



In re the Estate of Charles Gathuma Biringi alias Charles B Gathuma alias G Biringi alias Charles Gathuma (Deceased) (Succession Appeal E014 of 2023) [2024] KEHC 9791 (KLR) (24 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9791 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION APPEAL E014 OF 2023
DKN MAGARE, J
JULY 24, 2024**

**IN THE MATTER OF THE ESTATE OF CHARLES GATHUMA BIRINGI ALIAS
CHARLES B. GATHUMA ALIAS G. BIRINGI ALIAS CHARLES GATHUMA (DECEASED)**

BETWEEN

JOEL MATHENGE BIRINGI APPELLANT

AND

LOISE NYAWIRA GATHUMA 1ST RESPONDENT

ELDAD KARIUKI NDUNG'U 2ND RESPONDENT

*(Being an appeal from the Ruling of Hon. A. G. Kibiru (CM) in Nyeri
CM Succession Cause No. 140 of 2020 delivered on 9th August, 2023)*

JUDGMENT

1. This is an appeal from the decision of the Hon. A. G. Kibiru given on 9/8/2023. The Appellant sought orders that:
 - a. That a fresh grant be issued to the Petitioners/Respondents with the 1st Petitioner acquiring a life interest on the land parcels No. Tetu/Kabage/782 and Tetu/Kabage/200 and thereafter the properties to go absolutely to Samuel Biringi Gathuma.
 - b. That the grant of representation issued to the estate of the late Charles Gathuma Biringi herein issued to the Respondents Loise Nyawira Gathuma and Eldad Kariuki Ndungu on the 20th September, 2021 be revoked.
2. The main grounds were that the grant was confirmed in the names of the 1st Petitioner and left out the minor S.B.G. His case was that the 1st Petitioner should only acquire a life interest.



3. The Applicant stated that it was necessary that the said parcel be held in trust and for the benefit of the minor. The minor herein was born on 14/12/2007.
4. The certificate of confirmation of grant was for the 1st Petitioner who had all the assets to herself absolutely. There is no mention of the child or children of the deceased.
5. The appellant was not seeking a share for himself but for the minor who is now 16 years. The court dismissed the Summons for Revocation as the same was not merited.
6. The Appellant filed a petition on the following Grounds of Appeal:
 - i. The learned magistrate erred in law and fact by ignoring the provisions of S. 76 of the Law of Succession Act (Cap 160) by declining to revoke the confirmed grant.
 - ii. The learned magistrate erred in law and fact by failing to appreciate the grounds under which a confirmed grant can be revoked.
 - iii. The learned magistrate erred in law and fact by failing to notice the existence of fraud, concealment and misrepresentation of facts committed by the 1st Respondent on the face of the confirmed grant as pertains the distribution of the deceased's estate.
 - iv. The learned magistrate erred in law and fact by failing to recognize that the confirmed grant as per the certificate of confirmation of grant was obtained fraudulently as it contravenes the provisions of S. 35(1)(a) of the Law of Succession Act.
 - v. The learned magistrate erred in law and fact by failing to recognize that the 1st Respondent was the only spouse to the deceased with a surviving child.
 - vi. The learned magistrate erred in law and misapplied it by deeming the court functus officio in respect of the confirmed grant which on the face of it fraudulently distributed the estate exclusively to the 1st Respondent at the exclusion of the minor, the only surviving child of the deceased.
 - vii. The learned magistrate erred in law and fact by ignoring that the powers of an only surviving spouse where there is a child and/or children are limited to a life interest in the deceased's estate.
 - viii. The learned magistrate erred in law and fact by failing to appreciate and exercise the powers of the court as stipulated in S. 37 of the Law of Succession Act as pertains the sale of immovable property by a spouse where there is a surviving child.
 - ix. The learned magistrate erred in law and fact by holding that the Summons filed by the Appellant on 15/05/2023 was just but 'mere allegations' while ignoring the fact of admission by the 1st Respondent that she was indeed disposing one of the deceased's lands which had wholly devolved to her.
 - x. The learned magistrate erred in law and fact by ignoring the application of the law relating to admissions and totally ignoring the Appellant's submissions dated 22/06/2023 filed before it.
 - xi. The learned magistrate erred in law and fact by failing to recognize the admission by the 1st Respondent that she was selling the land contained in title number Tetu/Kabarage/200 which is an act meant to dis-inherit the deceased's only child in terms of S. 35(1)(a) of the Law of Succession Act.



- xii. The learned magistrate erred in law and fact by failing to appreciate that the sale of an immovable property and upon such an admission by the 1st Respondent, is only permissible through the court in the case of an only surviving spouse where there is a child.
 - xiii. The learned magistrate erred in law and fact by failing to appreciate that the disclosure of the existence of the minor having been disclosed at the stage of the application for the letters of administration, the minor's interests a beneficiary, were nevertheless not factored at the point of the mode of distribution of the deceased's estate.
 - xiv. The learned magistrate erred in law and fact by failing to appreciate that the substance of the summons filed by the Appellant on 15/05/2023 was solely premised on the best interests of the minor as an only child of the deceased whose interests were never factored at the mode of distribution of the estate as is evident in the Certificate of Confirmation of Grant.
 - xv. The learned magistrate erred in law and fact by failing to recognize that the deceased's estate as per the Certificate of Confirmation of Grant had absolutely and wholly devolved to the 1st Respondent without factoring the interest of the minor, the sole surviving child of the deceased.
7. The grounds are prolixious and messy, repetitive and unseemly. They are anathema to good order and concise pleadings under Order 42 Rule 1.
8. The Court of Appeal had this to say about compliance with Rule 86 of the Court of Appeal Rules (which is *pari materia* with Order 42 Rule 1 of the Civil Procedure Rules) in the case of *Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat* [2020] eKLR: -
- “We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See *Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others* [2013] eKLR) and *Nasri Ibrahim v. IEBC & 2 Others* [2018] eKLR. In the latter case, this Court lamented:
- “We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs.” The 18 grounds of appeal presented by the appellant, *Robinson Kiplagat Tuwei* against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues...”
9. There is only one issue, whether the court erred in dismissing summons for revocation.
10. It is disclosed on the file that the deceased died leaving a widow and a minor. The grant had been given to the Respondents who are the widow and a maternal relative of the widow.



11. The widow had the entire estate to herself to the exclusion of the minor. The court indicated that she was the mother therefore cannot disinherit the minor. The court equally stated that there is no evidence of sale.
12. The court erred in two particular aspects. Section 40 of the [Law of Succession Act](#) provides as follows:
 40. Where intestate was polygamous
 - (1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.
 - (2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.
13. Section 35 of [Law of Succession Act](#) provides as follows:
 35. Where intestate has left one surviving spouse and child or children (1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to
 - i. the personal and household effects of the deceased absolutely;
 - ii. and a life interest in the whole residue of the net intestate estate:

Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.
 - (2) A surviving spouse shall, during the continuation of the life interest provided by subsection (1), have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date.
 - (3) Where any child considers that the power of appointment under subsection (2) has been unreasonably exercised or withheld, he or, if a minor, his representative may apply to the court for the appointment of his share, with or without variation of any appointment already made.
 - (4) Where an application is made under subsection (3), the court shall have power to award the applicant a share of the capital of the net intestate estate with or without variation of any appointment already made, and in determining whether an order shall be made, and if so, what order, shall have regard to-
 - a. the nature and amount of the deceased's property;
 - b. any past, present or future capital or income from any source of the applicant and of the surviving spouse;
 - c. the existing and future means and needs of the applicant and the surviving spouse;



- d. whether the deceased had made any advancement or other gift to the applicant during his lifetime or by will;
- e. the conduct of the applicant in relation to the deceased and to the surviving spouse;
- f. the situation and circumstances of any other person who has any vested or contingent interest in the net intestate estate of the deceased or as a beneficiary under his will (if any); and
- g. the general circumstances of the case including the surviving spouse's reasons for withholding or exercising the power in the manner in which he or she did, and any other application made under this section.

(5) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.”

14. The above section was amended by the succession amendment Act 2022.

15. In this context there are two dependents, that is the minor and his mother. When there is a minor the law of succession provides 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;”

16. The priority is in section 39 as follows: -

“Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority—

- a. I father; or
- b. if dead mother; or if dead brothers and
- c. sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none”
- d. half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.



- (2) Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1), the net intestate estate shall devolve upon the State, and be paid into the Consolidated Fund.

17. In this matter Eldad Kariuki Ndung'u is not in any degrees of consanguinity referred to above and could not apply for letters. He is not related to the deceased at all. The appointment of Eldad Kariuki Ndung'u is therefore irregular, null and void. I set the same aside.
18. The estate shall have a relative of the deceased to act together with the spouse. In this case Joel Mathenge Biringi is available. I therefore revoke the grant issued to the Respondents and issue a fresh one to Loise Nyawira Gathuma and Joel Mathenge Biringi.
19. The widow got the interest absolutely. This is disinheriting the minor. I also note unique circumstances that should not have been disclosed in the nature the Applicant did. The estate has only one parcel of land, that is Tetu/Kabarage/200.
20. The same was given to the 1st Respondent absolutely. This is not proper. As aforesaid there are only two heirs. The spouse is entitled to household goods and life interest. The main heir is the minor.
21. Consequently, the confirmation was improper. I set it aside. There is no need of doing a fresh Summons for Confirmation of grant.
22. Therefore, it is hereby directed that land Parcel No. Tetu/Kabarage/200 shall be distributed as follows:-
- a. 1/2 share to be registered in the names of the administrators until the age of majority of the minor.
 - b. Loise Nyawira 1/2 share registered in her name. She shall have a life interest and thereafter to the minor absolutely.
 - c. Given the delicate nature of the case, each party shall bear its costs.

Determination

23. The court therefore makes the following orders: -
- a. The Ruling and order of the court below given on 19/8/2023 is hereby set aside.
 - b. Eldad Kariuki Ndung'u is hereby removed as an administrator and the grant of representation is accordingly revoked. In lieu thereof, I appoint Joel Mathenge Biringi and Loise Nyawira Gathuma as administrators.
 - c. There is no need of doing a fresh Summons for Confirmation of grant. I therefore direct that land Parcel No. Tetu/Kabarage/200 shall be distributed as follows:-
 - a. SBG as named in paragraph 5 of form P & A 5- ½ share to be registered in the names of the administrators until the age of majority of the minor.
 - b. Loise Nyawira Gathuma - 1/2 share registered in her name. She shall have a life interest and thereafter to the minor absolutely.
 - d. Given the delicate nature of the case, each party shall bear its costs.

DELIVERED, SIGNED AND DATED AT NYERI ON THIS 24TH DAY OF JULY, 2024.

Judgment delivered through Microsoft Teams Online Platform.



KIZITO MAGARE

JUDGE

In the presence of:-

Purity Mureithi for the Appellant

Ms. Macharia for the Respondent

Court Assistant - Jedidah

M. D. KIZITO, J.

