



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO. 17B OF 2018

SICILY GICHUKU SAMWEL.....APPELLANT

VERSUS

ABIDA KINA NJAGI1ST RESPONDENT

RACHEL WAWIRA NJAGI2ND RESPONDENT

EUNICE MUKAMI NJAGI 3RD RESPONDENT

PURITY WANJA NJAGI.....4TH RESPONDENT

RUTH WANJIRA NJAGI5TH RESPONDENT

LILIAN NJERI NJAGI 6TH RESPONDENT

JUDGMENT

1. This appeal arises from a ruling delivered on 19th April 2018 by *Hon. L.K.Mwendwa* (SRM) in Misc. Succ. Cause No. 6 of 2017. In that ruling, the learned trial magistrate revoked the grant of representation issued on 29th November 2010 to the appellant, *Sicily Gichuku Samuel* in respect of the estate of her late husband *Samuel Njagi Kibariki*. The ruling followed an amended summons for revocation of grant dated 31st May 2017 filed by the respondents who are the appellant's co-wife and her children, daughters of the deceased.

2. A reading of the aforesaid ruling reveals that the trial court revoked the grant of letters of administration issued to the petitioner on grounds that the succession proceedings which gave rise to the grant were not brought to the attention of the respondents contrary to the requirements of *Rule 26* of the *Probate and Administration Rules*.

3. The appellant was dissatisfied with the trial court's ruling hence this appeal. In her memorandum of appeal filed on 15th May 2018, she advanced the following grounds of appeal:

- i. That the learned Senior Resident Magistrate erred in law and in fact when he found that the succession proceedings were defective.**
- ii. That the learned Senior Resident Magistrate erred in law and in fact when he found that the 1st respondent had not filed any protest in succession cause no. 102 of 2010.**
- iii. That the learned Senior Resident Magistrate erred in law and in fact by finding that respondents were not notified of the succession proceedings in succession cause no. 102 of 2010.**
- iv. That the learned Senior Resident Magistrate erred in law and in fact by disregarding the appellant's submissions and affidavits.**
- v. That the learned Senior Resident Magistrate erred in law and in fact by revoking the grant issued by the court to the appellant herein.**

4. At the hearing, the parties consented to having the appeal prosecuted by way of written submissions which they had previously filed on different dates in the year 2019. The record shows that the appellant filed her submissions on 9th January 2019 while those of the respondents were filed on 30th January 2019.

5. This is a first appeal to the High Court. As such, it is an appeal on both facts and the law. The duty of a first appellate court is now well settled. As summarized by the Court of Appeal in ***Abok James Odera T/A A.J. Odera & Associates V John Patrick Machira & Company Advocates, [2013] eKLR*** the appellate court is enjoined to:

“.... re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

6. In her submissions, the appellant maintained that all the respondents were notified of the petition for grant of letters of administration of the deceased's estate and that the 1st respondent, her co-wife had no objection to her being issued with the said grant and that is why she signed the consent forms (Form 38); that the trial court erred in its finding that the respondents were not notified of the succession proceedings and that the 1st respondent had not filed a protest to the mode of distribution of the estate.

7. The appellant asserted that the 1st respondent had filed a protest which was considered and rejected by the trial court; that all the respondents were equitably provided for in the confirmed grant and that since they are in occupation of the suit land, the summons for revocation of grant was an afterthought aimed at buying time to allow them to continue benefitting from the land comprising the deceased's estate to her detriment.

8. On their part, the respondents submitted that the proceedings leading to the issuance of the grant of letters of administration and their confirmation were defective since the 2nd to 6th respondents did not sign the consent forms signifying their consent to the appointment of the appellant as the administrator of the deceased's estate; that the signature attributed to the 1st respondent on those forms was a forgery. The implored me to find that the proceedings leading to issuance of the grant were defective; that the trial court was correct in revoking the grant and dismiss the appeal for lack of merit.

9. I have carefully considered the grounds of appeal and parties' rival written submissions. I have also read the trial court's record including the ruling by the learned trial magistrate. Having done so, I find that the main issue arising for my determination in this appeal is whether the trial court erred in revoking the grant of representation to the deceased's estate issued to the appellant on grounds that the proceedings were defective in that the respondents were not notified of the proceedings. But before addressing this issue, I wish to briefly deal with the appellant's complaint that the learned trial magistrate erred in disregarding her submissions and affidavit.

10. My reading of the impugned ruling shows clearly that the learned trial magistrate expressly indicated that he had considered all the evidence presented before him and the parties' written submissions. The fact that the learned trial magistrate accepted the evidence and submissions made by the respondents does not by itself mean that he disregarded the evidence and submissions made by the appellant. From the ruling, it is evident that the learned trial magistrate made his finding based on an examination of Form P & A No. 38 which he correctly observed was not signed by the 2nd to 6th respondents. In the premises, nothing turns on that ground of appeal.

