In Re Estate of Rahel Monthe Ndumbu (Deceased) (Probate & Administration E3 of 2020) [2024] KEHC 12273 (KLR) (9 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12273 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITUI

PROBATE & ADMINISTRATION E3 OF 2020

FROO OLEL, J

OCTOBER 9, 2024

IN THE MATTER OF THE ESTATE OF RAHEL MONTHE NDUMBU (DECEASED)

BETWEEN

MARY P. MBITHI NDUMBU ..... APPELLANT

AND

JEDIDAH NZASU NDUMBU ..... 1ST RESPONDENT

MATHEW BENJAMIN NDUMBU ..... 2ND RESPONDENT

THOMAS RENE NDUMBU ..... 3RD RESPONDENT

HENRY NGULI D ISIKA (SUING AS THE CHAIRMAN AND ON BEHALF OF MBAA NGO AOINI CLAN) ..... 4TH RESPONDENT

(Being an appeal from the Ruling and Order of the learned Chief Magistrate, S. Mbungi Esq sitting in Kitui CMCC Succession Cause number 152 of 2013 dated 9th October 2020 and delivered on 13th October 2020)

JUDGMENT

A. Introduction

1. This appeal arises from the ruling/order of learned chief Magistrate Hon S. Mbungi (CM) dated 9th October 2020 but delivered on 13th October 2020, in Kitui CMCC Succession Cause number 152 of 2013, where he upheld the respondent's summons application dated 16th September 20216, seeking to revoke and annul the confirmed grant issued to the Appellant herein and also awarded costs of the said application to the respondents herein.

2. In the said application the respondents had averred that the appellant was not entitled to inherit the property known as Mulango/Wikililye/x (hereinafter referred to as the suit property) as she had given

false information that the deceased (her mother-in-law) had gifted her the said property and also failed to disclose that the 1st to 3rd respondents herein also had beneficial interest therein. The 4th respondent, as chairman of the local clan -Mbaa Ngo Aoini clan, where all the parties belong, on behalf of the said clan, also strongly supported the 1st to 3rd respondents' claim to the suit property.

3. Further the respondents averred that they were entitled to benefit from the suit parcel as it had been bequeathed to the 2nd and 3rd respondent's grandfather, JMN by their great-grandmother, (whose estate is in contention herein), and their grandfather had also later, in turn, bequeathed it to their father, Dr Antony Muli Ndumbu-deceased. The Appellant opposed the said application by filing grounds of opposition dated 3rd October 2016, where she stated that the respondents herein were neither beneficiaries nor dependants of the deceased and hence were meddlers to the estate.

4. She further stated that the application under consideration was res judicata, as the applicants had earlier withdrawn their protest to confirmation of the grant and therefore should not have been allowed to turn back and seek revocation of the same. Finally, the Appellant also stated that the said application for revocation of grant was otherwise an abuse of the process of the court and therefore should be dismissed with costs.

5. The parties took direction and agreed to have the said summons determined by way of viva voce evidence. The 1st and 4th respondents did testify and called two other witnesses who testified on their behalf. The appellant also testified and called two witnesses to support her case. The trial Magistrate considered the pleadings filed, evidence adduced and parties' submissions and proceeded to uphold the respondent's contention that the grant was improperly obtained, and proceeded to cancel the same.

B. Evidence At trial

i. Objectors case

6. The Application was canvassed by way of viva voce evidence.OW1 Henry Nguli Isika adopted his Supporting affidavit sworn in support of the summons for revocation and annulment of grant and urged the court to adopt the same as his evidence in chief. He further stated that when this dispute arose, they had called a clan meeting to resolve the same, but the respondent had refused to attend the said meeting alleging that they were compromised, which allegation was not true.

7. Despite her absence, the larger Ndumbi family did attend the said clan meeting, and the uncontroverted evidence adduced, was that the suit parcel was given to JMN by his deceased mother in 1976, and by then, the appellant had not been married into the Ndumbu family. JMN, too had bequeathed this property to the 1st respondent's husband and he had a vision to put up a hospital thereon. After the said meeting, the clan decided that the suit parcel of land be given to Dr Arnold Ndumbu family as the rightful heir's thereof.

