REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO. 6 OF 2020

ALBERT KITHINJI NJAGI.....APPELLANT

VERSUS

JEMIMA WAWIRA NJAGI.....1ST RESPONDENT

BENSON MUKUNDI NJAGI.....2ND RESPONDENT

AND

SIMON NYAGA NJERU.....3RD RESPONDENT/INTERESTED PARTY

JOYCE WANJA NYAGA.....4TH RESPONDENT/INTERESTED PARTY

JUDGMENT

A. Introduction

1. The instant appeal was instituted vide the memorandum of appeal dated 7/02/2020 and the same being from the ruling of Hon. S. Ouko (RM) delivered on 9/01/2020 in Runyenjes PMC's Misc. Application 3 of 2017- in the matter of Estate of Njagi Kibathi. The appellant framed seven (7) grounds of appeal but all of which were to the effect that the Learned Magistrate erred in law and fact in failing to consider that the grant issued in formerly Runyenjes Succession Cause No. 32 of 2013 was obtained fraudulently and the 1st Respondent had concealed material facts from the court and made false statements.

2. When the appeal came up for hearing, the parties took directions to dispose the same by way of written submissions and which directions were complied with.

B. Submission by the parties

3. The appellant in his written submissions generally argued that the grant was obtained fraudulently by concealment of material facts and by false statement of the fact that he was never informed of the succession process and he did not consent to the same. Further that, he is blind and could only give consent by fixing his finger prints as he could not sign and he never gave his consent in whatever manner. Further that, the appellant was denied an opportunity to submit orally and thus limiting his ability to submit properly to the trial court. That the witness statement by DW4 in the trial court (Rose Warue Njeru) is not true and was meant to mislead the trial court and was clear indication that the appellant never appeared before her for signing of the summons for confirmation of grant. The appellant further submitted that the trial court failed to consider the evidence of PW2 to the effect that 1st Respondent took advantage of the appellant's disability so as to swindle him, that the trial court failed to evaluate the evidence on record and thus arriving at a wrong decision and further proceeded to determine issues that were never pleaded by the parties.

4. On the part of the Respondents, it was submitted that the appellant did not proof that the grant was obtained fraudulently and thus failed to satisfy the grounds for revocation of grant under Section 76 of the Law of Succession Act. Further that the issue of disability was never raised in the trial court and the appellant always filed his pleadings in person and even filed substantive and well-reasoned submissions in the trial court. It was submitted that the consent to the mode of distribution was signed by the parties who appeared before DW4 and the authenticity of the said documents was never challenged by the appellant. Further that PW2's evidence was subject to cross-examination and as such, the allegations that the same was never adopted were not factual and that the ruling by the trial court was well-reasoned and which appreciated and considered the pleadings, evidence as adduced and the decision arrived at was right.

C. Issues for determination

5. It's now settled that the role of the first appellate court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**). The first appellate court ought not to ordinarily interfere with findings of fact 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 the findings. (See **Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga –versus- Kiruga& Another (1988) KLR 348). Further there is no set format which the first appellate court ought to conform to in its** re-evaluation of the trial court's evidence but the evaluation should be done depending on the circumstances of each case and the style used by the first Appellate Court and that what matters in the analysis is the substance and not its length. (See Supreme Court of Uganda's decision in **Uganda Breweries Ltd v. Uganda Railways Corporation [2002] 2 EA 634** and **Odongo and Another vs. Bonge Supreme Court Uganda Civil Appeal 10 of 1987 (UR).**

6. I have read through and considered the memorandum of appeal and the submissions of both counsels. I have also considered the authorities referred to by each counsel to support their legal propositions in the matter. Further, I have read and re-evaluated the record and evidence adduced thereto by the appellant. In my opinion, the only issue which this court is invited to decide is whether the trial court was right in declining the appellant's application for revocation?

