



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**(Coram: Odunga, J)**

**HIGH COURT CIVIL APPEAL NO. 12 OF 2018**

**JULIUS MUISYO MWANIA.....APPELLANT**

**-VERSUS-**

**ISAAC LOKI NDUNDA.....1<sup>ST</sup> RESPONDENT**

**SAMSON KITAVI NDUNDA.....2<sup>ND</sup> RESPONDENT**

**(Being an appeal from the ruling of Hon D. Orimba SPM delivered on 24.1.2018 in Kangundo Succession Cause 7 of 2015)**

**BETWEEN**

**ISAAC LOKI NDUNDA.....1<sup>ST</sup> INTERESTED PARTY**

**SAMSON KITAVI NDUNDA.....2<sup>ND</sup> INTERESTED PARTY**

**VERSUS**

**JULIUS MUISYO MWANIA....RESPONDENT/ADMINISTRATOR**

**JUDGEMENT**

1. This is a first appeal arising from a dispute as to whether the appellant should administer the estate of the deceased **Mwania Kitongo Loki** alias **Erasto Mwanja Kitongo** who died intestate on 5<sup>th</sup> October, 1995.

2. The background to the appeal is that letters of Administration in respect of the estate of the deceased were issued to the appellant on 18.9.2015 and confirmed on 15.7.2016.

3. The respondents applied for revocation of the said grant vide application dated 13.3.2017 on the grounds that property No Matungulu/Katheka/562 belonged to their deceased father **Ndunda Mutua** and yet the appellant included it as part of the property of the deceased herein. Further that the appellant failed to disclose to court that a caution was registered over the suit property by **Ndunda Mutua**. The trial court found that the appellant was aware of the caution that had been registered and there was indication that there was claim over the suit land and this was not disclosed to the court hence revoked the grant that was issued to the respondent. The appellant being dissatisfied with the ruling of **Hon D. Orimba** delivered on 24<sup>th</sup> January 2018 preferred the instant Appeal that raised the following grounds.

**a. The learned magistrate erred in law and fact in holding that the appellant had concealed presence of a caution in Matungulu/Katheka/562.**

**b. The learned Magistrate misdirected himself in finding that the appellant ought to have removed the caution first before petitioning for letters of administration.**

**c. The magistrate misdirected himself in finding that the appellant failed to include property known as Matungulu/Katheka/533 as part of the estate.**

**d. the learned magistrate misdirected himself in finding that the appellant misled the court by concealing material facts.**

**e. the trial court erred in revocation of the grant.**

4. The appeal was canvassed vide written submissions and learned counsel for the appellant submitted that the trial court went into error in finding that the appellant had concealed presence of a caution. According to counsel, the presence of caution is a matter of fact to be proved by evidence and that a search was annexed to the application that revealed that there was no caution. It was counsel's contention that the petitioner lacked the *locus standi* to remove the caution as he was not the administrator of the estate of the deceased **Ndunda Mutua**. Counsel cited **Section 2** of the **Law Reform Act** that states that the person who is entitled to bring a cause of action in respect to the estate of a deceased person is a personal representative or an executor or administrator respectively. Counsel submitted that the issues raised in the summons for revocation of grant dealt with first registration of the land which can only be ventilated in an Environment and land court which is clothed with the requisite Jurisdiction to hear and determine questions of title to land. Hence according to counsel the respondents ought to have moved the land and Environment court and not the Probate and administration court. It was counsel's argument that the respondent alleged that the appellant misled the court that title number **Matungulu/Katheka/562** was the only property his late father had got and that the deceased had other parcels namely **Matungulu/Katheka/533** however the respondent never annexed any document to the summons of revocation of the said grant to prove his allegations. Counsel submitted that the learned magistrate acted on a wrong set of facts and failed to appreciate that an official search was one of the documents attached to the petition for letters of administration intestate. According to counsel, the issue as to whether the deceased caused himself to be registered irregularly is not a matter which can be conclusively dealt with in a probate and administration court but an environment and land court constituted as such.

5. Counsel submitted that the appellant annexed a copy of the green card that shows that **Erasto Mwanja Kitongo** was the 1<sup>st</sup> person to be registered as a proprietor of the suit land and whether the same was registered fraudulently is an issue that is not the preserve of a succession court.

6. It was counsel's submission that there was no ground as envisioned in section 76 of the law of succession Act to warrant revocation of the grant and he urged the court to allow the appeal.

7. In response to the appeal, counsel for the respondent agreed with the trial court and submitted that material facts were concealed from the trial court to wit the existence of a caution that was indicative of contention with regard to ownership of the suit land. In this regard, counsel submitted that inclusion of property that was not part of the estate of the deceased was concealment of a material fact and the trial court was right to revoke the grant. Reliance was placed on the case of **Mercy Njoki Irungu vs. Lucy Wamuyu Maruru (2016) eKLR**. Counsel urged the court to dismiss the appeal.