8. Upon cross-examination, the witness confirmed that Dr Arnold Ndumbu was a son to JMN, and a grandson to Rahel Monthe Ndumbu, the registered owner of the suit parcel of land. The said Rahel Monthe Ndumbu had bequeathed the suit parcel of land to her son JMN and on the evidence presented at the clan meeting held in 2016, it was further proved that the late JMN also subsequently bequeathed this parcel to his son, the 1st respondent's husband.

9. OW1 confirmed that the Appellant and/or her family members did not attend the clan meeting and he was not aware if by then this succession dispute was already in court. He also confirmed that the Appellant was married to the late JN as a second wife after he divorced RK and they were blessed with children.

10. OW2, Alexander Mwangangi Ndumbu stated that the deceased herein was his grandmother and she was blessed with seven (7) children, Pricilla Ngamba, Solomon Ndumbu, (his father), Abel Malombe Ndumbu, Anne Nzioki, Joel Mbithi Ndumbu, Shem Ndumbu and Emily Kavinya. His uncle Joel Mbithi Ndumbu was married to RK and were blessed with two children, DN and AN (deceased). Later around the year 1982, his uncle introduced the Appellant to the family and later married her around 1993. He stated that the deceased herein had inherited the suit land from his grandfather and in 1974 he had witnessed as she subdivided the said parcel of land amongst her sons. He participated in the said process and helped place beacons. Others present were his mother, and area chief, known as chief Nganda.

11. During the said process, his grandmother had subdivided the larger parcel of land into seven portions and gave each son his portion. His uncle JMN was given the suit parcel, but on the advice of the land officer, it was retained under his grandmother's name, as his uncle was out of the country by then and his grandmother would hold the said parcel of land in trust for him. In 1976, his Uncle came back and on one occasion they had a meeting with his grandmother, where she confirmed that the suit parcel belonged to his uncle and advised his uncle to also give it to his sons. It was that point that his uncle confided in them that he would leave the parcel of land to his son, Arnold Ndumbu, who would later build a hospital thereon when he completed his studies in Medicine.

12. Later when the 1st respondent's husband (Dr. Arnold Ndumbu) had completed his studies and came to visit, his father in the presence of OW2, showed him the suit parcel and bequeathed the same to him as by then he was his only Son. After three years Dr Arnold Ndumbu got unwell and passed on in 1994. The land lay fallow until 2012 when the Appellant called her daughter-in-law Abel Katuku to use the said parcel as it was bushy and thugs were hiding therein. Later in 2016, he attended a clan meeting where it was agreed that the suit parcel be given to the 2nd and 3rd respondents as they were entitled to the suit parcel of land by their lineage and as an entitlement of their father's share.

13. Upon cross-examination OW2 confirmed that the 1st respondent had earlier filed a protest which she withdrew. He reiterated that his grandmother had bequeathed the suit parcel to his uncle JMN and he subsequently had given this parcel of land to his Son Dr. Arnold Ndumbu, their clan had also met and arrived at a finding that it was the 1st to 3rd respondent who had a right to inherit this parcel of land. Furthermore, he was not sure if Joel JMN and his first wife RK shared their properties after the divorce. In re-examination, OW2 confirmed his earlier evidence that JMN was a pastor and a strait forward person and he had bequeathed the suit parcel to his son Dr Arnold Ndumbu in his presence.

14. OW3 Gideon Muthula testified and stated that the deceased herein was his grandmother, he was the son of Shem Ndumbu. The deceased was blessed with 8 children and in the 1970s, had subdivided their ancestral land and bequeathed the suit parcel of land to his Uncle JMN, who was abroad at the time, and when he came back in 1975, he was shown his parcel of land. His uncle did not use the said parcel of land and in 2012 his cousin Joyce Katuku started using it, but at the time he was testifying, it was the appellant who was using the said parcel of land. In cross-examination, he stated that he was born in 1965 and knew that the suit parcel was still registered under the name of his grandmother. According to him, the suit parcel ought to be shared between Joel's Ndumbu's wives Mary and RK

15. OW4, Jedidah Nzasu Ndumbu stated that she joined this family in April 1991 when she married Dr Arnold Muli Ndumbu. The deceased herein was the grandmother of her husband, Dr. Arnold Muli Ndumbu (Deceased), and the appellant herein was her stepmother-in-law. Her father-in-law was blessed with two children, D and her late husband. She was reliably told that the deceased herein shared the family land amongst her sons in 1976 and later after her wedding, when the deceased herein was unwell, they did visit her, with her husband who also took the opportunity to treat her. It was during

this visit that the deceased told them that she had given the suit parcel to her father-in-law and wanted her grandson to put up a hospital therein to treat her and her people.

