Kinyanjui v Kinyanjui & another (Civil Appeal E201 of 2022)
[2024] KEHC 11217 (KLR) (23 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11217 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CIVIL APPEAL E201 OF 2022

CJ KENDAGOR, J

SEPTEMBER 23, 2024

BETWEEN

STEPHEN NDUNGU KINYANJUI ..... APPELLANT

AND

GODFREY NGIGE KINYANJUI ..... 1ST RESPONDENT

REUBEN MUTHAKA KINYANJUI ..... 2ND RESPONDENT

(Being an appeal from the Ruling delivered on 16th August, 2022 by Hon. C.N. Mugo, SRM in Limuru CM Succession Cause No. 49 of 2013)

JUDGMENT

1. The Deceased, Henry Kinyanjui Kibugi, died intestate on 15th May, 2012. The Appellant and the three Respondents are his children. In April 2013, the Respondents petitioned for the grant of letters of administration intestate. The grant was issued to the Respondents on 11th June, 2014 and was confirmed on 30th November, 2015. In 2020, the Appellant sought the revocation of the grant vide a Notice of Motion dated 9th July, 2020.

2. His reasons for the revocation were that the Grant was obtained fraudulently as he had not signed the form of consent of the mode of distribution, and his signature on the court documents was forged. He also claimed that he did not attend court during the confirmation. Lastly, he claimed that some properties of the Deceased had been deliberately left out of the list of assets of the Deceased, namely, Ruiru East/Juja 2/22452 and another for Gema Holdings in Rumuruti.

3. The Court delivered a ruling on 16th August 2022, which dismissed the Appellant's application in its entirety. It held that the Appellant did not offer evidence to support his fraud claims. It also held that the Appellant did not prove the existence of the properties he claimed had been left out.

4. The Appellant was dissatisfied with the ruling of the lower court and appealed to this court vide a Memorandum of Appeal dated 12th September, 2022, wherein he raised five grounds of appeal, namely;

    i. That the learned Magistrate erred in fact and in law in failing to appreciate the evidence and facts on record adduced by the Appellant.

    ii. That the Learned Magistrate erred in law and in fact in disregarding vital legal and factual issues while making her ruling.

    iii. That the Learned Magistrate erred in fact and in law by disregarding the evidence tendered by the Appellant.

    iv. That the Learned Magistrate erred in law and in fact in failing to consider and apply the law appropriately.

    v. That the Learned Magistrate erred in Law and in fact by failing to analyze Appellant's evidence and facts on record.

5. He asked this court to set aside the lower court's ruling. The appeal was disposed of by way of written submissions.

Appellant's Written Submissions

6. The Appellant submitted that the grant should be revoked because the Respondents forged his signature so that they could be issued with the grant. He supported his forgery claims by stating that the signature in the Consent Form purporting to be his was not signed by him. He also insisted that he did not attend the Court during the confirmation of the Grant. He argued that his oral testimony in court that his signature was forged was enough proof of forgery and that the lower court should not have disregarded his testimony. He claimed he had not signed the consent to amend the distribution of shares filed on 7th June, 2018 and that the signatures that appeared in the application for the applicant were forged.

7. On the second limb of his appeal, the Appellant argued that the grant should be revoked because the Respondents deliberately left some properties out of the list of assets. He argued that the lower court was wrong in holding that he had not proved the existence of the properties left out because he named them during his oral testimony in court. He relied on the case of *Beatrice Mbeere Njiru v Alexander Nyaga Njiru* [2022] eKLR.

Respondents' Written Submissions

8. The Respondents submitted that the lower court did not err in law by finding that the Appellant had not met the required standard of proof of fraud allegations. They argued that the evidence before the lower court and the record of proceedings showed that the Appellant signed the petition and the consent and that he had participated actively in the succession proceedings. On the Appellant's allegation that he did not attend court when the grant was confirmed, the Respondents argued that the allegation was misplaced because he was present during the rectification of the grant on the 28th February, 2017.

9. They submitted that the lower court did not err in law by finding that the Appellant had not proved the existence of the properties he claimed had been left out. They argued that the property Ruiru East/Juja 2/2245 could not be included in the list of assets because it does not form part of the deceased's estate. They submitted that the property was registered in the name of Grace Njoki Henry, the beneficiaries'

deceased mother. In addition, they submitted that the Appellant had not produced any documentation for the alleged property Gema Holding in Rumuruti.

10. Lastly, they argued that the appropriate remedy with regard to the properties left from the list of assets, if any, should have been rectification and not revocation. They relied on the case of Re-Estate of Thomas Mutua Mukumbi (deceased) 2014 eKLR, *Urmila W/o Mahendra Sha v Barclays Bank International Ltd. & Another* (1979) eKLR, and *Albert Imbunga Kisigwa v Recho Karai Kisigwa* (2016) eKLR.

The Duty of the Court

11. Being a first appeal, the duty of this court is to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. This principle was set out in *Selle and another v Associated Motor Boat Company Ltd and others* [1968] 1 EA 123 where the Court held:

> "...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 account of particular circumstances or probabilities materially to estimate the evidence ..."

12. The issue for determination herein is whether the Appellant's application at the lower court met the threshold for the revocation of a grant within the meaning of Section 76 of the *Law of Succession Act*.

13. For avoidance of doubt, Section 76 of the *Law of Succession Act* states as follows:

> "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."

14. Section 76 was expounded on by the court *In re Estate of Prisca Ong'ayo Nande (Deceased)* [2020] eKLR where it was stated that:-

> "Under Section 76, a court may revoke a grant so long as the grounds listed above are disclosed, either on its own motion or on the application of a party. 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."

