



REPUBLIC OF KENYA



**Kamau & 2 others v Kamau & another (Civil Appeal 50 of 2019)
[2024] KEHC 11916 (KLR) (23 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11916 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 50 OF 2019
TW OUYA, J
SEPTEMBER 23, 2024**

BETWEEN

EARNEST GICHERU KAMAU 1ST APPLICANT

ESTHER NJERI KAMAU 2ND APPLICANT

BEATRICE WANJIKU KIBE 3RD APPLICANT

AND

SAMUEL NDUNGU KAMAU 1ST RESPONDENT

GRACE WAIRIMU KAMAU 2ND RESPONDENT

(Being an appeal from the Judgement of the Senior Principal Magistrate, in the Principal Magistrate's Court at Githunguri the Honourable C. KUTWA (Mr.) delivered on the 21st day of March, 2019 in the Principal Magistrate Court at Githunguri Succession Cause No 44 of 2018)

JUDGMENT

Background

1. This Appeal emanates from the decision of Hon. Kutwa (SPM) delivered on 21st March, 2019 in Succession Cause No. 44- Githunguri. The Appellants had brought an Application premised under section 76 of the [Law of Succession Act](#) which the Court did not allow for not meeting the envisaged threshold. The Appellants, not being satisfied with the said decision have appealed to this court raising the following grounds:
 - i. That the learned trial magistrate erred in law and fact by dismissing the application for Revocation and/or annulment of Grant dated 29th August 2018.
 - ii. That the Learned Magistrate erred in law and fact by failing to consider that the Appellants have not been adequately provided for in the confirmation of Grant dated 27th August 2018.



- iii. That the trial Magistrate erred in law and fact by directing that the 2nd Respondent herein and Gladys Muthoni Kamau to hold L.R 36/41 Eastleigh (Galole Street) property in trust of other beneficiaries who are adults.
 - iv. That the Learned trial magistrate erred in law and fact by failing to consider that the Respondents never included some of the Deceased properties with an intention of defraud the other beneficiaries.
 - v. That the learned trial magistrate erred in law and fact by failing to consider that the Respondents forged the Appellants signatures of their consent while making of grant of Administration Intestate.
 - vi. That the learned trial magistrate erred in law and fact by proceeding to hear and determine when he was seized of pecuniary to hear the matter as the property is over Ksh. 20 million.
 - vii. That the learned trial magistrate erred in law and fact by failing to order the 1st Respondent to render accounts for the rental income he has been collecting for 18 years from R.L.N 36/111/1442 Eastleigh Nairobi Housing Finance Company Of Kenya Limited.
 - viii. That the learned trial magistrate erred in law and fact by failing to order the 1st Applicant to render accounts for the rental income he has been collecting from R.L.N 36/111/1442 Eastleigh Nairobi Housing Finance Company of Kenya Limited Shares.
 - ix. That the learned trial magistrate erred in law and in fact by selectively applying evidence, and relying on extraneous evidence not before court and hence arriving at an erroneous decision.
2. The Appellant prays for orders that this Appeal be allowed, the Ruling delivered on 21st March, 2019 in Succession Cause No. 44 of 2018 be set aside and judgement to be entered for the Appellant.
 3. The subject matter of this Appeal is the Estate of the late David Kamau Njoroge who died on 18th October 2004 where a grant was issued to Samuel Nganga and Grace Kamau (the Petitioner/ Respondents) who applied for confirmation of grant based on a consent signed by the applicant and other beneficiaries some of whom were present in court when the letters were confirmed on 27th August 2018.
 4. The Applicant filed summons for revocation of the grant on 29th August 2018 based on an affidavit averring that not all the beneficiaries were consulted, that some of the beneficiaries' signatures were forged while the family of their late brother Joseph Njoroge Kamau were left out. Further to the above he averred that there was an existing Succession Case in the High Court being 1775 of 2010 and that the trial court at Githunguri had no jurisdiction to handle the matter in view of the size of the estate. The Applicant posited that the estate was undervalued by leaving out key assets namely: -
 - a. Ruiru West Block 72231
 - b. L.R. No. 36/VI403 Umoja
 - c. Motor Vehicle registration No. KAG 801G
 - d. Shares in Kenya Airways
 - e. Monies in account No. 99011784 at Equity
 - f. Monies in account No. 0151011345631 at savings and Loan.