16. Later about the year 1996, her father-in-law had also told her that he left the suit parcel for her family. Her father-in-law used the said parcel of land for some time and died in the year 2002, while her husband died in 2012. The land was left fallow and the area chief advised her to be using it as it was bushy and thieves had taken advantage of that to harass residents. Later the appellant did allow Katuku to clear the said parcel of land. OW4 also confirmed that her late father-in-law was married to Ruth Katunga and the appellant, but had divorced the former in 1983 or thereabouts. It was her evidence that the suit parcel of land should not form part of the estate in dispute as it had already been bequeathed to her husband and therefore, she and her children had the exclusive right to own and use the same. She confirmed that she had initially filed an objection but withdrew the same as it was stressing her children who had their university exams. She did not abandon her claim but opted to have the clan resolve the dispute.

17. Upon cross-examination, OW4 confirmed that she got married into the family in 1991 and by that time her father-in-law had divorced her mother-in-law, RK. She was the one who initiated these proceedings and made an error in describing herself as the granddaughter of the deceased herein. The appellant herein together with other family members did file an objection and Solomon Ndumbu and the Appellant herein were appointed as administrators. She did not have any written will, which had bequeathed the entire suit parcel to her husband, but her claim was based on several discussions held between her husband, his father, and his grandmother.

18. She further confirmed that she filed previous objection proceedings, challenging the appointment of the Appellant as an administrator, but midway she did instruct her advocate to withdraw the same as her children were traumatized by the whole process. They (her children) were not parties to the suit but would have been witnesses in the case if it had continued. After her protest was withdrawn, the grant was confirmed as proposed by the applicant but her input was not considered. She proposed that the suit parcel be shared between the dependants of her father-in-law, as they had a right to inherit the said parcel from the deceased.

19. OW4 also confirmed that she had not used the suit parcel and reaffirmed that after she withdrew her protest, she approached the clan to handle the dispute, but the appellant refused to participate in the said process. In re-examination, OW4 reiterated that the suit parcel was bequeathed to her father-in-law, who then passed it on to her husband, and though there was no written will to support this contention, that was the truth.

ii. Petitioner/Respondent's case

20. PW1 Mary Paula Mbithi Ndumbu, confirmed that the deceased herein was her mother-in-law, while the applicant was her daughter-in-law and original protestor in this cause. She stated that she would rely on the contents of her replying affidavit sworn on 5.12.2016 and filed in court on 6.12.2016 as her evidence in chief. She further testified that the 1st respondent had initially filed an objection and at some point, withdrew the same and grant was confirmed in her favour. The 4th respondent was their clan chairperson, but they were not related and the estate herein had not been the subject of clan discussion.

21. She confirmed that the suit parcel was bequeathed to her husband while he was out of the country and her other brothers-in-law too had got their share of the estate. To her knowledge, when her husband and RK divorced, they divided their property, and Ruth Katunge was given her share of property. She did not make any false statement or false representation to have the grant confirmed and there was therefore no basis to revoke the grant as sought. She therefore prayed that the objection be dismissed.

22. Upon cross-examination, she confirmed that her mother-in-law did distribute her estate to all her sons. The suit property was given to her husband and therefore she had a rightful claim over the same, though still under the deceased name. She did not want the 1st respondent to get a share of this parcel as it was rightfully given to her by her mother-in-law as her husband's rightful share. This position was justified as the family of Ruth Katunge had been given her share on divorce and the applicants should have claimed their share of what she was given. She was aware that the clan deliberated on this dispute, but she did not attend the said meeting and was not bound by its findings. In re-examination the witness reiterated her above evidence.

