



In re Estate of Meshack Kusimba Bera alias Mishak Kusimba s/o Bera (Deceased) (Probate & Administration Appeal E047 of 2023) [2024] KEHC 10716 (KLR) (1 August 2024) (Judgment)

Neutral citation: [2024] KEHC 10716 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
PROBATE & ADMINISTRATION APPEAL E047 OF 2023
REA OUGO, J
AUGUST 1, 2024
IN THE MATTER OF THE ESTATE OF MESHACK KUSIMBA
BERA ALIAS MISHAK KUSIMBA S/O BERA (DECEASED)**

BETWEEN

FRANCIS CHEMARKET CHESEBE APPELLANT

AND

MATATA ARAP CHEPKOY RESPONDENT

(Being an appeal from the ruling made by the Honourable Resident Magistrate J.O Manasses delivered and dated 27/4/2023 in Sirisia Succession Cause Number 26 of 2021)

JUDGMENT

1. By way of background, the respondent at the lower court applied for a grant of letters of administration intestate to the estate of Meshack Kusimba Bera alias Mishak Kusimba S/O Bera (deceased). The respondent was appointed as administrator. He filed a summons for confirmation of grant and a certificate of confirmation of grant was issued on 24th October 2022.
2. The confirmed grant triggered the appellant to file a Notice of Motion dated 24/1/2023. He sought the stay of execution of the certificate of confirmation of grant, a temporary order of injunction restraining the petitioner from entering into, occupying appropriating or in any other manner interfering with the appellant's use of title number North Malakisi/South Wamono/421. The appellant also sought revocation and/or annulment of the grant of the letters of administration that were issued to the respondent.
3. In his ruling, the trial magistrate found no known liabilities to the estate as the appellant failed to establish a prima facie case against the estate. On the revocation of the grant, the magistrate found that the elements in section 76 of the *Law of Succession Act*. The court found no merits in the application and dismissed it.



4. The appellant dissatisfied with the ruling of the trial court filed a memorandum of appeal dated 15th May 2023 on the following grounds:
 1. The Honourable Magistrate erred in fact and in law by failing to consider the fact that the appellant/applicant is a liability to the estate of the deceased herein namely North Malakisi/South Wamono/421 having buried his first wife and son thereon; which fact was never disputed by the respondent in their pleadings so that the same is incontrovertible.
 2. The Honourable Magistrate erred in fact and in law by failing to give reasons why the applicant/appellant did not meet the conditions of section 76 of the Law of Succession Act as by law provided.
 3. The Honourable Magistrate erred in fact and in law by failing to understand the import of Rule 17 of the Probate and Administration Rules respecting the timelines under which an objector should move the court by not considering the fact the said Kenya Gazette ordinarily never reaches the people in the rural areas; thereby reaching an unfair/unjust decision.
 4. The Honourable Magistrate erred in fact and in law by failing to give due consideration to the Constitutional provisions of Article 159 of the Constitution (respecting undue regard to procedural technicalities) while interpreting Rule 17 of the Probate and Administration Rules (which, anyway, is an extrinsic factor that was never raised by the parties).
 5. The Honourable Magistrate was biased by giving drastic orders on a land matter without at least orally hearing the appellant/applicant thereby condemning him unheard contrary to the fundamental principles of natural justice.
 6. The Honourable Magistrate erred in fact and in law by misdirecting himself on the rule of law respecting circumstantial evidence since having found (and wrongly so) that the deceased herein was only a witness to the agreement dated 26/4/1976, then he ought to have at least considered that since the appellant buried his first wife and son on the subject parcel of land without any interference by the deceased BERA who later relocated and was not buried on the said parcel of land, then circumstantially it should follow that the said parcel of land belongs to the appellant so he should be included as a liability to the subject estate.
 7. The Honourable Magistrate was generally biased by failing to consider the appellant's evidence on record and particularly the legal provisions respecting ownership of land.
5. The appellant seeks that the ruling of the subordinate court be set aside and substituted by a proper finding of this honorable court.
6. The appeal was canvassed by way of written submissions. The appellant in his submissions dated 29th February 2024 argues that the appeal raises four issues
 - a. Whether or not the appellant has proved his appeal in the balance of probabilities.
 - b. Whether or not title to the suit land was fraudulently obtained to warrant a revocation thereof.
 - c. Whether or not the Appellant's case should succeed.
 - d. Who should bear the cost of the appeal.
7. The appellant submits that Order 1 Rule 1 provides that any person may be enjoined in a suit in whom any right of relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist. He relied on the case of Raila Amolo Odinga & another v IEBC &



