In re Estate of Maithya Muthoka Nzeve (Deceased) (Civil Appeal E010 of 2020) [2025] KEHC 21 (KLR) (10 January 2025) (Judgment)

Neutral citation: [2025] KEHC 21 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITUI

CIVIL APPEAL E010 OF 2020

FR OLEL, J

JANUARY 10, 2025

IN THE MATTER OF THE ESTATE OF MAITHYA MUTHOKA NZEVE (DECEASED)

BETWEEN

TABITHA NDUNGE MATUKU ..... APPELLANT

AND

KASINA MUTHOKA MAITHYA ..... 1ST RESPONDENT

MWONGELA MUTHOKA MAITHYA ..... 2ND RESPONDENT

DANIEL MULINGE KASINA ..... 3RD RESPONDENT

PATRICK MUSYIMI MAITHYA ..... 4TH RESPONDENT

(Being an appeal from the Ruling and Order dated 27th October 2020, of the learned Senior Principal Magistrate, M. Kasera Esq sitting in Kitui in Succession Cause number 234 of 2012)

JUDGMENT

A. Introduction

1. The Appellant filed this appeal challenging the Ruling/Order of learned Principal Magistrate Hon M Kasera (PM) dated 27th October 2020, where she dismissed the Appellants application dated 15th February 2016, wherein she had sought for orders to revoke the confirmed grant, earlier issued on the basis that the same was confirmed in her absence and without her express consent.

2. She also alleged that the respondents had failed to disclose to the court that land parcel Number Kyangwithya/Mulutu/224 had been bequeathed/gifted to one Benedict Matuku Maithya, her husband, (one of the deceased sons) before he died and thus the said parcel of land did not form part of the estate nor was the said property free for distribution.

3. The Appellant further averred that when she attended court for confirmation of the grant on 21st May 2013, she disagreed with her in-laws on the mode of distribution proposed. The trial Magistrate requested them to go out of court and try amicably settling the matter, but no agreement was reached specifically touching on the suit property. She therefore did not go back to court when the matter was recalled for confirmation of the grant and the respondents unfortunately took advantage of her absence and misinformed the court that they were all in agreement on distribution, leading to the confirmation of the grant by the Honourable Magistrate on the said material day.

4. This was an error, which had to be corrected as she had proof that the suit property had been bequeathed to her husband in the year 1987 as a gift by the deceased after which, they had started living in the said property as their matrimonial home to the exclusion of the other parties/beneficiaries of the Estate. She therefore urged the court to find that her Application was merited and the orders sought be granted.

5. The respondents opposed this application and filed their response through their grounds of opposition dated 10th March 2020 and the 1st respondent's replying affidavit(undated) but filed in court on 26th August 20216. They averred that the grant herein was confirmed in the presence of all the parties, including the Appellant, who confirmed to the trial Magistrate that she had consented to the same. It would therefore be unfair for the applicant to come up three years later to claim that she did not consent to the mode of distribution agreed upon, yet she participated in the confirmation of grant proceedings.

6. Further, the applicant provided her identification documents, signed the mutation forms, application for consent to subdivide, transfer by transmission forms, and paid stamp duty for the transfer of her rightful share, and this signified her acceptance that distribution as effected, was equitable to all beneficiaries of the estate. As a result of this process, which had been long concluded, the Appellant had secured her share of the estate in the suit parcel, and a new title deed, Kyangwithya/Mulutu/1165 measuring 2.6ha issued under her names.

7. The appellant's contention that the suit property was exclusively bequeathed to her husband was also a fallacy, as the document relied upon to lay her claim was neither signed by the maker of the said document nor was it witnessed by any party. The same was thus inadmissible under law.

8. They had made full disclosure before the grant was confirmed and therefore, it could not be said that they had proceeded based on non-disclosed evidence nor did they obtain the said grant through fraudulent means. Equity aided the vigilant and not the indolent and the lapse of three years before seeking to set aside the confirmed grant did demonstrate that the Appellant was lackadaisical in her attitude and approach and did not deserve to be granted the orders sought, which would be detrimental to the other beneficiaries. The respondents therefore prayed that the said Application be dismissed.

9. The trial magistrate considered the pleadings and submissions filed and vide her ruling dated 27th October 202o, did find that the Application under consideration had no merit and proceeded to dismiss the same. The appellant being aggrieved by the said finding /ruling did file her memorandum of Appeal dated 25th November 2020 and raised the following grounds of Appeal;

    a. That the learned Senior Principal Magistrate erred in law and misdirected herself on the facts when she distorted the facts of the case and ruled that the matter before her was with respect to the mode of distribution of the estate of the deceased and not the breaches of the law and procedure that were committed by the Respondents

    b. The learned Senior Principal Magistrate erred in law and misdirected herself on the law and the facts when she proceeded on the erroneous premises that the proceedings before her were for

the distribution of the estate, while in essence the proceedings and evidence tendered before her were in respect to the revocation of the grant of letters of administration.

c. The Learned Senior Principal Magistrate erred and misdirected herself on the law and the facts when she failed to address the appellant's request to have all the properties shared equally amongst the beneficiaries bearing in mind that some properties were in more prime locations than others and so the size or acreage ought not to have been the sole consideration in the disputed distribution

10. The appellant therefore urged this court to allow this appeal, set aside the ruling/order of the trial court, and substitute it with an order allowing the Appellants Application dated 15th February 2020.

