



REPUBLIC OF KENYA



KENYA LAW
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**Kilonzo v Peter & another (Civil Appeal 37 of 2019)
[2025] KEHC 4636 (KLR) (1 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4636 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CIVIL APPEAL 37 OF 2019**

LW GITARI, J

APRIL 1, 2025

BETWEEN

ELIZABETH MUSEVEKI KILONZO APPELLANT

AND

MERCY MUSEO PETER 1ST RESPONDENT

LAWRENCE MWENGE MULATYA 2ND RESPONDENT

JUDGMENT

1. This matter relates to the Estate of Makau King'enda (Deceased) who died intestate on 20/10/1974. A grant of letters of administration was issued to Mercy Muteo Peter on 8/12/2014 and confirmed on 26/02/2015. The estate which comprised of Land Parcel No. Kyangwithya/Kaveta/683 measuring 8.0 Hectares and Kyangwithya/Kaveta/688 measuring 0.43 Hectares were distributed to his beneficiaries under the said grant.
2. Later, a summons for revocation of grant was filed by Elizabeth Museveki Kilonzo and a ruling in the said summons was delivered by the learned Magistrate who held that the application was not proved on a balance of probabilities and was dismissed. The learned Magistrate also held that the parties were at liberty to apply for the rectification of the said grant to provide for the additional properties which were left out in the initial grant.
3. The appellant was dissatisfied with the said ruling and has filed this appeal based on the following five grounds on the Memorandum of Appeal.
 1. That learned Senior Resident Magistrate erred in law and misdirected herself on the facts in disregarding the fact that the appellant being a dependant of the deceased was entitled to a share of the estate of the deceased.



2. That learned Senior Resident Magistrate erred and misdirected herself on the facts in disregarding that the grant of representation made to the 1st respondent to the exclusion of all the other defendants of the deceased was not validly made.
 3. That learned Senior Resident Magistrate erred in law and fact by holding that the appellant and her siblings had consented to the distribution of the estate even when there was an allegation of forgery of their signatures on the consent relied on.
 4. That learned Senior Resident Magistrate erred and misdirected herself on the law and the facts by failing to appreciate that by directing that the grant to be rectified to include the omitted properties would result in the appellant and her siblings being rendered homeless.
 5. That learned Senior Resident Magistrate Ruling misapprehension of the law as regards intestate succession.
4. The appellant prays that the appeal be allowed, the ruling be set aside and be substituted with an order revoking the grant issued to the 1st respondent. The court gave directions that the appeal be canvassed by way of written submissions.

Appellants Submissions

5. The appellant submits that the deceased was survived by:
 - a. Mwikali Mwinzi – Married daughter
 - b. Ndania Makau – Unmarried daughter
 - c. Museveki Kilonzi – Married daughter
 - d. Malia Swaleh – Married daughter
 - e. Mwided (sic) Mwongela – Married daughter
 - f. Dominic Peter Makau - Son
6. That Dominic Peter Makau had filed Succession Cause No. 127/2009. The daughters of the deceased had filed a joint protest to the grant issued to Dominic Peter Makau who is deceased. That the 1st respondent who was the wife of Dominic Peter Makau filed Succession Cause No. 237/2014 secretly without the knowledge of the applicant. This was after the death of Dominic Peter Makau before the conclusion of Succession Cause No. 127/2009 which then abated. Upon being issued with the grant, the 1st respondent applied for its confirmation before the expiry of six months on the ground that one Onesmus Mwalimu had bought Land Parcel No. Kyangwithya/Kaveta/683 and he wanted to develop the property for commercial purposes. That the 1st respondent distributed the estate as follows:
 - Kyangwithya/Kaveta/683 – 8.0 Hectares
 1. Mercy Museo Peter – 6.967 Ha.
 2. Lawrence Mwengi Mulatia – 0.779 Ha
 - Kyangwithya/Kaveta/688 – 0.43 Hectares
 1. Mercy Museo Peter – whole share
7. The applicant submits that the respondent did not distribute any part of the estate of the deceased to the daughters of the deceased but instead distributed a portion thereof to a stranger one Lawrence