23. PW2 Emily Kavinya Wandia, stated that she was a daughter of the deceased and the appellant was her sister-in-law. She confirmed that the suit parcel belonged to the appellant as it was given to her husband by their mother and they had exclusive possession and use of the said parcel of land to the exclusion of all other family members. The 1st respondent was a great-granddaughter-in-law to the deceased and had no right to claim the suit parcel of land when immediate family members were alive. The same position applied to her children and clan chairman Hendry Nguli Isika. It was also her position that the 1st respondent's mother-in-law was given her property upon divorce and she should get her share therefrom.

24. Upon cross-examination, PW2 reiterated that all the deceased's children were in agreement that the suit property should remain in the name of the appellant and they had all signed a consent allowing her to inherit the said property. Her brother JN and RK (the 1st respondent mother-in-law) had many properties and when they divorced, RK was given her share of properties, which her children would inherit from. The suit parcel had also been used exclusively by her mother and the appellant, who therefore had a right to inherit the same.

25. PW3, Daniel Muema Muli stated that Priscilla Ngamba was the deceased's daughter and his mother-in-law. He was married to her daughter, Margaret Muthenya. He adopted his witness statement, wherein he deponed that he was very close to the deceased herein during her lifetime, and frequently visited her at Mulango shopping centre, where he also ran his shop for over 25 years. He had over that period seen the appellant exclusively use the suit parcel of land and therefore it would be right for her to inherit the same.

26. Upon cross-examination he confirmed that he knew the deceased as he had resided at Mulango for over 40 years, though had operated his shop at the said shopping centre for 25 years. The late JN, too was his friend and knew as a fact that the deceased herein had bequeathed the suit parcel to him in the 1980's. JN and his first wife were blessed with two sons and one daughter and he was not sure if he gave them any property. The appellant herein too was J's wife and therefore she had a rightful claim on the suit parcel of land.

27. In re-examination, PW3 clarified that when the appellant was married into the family, her mother-in-law gave her the suit parcel of land. The 4th respondent was a divisive and bad man who fuelled divisions in the family and had not even attended Joel's funeral. He was also not a member of the said family and had no authority to determine their issues.

iii. Ruling

28. The trial court did consider the evidence tendered and the parties' submissions and made a ruling to the effect that;

    a. That the Respondent had not demonstrated that the application was res judicata.

b. The 1st, 2nd, and 3rd Applicants have a stake in the estate of Rahel Monthe Ndumbu by virtue of the suit property belonging to Joel Mbithi Ndumbu (deceased) who was the father in-law and grandfather respectively of the 1st – 3rd Applicants. That his blood relation gives them locus standi.

c. The court also found that the chairman of Mbaa Ngo-Aoini clan had locus standi to participate in the proceedings before court.

d. That the proceedings were defective as the suit property belongs to JMN (deceased) and not Rahel Monthe Ndumbu. That the beneficiaries of the former estate were not notified of the proceedings neither was their consent sought as required by Rule 26 (1) (2) of the Probate and Administration rules.

e. The certificate of confirmed grant issued to the Respondent was revoked.

f. Costs would be paid from the estate of JMN (deceased) and if the estate had no money then a portion of Land Parcel Mulango/ Wililiye/x be sold to cater for the costs and this is to be factored in at the time of distribution of the estate.

C. The Appeal

29. The appellant being aggrieved by the said finding /ruling/order of the trial Magistrate did file her memorandum of Appeal dated 27th October 2020 and raised the following grounds of Appeal;

a. That the learned Chief Magistrate erred in law and misdirected himself on the facts when he distorted the facts of the case and ruled that the matter before him was in respect of the estate of JMN and not the Estate of Rahel Monthe Ndumbu which was the case and which fact has not been disputed by the parties to this case.

b. The learned Chief Magistrate erred in law and misdirected himself on the facts when he proceeded from an erroneous premise that the succession proceedings for the grant of letters of administration to the estate of Rehel Monthe Ndumbu (deceased) had been commenced by the administrator (the Appellant) while the truth was that the proceedings had been commenced by the 1st respondent and hence the appellant could not be faulted over the same.