D. Determination of the issue

7. As I have already noted, the Appellant's application before the trial court was for revocation of grant. The grounds upon which the said application was premised were that the same was obtained fraudulently by concealment of material particulars and making of a false statement; that the grant was obtained by means of untrue allegations of facts essential in point of law to justify the grant; and that the proceedings to obtain the grant were defective in substance. The affidavit in support of the application seems not to have sufficient details. However, when the application came up for hearing before the trial court, the appellant's testimony was to the effect that the Respondents petitioned for letters of administration without his knowledge but came to know about the same when he saw people construct on the suit land. His case was that the land parcel should be distributed equally between the two families. The 1st Respondent testified to the effect that she involved all her sons in the process and that Albert was present in court when the 1st Respondent was given the suit land.

8. The appellant in his submissions before this court reiterated the fact that the grant was obtained fraudulently as she did not give her consent and the whole process was conducted in secrecy. He disputed the consent to confirmation of grant and the evidence by one Rose W. Njeru to the effect that he signed the said consent as he was not in a position to sign using his hands due to disability. The Respondents filed submissions wherein they controverted the Appellant's submissions.

9. The circumstances under which a grant can be revoked are provided for under section 76 (a) - (e) of the Law of Succession Act and include;

> ***a) Where the proceedings to obtain the grant were defective in substance;***
>
> ***b) Where 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;***
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> ***c) Where 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) Where 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) Where the grant has become useless and inoperative through subsequent circumstances.***

10. The Learned Justice W. Musyoka in **re Estate of Agwang Wasiro (Deceased) [2020] eKLR** explained the above provisions and in doing so held thus: -

> ***"Under Section 76 of the Act, a grant of representation is liable to revocation on three general grounds. The first ground would be where the process of obtaining it was attended by glaring difficulties, such as where the same was defective, say because the person who obtained representation was not qualified to be appointed as personal representative, or the procedural requirements were not met for some reason or other. It could also be because the petitioner used fraud or misrepresentation or concealed important information in order to obtain the grant. The second general ground is where the grant is obtained procedurally, but the administrator subsequently runs into difficulties during the process of administration of the estate. Such difficulties include his failure or omission to apply for confirmation of his grant within the period allowed in law, or where he fails to exercise diligence in administration of the estate, such as where he omits to collect or get in an asset, or where he fails to render accounts as and when he is required to do so by the law. The third general ground is where the grant has become inoperative or useless on***

account of subsequent circumstances, such as where the sole administrator died or loses the soundness of his

mind or is adjudged bankrupt."

11. The Appellant tried to raise a ground of revocation of grant that the same was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case. By submitting to the effect that he never appeared before Rose W. Njeru and further that he could not sign due to his disability but could only use fingerprints, it is my opinion that he attempted to allude fraud in the obtaining the said consent.

12. It is trite law that whoever asserts a fact is under an obligation to prove it in order to succeed. The standard of proof in civil cases (the degree of certainty with which a fact must be proved to satisfy the court of the fact) is the balance of probabilities (See **Miller v Minister of Pensions [1947] 2 All ER 372** and **Sections 107 of the Evidence Act**). A claimant remains with this burden even where a defendant has not denied the claim by filing of defence or even where the defendant did not appear. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side (See **Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi& another [2014] eKLR).**

13. Where fraud is pleaded, the burden and standard of proof was well explained by the Court of Appeal in **Kuria Kiarie & 2 others v Sammy Magera [2018] eKLR** held as thus: -

"25…… The law is clear and we take it from the case of Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR, where Tunoi, JA. (as he then was) stated as follows:

"It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts." *[Emphasis added]…….*

26. *As regards the standard of proof, this Court in the case of* ***Kinyanjui Kamau vs George Kamau [2015] eKLR*** *expressed itself as follows: -*

"……It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo vs Ndolo (2008) 1 KLR (G & F) 742 wherein the Court stated that: "...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases..."...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts."

14. In the instant case, the Appellant did not tender any evidence as to the fact that he did not sign the consent to confirmation of grant dated 15/05/2013. In fact, the evidence on record was to the effect that the said consent was signed by all the parties in presence of Rose W. Njeru - Advocate. I have perused the trial court record and note that the Appellant was always executing his pleadings by use of fingerprints. This in my opinion cannot be taken to be evidence of his assertions that he did not sign the said consent. As such, the grant could not be revoked based on fraud allegations which were never proved.