- Mwengi Mulatia. The applicant contends that the daughters of the deceased never consented to the mode of distribution and were not present in court when the grant was confirmed.
8. That the trial court confirmed that there was material none disclosure as the respondent had omitted some properties which formed the estate of the deceased. The appellant urges the court to find that they were disinherited and the estates was distributed to a stranger. It is also the contention by the appellant that the 1st respondent failed to disclose that she was a daughter-in-law of the deceased and not a daughter.
 9. The applicant submits by the court allowing the 1st respondent to apply for the rectification of grant, it was tantamount to sanctioning fraud. That the court found that there was a material none disclosure of other properties belonging to the deceased and urged the parties to move the court for the rectification of the grant to include the properties left out.
 10. In their grounds of Appeal the appellants contend that the lower court erred for failing to make a determination and the appellant and other siblings who were dependants of the deceased and therefore entitled to a share of the deceased's estate.
 11. On Ground 2 & 3 the appellant submits that the grant was not validly made as the respondent failed to disclose that she was a daughter-in-law and not a daughter of the deceased. That the learned Magistrate erred by failing to note that the daughters of the deceased had not consented to the mode of distribution and were disinherited.
 12. On the 4 & 5 ground, the appellants fault the court for allowing the appellant to move the court for rectification of grant to include the properties which had been omitted from the said grant which would amount to sanctioning fraud as the respondent had deliberately omitted the properties. That the appellant and other dependants were living on Land Parcel No. Kyangwithya/Kaveta/683 who were rendered homeless.
 13. That the learned Magistrate demonstrated misapprehension of the law as it relates to intestate succession were all the dependants are treated equally. The appellant prays that the ruling delivered on 4/6/2019 be set aside and the resultant titles be cancelled.

Respondent's Submission

1st Respondents Written Submissions

14. She submits that there are no disputes that the appellant is a dependant of the deceased. She submits that the dependants were all aware of the grant. That the appellant and her siblings are married and do not reside on any of the properties forming the estate of the deceased. That the lower court reached the right decision and the appeal lacks merit.

2nd Respondents Submissions

15. The 1st respondent has submitted that he is a bona fide purchaser for value in respect of Land Parcel No. Kyangwithya/Kaveta/683 measuring 2.5 acres for a consideration of Kshs. 1,200,000/= and the process of purchase was above board having purchased the same from Onesmus Mwalimu Mutua who had purchased the land from the children of the late Makau Kingenda who was the registered owner and who received the proceeds of the said sale. That the sale was done with the consent of all the beneficiaries and the administrator of the estate who is the 1st respondent. That he is an innocent purchaser who should not be involved in the succession dispute. He relies on the case of Kojwang -vs-



Ondiek & Another ELCA E010/2023 (2024) KE ELC 7078 KLR 24/10/24. Dina Management Ltd -vs- County Government of Mombasa & 5 Others (Pet 8 (E010) 2021, Supreme Court.

16. The 2nd respondent submits that he conducted a search and established that the land belonged to Makau King'enda and was sold to Onesmus Mwalimu Mutua by the children of the deceased. He was later issued with a title deed No. Kyangwithya/Kaveta/1510 which was exercised from Kyangwithya/Kaveta/683. On 13/3/2015, he took possession and has developed the property.
17. The 2nd respondent submits that the appellant had the burden to prove that there was no consent to the making of the grant, a burden that she did not discharge. He submits that the claim by the applicant against him is unwarranted and should be dismissed.

Analysis and Determination

18. I have considered the grounds of appeal, the proceedings before the lower court and the submissions by all the parties. The issue that arises for determination is whether the learned Magistrate erred by holding that the appellant and her siblings who were dependants of the deceased were not entitled to a share of the estate. This being a first appeal the court has a duty to analyze the evidence, evaluate it and come up with its own independent finding. The court has to bear in mind that it had no opportunity to see the witnesses when they testified and leave room for that. See Court of Appeal in the case of Munyu Maina -vs- Hiram Gathiha Maina (2013) KECA 94 KLR where the Court of Appeal Quoted the Case of Sell -vs- Associated Motor Boat Company (1968) EA 123 where it was stated that:

“An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly but they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect in particular this court is not bound necessarily to follow the trial Judge's finding of fact if it appears either that he has clearly failed on some point to take account of particular circumstances on probabilities materially to estimate the evidence or if the impression based on demeanor of a witness is inconsistent with the case generally.”

19. The Court of Appeal in Jabane -vs- Olenja (1986) KLR 661 @664, stated that:

“More recently however, this court has held that it will not lightly differ from the findings of fact of a trial Judge who had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did see in particular Ephantus Mwangi -vs- Duncan Mwangi Wambugu (1982-88) 1 KLR 278 and Mwanasokoni -vs- Kenya Bus Services (1982 -88) 1 KAR 870.”