c. The learned Chief Magistrate erred and misdirected himself in law and the facts when he failed to hold that the respondents having participated in the confirmation of grant and having withdrawn their protest thereof, revisiting the same issue by the application dated 19.09.2016 was bad in law for being Res judicata.

d. The learned Chief Magistrate erred and misdirected himself on the law and the facts when he applied erroneous doctrines and customs repugnant to written law and justice and therefore failed to hold that the respondents were neither dependants nor beneficiaries to the estate of the deceased Rahel Monthe Ndumbu and hence lacked the locus standi to initiate the impugned proceedings.

e. The learned Chief Magistrate erred and misdirected himself on the law and facts when he proceeded on the erroneous premise that the proceedings before him were for the revocation of grant, while in essence the proceedings and evidence tendered before him were in respect to the distribution of the estate of the deceased Rahel Mothe Ndumbu.

f. The learned Chief Magistrate erred and misdirected himself on the law and facts when he awarded the respondents costs on the matter and further erred by directing that part of the

estate be sold to settle the costs without considering that such order was grossly unmerited since the initial letters of administration in the cause were commenced by the 1st respondent.

30. The appellant therefore urged this court to allow this appeal, set aside the ruling/order of the trial court, and substitute it with an order dismissing the respondent's application dated 19th September 20216.

31. The Appeal was canvassed by way of written submissions.

D. Parties Submissions

i. Appellant's Submissions

32. The Appellant submitted that the suit property had been preserved for her husband, the late JMN who predeceased his mother Rahel Monthe Ndumbu, and evidence led had proved that it was the Appellant in sole occupation of the said property. The Trial Court therefore erred in proceeding on the wrong premises as if the matter before him was in respect to the estate of JMN.

33. Secondly, it was submitted that the Petition before the trial was filed by the 1st Respondent, the appellant joined the said proceedings as an objector and eventually was appointed as an administrator by consent of all the parties. The trial court had thus erred in finding that the Appellant had initiated the proceedings and obtained the grant fraudulently by making false and untrue allegations of fact / concealment of material facts relevant to the case yet it was the 1st Respondent who was to be blamed for the manner in which the petition was structured.

34. Thirdly, it was submitted that neither of the Respondents were dependents of the deceased and the trial court had erred in relying on Kamba Customary law to so find, without proof of existence of such custom contrary to the provisions of Section 29 of the *Law of Succession Act*. The appellant also faulted the respondents as to how they had structured their application for revocation of grant and only led evidence to suggest that the estate should have been shared between the appellant and the 1st – 3rd Respondent or her late mother-in-law. It was also to be noted that the 1st respondent had earlier withdrawn the protest to confirmation of grant and the application as filed had to fail as there was no evidence to support any of the grounds for revocation of grant as advanced.

35. Lastly, the appellant did submit that the trial court wrongly ordered that the respondents be paid costs from the estate of JMN, which was not the estate before the trial court for determination. Further, it was to be noted that in Kitui High Court Probate and Administration cause No 1 of 2016, Estate of JMN it was held that the Appellant and her children were the rightful heirs of the estate and not the 1st to 3rd Respondents.

36. The Appellant thus urged this court to find merit in this Appeal and dismiss the objection filed with costs to the Appellant.

ii. Respondents Submissions

37. The Respondents filed submissions on 15.02.2024 in opposition to this Appeal and did contend that all the witnesses confirmed under oath that the suit property belonged to the estate of JMN and not Rahel Monthe Ndumbu. The Trial Court was therefore correct to rule that the proceedings before it were defective as they related to an estate of a person who was not the owner of the property in dispute. It then did not matter, who petitioned for the said letters of administration as the court would still proceed to revoke the same.

38. The respondents further, submitted that the protest proceedings earlier filed challenged the appointment of the appellant as an administrator of the estate, and were different proceedings from the

application for revocation of grant under consideration. The said protest had been withdrawn before it was heard and determined and the subsequent application under consideration for revocation of grant could not be considered to be Res judicata. Reliance was placed in the matter of the estate of L.A.K (deceased) [2014] e KLR.