15. Further, it is my opinion that signing of the said consent or failure to sign the same cannot be a ground for revocation of grant. The process of confirmation of grant is always after the grant has been made. What Section 76 provides are the conditions or circumstances under which a grant can be revoked. Allegations of fraudulent process ought to be in relation to obtaining the grant and not the process of confirmation of the same. As W. Musyoka J held in **re Estate of Prisca Ong'ayo Nande (Deceased) [2020] eKLR** a person who is aggrieved by the orders made with respect to a confirmation application has no remedy under Section 76 of the Law of Succession Act, for that provision does not envisage revocation of certificates of confirmation of grants. Such an aggrieved party has only two recourses under general civil law, that is to say appeal and review, to the extent that the same is permissible under the Law of Succession Act.

16. However, I have perused the trial court record and the pleadings in relation the application for grant. I note that the affidavit in support of the petition lists five (5) persons as having survived the deceased. The names which appear in the said affidavit are similar to the names which appear on the letter. The petitioners before the trial court were two (Jemima who is wife of the deceased and Benson Mukundi Njagi who is indicated in the Chief's letter as a son to the deceased). The said letter indicates other dependants being Joyce Rwamba, Albert Kithinji and Silas Nyaga (being a daughter and sons respectively). The appellant in his witness statement which he adopted as his evidence in court testified to the effect that he was never aware of the succession process and came to learn about it when he saw people building on the suit land.

17. Rule 7(7) of the Probate and Administration Rules requires that a person with equal or lesser right to administration ought to obtain the consent of the person or persons with a greater priority to administration, or get that person or persons to renounce their right to administration or cause citations to issue on them requiring them to either apply for representation in the estate or to renounce their right to so apply. Further under Rule 26(2), where representation is sought by a person with equal right to others who have not petitioned like him or with a lesser right, such a petitioner is expected to notify such persons with equal entitlement with notice. The individuals with entitlement who have not applied for representation would signify that they had been notified of the petition by either executing their renunciation of their right to administration or by signing consents in Forms 38 (for intestacy succession). Where a consent or renunciation is not forthcoming, then the petitioner should file an affidavit, ostensibly dealing with these issues, that is by indicating that notice was given to all the other persons equally entitled, and perhaps demonstrating that such person had failed or refused to renounce their rights or to sign consents to allow him to go ahead with his petition.

18. Section 66 of the Law of Succession Act sets out the order of preference with regard to who ought to apply and be appointed administrator in intestacy. Priority is given to surviving spouses, followed by the children of the deceased.

19. A reading of the above provisions together would mean if any one of the four children of the deceased sought representation to the estate, to the exclusion of the other three, there would, then, be need to comply with the requirements of Rules 7(7) and 26 Probate and Administration Rules, since those provisions apply to persons who seek representation while they had an equal or lesser right to administration. The 2nd Respondent herein had equal right to administration with the Appellant herein and his other brother Silas Nyaga. Joyce Rwamba was indicated in the pleadings to be a minor and thus she had no capacity to consent. As such, he needed to obtain their consents or their renunciation of right to administer or obtained citations to be issued and served on them, before he applied for representation to the estate of their late father (as a co-administrator).

20. However, a look at the said Consent which was filed together with the petition clearly shows that Albert Kithinji and Silas Nyaga did not sign the said consent. It was only Joyce Rwamba and who is indicated to be a minor who signed. It is my opinion therefore that Rules 7(7) and 26 Probate and Administration Rules were not complied with and that the grant was not obtained procedurally. As the court held in **Al-Amin Abdulrehman Hatimy -vs- Mohamed Abdulrehman Mohamed & another [2013] eKLR**, failure to have an application for issue of a Grant accompanied by a consent duly signed by all persons entitled in the share in the same estate is a discrepancy which renders the issuance of the Grant to the applicants unprocedural. The same ought to be revoked by virtue of the same having been obtained fraudulently by the making of a false statement and by the concealment from the court of something material to the case and by means of an untrue allegation of a fact essential in point of law to justify the grant and all this was to the effect that all the beneficiaries had consented to the making of grant to the 2nd Respondent as a co-administrator. The Court of Appeal in **Samuel Wafula Wasike -Vs- Hudson Simiyu Wafula Ca No.161 Of 1993)** (Kwach, Omolo and Tunoi JJA) held that a grant obtained on the strength of false claims,…and on the basis of facts concealed from the court, is liable to revocation. Koome J (as she then was) stated in **The Matter Of The Estate Of Ngari Gatumbi Alias James Ngari Gatumbi (Deceased Nairobi High Court Succession Cause No.783 Of 1993** (persuasively) that:

> ***"A grant will be revoked where a person who is entitled to apply is not notified by the petitioner of their intention to apply and that person's consent to the petitioner's application is not sought.*** See also **Monica Adhiambo v Maurice Odero Koko [2016] eKLR.**

21. The issue as to the appellant having not consented to the issuance of grant was raised by the appellant in his witness statement and thus was evidence tendered in court. It is my opinion that the trial court erred in not revoking the grant on that ground. However, even in absence of the issue having been raised, the trial court had jurisdiction to revoke the grant *sui moto* upon satisfying itself of the evidence as to the grounds under section 76 of the Act (See **Matheka and Another –vs- Matheka [2005] 2KLR 455).**

22. From the trial court's record, it is also clear and undisputed that the deceased was survived by the 1st Respondent only as the spouse as the Appellant's mother was remarried elsewhere. Section 3(1) of the Act defines "**house"** means a family unit comprising a wife, whether alive or dead at the date of the death of the husband, and the children of that wife. As such the family of the Appellant in my opinion could not be considered as a house as the mother was not there. The deceased therefore was survived by one spouse. As such, it is my opinion that the Appellant's submissions to the effect that the suit land ought to be shared in equal shares between the two houses are misplaced. His mother's house could not be said to be a house.

I note that the interested parties (3rd and 4th Respondents) before the trial court submitted to the effect that they had purchased the suit land from the 1st Respondent. However, looking at the trial court's records, it is evident that the grant was made on 13.05.2013 and confirmed on 23.05.2013 and that was pursuant to the application for confirmation having been made under section 71(3) of the Act. The agreement for sale of the suit land to the interested parties was made on 1.12.2012 and which date was before the grant was even made by the court. The question which lingers in my mind is in relation to the capacity of the 1st Respondent to sell the said property to the interested parties.

23. Under Section 80(2), a *grant of letters of administration, with or without the will annexed takes effect only as from the date of such grant.* The effect of a grant being made is to vest the property of the estate or dead person, by virtue of Section 79 of the Law of Succession Act, in the person to whom the grant is made. That means that the grant-holder steps onto the shoes of the dead owner of the property. He succeeds into his rights and powers, and he can do anything that the deceased himself would have done with respect to the property. In other words, the grant-holder is legally the owner of the property. The powers that he can exercise as a grant-holder, which are akin to those of an owner, are set out in section 82 of the Law of Succession Act, and include the power to dispose of such property by way of sale {section 82(b)}. However, the power of the administrator to sell the property of the deceased is limited in the sense that when it comes to immovable property, the same can only be sold after confirmation of grant {see Section 82(b)(ii)}.

24. My understanding of the above provisions of the law is that the administrator did not have the capacity to sell the suit land (Gaturi/Githimu/7435 to the 3rd and 4th Respondents herein before the grant was confirmed. Any purported sale therefore was in contravention of an express provision of the law and hence null and void *ab initio.* In fact, Section 45 creates an offence of intermeddling to cater for such dealings with the estate of the deceased. In ***Re Estate of M'Ngarithi M'Miriti*** **[2017] eKLR** the court in finding that the sale of immovable estate of the was in violation of the law and hence null and void held *that any person who without the authority of the Law of Succession Act or any other written law or grant of representation, takes possession or disposes of, or otherwise intermeddle with the free property of the deceased is guilty of a criminal offence and is answerable to the rightful executor or administrator of the extent of the assets he has intermeddled with. The court further held that where the grant is yet to be confirmed there is a restriction on distribution of estate's capital or immovable properties under section 55 and 82(b) (ii) of the Law of Succession Act and thus there is in law nobody yet with authority to sell the estate property herein to any person. In* ***Re Estate of John Gakunga Njoroge (Deceased)*** **[2015] eKLR** the Learned Judge stated that -

> ***'For the transactions between the applicants and the beneficiaries of the estate of the deceased entered into before the Grant of Letters of Administration to them and before the Confirmed Grant, the contracts of sale are invalid for offending the provisions of section 45 and 82 of the Law of Succession Act. Even if the sale transactions were by the administrators, the dealings with***

immovable property of the estate is restricted by the provisions on the powers and duties of the personal representatives under section 82 (b) Proviso (ii)……..”

