



REPUBLIC OF KENYA



**In re Estate of Mutegi Rugane (Deceased) (Civil Appeal
E017 of 2022) [2024] KEHC 8493 (KLR) (11 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8493 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CIVIL APPEAL E017 OF 2022**

LW GITARI, J

JULY 11, 2024

N THE MATTER OF THE ESTATE OF THE LATE MUTEGI RUGANE (DECEASED)

BETWEEN

LUCY KAWIRA MUTEGI APPELLANT

AND

NGAI RUGANE RESPONDENT

JUDGMENT

1. These succession proceedings relate to the estate of the late Mutegi Rugane (deceased) who died on 10th October, 2011. A grant of letters of administration was issued on 9th December, 2020 to the Respondent as the brother of the deceased in Chuka Chief Magistrate’s Court Succession Cause No. 46 of 2020.
2. The Appellant herein lodged objection proceedings on 25th June, 2021 in respect of the aforesaid grant of letters of administration intestate.
3. The present appeal is against the decision and ruling delivered on 7th July, 2022. In the impugned decision, the lower court dismissed the Appellant’s objection on the ground that it served no useful purpose since the grant had already been issued.
4. Aggrieved by the said decision, the Appellant proffered the present appeal which is based on the following grounds:
 - i. That the Learned Magistrate erred in law and fact by relying on extraneous considerations and inferences and/or misapprehended the law in arriving at an erroneous decision against and without considering the facts and evidence on record.



- ii. That by relying on extraneous considerations and inferences, the learned magistrate erred in law and fact because by relying on such inferences the same had high chances of misleading the court at arriving at wrong findings, determination and/or decision.
 - iii. The Learned Trial Magistrate erred in law and fact by failing to consider that the appellant is the only daughter of the deceased herein, and hence the most fit and proper person to petition the court for letters of administration intestate for the estate of her father.
 - iv. The Learned Trial Magistrate erred in law and in fact and misdirected herself by not considering and taking into account the Appellant's averments in her objection to making of grant and affidavit in support of objection of grant and her written submissions thereof.
 - v. The Learned Trial Magistrate erred in law and fact by failing and/or altogether neglecting to consider, factor, and allow the applicability of the Estoppel principle based on the availed evidence hence arriving at a wrong decision against the Appellant.
 - vi. The Learned Trial Magistrate erred in law and fact by failing, refusing, declining and/or altogether neglecting to find that a Notification of Birth Registration is sufficient evidence and prove of child-parent relationship.
 - vii. The Learned Trial Magistrate misdirected herself into using wrong principals of the law in arriving at an erroneous decision when there was clear evidence tendered by the Appellant in support of her case.
 - viii. The Learned Trial Magistrate erred in law and fact by failing to find that equity and the balance of convenience and logic weighed in favor of the Appellant and which omission led to a wrong decision.
 - ix. The Learned Trial Magistrate erred in law by failing to consider and uphold Rule 26(1) and (2) of the *Probate and Administration Rules* and Section 66 of the *Law of Succession* CAP 160 Laws of Kenya which clearly shows the preference given to persons to administer the estate of person intestate.
 - x. The Learned Trial Magistrate erred in law and fact by failing to consider and uphold the fact that the Appellant is a daughter and dependant of the Deceased herein as per Section 29(b) of the *Law of Succession Act* CAP 160 Laws of Kenya and, therefore, depriving her of the share in the Deceased's estate is unreasonable, unfair, inequitable and unjustified.
 - xi. The Learned Trial Magistrate erred in law and fact in failing to apply and follow the principle of ratio decidendi and stare decisis thus ignoring the established principles of law.
 - xii. The Learned Trial Magistrate totally misdirected herself into applying unknown and/or wrong principles of the law in arriving at an erroneous and injudicious decision.
5. The Appellant thus prayed for the appeal to be allowed by setting aside the impugned ruling and for the Appellant to be awarded the costs of the appeal.
 6. The appeal was canvassed by way of written submissions.

The Submissions

7. The Appellant filed her submissions on 29th June, 2023. She contends that she is the only child of the deceased and faults the learned magistrate for failing to find that the Appellant proved this point through a notification of birth registration. She further faults the lower court from excluding the



Appellant from benefitting from the subject estate. According to the Appellant, the delay in lodging the objection proceedings ought to have been considered as reasonable and excusable in the interest of justice.

8. On his part, the Respondent submitted that the Appellant's objection was filed outside the time prescribed in the notice published in the Kenya Gazette. That in any case, a notice of objection can only be filed prior to the issuance of a grant of letters of administration unless the objector invokes the provisions of Rule 17(2) of the *Probate and Administration Rules* (the "Rules") for extension of time. In addition, it was the Respondent's submission that the notice of objection was not in the prescribed form and hence, the same contravened Rule 17(1) of the *Rules*. It was finally the Respondent's submission that the trial magistrate did not err in dismissing the objection by the Appellant and thus urged this Court to find the present appeal lacks merit and hence proceed to dismiss the appeal.

Issue for Determination

9. I have considered the grounds of appeal, the record of appeal as well as the submissions by the parties. The main issue that arises for determination is whether the trial court erred in dismissing the objection by the Appellant.

Analysis

10. This being a first appeal, the duty of this Court is as was stated by the Court of Appeal in the case of *Abok James Odera t/a A. J. Odera & Associates v. John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, where the Court pronounced itself as follows: -

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kustron (Kenya) Limited 2000 2EA 212 wherein the Court of Appeal held, inter alia, that: -

‘On a first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.’”

11. This Court is therefore called upon to reconsider the evidence before the trial court and the submissions of the parties in light of the applicable law.
12. From the record of the trial court, the Appellant filed a notice of objection dated 25th June, 2021 under the provisions of Sections 67, 68, 69, and 70 of the *Law of Succession Act*. The said provisions address the procedure for objection.
13. Rule 17 of the *Probate and Administration Rules* details how the objection is to be lodged at the registry, how the petitioners and principal registrar are to be notified of the objection, the filing of answer and cross-petition by the objector, the extension of time by the registrar where an application in that regard has been made and determined by the court of the petition and cross-petition. A person may object to issuance of letters of administration in respect of a deceased's estate within the period stipulated in the Kenya Gazette.



14. Notably, Section 67 (1) of the *Law of Succession Act* provides that:-

“No grant of representation, other than a limited grant for collection and preservation of assets, shall be made until there has been published notice of the application for the grant, inviting objections thereto to be made known to the court within a specified period of not less than thirty days from the date of publication, and the period so specified has expired (emphasis court).”

15. Further, Section 68 of the *Law of Succession Act* provides that:-

- “1. Notice of any objection to an application for a grant of representation shall be lodged with the court, in such form as may be prescribed, within the period specified by such notice as aforesaid, or such longer period as the court may allow.
2. Where notice of objection has been lodged under subsection (1), the court shall give notice to the objector to file an answer to the application and a cross-application within a specified period.”

16. Section 69 of the *Law of Succession Act* further stipulates that:-

- “1. Where a notice of objection has been lodged under subsection (1) of section 68, or no answer or no cross-application has been filed as required under subsection (2) of that section, a grant may be made in accordance with the original application.
2. Where an answer and a cross-application have been filed under subsection (2) of section 68, the court shall proceed to determine the dispute.”

17. It is clear that although the Appellant has not included the gazette notice in the record of appeal, the same must have been published on 16/10/2020 vide gazette Notice No.8338 which was prior to the issuance of the grant of letters of administration on 9th December, 2020. Noting that the objection proceedings were lodged on 25th June, 2021, the said objection had been overtaken by events.

18. In this regard, the trial court placed reliance in the holding in the case of In the *Re Estate of Agnes Ogolas Akoth (Deceased)* [2016] eKLR where an objection that had been filed after the grant has been made was dismissed after the court found that the objection had already been overtaken by events.

19. The trial court further relied on the court’s holding in In *Re Estate of Esther Francis Thoya (Deceased)* [2018] eKLR where the court held that once a grant has been issued, an objection under Section 68 of the *Law of Succession Act* is no longer viable and any person desirous of upsetting a grant that is already issued should look upon other remedies availed by the Law of Succession Act.

20. In addition, the provisions of Section 68 of the *Law of Succession Act* envisage the filing of a notice of objection, followed by an answer to the petition and a petition by way of cross-application. In *Jason Werimo Onyango v Patrick Onyango Sakwa* [2019] eKLR, W. Musyoka, J. expressed himself as follows in this regard:

- “15. What constitutes the objection is the combination of the notice of objection, the answer to petition and the petition by way of cross-application. It would appear that where the objector files a notice of objection but does



not file the answer and the cross-petition then the objection pleadings would be incomplete and the court ought to disregard the notice of objection and proceed to make a grant to the petitioner. According to section 69(2), the objection proceedings should only be heard after an answer and cross-application are filed under section 68 (2) of the Act. Under section 69(1) of the Act, where a notice of objection is filed but no answer or cross-application has been filed as required by section 68(1) of the Act, the court ought to make the grant in accordance with the petition.”

21. I associate myself with this finding as it is reflection of the procedure to be followed when filing an objection and I am persuaded by the above authority and therefore agree with submission of the Respondent that the notice of objection was not in the prescribed form. Furthermore objection is filed to the making of a grant and therefore the objection should be filed before the grant is issued. Once the grant is issued the window of making the objection is closed and the objection filed thereafter is overtaken by events and is not properly before court. The party must then follow other procedures which are available in the Law of Succession Act to challenge the grant.

Conclusion

22. The upshot of the above analysis is that the present appeal is lacking in merits and should be dismissed. I therefore order as follows:
1. This appeal is dismissed.
 2. The ruling by the learned trial magistrate is upheld.
 3. Costs to the Respondent.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 11TH DAY OF JULY 2024.

L.W. GITARI

JUDGE

11/7/2024

The Judgment has been read out in open court.

L.W. GITARI

JUDGE

11/7/2024

