trial court erred in law and fact in proceeding to base his ruling on matters that were never pleaded, proved and were never raised in the application for revocation of grant, there was no submission to substantiate this ground hence the same is dismissed, as I find no material on record to support the bare allegation.

97. The Appellant's counsel in his submissions in support of ground 3 of the grounds of Appeal asserted that the trial magistrate erred in law and in fact in ignoring the fact that the Respondent had recognized the Appellants as beneficiaries of the deceased's estate but that they had not been included in the petition for letters of administration hence the grant ought to have been revoked.

98. I have perused the trial court record. I observe that during the objection proceedings, and before hearing in the trial court, the objectors herein were ably represented by Mr. Okeyo Advocate on 27/11/2018 but the advocate silently pulled out of the proceedings and the objectors never sought to bring him or any other advocate of their choice on board to represent them.

99. On 27/11/2018 at 2.45 pm Mr. Okeyo appeared for the appellants whereas the Petitioner/Respondent herein in person. That was the same day that the grant had been confirmed before the appellants filed their summons for revocation of the grant. Mr. Okeyo informed the trial court that he had a talk with the Petitioner on the way forward and that they were praying for more time if they could resolve the matter.

100. The Petitioner stated that she had had some talks but that they had not reached a permanent solution though she was willing to give some portion of land to the 2nd Objector once whole process had been completed.

101. Mr. Okeyo then sought for a hearing date for the application and that in the event of an agreement then the application would be compromised but if not then same could be heard and the court would decide.

102. From the above extract of trial court record, there is absolutely no evidence of concession on the part of the Respondent which the trial court could have based his decision or finding that the Respondent accepted to share in the estate of the deceased with the appellants herein.

103. An intention to negotiate the despite out of court, where there is no such negotiations and agreement reached cannot be inferred to suggest that the Respondent conceded to ceding the estate of the deceased.

104. The appellants did not demonstrate and have not demonstrated before this court any evidence of entitlement to the estate of the deceased.

105. Furthermore, the Respondent only indicated her willingness to give some portion to the 2nd objector not the whole portion or to both objectors. It was therefore upon the 2nd objector to pursue a negotiated settlement and where this was not workable, to adduce evidence to prove that how he was beneficially entitled to the estate of the deceased. The same would apply to the 1st Objector. He was bound to prove his beneficial interest in the estate of the deceased and not leverage on the gradient of the Respondent as their advocate made it clear that where discussions would not bear any fruit, then the matter would be left to the court to decide. When the court was deciding the matter, there was no consent on sight. The trial court cannot be blamed for ignoring the statement made by the Respondent on her willingness to give part of the land to the 2nd Objector as there was no consent and whatever the Respondent stated after the Objector's counsel had addressed the court cannot be used against her. The appellants are at liberty to approach the Respondent to consider giving them a share of the estate, but through compulsion as they totally failed to establish dependency and how they are beneficially entitled to the estate of the deceased.

106. For the above reasons, I find all the grounds of appeal as argued devoid of merit. I dismiss this appeal with costs to the Respondent Petitioner.

Dated, signed and Delivered at Siaya, this 19th Day of October, 2020 virtually via Microsoft Team in the presence of Mr. Okeyo and Mr. Mukabane counsel for the appellant and respondents respectively.

R.E. ABURILI

JUDGE

Court Assistant: Brenda