- 2 others [2017] eKLR where the court held that pleadings ensure that each side is fully alive to the questions that are likely to be raised and that it is not permissible for a court to frame an issue not arising on the pleadings. He submits that when the court held that the appellant had not established a prima facie case against the estate, then it acted in ultra vires as a land and succession court.
8. It was further submitted that a gazette notice is a technicality because under the common law maxim of justice must not only be done but seen to be done, the same is not sufficient notice when the appellant are based on the ground. He cited the case of Tum & 2 others v Towett & 5 others, Narok ELC 501 of 2017 on fraud. The elements of fraud leading to the filing of the application at the subordinate court had to be tabled by *viva voce* evidence as an application of objection proceedings must not be determined at a preliminary stage. The appellant submits that in applying sections 107, 108 and 109 of the Evidence Act, the evidence on record and the purchase of land was proved.
 9. The respondent opposed the appeal and filed submissions dated 15th March 2024. He identified a sole issue: whether the appellant’s application was wrongly dismissed. The respondent submits that the record does not show an objection to the respondent’s grant, instead, the appellant filed a notice of motion. There was no substantive objection against the grant on which the interlocutory injunction was to be premised. The agreement supplied by the objector was a sham for reasons stated in the magistrate’s ruling, that is, that the deceased was merely a witness in the agreement.
 10. The respondent further argues that the question of whether there is a valid sale of the registered land per the relevant land legislation is an issue that is well outside the jurisdiction of a succession court.

Analysis And Determination

11. I have considered the evidence on record, and the submissions by the parties, and at the outset, the issue of jurisdiction has been raised.
12. The appellant at the trial court claimed ownership of land parcel no. North Malakasi/South Wamono/421. He tendered an agreement of sale and the trial magistrate proceeded to make findings on the allegation of sale of land although it did not possess such jurisdiction as it was acting as a probate court. The court in Adome v Ogutu (Succession Appeal 24 of 2021) [2024] KEHC 7682 (KLR) (28 June 2024) (Judgment) observed that:

“The High Court has no jurisdiction to address issues around ownership of property, by dint of Articles 162(2) and 165(5) of the Constitution. That would include where issues of ownership arise in probate and administration proceedings. It would mean that where an issue around ownership arises in probate proceedings conducted before the High Court, the probate proceedings before that court would not be the appropriate forum to resolve the issues, and the same ought to be placed before the court with jurisdiction. The magistrate’s court is enabled, through the Land Act, Cap 280, Laws of Kenya, and the Land Registration Act, Cap 300, Laws of Kenya. It can determine issues around use, title and occupation of land. However, the magistrate’s court ought not determine contested questions around those issues, within the context of probate and administration causes, for the reasons discussed in such cases as *In re Estate of Kimani Kinuthia* [2008] eKLR (Ibrahim, J), *Jidraph Kamero Njuguna & 3 others v Hilda Njeri Kamero* [2012] eKLR (L. Njagi, J), *In re Estate of Julius Wachira (Deceased)* [2013] eKLR (Musyoka, J), *In re Estate of Stone Katbuli Muinde (Deceased)* [2016] (Musyoka, J), *In re Estate of the Late Jonathan Kinyua Waititu (Deceased)* [2017] eKLR (Ndung’u, J) and *In re Estate of Mwangi Gikonyo* [2017] eKLR (Waweru, J).”



13. The trial magistrate was not clothed with the jurisdiction to determine the issue of the agreement on the sale of land within the succession cause. Similarly, this court sitting on its probate jurisdiction does not have the jurisdiction touching on ownership of land.

14. Similarly, the court *in re Estate of Stone Kathuli Muinde (Deceased)* [2016] eKLR that:

“Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit properly brought before a civil court in accordance with the provisions of the *Civil Procedure Act* and the *Civil Procedure Rules*. This could mean filing suit at the magistrates’ courts, or at the Civil or Commercial Divisions of the High Court, or at the Environment and Land Court. If a decree is obtained in such suit in favour of the claimant then such decree should be presented to the probate court in the succession cause so that that court can give effect to it.”