8. Having considered the memorandum of appeal and the rival submissions, the singular issue for determination is whether the trial court had jurisdiction to revoke the grant on the basis of the facts before the court.

9. In considering the issues framed for determination in this appeal, I am cognizant of the role of the Appellate court, that is to re-evaluate and re-assess the evidence adduced before the trial court keeping in mind that the trial court saw and heard the parties and giving allowance for that reach an independent conclusion as to whether to uphold the judgment, this was observed in the case of **Selle vs. Associated Motor Boat Co. [1968] EA 123**.

10. From the application for revocation of grant as gleaned from the pleadings in the trial court, the applicant claims to be entitled to what was included as the estate of the deceased. However, as was appreciated by **Musyoka, J In re Estate of Stone Kathuli Muinde (Deceased) [2016] eKLR**:

**“Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit properly brought before a civil court in accordance with the provisions of the Civil Procedure Act and the Civil Procedure Rules. This could mean filing suit at the magistrates' courts, or at the Civil or Commercial Divisions of the High Court, or at the Environment and Land Court. If a decree is obtained in such suit in favour of the claimant then such decree should be presented to the probate court in the succession cause so that that court can give effect to it.”**

11. The application for revocation was at the instance of relatives of the appellant who claimed that his deceased father irregularly allocated the suit land to himself hence the said transfer was fraudulent.. In **Rosemary Wanjiku Murithi vs. George Maina Ndinwa (2014) eKLR**, the Court held that proof of fraud involves questions of fact. Simply raising the issue of fraud is not proof of fraud and where such issues are raised in a succession cause, rule 41(3) of the Probate and Administration Rules provides that claims which are *prima facie* valid should be determined before confirmation.

12. In my view, the respondent had an obligation to have the matter resolved in the court of requisite jurisdiction and not the probate court.

13. In determining what order to make I am guided by the position adopted in **In re estate of P N N (Deceased) [2017] eKLR**, where it was held that:

**“According to Article 162(2) of the Constitution the Environment and Land Court (ELC) is vested with jurisdiction to determine disputes touching on ownership and the right to occupy and use land. Article 165(5) of the Constitution states that the High Court has no jurisdiction over matters that are the subject of Article 162(2) of the Constitution. It is my considered view that the matter of Ngong/Ngong/[particulars withheld]. falls within the purview of Article 162(2) of the Constitution, meaning that this court then, by virtue of Article 165(5) of the Constitution, does not have any jurisdiction over it. Determination of the question of the ownership of Ngong/Ngong/[particulars withheld]. as between the deceased and the other claimants should be referred to the ELC for resolution of the matter of as to who between the deceased and his father**

had bought the property from Paul Karanja Muiruri. Under Rule 41(3) (4) of the Probate and Administration Rules, during the hearing of a confirmation application, like in the present case, where an issue arises as to the identity or share or estate of any person claiming to be beneficially interested in it, the court may set aside the distribution of that share or property to await determination of the matter elsewhere. Under section 71 of the Law of Succession Act, Cap 160, Laws of Kenya, the court seized of a confirmation application may postpone determination thereof for one reason or other.

14. The court therefore directed that the administrator of the estate files and prosecutes a suit seeking to resolve the ownership questions at the ELC in a period of 366 days. In **Raphael Muriithi Ngugi vs. Paul Thuo Kimani [2017] eKLR**, the succession proceedings were stayed for seven months pending the determination of the proceedings before the ELC. Similar orders were made in **Re the Estate of Kipyego Chepsiror Kolil [2007] eKLR** and **Charity Mworira M'iwathuku vs. Charity Kairigo & 2 Others [2017] eKLR**.

15. It is clear that the issues which were raised before the learned trial magistrate were raised in the wrong forum and without the same being determined by a court of competent jurisdiction ought not to have been the basis for revoking grant. With respect to the omission to include one of the properties of the estate there was simply no evidence to support that allegation.

16. In the premises while I find this appeal merited in the interest of justice the orders which commend themselves to me and which I hereby grant are as follows:

**1. This appeal is hereby allowed and the decision of the learned trial magistrate set aside with costs.**

**2. However, the status quo regarding the estate of the deceased shall be maintained for a period of 30 days to give the Respondent herein a window to ventilate his interest before the Environment and Land Court.**

17. It is so ordered.

**Read, signed and delivered in open Court at Machakos this 28<sup>th</sup> day of November, 2019.**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of the Appellant and the 1<sup>st</sup> Respondent in person.**

**CA Geoffrey**