5. The Application was objected to by the Petitioners who contended that their late mother Beth Wanjiru Kamau was issued with a grant of letters of administration in respect of the deceased's estate and that part of the property was already distributed. That their late brother Joseph Njoroge Kamau had objected to the grant but later died and was cremated in the USA, his family was unknown and that the succession was closed in May 2018.
6. The Court dismissed the Application on the basis that the Applicant did not avail evidence to prove that the value of the estate was beyond kshs.10 million, that properties that were allegedly left out belonged to the deceased and that the process for application for the grant was shrouded in fraud.
7. Being that this is the court of first appeal, I have the obligation to re-evaluate the entire evidence as presented before the trial court. In the instant appeal, the applicant argues four main grounds that:
 - i. The court as constituted at Githunguri had no jurisdiction to hear and to determine the proceedings since the Estate was also subject to proceedings in succession cause No.1775 of 2010 at the High Court in Nairobi. That the Succession Cause at Githunguri was filed while the cause at the high court was still subsisting.
 - ii. The Trial court is also faulted for lack of pecuniary jurisdiction based on the value of the estate which the Applicant states that is valued above kshs. 10 million.
 - iii. That the succession cause as filed completely left out one of the beneficiaries to wit, the second born brother Joseph Njoroge Kamau (deceased in 2018). The court was not presented with evidence about him or that he had no successors. The Court ignored this information which was raised in the application of grant.
 - iv. That grant of letters of Administration were issued to the Respondents on 13th August, 2018 and confirmed on 27th August, 2018 in contravention of Cap160 requiring 6 months waiting period.
8. The Respondents on the other hand contend that:
 - i. The Appellants herein were adequately provided in the confirmed certificate of grant.
 - ii. That the distribution was done according to the availability of the estate and number of beneficiaries.
 - iii. The issue of alleged forgery of signatures was not raised before the trial court.
 - iv. That the grant of letters of administration included the assets that were in the name of the deceased
 - v. There was no proof that the Respondents forged the Appellant's signatures in the consent of making the grant.
 - vi. There was no proof that the estate value was more than 20 million
 - vii. There was no proof of fraud, false statements or concealment of facts.
9. The Respondents submit to the court not to exercise its discretion to set aside or vary the orders by the trial court as none of the grounds raised by the appellants meet the threshold for nullification of grant under section 76 of the *Succession Act*.
10. I have considered the pleadings, submissions and arguments from both parties and narrowed down to the following as the issues for determination:



- i. Whether the trial at Githunguri had jurisdiction to determine this matter.
 - ii. Whether all the beneficiaries were catered for in the letters of grant.
 - iii. Whether there was breach of law regarding the period between issuance and confirmation of grant.
 - iv. Whether the process was flawed or illegal on the basis of forgery of signatures.
 - v. Whether the application for revocation of grant falls within the threshold under section 76 of the Succession Act.
11. Jurisdiction is a fundamental issue of law that has to be settled before anything else. The Applicants have raised the ground that the court sitting at Githunguri had no jurisdiction to proceed with this matter since there existed a suit on the same subject matter at the High Court Milimani to wit; Succession Cause No. 1775 of 2010. I have cross-checked the record regarding this high court matter and established that it was filed in 2010 and closed on 29th May 2018. The proceedings regarding the Application for letters of administration in succession Cause no. 44 of 2018 were commenced on 13th August 2018. The grant was issued on 13th August and confirmation of the same was on 27th August 2018. The upshot of the above is that the subject proceedings Succession Cause No 44 of 2018 were commenced and concluded long after the closure of the high court matter, HC Succession Cause No. 1775 of 2010. At no time were there parallel proceedings on the same.
12. The other limb of argument as raised by the Applicants is that the trial court lacked pecuniary jurisdiction to handle this succession as the estate value was beyond kshs. 20 million. From the proceedings, the Applicants pointed out a list of properties that allegedly belonged to the deceased and were left out. These properties were however, not registered in the deceased names and there was no sufficient evidence to determine their value as most of them comprised of shares held in various companies. It was therefore not possible for the court to determine whether or not they were valued beyond kshs.10 million. Moreover, the estimated value declared at the petition for letters of administration was kshs. 1,000,000 which was within the principal magistrate's court jurisdiction.
13. The next ground is that not all the beneficiaries were catered for in that the family of their late brother was left out both in the supporting letter by the Chief and in the final list. The beneficiaries listed in the petition for letters of administration are seven namely:
- i. Grace Wairimu Kamau – Daughter
 - ii. Samuel Ndungu Kamau – Son
 - iii. Esther Njeri Kamau – Daughter
 - iv. Benest Gicheru Kamau – Son
 - v. Gladys Muthonu Gitau Kirika - Daughter (Married)
 - vi. Jane Ngonyo Kamau – Daughter (Married)
 - vii. Beatrice Wanjiku Kibe – Daughter (Married)
- Amongst those listed are the 1st, 2nd and 3rd Applicants who are also beneficiaries while the administrators are Samuel Ndungu Kamau and Grace Wairimu Kamau. Indeed, the name of the late Joseph Njoroge Kamau does not feature at all in this list. From high court record, SC No. 1775 of 2010, the Applicant was Beth Wanjiru Kamau(deceased/widow) while Joseph Njoroge (deceased) was listed as number two out of eight children of the deceased. It is not



clear from the record when the deceased's widow, Beth and Son, Joseph passed on because they are subsequently referred to in the proceedings as 'the late'. What is clear is that as at the time the letters of grant were confirmed, both were deceased. It is therefore not logical to argue that the late Joseph Njoroge was left out. Both parties confirm that he resided and died in the USA. The Applicants have not provided any evidence of his dependents or beneficiaries.