15. The appellant failed to avail any decree from the Environment and Land Court with the holding that he was the owner of the land for the court to consider him a liability to the estate. In my view, the trial court should have restricted itself on the issue of revocation of the grant given that it did not have jurisdiction as a probate court to handle the issue of ownership.

16. I now turn to consider whether the appellant proved his case for revocation of grant. However, before going into the merits of the application for revocation, I note that the appellant in his submissions argued that he was not granted the opportunity to adduce viva voce evidence, however, the proceedings from the trial court reveal that his advocate sought to have the application be canvassed by affidavit and submissions. The proceedings at the subordinate court were as follows:

“2/02/2023

Before Hon. Manasses

Mr. Owuor present for the Objector/Applicant

Mr. Wasiali present holding brief for Musendi Lukoye & Co. Advocates for the Petitioner/Respondent

Mr. Wasiali: We have just filed our Notice of Appointment together with a reply to the Objector’s objection dated 01/02/2023.

Mr. Owuor: We are yet to be served with the response to the objection. We pray for service and we put in a further affidavit together with submissions.

Mr. Wasiali: We can have a mention to confirm compliance.

Court: Parties granted leave to file and serve and dispense by way of written submissions.”

17. The proceedings reveal that it was the appellant through his advocate elected to have the matter heard by way of affidavit and his argument that access to justice was impaired at the trial court cannot stand.

18. Section 76 of the *Law of Succession Act* provides as follows:

“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 making of a false statement or by 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”

19. In the case [Albert Imbuga Kisigwa v Recho Karai Kisigwa](#) [2016] eKLR stated:-

“(13) Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrongdoing 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.”

20. The court [In re Estate of Prisca Ong’ayo Nande \(Deceased\)](#) [2020] eKLR explained the application of section 76 of the [Law of Succession Act](#) as follows:

“Under section 76...a grant of letters of administration may be revoked on three general grounds. The first is where the process of obtaining the grant was attended by problems. The first would be where the process was defective, either because some mandatory procedural step was omitted, or the persons applying for representation was not competent or suitable for appointment, or the deceased died testate having made a valid will and then a grant or letters of administration intestate was made instead of a grant of probate, or vice versa. It could also be that the process was marred by fraud and misrepresentation or concealment of matter, such as where some survivors are not disclosed or the Applicant lies that he is a survivor when he is not, among other reasons. The second general ground is where the grant was obtained procedurally, but the administrator, thereafter, got into problems with the exercise of administration, such as where he fails to apply for confirmation of grant within the time allowed, or he fails to proceed diligently with administration, or fails to render accounts as and when required. The third general ground is where the grant has become useless and inoperative following subsequent circumstances, such as where a sole administrator dies leaving behind no administrator to carry on the exercise, or where the sole administrator loses the soundness of his mind for whatever reason or even becomes physically infirm to an extent of being unable to carry out his duties as administrator, or the sole administrator is adjudged bankrupt and, therefore, becomes unqualified to hold any office of trust.”

21. The appellant in his application averred that the grant of letters of administration was obtained through the concealment of material facts. The appellant in his submissions has also alleged the existence of fraud. However, the respondent availed a certificate of official search in which the deceased is the registered proprietor of North Malakasi/South Wamono/421. There was no evidence of fraud on the part of the respondent or that he concealed any information regarding ownership as he availed the certificate of search which confirms that the deceased was the proprietor. There is no decree from the Environment and Land Court to show otherwise, and in this regard, the appellant failed to prove any ground enumerated by section 76 of the [Law of Succession Act](#). The trial magistrate also found that the application had not been filed within the timelines as provided by the [Probate and Administration](#)



Rules, however, even after considering the application of revocation of the grant on its merits, I find that the appellant did not adduce evidence in support of any grounds set out under section 76 of the *Law of Succession Act*. Therefore, the trial court was correct in dismissing the appellant's Notice of Motion.

22. In conclusion, I find that the appeal is without merit and the same is dismissed. There shall be no orders as to costs.

DATED, SIGNED, AND DELIVERED AT BUNGOMA ON THIS 1ST DAY OF AUGUST 2024.

R.E. OUGO

JUDGE

In the presence of:

Mr. Waswa h/b for Mr. Mukhooli -For the Appellant

Mr. Shikhu h/b Mr. Musudi -For the Respondent

Wilkister -C/A