20. On the 1st ground the appellant faults the lower court for failing to determine that the appellants are dependants of the deceased who were entitled to a share of the estate. The appellant had alleged that the 1st respondent had alleged that she was the only beneficiary to the estate and failed to disclose that there are other beneficiaries. The record shows that the appellant had filed a summons seeking revocation of grant issued to the 1st respondent on the grounds that the respondent had failed to disclose that the deceased had several beneficiaries.



21. Section 29 of the *Law of Succession Act* (Cap 160 Laws of Kenya) to be referred to as The Act defines dependants 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, grand-parents, grandchildren, step-children, 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 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.”

The Act further states as follows in its preamble:

“An Act of parliament to amend define and consolidate the law relating to intestate and testamentary succession and administration of estates of deceased persons; and for the purpose connected therewith and incidental thereto.”

22. The duty of the probate and administration court is to identify the property forming the estate of the deceased, identify the lawful beneficiaries and the distribution of the estate to its rightful beneficiaries. In *Re Estate of Alice Mumbua Mutua (Deceased)* (2017) eKLR Musyoka J stated as follows with regard to this duty:

“...The *Law of Succession Act* and the rules made there under are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets among the survivors and the persons beneficiary interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries and distribution of the assets.”

23. The learned Magistrate had a duty to identify the properties forming the estate of the deceased and distribute the properties to the lawful beneficiaries. In this case the learned Magistrate held that the appellant and her siblings had signed consent on the mode of distribution of the estate as proposed by the 1st respondent. I have noted the content to the confirmation of the said grant which is dated 18th February 2015, the appellant had not signed the consent. The replying affidavit of the respondent sworn on 13/8/2020 at Paragraph 7 had listed names of beneficiaries who had not been listed on the said consent. He 1st respondent had sworn an affidavit stating that she was a daughter of the deceased and yet she was a daughter-in-law of the deceased. The 1st respondent further sworn an affidavit dated 17/12/2018 where she disclosed that she was a daughter-in-law and further that the appellant together with her sisters are daughters of the deceased who were all married when the deceased passed on. The appellant and her siblings are daughters of the deceased and are therefore dependants as defined under the Act. *The Constitution* of Kenya 2010 outlaws any form of discrimination and in particular discrimination on account of one’s gender.



24. Article 27(1) to (5) of *the Constitution* provides as follows:

- “ 27. Every person is equal before the law and has the right to equal protection and equal benefit of the law.
- (1) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
- (2) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
- (3) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
- (4) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

25. The *Law of Succession Act* provides for the equal distribution of the estate of the deceased. Section 38 of the Act provides that:

“ where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of Section 41 & 42 devolve upon the surviving child, if there be only one or be equally divided among the surviving children.”

26. I note that the 1st respondent in her affidavit in support of the summons for confirmation of grant had indicated that she was the only beneficiary her siblings and two grand children of the deceased. The 1st respondent had not listed the appellant and her siblings as beneficiaries. The appellant and her siblings were entitled to a share of the estate of the deceased and had not consented to be disinherited off their lawful share of the estate. The learned Magistrate held that the 1st respondent had annexed a Chief’s letter where the appellants name appears. However, when seeking confirmation of grant she deponed that she is the child deceased had no dependant other than herself. The leaned Magistrate held that the affidavit in support of the petition of letters of administration dated 12/11/2014 had disclosed the beneficiaries.

27. However, the learned Magistrate failed to find that the petitioner i.e the 1st respondent failed to make provision of he respondent in the summons for confirmation. The appellant had alleged that their signatures were forged. I note from the proceedings that the appellant was not before court when the grant was confirmed. The court was informed that all the beneficiaries had signed a consent. The beneficiaries were not before court and there was not indication that they had been served to appear in court. They did not confirm that they had signed he consent. There was a possibility that the signatures were forged. The appellant has show that they were listed as dependants in Succession Cause No. 127/2009. The appellants had filed a protest on the mode of distribution of the estate. The petition passed on before the protest was heard. It defeats logic that the appellants could sign a consent to be disinherited and also fail to attend court at the time of confirmation of the grant.

28. I find that the appellants could not have signed the consent on the mode of distribution which had disinherited having filed a protest on the mode of distribution in Succession Cause No. 127/2009. I find that the learned Magistrate erred in dismissing the allegation of forgery as were allegations as there was no substantive evidence. The matter before court did not require strict proof. The appellants need



to proof the allegations on a balance of probabilities. The appellants were not before court to confirm the consent. Section 72(a) of the Act provides that:

“No grant of representation shall be confirmed until the court;

a. is satisfied that no application under part III is pending.”

