



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Njogu v Njogu (Family Appeal E009 of 2023)
[2024] KEHC 12918 (KLR) (16 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12918 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
FAMILY APPEAL E009 OF 2023
DKN MAGARE, J
OCTOBER 16, 2024**

IN THE MATTER OF THE ESTATE OF WILLIAM NJOGU MAGURU (DECEASED)

BETWEEN

JOSEPH GIKONYO NJOGU APPELLANT

AND

MARGARET WAMBUI NJOGU RESPONDENT

JUDGMENT

1. This appeal arises from the Ruling of Hon. V.S. Kosgei delivered on 20/6/2023 in Karatina PM Succession Cause No. 258 of 2016.
2. The Appellant materially set out the following grounds in his Memorandum of Appeal dated 25/6/2023:-
 - a. The learned magistrate erred in law and fact in finding no breach of the provisions of Section 76 of the *Law of Succession Act*.
 - b. The learned magistrate erred in law and fact in finding that the Grant be confirmed as testate when the cause was prosecuted as intestate.
 - c. The learned magistrate erred in law and fact in finding that the Protestors had abandoned their protest.

Pleadings

3. The Respondent petitioned for a grant of letters of administration which was issued on 19/7/2017. The Respondent's case was that she was the wife of the deceased. The grant was confirmed on 20/5/2021.



4. Subsequently, the Appellant applied for the revocation of the Grant vide the application dated 12/8/2021. The application was supported by the affidavit of the Appellant as follows:
 - a. The beneficiaries of the estate of the deceased were misrepresented as 12 when they ought to have been 22.
 - b. The Respondent had even reduced the number of beneficiaries to 3 without justification.
 - c. The Respondent was only entitled to a life interest.
 - d. No effort had been made to substitute deceased beneficiaries.
 - e. As per the Protest filed on 20/3/2018, the deceased had 3 wives and distribution should have been in accordance with Section 40 of the *Law of Succession Act* based on the 3 houses: Mary Muthoni, Eunice Wangu and Margaret Wambui.
5. In response to the application for revocation of grant, the Respondent filed a replying affidavit dated 1/9/2021 in which she deponed as follows:
 - a. The deceased was survived by 3 widows and children.
 - b. The import of the deceased's will was that upon his demise, his properties would be shared equally among his 3 wives.
 - c. The Appellant cited the members of the two other widows who refused and so she took up the role of sole administrator.
 - d. The confirmation of the grant dated 16/6/2021 was issued strictly pursuant to the oral will of the deceased.
 - e. The oral will was witnessed by Washington Muthingu Waiguru, Nduro Gachemi and Nguniro Kanya.
 - f. The effect of the will was that Magutu/Ragati/236 and Narumoru/Block 1/244 would be shared equally among the 3 houses represented by Margaret Wambui Njogu, Christopher Ndekere Njogu and Michael Wachira Njogu respectively.
6. Washington Muthungu Waiguru also swore an affidavit dated 12/8/2021 in support of the existence and the content of the oral will. The parties took directions for the Summons to proceed by way of submissions.

Submissions

7. In their submissions dated 9/5/2024, the Appellant submitted that the lower court erred in failing to find that the Appellant had proved conditions for setting aside a grant under Section 76(a), (b) and (c) of the *Law of Succession Act*. It was submitted that the court declined to recognize the oral will as it did not exist in law.
8. The Respondent filed submissions dated 5/6/2024 and submitted that the lower court correctly found no reason under section 76 of the *Law of Succession Act* to justify revoking the grant. They cited *Jamleck Maina Njoroge vs Mary Wanjiru Mwangi (2015) eKLR*. The Respondent maintained that the deceased had shared the property among his wives and what was remaining was simply registration. These were said to be facts that the court below used.



Analysis

9. The duty of the first appellate court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of *Selle and another Vs Associated Motor Board Company and Others* [1968]EA 123, where the court in their usual gusto, held as follows:-

“.. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”

10. In the case of *Mbogo and Another vs. Shah* [1968] EA 93 the Court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

11. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

12. In the case of *Peters vs Sunday Post Limited* [1958] EA 424, the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

13. The issue before me for determination is whether there is any lawful ground on which to revoke or annul the grant of letters of administration issued to the Administrator herein which the learned magistrate failed to take into consideration.