14. The Applicants raised the ground of illegality on the basis of alleged forgeries of signatures. However, this was not supported by evidence as required by the law as allegations of forgery must always be subjected to a technical test. As was held in the case of: *ZNN v MNN* (Nyahururu High Court) Succession Cause No. 25 of 2019 Where the court held:

“I associate myself with the statements of the court made *In the Estate of Francis Andabwa Nabwangu (Deceased)* [2021] eKLR that: -The way to deal with allegation of forgeries of signatures on a will is to have them referred to handwriting experts or document examiners for comparison of the alleged forged signatures with the known signatures of the deceased, as was said and done in *In Re JNM (Deceased)* [2005] eKLR (Koome J). See also *Elizabeth Kamene Ndolo v George Matata Ndolo* [1996] eKLR (Gicheru, Omolo and Tunoi JJA) and *In re Estate of the late Samson Kipketer Chemirmir (Deceased)* [2019] eKLR (Ndung'u J). The opinion of document examiners or handwriting experts is critical.

Accordingly, the Applicant did not bring forth any evidence from handwriting experts or documents examiners that the signature was indeed forged. Further, no samples of the deceased's known signatures were placed before the court for comparison. The Applicant failed to offer any concrete evidence to support her allegations of forgery. It is my view that mere allegations are not enough to compel the court to invalidate the Will. The standard of proof for forgery and fraud, being criminal offences, is, higher than what is expected in ordinary civil cases. (See *Elizabeth Kamene Ndolo v George Matata Ndolo* [1996] eKLR)”

I hold the same view as above that failure to adduce critical evidence renders the claim a mere allegation.

15. As to whether or not there was any breach of the law by the trial court in confirming letters of Administration before the expiry of six months, this court relies on section 71(3) of the *Succession Act* which provides:

- (3) The court may, on the application of the holder of a grant of representation, direct that such grant be confirmed before the expiration of six months from the date of the grant if it is satisfied —
- (a) that there is no dependant, as defined by section 29, of the deceased or that the only dependants are of full age and consent to the application;
 - (b) that it would be expedient in all circumstances of the case so to direct.
- (4) Notwithstanding the provisions of this section and sections 72 and 73, where an applicant files, at the same time as the petition, summons for the immediate issue of a confirmed grant of representation the court may, if it is satisfied that—
- (a) there is no dependant, as defined by section 29, of the deceased other than the petitioner; [Rev. 2017] Law of Succession CAP. 160 29
 - (b) no estate duty is payable in respect of the estate; and



- (c) it is just and equitable in all circumstances of the case, immediately issue a confirmed grant of representation.

I am therefore satisfied that the confirmation of letters of grant in the instant case was within the provisions of the law.

16. The applicants have moved the court to allow this appeal and to set aside the ruling in the succession cause delivered on 21st March 2019. The grounds for annulment of grant are clearly set out under Section 76 of the *Law of Succession Act*:

76. Revocation or annulment of grant 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.

17. The Applicants have failed to demonstrate any evidence of defective process, fraud or legal ground for the court to revoke or annul the grant of letters of administration. This court does not find any basis to vary and/or interfere with the trial court decision. The principle is well laid down in the decision in *Mbogo v Shah & Another* (1968) E A 93 as follows:

“I think it is well settled that this court will not interfere with the exercise of discretion by the inferior court unless it is satisfied that the decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should have taken into account and consideration and in doing so arrives at a wrong decision”.

18. Finding

- i. The trial court had both territorial and pecuniary jurisdiction to determine this matter.
- ii. There was no breach of the law or illegality to invalidate the succession process
- iii. There is no ground under section 76 of the *Law of Succession Act* to revoke the grant



- iv. All parties including the Applicants are catered for in the grant
19. Determination
- i. The ruling by the trial court delivered on 21st March 2019 is hereby upheld.
 - ii. This appeal is hereby dismissed
 - iii. Each party to bear their costs for the appeal

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 23RD DAY OF SEPTEMBER, 2024

ROA 14 days.

HON. T. W. Ouya

JUDGE

Miss Musyoka for the Appellant

Miss Gathiru for the respondents

Court Assistant Martin Korir