39. Thirdly, it was submitted that the 2nd and 3rd respondents were connected to Rahel Monthe Ndumbu and JMN by blood and the trial court had made the correct decision in holding that they were beneficiaries of the estate by blood connection and had locus premised on Section 40 of the *Law of Succession Act* to also get their share of the estate. Lastly, it was submitted that the suit property belonged to JMN (deceased) and the trial court finding in revoking the grant made correct decision as the appellant's action to exclude the Applicants from the estate property was fraudulent. Reliance was placed on the Estate of M'Kailiba M'itaru alias Kalib Itaru (deceased) [2017] Eklr and Re estate of Florence Mukami Kinyua (deceased) [2018] Eklr.

40. The respondents also did contend that the award of costs was just and fair and should not be interfered with.

ii. Determination

41. A first appeal is a valuable right of the parties and unless restricted by law, the whole case therein is open for rehearing both on the question of fact and law. The judgment of the appellate court must therefore reflect its conscious application of mind and record the findings supported by reasons, on all issues arising along with the contentions put forth and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the appellate court had discharged the duty expected of it. See Santosh Hazari Vs Purushottam Tiwari (Deceased) by L.Rs (2001) 3 SCC 179.

42. A first appellate court is also the final court of fact and litigants are entitled to full fair independent consideration of the evidence. The parties have a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of section 78 of the *Civil Procedure Act* a court of first appeal can appreciate the entire evidence and come to a different conclusion. See Kurian Chacko Vs Varkey Ouseph AIR 1969 Keral 316.

43. I have considered this appeal, submissions, and the impugned ruling. I have also considered the decisions relied on and perused the trial court's record. This court and note that the following issues arise for determination;

    a. Whether the respondents herein are beneficiaries of this estate, and specifically if they are entitled to benefit from a share of the suit property; L.R. Number Mulango/Wikilye/x .

    b. Whether the respondents did lay valid and proper grounds upon which the grant issued herein to the appellant should be revoked.

    c. Whether the trial Magistrate was right in directing that the costs of the primary application be borne by the Estate of the late JMN (deceased) or that in the alternative a share of the suit property be sold to meet the said expenses at the time of distribution of the said estate.

    d. Who should bear the costs of this Appeal?

i. Whether the respondents herein are beneficiaries to this estate, and specifically if they are entitled to benefit from a share of the suit property; L.R. Number Mulango/Wikilye/x.

44. From the evidence adduced, it is common ground that the estate herein concerns Rahel Monthe Ndumbu (deceased), who was married to the late Gideon Ndumbu Mwenza (also deceased) and were blessed with eight (8) children). JMN (deceased) was their 5th born child.

45. The said JMN got married to one RK and the union was blessed with two children DM and AMN. At some point in the early 1980's, the said JMN divorced RK and married the Appellant herein Mary P Mbithi Ndumbu. The said union too was blessed with three children Olivia Nduka, Mutuku Joel and Gideon Joel. Dr Arnold Muli Ndumbu, married the 4th respondent herein Jedida Nzasu Ndumbu, and were blessed with two children Mathew Benjamin Ndumbu and Thomas Rene Ndumbu, the 2nd and 3rd respondent herein. The 1st to 3rd respondents are therefore the great-granddaughter-in-law and great-grandchildren of Rahel Monthe Ndumbu (deceased).

46. As regards the suit property herein, all the witnesses who testified for both parties, categorically confirmed that L.R. Number Mulango/Wikilye/x is registered under the name of the deceased herein, but around the year 1975 or thereabouts, while bequeathing her Son's share of the family land, the deceased herein Rahel Monthe Ndumbu, did bequeath this parcel of land to JMN, but the same was not register under Joel Mbitih Ndumbu's name as he was out of the country at the material time. The suit property was thus held in trust for JMN and by extension for the benefit of his family. Logically it follows that his wife the appellant, Son from the first Marriage Dr Arnold Muli Ndumbu, and his family (the 1st to 3rd respondents) are direct beneficiaries of this property unless proven otherwise.

47. The Appellant faulted the trial Magistrate's finding in this regard and urged the court to find that the estate in dispute was not that of JMN but that of his mother Rahel Mbithi Ndumbu and the respondents were neither dependants nor beneficiaries to her estate. This proposition on account of the evidence adduced is far-fetched and is not supported by clear provisions of Section 41 and 42 of the *law of Succession Act*, which specifically provided that;

    Section 41 of the *law of Succession Act* provides that;

    Where reference is made in this Act to the " net intestate estate" or the residue thereof, devolving upon a child or children, the property comprised therein shall be held in trust, in equal shares in the case of more than one child, for all or any of the children of the intestate who attains that age of eighteen years or who, being female, marry under that age, and for all or any of the issue of any child of the intestate who predeceases him and who attain the age or so marry, in which case the issue shall take through degrees, in equal shares, the share which their parent would have taken had he not predeceased the intestate.

48. Section 42 of the *law of Succession Act* further provides that where;

    a. An Intestate has, during his lifetime or by will, paid given or settled any property to or for the benefit of a child, grandchild or house; or

    b. Property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act,

    That property shall be taken into account in determining the share of the net intestate finally accruing to the child, grandchild, or house.

49. Secondly, the appellant also urged the court to find that she had been the one in sole occupation of the suit property and had utilized it all along. It was also her contention that the 1st to 3rd respondents

should not get a share therein as during/after their grandfather JMN had divorced their grandmother/ mother-in-law Ruth Katunga, and she had been given her share of property which the 1st to 3rd respondents should benefit from. This proposition too cannot hold as the appellant simply alleged that Ruth Katunga was given some property but never proved that same by cogent evidence.

50. Further, the primary factor/obligation, the court considers for testamentary succession and administration of the estate of the deceased, is the determination as to who are the rightful heirs/ dependants/beneficiaries of the said estate after which the question of distribution of the same kicks in. It is at this point, where questions related to the occupation and usage of the property can be considered amongst other evidence and a determination made on who are the rightful beneficiaries and what are their respective shares. For purposes of determining the objection as filed, the question of occupation then became a moot point.

ii. Whether the respondents did lay valid and proper grounds upon which the grant issued herein to the appellant should be revoked.

51. Section 76 of the *Law of Succession Act* gives the court the powers to revoke a grant provided the conditions stipulated therein have been met. It states that:-

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 has ordered or allowed; 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

iv. The grant has become useless and inoperative through subsequent circumstances.

52. The circumstances in which a grant can be revoked were discussed in the case of In the Matter of the Estate of L.A.K. (Deceased) [2014] eKLR :-

> " Revocation of grants is governed by Section 76 of the *Law of Succession Act*. The relevant portions of Section 76 are paragraphs (a), (b) and (c) since the issues raised relate to the process of the making of a grant. A grant may be revoked where the proceedings leading up to its making were defective, or were attended by fraud and concealment of important matter, or was obtained by an untrue allegation of a fact essential to the point."

53. The court also in the case of Re; Estate of Prisca Ong'ayo Nande (Deceased) [2020] eKLR 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."

54. That section provides that a grant of representation may at any time be revoked or annulled as long as the court is satisfied that the facts contemplated under the said section are proved. It is therefore clear that there is no limitation in so far as matters revocation or annulment of grant are concerned.However, it is not in every situation where transgressions are alleged that the grant must be revoked.

55. The appellant's contention that the respondents did not have locus to claim a portion of the deceased estate, does not lie, as the evidence adduced did prove that the 1st to 3rd respondents were the great-grandchildren and great-granddaughter-in-law to the deceased and their grandfather JMN was bequeathed the suit property. They are direct beneficiaries of this estate and have locus to pursue this cause. In Re Estate of John Mutio Mutua (Deceased) [2021] eKLR the court stated as follows, which I agree with;

> " In succession causes, persons who would be outright interested parties are beneficiaries, spouses, children, creditors, and any other person who has a legal claim to an estate."

56. On whether proper and valid reasons had been laid out the basis upon which the grant ought to be revoked, I do find that it was not proved that the proceedings under consideration, were obtained fraudulently by making a false statement, but it is obvious that the appellant did err in not including the 1st to 3rd respondents as beneficiaries to the said estate and her excuse that the 1st respondent had withdrawn her earlier objection dated 29th September 2015 did not give her a carte blanc -cheque to exclude her and her children from the final distribution of this estate. It should be noted that the objection earlier withdrawn was against the appellant being appointed as administrator of the estate and did not concern distribution thereof. Its withdrawal did not signify that the 1st respondent and or her children did not have a right to resubmit the same especially where they had a clear and established stake in the said estate.

57. The 1st respondent's interest in the said estate even after withdrawal of the first objection is seen by her effort to have the clan resolve this dispute and the clan's deliberations and findings were presented in court. Given that the Appellant did not heed the ADR mechanism followed, she opted to refile her objection and was well within her rights to do so.

58. Further Section 71(2) of the *law of Succession Act* specifically provides that

> " in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmation is confirmed the grant shall specify all such persons and their respective shares."

59. This proviso is to be read together with Rule 26(1) and (2) of the Probate and Administration Rules, which further provide that;

> " i. Letters of Administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.
>
> ii. An applicant for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39 by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require."

60. The appellant did file for confirmation of the grant on 9th July 2015, declaring herself as the sole beneficiary of this estate, and the same was consented to by only Shem Munyalo Ndumbu and Emily Kavinya Mwandia. The deceased had eight (8) children and even though some may have died at the time of confirmation of grant, the other children of the deceased and/or their beneficiaries did not give the appellant consent, which is a fatal error and indeed rendered the issuance of the grant to be rendered un-procedural. The trial court in this respect therefore cannot be faulted for his finding in favour of the 1st to 3rd respondent herein.

61. This position was adopted in the case of Albert Imbuga Kisigwa vs. Recho Kavai Kisigwa [2016] eKLR Succession Cause No.158 of 2000, Where Mwita J. held that;-

> " Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not a 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 the interests of all beneficiaries entitled to the deceased's estate and ensure that the action taken will be for the interest of justice."

62. It was also important for the trial court to consider that there should be an end to litigation and not leave the estate without an administrator especially when the evidence pointed to the fact that both parties were entitled to the suit property. The trial court therefore ought to have used its wide discretion "to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court" based on Section 47 of the succession Act, Cap 160, and Rule 73 of the probate and Administration Rules.

63. The most expedient orders would have been to appoint both the appellant and the 1st to 3rd respondents as joint administrators of the estate herein and also allow them to share in the suit property equally.

(iii) Whether the trial Magistrate was right in directing that the costs of the primary application be borne by the Estate of the late JMN (deceased) or that in the alternative a share of the suit property be sold to meet the said expenses at the time of distribution of the said estate.

64. The trial court did order that the costs of the objection application be assessed and the same be paid from the state of the late JMN (deceased). Further, if the said estate had no money, then a portion of the suit property L.R Number Mulango/Wikiliye/x be sold to cater for the said costs. This finding was made in error and beyond the scope of the matters in question. The said estate was not a party to the suit and could not be directed to settle costs incurred. The parties herein are also related and share a common lineage. It would be in the best interest of all parties to reside harmoniously despite their deep-seated differences.

iii. Disposition

65. The upshot and upon consideration of all the matters raised herein I do find that the appropriate orders to award herein are that this appeal lacks merits and is dismissed save that based on Section 47 of the succession Act, Cap 160, and Rule 73 of the probate and Administration Rules the ruling of the trial court is amended as follows;

    i. The letters of administration intestate dated 20th March 2014 and the certificate of confirmation of grant herein dated 20th August 2016, both issued to the Appellant herein Mary P Mbithi Ndumbu are hereby cancelled and fresh letter of administration intestate and certificate of confirmation of grant will be issued jointly to Mary P Mbithi Ndumbu And Jedidah Nzasu Ndumbu, Mathew Benjamin Ndumbu & Thomas Rene Ndumbu.

    ii. The Appellant and the 1st to 3rd Respondent to share property known as L.R. No L.R Number Mulango/Wikiliye/x equally. (½ share to the Appellant and ½ share to the 1st to 3rd Respondents.)

    iii. Each party will bear their own costs of this Appeal and of the proceedings before the trial court.

66. It is so Ordered.

JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 9TH DAY OF OCTOBER 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Team this 9th day of October 2024.

In the presence of: -

Ms Kiama for Appellant

No Appearance for Respondent

Susan Court Assistant