11. Turning now to the issue I have identified above as the key issue for my determination, *Section 76 of the Law of Succession Act Cap 160 Laws of Kenya* enumerates the grounds on which a grant of representation to a deceased person's estate can be revoked. It provides that a grant whether or not confirmed can at any time be revoked or annulled either on application by an interested party or on the court's own motion if any of the following circumstances are established:

(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

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

12. As noted earlier, in its ruling, the trial court revoked the grant on grounds that it was based on proceedings which were defective since the appellant had failed to comply with *Rule 26 (1) of the Probate and Administration Rules (P & A Rules)* which in his view required that all

beneficiaries of a deceased person's estate be notified of the petition for a grant.

13. *Rule 26 (1) of the P & A Rules* states 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.”

14. *Rule 26 (2) of the same Rules* proceeds to provide the procedure to be followed if the petitioner was entitled to the grant in a degree equal to or lower than that of any other person.

15. A holistic reading of *Rule 26 of the Rules* leaves no doubt that not all beneficiaries must be notified of the filing of succession proceedings. In my considered view, the requirement is only mandatory in respect of the beneficiaries who are entitled to the grant in the same degree or in priority to the applicant.

16. In this case, the appellant applied for the grant in her capacity as the 1st wife of the deceased. Whether or not she had separated from the deceased at the time of his demise is immaterial as she was still the deceased's wife for purposes of the law of succession. I say so because the word “wife” as defined in *Section 3 of the Law of Succession Act* includes a wife who is separated from her husband.

17. From the record of appeal and the parties submissions, it is clear that it is not disputed that the 1st respondent is the appellant's co-wife meaning that they were both equally entitled in the same degree to apply for grant of their late husband's estate.

18. It is also not disputed that the 2nd to 6th respondents are all children of the 1st respondent. According to *Section 66 of the Law of Succession Act (the Act)*, where a deceased died intestate, his surviving spouse or spouses rank higher in preference to all other beneficiaries when considerations are made regarding who should be issued with a grant of representation to the estate. For the avoidance of doubt, *Section 66 of the Act* states as follows:

“When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(c) the Public Trustee; and

(d) creditors:

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.”

19. In view of the foregoing, I have no doubt in my mind that though as correctly stated by the learned trial magistrate the 2nd to 6th respondents are beneficiaries of the deceased's estate, they were not entitled to the grant in the same degree or in priority to the appellant and the 1st respondent with regard to the order of preference provided by *Section 66 of the Act*. Though it would have been desirable to inform all the beneficiaries of the deceased's estate including the respondents about the institution of the proceedings that led to issuance of the grant, given the provisions of *Rule 26 (1) of the P & A Rules*, it is my finding that it was not mandatory for the appellant to notify the 2nd to 6th respondents of the filing of her petition for grant of representation of their father's estate more so considering her case that she had already informed their mother the 1st respondent about the proceedings.

20. It is therefore my finding that the learned trial magistrate erred in basing his finding that the proceedings were defective on grounds that the 2nd to 6th respondents were not informed of the proceedings without first ascertaining as a fact whether or not the 1st respondent who was equally entitled to the grant had been made aware of the proceedings.

21. The appellant has maintained that she had informed all the respondents about her intention to petition for grant of letters of administration to the deceased's estate. She averred in her replying affidavit to the summons for revocation of grant that the 1st respondent had signed Form P & A No. 38 confirming that she was notified of the proceedings and that she had consented to the appellant being granted the letters of administration. The 1st respondent denied that claim asserting that the signature appended next to her name on the form was a forgery.

22. It is trite that he who alleges the existence of certain facts has the burden of proving that those facts exist. This is the import of *Sections 107 to 109 of the Evidence Act*. The 1st respondent did not avail any evidence before the trial court to substantiate her claim that the signature attributed to her in the consent form did not actually belong to her and that it was in fact a forgery.

23. In the absence of such evidence, it is my finding that the 1st respondent failed to discharge her burden of proving that the signature attributed to her in the consent form was a forgery. The appellant's claim that the 1st respondent had consented to her being appointed

administrator of their husband's estate and that she was aware of the succession proceedings from the very beginning was thus not disproved and must carry the day.

24. Given my findings above, it is my conclusion that the proceedings which led to the issuance of a grant of representation to the deceased's estate to the appellant were lawful and proper and were not defective as held by the learned trial magistrate.

25. The learned trial magistrate failed to properly address his mind to the true import of *Rule 26 (1)* of the *P & A Rules* and came to the erroneous conclusion that the proceedings were defective and that the respondents had established one of the grounds that would justify revocation of the grant issued to the appellant.

26. Consequently, I am satisfied that this appeal is merited and it is hereby allowed. The ruling of the learned trial magistrate is accordingly set aside and is substituted with an order dismissing the amended summons for revocation of grant dated 31st May 2017 with costs to the appellant.

27. Regarding costs of the appeal, given that the dispute giving rise to this appeal was between family members in succession proceedings, the best order that commends itself to me is that each party shall bear his or her own costs of the appeal.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 30th day of November 2020.

C. W. GITHUA

JUDGE

In the presence of:

No appearance for the appellant

No appearance for the respondents

Ms Mwinzi: Court Assistant