14. The grounds for revocation or annulment of grant of Letters of Administration are set out in Section 76 of the Law of Succession 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 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.
15. The power to seek revocation of a grant, and for this court to revoke a grant, is stipulated in the first part of section 76 of the [Law of Succession Act](#) as doth:
- 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.
16. I need to dispel issues related to irregularities in the initial filings. There is no appeal in respect of the same. What is seen as an anomaly is really nothing but mere infractions that do not go to the root of the dispute. The court was correct in respect of the Appellant, having been part of the objectors who had an opportunity to object and did not do so. In short his goose was cooked, served and eaten.
17. The court was of the view that failing to like the mode of distribution is not a ground for revocation. This is indeed correct as a party aggrieved by distribution must seek recourse to the higher court. Unfortunately, the matter is not here on the mode of distribution but a totally different issue. This is not the place or time to relook at distribution. There was no concealment of facts.
18. The ground cited by the Applicant for seeking revocation of the grant appears to be that the proceedings leading to the grant were defective and that confirmation of the grant was obtained fraudulently through concealment of material facts, namely that other beneficiaries existed who were not included in the confirmation of the grant and so were disinherited.
19. The Court considered the summons for revocation of grant and in its ruling dated 20/6/2023, the lower court established that the Appellant had not proved any of the conditions in Section 76 of the [Law of Succession Act](#).
20. This court noted that as per the certificate of confirmed grant dated 16/6/2021 the estate was disposed as follows:
- a. LR No. Magutu/Ragati/236 - Margaret Wambui Njogu, Christopher Ndejere Njogu and Michael Wachira Njogu to share equally.
 - b. LR No. Naromoru/ Block 1/ Ragati/244 - Margaret Wambui Njogu, Christopher Ndekere Njogu and Michael Wachira Njogu to share equally.
21. The Appellant had the burden to prove that beneficiaries or additional properties were left out. It was not enough to state without proving. The Respondent's case was that the spirit of the oral will and the intention of the deceased was that the 3 houses were to share the 3 properties equally. There is no dispute that Christopher Ndekere Njogu and Michael Wachira Njogu represented their respective houses and the Respondent also represented a house making up the 3 houses.
22. It must all be remembered that the matter started as a citation to accept or refuse letters, and the Appellant is one of the cited persons. Their failure to do anything with the citation, means that they



were informed and were not interested with filing for letters of administration. Parties must never think that civil or succession processes cannot proceed without them. No party has a veto power over others.

23. The formula suggested by the Appellants was for each and every beneficiary benefiting with their respective shares. However, the Appellant did not demonstrate how the alleged beneficiaries who had been disinherited could not get a share from their houses. I find no basis to interfere with the finding of the trial magistrate. The Appellant alleged in their protest that another property, Naromoru Block 1/551 had been left out of the estate propounded in the confirmed grant but led no evidence to confirm the existence of such property nor was there any material from which the court would infer the alleged proceeds of the accident case from Kerugoya Court.

24. In the case of *Jamleck Maina Njoroge v Mary Wanjiru Mwangi* (2015) eKLR the court discussed circumstances when a grant can be revoked. The court observed:

“ 11. The circumstances that can lead to the revocation of grant have been set out in Section 76 Law of Succession. For a grant to be revoked either on the Application of an interested party or on the court’s own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.”

25. The Appellant thus did not place material before the court constituting sufficient evidence that the Administrator concealed material facts as to the ownership of the subject property. It was not enough for the Appellant to suggest that the proceedings ought to have been intestate and not testate in the absence of a specific challenge to the oral will. In any event, the grant as confirmed advanced the spirit of sharing the property equally among the 3 houses and this court finds no injustice as there is no pleading or evidence that in so doing any house was disadvantaged.

26. Therefore, the Appellant did not prove any of the grounds upon which the grant is revoked. In the case of *Albert Imbuga Kisigwa v Recho Kawai Kisigwa*, Succession Cause No.158 of 2000, the Court stated as follows:

“(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 wrong doing 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.”

27. The legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. In *Evans Nyakwana –vs- Cleophas Bwana Ongaro* [2015] eKLR it was held that:

“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as



Section 108 of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side.”

28. I do not find any merit in the application for revocation. The Applicant did not place before the court material to enable me exercise discretion in his favour. To the contrary, I find the Respondent was able to show that there was no one left out of the estate. The appeal is thus not merited and as such it is dismissed.
29. I do not find it useful to grant any party costs, being a family matter. For the circumstances obtaining, each party shall bear their own costs.

Determination

30. In the upshot, I make the following orders:-
- a. The appeal is dismissed.
 - b. Each party shall bear their own costs.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 16TH DAY OF OCTOBER, 2024.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Mindo for the Appellant

Mr. Kungu for the Respondent

Court Assistant – Jedidah