B. The Appeal.

11. This court has examined the Record of Appeal, the grounds of appeal, and given due consideration to the submissions by the parties' respective Counsel. This being a first appeal, this court has the duty to analyze and re-examine the evidence adduced in the lower court and reach its own conclusions but always bearing in mind that it neither saw nor heard the witnesses testify and make allowance for the said facts. See Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR & Peters –vs- Sunday Post Limited [1958] EA 424:

12. A first appellate court is also the final court of fact and litigants are entitled to full fair independent consideration of the evidence. The parties have a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of section 78 of the *civil procedure Act* a court of first appeal can appreciate the entire evidence and come to a different conclusion. See Kurian Chacko Vs Varkey Joseph AIR 1969 Keral 316.

13. The Appellants appeal is basically premised on the grounds that the learned trial Magistrate failed to consider her application on the grounds advanced, to wit that she did not consent to the distribution of the estate and secondly that the grant was procured fraudulently and by concealment of material facts.

14. Section 76(a), (b) and (c) of the *Law of Succession Act* provides as hereunder:

> A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—
>
> (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;

15. In the case of Albert Imbuga Kisigwa vs. Recho Kavai Kisigwa [2016] eKLR Succession Cause No.158 of 2000, Mwita J held that;-

> " Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not a discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the court to invoke section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take

into account interests of all beneficiaries entitled to the deceased's estate and ensure that the action taken will be for the interest of justice."

16. Similarly, in Re; The Estate of the Late Suleman Kusundwa [1965] EA 247, it was held that:

> " The court is...not obliged to revoke the existing grant, and should only exercise its discretion to do so if useful purpose would be thereby achieved or any right of the applicant safeguarded which could not otherwise be safeguarded. In the present case such rights of inheritance as the applicant possesses, outside the will, are sufficiently safeguarded by the assurance given by the Administrator-General. Therefore I decline to revoke the existing grant, a revocation which would entail needless expense; but it is qualified by declaring that the provisions of the annexed will, in which he purported to leave the whole of his property to his nephew, the second respondent, shall be given effect to only in respect of such portion of the deceased's property as he was entitled to dispose of by will under the applicable law of inheritance."

17. The Appellant alleged that the suit parcel Kyangwithya /Mulutu /224 was exclusively bequeathed to her husband, By her father in law as a gift in the year 1987, and that they proceeded to build their matrimonial home therein and had exclusive control and possession of the said parcel of land. The said property therefore did not form part of the deceased estate and was wrongly shared out to the other parties.

18. The respondent opposed this assertion and pointed out that the document the applicant had annexed to her application was inadmissible in law as it was neither signed by the maker of the said document nor was it witnessed. I do agree with the respondent's assertion that the "alleged will" was inadmissible in law by virtue of provisions of section 67 and 70 of the *Evidence Act*, as read together with Section 11 of the *law of Succession Act*, which requires that the said written will be attested by two independent persons. The applicants claim, that there was concealment of material fact therefore fails.

19. Secondly it was the Appellants contention that she did not consent to the mode of distribution as proposed, and the trial court wrongly confirmed the grant in her absent and without her consent. The court proceedings of 21st May 2013 indeed confirmed that the petitioner and the respondents failed to agree on the mode of distribution and later when the matter was dealt with, the court did note that, "The sister has been considered in the distribution and she has not objected to the said distribution. She was before court and did not express any reservations, grant confirmed."

20. The trial Magistrate considered the proposed mode of distribution and noted that the estate was divided in five equal portions with each beneficiary being allocated 2.63ha of land being their share of the said estate. Even though it is the appellants contention that she did not agree on the mode of distribution, the proceedings of the material day do not bear out or show that she did raise any objections orally.

21. Be that as it may, even if she walked away in protest, the distribution as effected was proper, equitable and made in line with the spirit of Section 35, 38 and 40 of the *law of succession Act*, which provides for equal distribution of the intestate estate amongst his children. The trial Magistrate therefore cannot be faulted for so finding and I uphold the same.

22. Finally, the respondents are also right when they pointed out that the Appellant filed her application three (3) years after the said grant had been confirmed, and the estate equally sub divided to each beneficiary. While this process was ongoing, the Appellant did sign all relevant land documents to enable transfer by transmission to be effected, provide her KRA Pin, National identity card and

fully participated in the Sub division process, which signified her acceptance of how distribution was effected. By her conduct I do find that the Appellant is estopped running away from the equitable mode of distribution adopted.See; Thomas V Thomas (1956) NZLR. 785. Where the court followed the ratio decidendi of Dillwyn V Llewelyn (Supra) & Inwards & Others v Baker [1965] 1 All ER.

23. Finally, in Re Estate of Gitau (Deceased) [2002] 2 KLR 430 Khamoni J held that a party dissatisfied by distribution of the estate should not take the route of filing an application to revoke grant under section 76 of the *law of Succession Act*:

> " Distribution of the estate comes during the proceedings to confirm the relevant grant and a party dissatisfied with the distribution may not necessarily be dissatisfied with the grant of letters of administration and vice versa. That being the position, it becomes unreasonable for a person dissatisfied with the distribution of the estate only to proceed to ask for the revocation or annulment of the grant, which has nothing wrong...While section 76 of the *Law of Succession Act* should therefore be relied upon to revoke or annul a grant it is not proper to use the same section where the objector is challenging the distribution only. There are relevant provisions to be used for that purpose and section 76 is not one of them."

C. Disposition

24. Having considered all the grounds raised in this Appeal, I do find that the same are not merited and dismiss the said Appeal with no orders as to costs since the parties herein are members of the same family.

25. It is so Ordered.

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 10TH DAY OF JANUARY, 2025

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 10TH DAY OF JANUARY, 2025.

In the presence of;

No appearance for Appellant

No appearance for Respondent

Sam/Susan Court Assistant