29. Part III deals with provisions for Dependents. The learned Magistrate failed to comply with the laid down procedure under Rule 41(1) of the Probate and Administration Rules when he confirmed the grant. The rule provides that:

“At the hearing of the application for confirmation of grant, the court shall first read out in the language in which they appear in the application, the grant, the affidavits and any written protests which have been filed and shall then hear the applicant and each protester and any other person interested, whether such person appear personally, or by advocate or by a representative.”

The allegations of forgery was not properly considered as the appellant did not appear in court to confirm the said consent and there is no evidence that they had been informed that the confirmation of grant was to proceed in court. The requirement for the parties to appear in court for the confirmation of the grant is for the court to satisfy itself that the estate has been distributed to the rightful beneficiaries and that each beneficiary has gotten its share the estate. It is my view that the none compliance with the procedure laid under Rule 42 of Probation and Administration Rules was prejudicial to the appellants and the ruling cannot be left to stand. The appellants did not get an opportunity to confirm that they had signed the impugned consent and they were condemned unheard contrary to the rules of natural justice.

30. The appellant had filed a summons for revocation of grant. Section 76 of the *Law of Succession Act* provides that:

“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;
- (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.”

31. Under the Section a grant of letters of administration may be revoked where it is proved that:
- a. The proceedings to obtain the grant were defective in substance.
 - b. The grant was obtained fraudulently by making of a false statement or by concealment from court of something material to the case.
 - c. The grant was obtained by means of untrue allegation of fact essential in a point of law to justify the grant notwithstanding that the allegation was in ignorance or inadvertently. These are among other grounds under Section 76 of the Act.
32. The 1st respondent had made a false statement that she was a daughter of the deceased. Section 35 of the Act gives the children of the deceased the right to file succession where the deceased was not survived by a widow. The applicant misled the court that she was a child of the deceased in order to mislead the court. The 1st respondent also distributed the estate of the deceased to strangers Lawrence Mwengi Mulatya who was not entitled to a share of the estate of the deceased. The 1st respondent had omitted some properties which she was seeking to distribute after rectification of the grant. Section 76 of the Act (Supra) is clear that the grant may be revoked where there is a false allegation whether the allegation was made in ignorance or inadvertently. There were good grounds to revoke the grant.
33. As against the 2nd respondent, it is trite law that no transfer of immovable property can be made before the grant is confirmed. Section 82(b)(ii) of the Act provides that:
- “No immovable property shall be sold before confirmation of the grant.”
34. The second respondent submits that he bought land parcel Kyanguithya/Kaveta/683 from Onesmus Mwalimu Mutua who had purchased the same from the children of the late Makau King’enda. The 1st respondent when applying for confirmation of grant stated that land parcel No. Kyanguithya/Kaveta/683 was among the properties the deceased left and the purchaser wanted to develop it. This makes it clear that the land was sold before the grant was confirmed. That although the affidavit stated that Onesmus Mwalimu was the purchaser, the person included in the grant was Lawrence Mwengi Mulatia, a stranger to the estate. The 2nd respondent depones that he entered an agreement with Onesmus Mwalimu Mutua for the purchase of the said land. He conducted a search and established that the land belonged to Makau King’enda. This affidavit was sworn on 9/3/2020. It is therefore clear per adventure that he was well aware that the person selling the land to him was not the registered owner. The grant was confirmed on 8/12/2014.
35. The Act protects purchaser to whom the immovable property has been transferred. Section 93 of the Act provides:
- “(1) All transfers 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.”

36. The 2nd respondent bought the land which was not transferred to him as it belonged to the estate of the deceased. The land which was transferred is not what was purchased in the agreement. This court cannot sanitize a transaction that was not lawful in the first place. The land was not sold to him by the administrator and at the time of sale he became aware that the seller was not the owner. I find that the sale to the 2nd respondent was fraudulent and cannot be protected under the Act.

Conclusion

37. I find the appellant has proved that there were good grounds to warrant the revocation of the grant. The ruling of the learned Magistrate cannot therefore be upheld. I therefore Order as follows:

1. The ruling of the learned Magistrate is set aside.
2. It is substituted with an order that the grant issued to the 1st respondent is revoked together with all the consequential orders.
3. The appellant is appointed as the administrator of the estate of the deceased.
4. The matter is referred back to the Chief Magistrate’s Court for the appellant to move the court with summons for confirmation of the grant.
5. Each party to bear its own costs.
6. The matter be mentioned before the learned Chief Magistrate on 29/4/2025.

DATED, SIGNED AND DELIVERED AT KITUI THIS 1ST DAY OF APRIL 2025

HON. LADY JUSTICE L. GITARI

JUDGE