25. From the forgoing it is clear that the sale agreement between the 1st Respondent and the interested parties was null *ab initio* by virtue of the provisions of the law and amounted to intermeddling on the part of the 1st Respondent. As **Lord Denning M.R** in the case of **Macfoy – vs- United Africa Co. [1961] 3 All ER 1169** at **page *1172*** held: -

“… if an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

26. The interested parties before the trial court did not present any evidence as to them being innocent purchasers for value. They only stated that they bought the land from the 1st Respondent. In my opinion, if they were a bit diligent they ought to have conducted search at the Lands Registry and would have discovered that the land which they bought was not in the names of the 1st Respondent. In fact, the copy of the search to the suit land which was produced by the parties clearly indicates the ownership. In my opinion, the interested parties could not be said to be innocent purchasers.

27. But can the interested parties get refuge under section 93 of the Law of Succession Act? My opinion is no. Section **93** of the **Law of Succession Act** provides as follows: -

“93(1) A transfer of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this act.

(2) A transfer of immovable property by a personal representative to a purchaser shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities, funeral and testamentary or administration expenses, duties and legacies of the deceased have not been discharged nor provided for.”

This Section 93 has been a subject of judicial interpretation in a number of cases. In **Adrian Nyamu Kiugu vs Elizabeth Karimi Kiugu and Another (2014) eKLR** the High Court at Meru stated: -

“Whereas the above section states that a transfer by person to whom representation has been granted shall be valid notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act, I am of the considered view that such transaction can only be relied upon where one has obtained the grant fraudulently. The purchaser in this cause came from the neighbourhood of the objector and it is not possible that he did not know of the objector herein. I therefore find and hold the sale to be invalid.”

28. In **Jacinta Wanja Kamau vs Rosemary Wanjiru Wanyoike and Another (2013) eKLR** the Court of Appeal sitting in Nyeri stated: -

“Before the appellant could seek protection as a purchaser under Section 93 of the Act, she had first to prove that she is a purchaser. In this case, there was no prima facie evidence that she was a purchaser. In any case and as provided by Section 82(b)(11) of the Act it would have been illegal for Beatrice Njeri Mugondu to sell the land before the confirmation of the grant.”

29. In **Jane Gachola Gathetha vs Priscilla Nyamira Gitungu and another (2006) eKLR** the court of Appeal in Nyeri stated this:-

“We think with respect, that there is a fallacy in invoking and applying the provisions of Section 93(1) of the Law of Succession Act and the Superior Court fell into error in reliance of it. The section would only be applicable where firstly there is a transfer of any interest immovable or moveable property. Kabitau had no interest in plot 321 or any part thereof and therefore he could not transfer any. A thief acquires no right or interest which is transferable in stolen property. The transaction would be void ab initio and the property is traceable.”

30. It is my opinion therefore in all respect, the sale between the 1st Respondent and the interested parties was by all means null and void for want of capacity on the part of the 1st Appellant to sell the same.

31. It is my opinion further that the said sale cannot be protected by virtue of Section 93 of the Law of Succession Act as the interested parties were not purchasers in law.

32. The grant made to the Respondents herein having been obtained in contravention of the provisions of Section 76 of the Law of Succession Act by virtue of the same having been obtained fraudulently by the making of a false statement and by the concealment from the court of something material to the case and by means of an untrue allegation of a fact essential in point of law to justify the grant and all this was to the effect that all the beneficiaries had consented to the making of grant to the 2nd Respondent as a co-administrator, the same ought to be revoked.

33. In the end, I find that the appeal has merits and the same is allowed with costs to the appellant.

34. Orders accordingly.

Delivered, dated and signed at Embu this 25th day of November 2020.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent