In re Estate of Njoroge Mote (Deceased) (Family Appeal 13 of 2023) [2024] KEHC 8687 (KLR) (11 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8687 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

FAMILY APPEAL 13 OF 2023

FN MUCHEMI, J

JULY 11, 2024

IN THE MATTER OF THE ESTATE OF NJOROGE MOTE (DECEASED)

BETWEEN

SILAS MWANGI NJOROGE ..... APPELLANT

AND

JANE WANGECHI IHOMBA ..... 1ST RESPONDENT

LUCY WANJIRU NJOROGE ..... 2ND RESPONDENT

(Being an Appeal from the Ruling of Hon. M. W. Wanjala (SRM) delivered on 5th July 2022 in Thika CM Succession Cause No. 564 of 2005)

JUDGMENT

Brief facts

1. This appeal arises from the ruling of Thika SRM in CM Succession Cause No. 564 of 2005 where the court dismissed the application for revocation of grant dated 3rd February 2016 on the grounds that the appellant failed to demonstrate that the grant issued on 23rd March 2006 and confirmed on 12th July 2006 was obtained fraudulently through false statements and concealment of material facts.

2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 11 grounds of appeal summarized as follows:-

    a. The learned trial magistrate erred in law and in fact in failing to find the procedure adopted for obtaining the grant and confirmation of grant was irregular as some of the beneficiaries including the appellant were not notified nor gave their consent in court for the confirmation of grant in Succession Cause No. 564 of 2005;

b. The learned trial magistrate erred in law and in fact in dismissing the appellant's claim that the deceased had shared out her properties during his lifetime;

c. The learned trial magistrate erred in law and in fact in failing to find that that the sale of LR No. 1212 and 628 without the issuance of confirmation of grant was null and void.

3. Parties put in written submissions to dispose of the appeal.

Appellant's Submissions

4. The appellant submits that the deceased died intestate on 12th September 1999 and he had two families consisting of six beneficiaries in the first house and eleven beneficiaries in the second house. The appellant further submits that he hails from the second house whereas the respondents who were appointed the co-administratrix of the estate, hail from the 1st house.

5. The appellant states that the deceased's estate comprises of two parcels of land namely LR Nos. Loc 1/Mukarara/466 and Makuyu/Makuyu Block 2/628. According to the appellant, the deceased during his lifetime sub divided LR No. Loc 1/Mukarara/466 into several portions and distributed them to his sons save for one portion namely Loc 1/Mukarara/1212 which remained in the deceased's name.

6. The appellant submits that his family was neither consulted or involved at the time of obtaining the chief's letter or the filing of the succession cause. He only came to learn of the cause from one Joseph Ngurumi Wainaina who attempted to evict him from LR No. Loc 1/Mukarara/1212 which was registered in the third party's name. The appellant argues that the two land parcels were available for distribution between the two houses with 1 acre being shared amongst the daughters of the deceased and the remaining 1 acre being shared amongst all the sons of the deceased. The appellant further denied ever entering into an agreement for sale of any portion in the suit properties with the said Joseph Ngurumi Wainaina.

7. The appellant relies on Rule 26 of the Probate and Administration Rules and the case of Estate of Ngari Gatumbi alias James Ngari Gatumbi (Deceased) HC Succession Cause No. 783 of 1993 and submits that a petitioner of grant must ensure that he/she obtains the consent of all the beneficiaries and notify all other interested parties. In this case, the petitioners did not comply with the law. The appellant argues that the petitioners did not produce any evidence in court that he was involved the appellant. Neither did he obtain consent from other beneficiaries. The appellant was not among the 11 people present in court during the confirmation of the grant. Further, the appellant submits that the only consent on record is the consent to the confirmation of grant which was signed by six persons yet the trial court found that the petition was signed by all the beneficiaries. The appellant further submits that the record does not show who amongst the beneficiaries were present in court for the confirmation of grant, as it only states that 11 beneficiaries were present in court.

8. The appellant argues that the second house never sold any land to Joseph Ngurumi and further no sale agreement was ever produced to prove the said sale. As such, the appellant submits that the said alleged sale is contrary to Section 3 of the *Law of Contract Act*, hence null and void.

9. Furthermore, the appellant submits that the alleged sale took place after the death of the deceased and before the grant was confirmed which contravenes Section 45 and 82(b) of the *Law of Succession Act*. The appellant relies on the cases of in Re Estate of Simon Njogu Gicheni (Deceased) [2021] eKLR; Succession Cause No. 36 of 2017 In the matter of the Estate of Ibrahim Hassan alias Sheikh Ibrahim Hassan (Deceased) and Civil Appeal No. 14 of 2020 In the Matter of Eddah Wangu vs Sacilia Magwi Kivuti and submits that the said alleged sale and transfer of the suit properties was illegal, null and void

and it is not relevant the duration after the grant was confirmed as in the case of the Estate of Ibrahim, the grant was revoked after 20 years after its confirmation.

The Respondents' Submissions

10. The respondents rely on Order 42 Rule 2 and 13(4) of the Civil Procedure Rules, Section 75G of the *Civil Procedure Act* and the case of Ndegwa Kamau t/a Sideview Garage vs Fredrick Isika Kalumbo (2016) eKLR and submit that the appellant filed his record of appeal but failed to attach the order of the subordinate court. The judgment or ruling of the trial court ought to be reduced into a decree or order which forms the basis of the appeal. Thus, the respondents argue that the appeal must fail as the appellant has failed to attach the order of the trial court.

11. Relying on the decisions of Margaret Wangechi Muchoki vs Julia Wanyiri Muchoki HC. Civil Appeal No. 123 of 2002; Kotak vs Kooverji (1976) EA 348; Mukasa vs Ocholi (1968) EA 89; Bwana Mohammed Bwana vs Silvano Buko Bonaya & 2 Others [2015] eKLR and Chege vs Suleiman [1988] eKLR, the respondents argue that failure to attach a decree is a jurisdictional point and further that an appeal is not properly before a court for failure to attach a decree.

12. The respondents submit that the appellant filed an application for revocation of grant dated 3rd February 2016, ten (10) years after the said grant was confirmed and the estate distributed. The respondents further submit that the appellant was aware that the deceased had left LR No. Loc 1/Mukarara/1212 to his daughters upon his demise. From the record, the deceased sub divided LR. No. Loc 1/Mukarara/466 into nine portions and the eight sons each had a portion transferred to his name before the deceased died. The respondents further submit that the deceased lived on two acres which he had allocated to his daughters. The sister to the appellant one Waithaiya Njoroge was allocated ½ an acre from the same land. Relying on Section 107 of the *Evidence Act*, the respondents argue that the appellant did not establish that LR. No. Loc 1/Mukarara/1212 was to be distributed to the sons of the deceased as the other brothers of the appellant did not file any application to seek for such orders and neither did they support the appellant in his application for revocation before the lower court.

13. The respondents submit that the appellant has not approached the court with clean hands and his aim is to unjustly enrich himself at the expense of his siblings. The respondents state that the transfer of LR Nos. Loc 1/Mukarara/1460 and Makuyu/Makuyu/Block 2/628 took place due to the intervention of the appellant and further LR No. Makuyu/Makuyu/Block 2/628 belongs to the appellant's brother one Joseph Maina Njoroge who did not object to the succession proceedings.

14. The respondents argue that the appellant is the main connection between them and the purchaser one Joseph Ngurumi Wainaina. The family of the deceased transacted with the said Joseph Ngurumi and the appellant was present during all transactions relating to the said properties. The respondents further argue that the appellant sold part of his inheritance being LR. No. Loc 1/Mukarara/1215 which he subdivided into two parcels namely Loc 1/Mukarara/1352 and 1353 and now wants to benefit twice from the deceased's estate.

15. The respondents submit that they involved all the dependents of the deceased and confirmation of grant was made in their presence. Further, the appellant and his brothers have never lived on LR No. Loc 1/Mukarara/1212 as they had their own parcels of land. The proceeds of LR No. Makuyu/Makuyu/Block 2/628 were shared among all the dependants of the deceased.

16. The respondents argue that they gave a very elaborate series of events in regards to the properties of the deceased but the appellant did not counter them nor give contrary evidence. It is noted that the appellant did not dispute his involvement neither did he deny receiving any monies from Joseph

Ngurumi Wainaina. The respondents submit that the appellant did not avail any of his siblings to contravert their averments.

Issues for determination

17. The main issues for determination are:-

    a. Whether the appeal is fatally defective for failure to attach decree, certified copy of judgment and proceedings.

    b. Whether the appeal has merit.

The Law

18. being a first Appeal, the court relies on a number of principles as set out in Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123:

> "…..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 findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence."

19. In Gitobu Imanyara & 2 Others vs Attorney General [2016] eKLR the Court of Appeal 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 put, 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.

20. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-

    a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

    b. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and

    c. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

Whether the appeal is fatally defective for failure to attach decree, certified copy of judgment and proceedings.

23. The respondents submit that the appeal is fatally defective for failure by the appellant to attach a decree or order in the Record of Appeal which renders the appeal incurably defective. I have perused the record of appeal and noted that the appellant attached a copy of the ruling that is the subject of this appeal. As such, the failure to attach the decree is a technicality which in the court's view ought not to invalidate the appeal. This appeal has already been admitted even before hearing was fixed as is required by the law. It is also noted that the lower court record is before this court and that it contains a copy of

the decree. It is my view that no prejudice will be occasioned to the respondents. This court is guided by the decision in South Nyanza Sugar Co. Ltd vs Daniel Obara Nyandoro (2010) eKLR where the court stated:-

> In my view, it will amount to miscarriage of justice for this court to strike out the appeal for the reason as advanced by Mr. Ogweno when the appeal had already been admitted and directions taken in the presence of counsel for both parties. In any event, the lower court record is before this court and no prejudice will be occasioned to the respondent by reference to the same. In addition, it will be against the spirit of the overriding objectives of the *Civil Procedure Act* as stated under Section 1A and 1B for this court to summarily reject the appeal for want of decree.

24. Further in the Court of Appeal in the case of Emmanuel Ngade Nyoka vs Kitheka Mutisya Ngata [2017] eKLR held that:-

> According to the Judge, the record of appeal before him had a certified copy of judgment of the trial court. Consequently, he reasoned, the record of appeal was competent notwithstanding the fact that a formal decree had not been included in the record.
>
> We entirely agree with the reasoning of the learned Judge on this aspect. In any event, this was a mere technicality that could not have sat well with the current constitutional dispensation that calls upon courts to go for substantive justice as opposed to technicalities. Further holding otherwise would have run counter to the overriding objective as captured in Section 1A and 1B of the *Civil Procedure Act*. Finally, one would ask what prejudice did the appellant suffer with the omission of the certified copy of the decree in the record of appeal. We do not discern any.

25. Therefore, It is my considered view that the appeal herein is not fatally defective for failure to attach the decree.

Whether the appeal has merit

26. The deceased died on 12th September 1999 and left sixteen survivors who were his children from two households:-

    a. Naomi Mumbi Muchui – daughter

    b. Julia Wambui Muchui – daughter

    c. Lucy Wanjiru Njoroge – daughter

    d. Lucy Wairimu Kamuki – daughter

    e. Jane Wangechi Ihomba – daughter

    f. Mary Muringo Ndichu – daughter in law

    g. Tabitha Njeri Njoroge – daughter

    h. Francis Mburu Njoroge – son

    i. Wainaina Njoroge – son

    j. Kamuiru Njoroge – son

    k. Mwangi Njoroge – son

l. Njambi Ng'ang'a – daughter

m. Wathainya Njoroge – daughter

n. Wambui Njoroge – daughter

o. Maina Njoroge – son

p. Nyoike Njoroge – son

27. From the record, the respondents applied for letters of administration intestate on 15th December 2005 and listed the properties forming the estate as LR. No. Loc 1/Mukarara/1212 and Makuyu/Makuyu/Block 2/628. The respondents attached a consent to their application for letters of administration which was executed by all the beneficiaries including the appellant. In the said consent the respondents included the name of Joseph Ngurumi Wainana as a purchaser for value.

28. Grant of letters of administration intestate were issued on 23rd March 2006 and the respondents proceeded to file an application for confirmation of grant on 28th June 2006. The said grant was confirmed on 12th July 2006 with the certificate of confirmation being issued on 18th July 2006. On further perusal of the record, the trial court indicated that on the day the grant was confirmed, eleven beneficiaries were present in court. Although the record did not indicate the names of those who were present, the court confirmed the grant after the administrator stated that they resolved a dispute they had earlier and that no beneficiary raised any objection to the confirmation.

29. On 3rd February 2016 which is ten (10) years after the confirmation of the grant, the appellant filed Summons for Revocation of grant on the premise that the grant was obtained fraudulently by making false statement and concealment of material facts. He further claimed that the proceedings were defective in substance and that the grant was issued based on untrue allegations. The appellant argued that the respondents failed to disclose that the deceased had two wives and that the deceased shared his properties in his lifetime. The appellant further argued that he and his siblings were not included in the succession proceedings and only came to know of the succession cause when one Joseph Ngurumi sought to evict him from LR. No. Loc 1/Mukarara/1212.

30. The summons was opposed by the respondents who argued that all the beneficiaries were aware of the succession proceedings and that both houses consented to the process. The respondents further argued that the deceased shared his properties during his lifetime and had set aside LR No. Loc 1/Mukarara/1212 to be inherited by his daughters with the daughters in the first house sharing one acre and the daughters of the second house sharing the other acre . The respondents further led evidence in court that they sold the suit property to one Joseph Ngurumi, who was introduced to them by the appellant.

31. The fact that the deceased shared his properties during his lifetime is not in dispute. The issue in dispute herein is the means by which the grant was obtained in respect to distribution of LR Nos. Loc 1/Mukarara/1212 and Makuyu/Makuyu/Block 2/628. From the record, the appellant argues that the grant was obtained fraudulently and by concealment of material facts. Upon perusal of the record it is noted that the respondents in applying for the letters of administration, listed all the children of the deceased from the two households and each beneficiary executed the consent to their application for letters of administration. Although the appellant argues that he was not aware of the succession proceedings, he did not explain why he signed the consent together with the other beneficiaries. The appellant did not say that his signature was forged by the respondents. The appellant claimed that his siblings and himself were left out of the succession proceedings. None of those beneficiaries he

mentioned supported the claim of the appellant. That notwithstanding, none of the other beneficiaries have come forth to dispute the distribution of the estate save for appellant.

32. On further perusal of the record, the appellant claimed that one Joseph Ngurumi, a purchaser for value who bought a share of LR. No. Loc 1/Mukarara/1212 and Makuyu/Makuyu 2/628, was a stranger. The said Joseph testified as DW3 in the hearing of the Summons for Revocation filed by the applicant. He stated that he knew the appellant well for the appellant was the one who introduced him to his family members in 2002 to purchase LR. No. Loc 1/Mukarara/1211 from one of the beneficiaries, one John Nyoike. Furthermore, both the witness and the respondents' evidence was to the effect that the appellant was the spokesman during the purchase of LR. No. Loc 1/Mukarara/1212 and Makuyu/Makuyu/628 that was agreed and approved by all the beneficiaries. Additionally, nowhere did the appellant deny receiving money from the said purchaser for value.

33. That notwithstanding, the grant herein was confirmed in the year 2006 and the appellant waited until 2016 to file Summons for revocation of grant. In the said application the appellant failed to disclose the fact that the deceased had sub divided his land during his lifetime and gave him a share being LR. No. Loc 1/Mukarara/1215. It is surprising that the appellant argues that the respondents concealed material facts when applying for the grant of letters of administration The evidence of the appellant in support of his Summons for Revocation was contradictory. The documents on record including the consent he had signed all contradicted the appellant's evidence.

34. Section 42 of the *Law of Succession Act*, provides that in the event of distributing the assets of the deceased, the court will take into consideration any prior gifts bequeathed to beneficiaries during the lifetime of the deceased. Thus, the appellant argument that he was left out of the succession proceedings is not supported by the record. The appellant was bequeathed 1.28 acres of LR. No. Loc 1/Mukarara/1215 from which parcel the daughters of both households are sharing one acre for each household. During the confirmation of the grant, the parties told the court they had a dispute but that it had been resolved. The court confirmed the grant based on the fact that the beneficiary had agreed on the mode of distribution. In the ruling of the court, it was noted that most of the beneficiaries had taken up their shares and that even some of them have sold part of their inheritance. This position was accepted by the family as a whole. It was not the intention of the beneficiaries to disturb the status quo on distribution of the estate.

35. In the case of the appellant, he claimed before the Magistrate's court that he was not aware of the succession case until one Joseph Ngurumi came to evict him from L.R. No. Loc.1/Mukarara/1212. This was found to be far from the truth because the respondents said that it was the appellant who brought in the buyer that he was complaining about ten (10) years after the sale. Joseph testified before the court to the effect that he bought the shares of some of the beneficiaries. The evidence of the respondent that the appellant had never settled on the said parcel of land as he had claimed was accepted by the court as credible. It is noted that the appellant lacked credibility before the lower court especially due to the contradiction of his evidence to documents on record. He signed the necessary consents and was as such aware of the proceedings from initiation to the stage of confirmation. His claim is an afterthought because Joseph said it was the appellant whom he referred to as Mwangi who had approached him to buy the share of his brother Nyoike. He later bought the share of the appellant's sisters when they approached him to do so. The Magistrate took the evidence of the buyer and other beneficiaries as credible, while he disbelieved the appellant. Upon perusal of the evidence, I hold the same view that it is not true that the appellant did not know of the Succession Cause until the buyer came to evict him from the land. The evidence supports the fact that all the seventeen (17) beneficiaries including the appellant were aware of the cause from inception to its conclusion and that they had all cooperated in every stage of the process.

36. The other ground for revocation of grant as framed by the appellant was that the respondents failed to disclose facts material to the case. From the evidence on record, the appellant did not present any evidence to support the allegations and this was clearly observed by the court.

37. The Magistrate further observed that although some of the beneficiaries sold their shares before distribution, the act of revocation would have far reaching consequence on the beneficiaries and purchasers for value and in good faith. I am in agreement with this observation and in addition, it was only the appellant out of who sought revocation of the grant ten (10) years after the grant was confirmed. The action of the appellant was an after thought and an act only meant to give him an advantage over and above other beneficiaries.

38. I have carefully analysed the evidence on record and find that the appellant has failed to satisfy this court that the decision of the honourable Magistrate was against the weight of the evidence. In my view, the magistrate served justice to the parties in the succession cause. I find no fault in the ruling of the magistrate delivered on 5th July 2022 on the premise that the appellant failed to prove any ground for revocation of grant under Section 76 of the Act.

39. Consequently, the ruling delivered on 5th July 2022 is hereby upheld. This appeal is hereby dismissed for lack of merit.

40. Being a family matter, I make no orders for costs. Each party will meet their own costs.

41 It is hereby so ordered.

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

F. MUCHEMI

JUDGE