Whether the Appellant proved fraud allegations against the Respondents to the required standard

15. The Appellant argued that the signature in the Consent Form purporting to be his was forged and that he never signed the Form of Consent of Mode of Distribution. On the other hand, the Respondents maintained that they did not forge his signature. During his examination-in-chief, the 2nd Respondent told the court;

> "I said Stephen (Appellant) signed documents for confirmation. He came with a cousin to my father being a witness. Stephen (Appellant) is lying."

His testimony was not controverted because he was not cross-examined. The lower court held that the Appellant did not offer evidence to support his fraud claims against the Respondents.

16. The law on the proof of fraud allegations is well-settled. In the case of *Christopher Ndaru Kagina -v- Esther Mbandi Kagina & Another* [2016] eKLR, the court stated that:

> " It is trite law that he who alleges fraud must prove fraud. Allegations of fraud must strictly be proved. Great care must be taken in pleading allegations of fraud or dishonesty. In particular, the pleader needs to be sure that there is sufficient evidence to justify the allegations.
>
> In the Case *Central Bank of Kenya LTD v Trust Bank Ltd & 4 Others* [26] the Court of Appeal in considering standard of proof required where fraud is alleged state that fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof is much heavier on the person alleging than in an ordinary Civil Case. The burden of proof lies on the applicant in establishing the fraud that he alleges."

17. The obligation of a litigant seeking to prove fraud was well articulated by the High Court in *Re The Estate of Thomas Mutua Mukumbu – (Deceased)* [2014] eKLR, where the court held as follows;

> " 9. The applicant alleges that the respondent forged her signatures in the affidavits which supported his application for confirmation. She also asserts that the respondent acted fraudulently. These are very serious allegations. Forgery and fraud amount to criminality. The applicant is literally accusing the respondent of acting criminally. The standard of proof required to establish forgery and fraud is very high. Even in civil cases it is higher than balance of probability. The Court of Appeal had occasion to address its mind on this in *Elizabeth Kamene Ndolo v George Matata Ndolo* (1995) LLR 390, albeit in a matter on forgery with respect to wills, when it stated that the charge of forgery or fraud is a serious one, and that the standard of proof required of the alleger is higher than that in ordinary civil cases, although not beyond reasonable doubt. The applicant in this case ought to have subjected her alleged signature in the two impugned affidavits to testing by a handwriting expert or a document examiner. It is not enough for her to deny the signature, she should have sought to demonstrate that the signatures in those two documents could not possibly be hers. I am not an expert in such matters, for I do not have a trained eye in that regard, and I cannot possibly pass judgment as to whether the signatures on the two affidavits were have genuine or not."

18. Similarly, *in Re Estate of Samuel Ngugi Mbugua (Deceased)* [2017] eKLR, the court held as follows;

> " 25. On the forgery claim, she relies on a document that she placed on record to demonstrate that the signature on the will differed from the deceased's usual signatures. The applicant did not claim to be a document examiner; neither can I claim to be one. Neither of us can speak authoritatively about the authenticity of the alleged signature. The most effective way of dealing with such matters is to subject the alleged signature to testing by a document or handwriting examiner or expert. The applicant did not subject the signature on the will, alleged to be that of the deceased, to such testing, there is no report of such an expert, and none was called. I cannot therefore make any determination at all on the said signature without such expert evidence."

19. Based on the above authorities, the Appellant ought to have subjected his alleged signature in the doubted form of consent to testing by a handwriting expert or document examiner. He did not. I

therefore agree with the lower court's finding that the Appellant did not offer evidence to support his claim of fraud against the Respondents.

Whether the Appellant proved the existence of the properties allegedly left out

20. The next issue for determination is whether the Appellant proved the existence of the properties he alleges were left out. The Appellant submitted that the Respondents deliberately left out some properties. On the other hand, the Respondents argued that the property Ruiru East/Juja 2/2245 could not be included in the list of assets because it did not form part of the deceased's assets. They also submitted that the Appellant had not produced any documentation for the alleged property Gema Holding in Rumuruti. The court held that the Appellant had failed to prove the existence of the properties left out.

21. It is a well-established rule of law that he who alleges must prove. The burden of proof is on the party alleging the existence of a fact he wants the Court to believe. Section 107 (1) and (2) of the *Evidence Act* provides as follows: -

> " 107
>
> (1) whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist"
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person"

22. In *Miller .v. Minister of Pensions* 1947 All E.R 372, Lord Denning put this standard in the following terms: -

> " That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in criminal cases. If the evidence is such that the tribunal can say: We think it more probable than not; the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case is which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

23. I have reexamined the evidence placed before the lower court to ascertain whether the Appellant proved the existence of the said properties. I take note of his testimony before the court on 7th June, 2022 when the matter came up for hearing. During his cross examination, he stated that,

> " There are some properties not included. I have not stated which they are."

24. He seemed to have cured this during re-examination where he stated as follows,

> " I said some properties were left out. One was Ruiru East/Juja 2/22452, there is another for Gema Holdings at Rimuruti."

Beyond that, the Appellant did not provide further details about these two properties. I, therefore, agree with the lower court on its observation that the Appellant did not annex any documents showing such properties exist.

25. I am therefore not persuaded by the Appellant's arguments that the Respondents obtained the grant fraudulently and that they deliberately omitted some assets. I find that pursuant to Section 76 of the *Law of Succession Act*, the Appellant has not satisfied the court or made a case to warrant the revocation of the grant. In this regard, the appeal must fail.

26. I hereby dismiss this appeal. Each party to meet their own costs.

DELIVERED, DATED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON 23RD SEPTEMBER, 2024.

C. KENDAGOR

JUDGE

In the presence of:-

Court Assistant: Hellen

Advocate for Appellant: Ms. Kaberia holding brief for Kimani Advocate

Advocate for Respondent: Ms. Kariuki