



**Gichovi & another v Muthee & another (Civil Appeal 73 of 2019)
[2023] KEHC 2017 (KLR) (8 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2017 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL 73 OF 2019
LM NJUGUNA, J
MARCH 8, 2023**

BETWEEN

TARASIA WAMBUI O. GICHOVI 1ST APPELLANT

MIZIZI HOLDINGS LIMITED 2ND APPELLANT

AND

LUCY MUTHONI MUTHEE 1ST RESPONDENT

SALESIO NJERU NJUE 2ND RESPONDENT

(Originating from the ruling of Hon MN Gicheru, Chief Magistrate at Chief Magistrates' Court at Embu delivered on October 28, 2019 in Succession Cause No 226 of 2017)

JUDGMENT

1. The appeal herein arose from the ruling of Hon MN Gicheru, Chief Magistrate at Chief Magistrates' Court at Embu delivered on October 28, 2019 in Succession Cause No 226 of 2017.
2. Being dissatisfied with the said ruling, the appellants filed the appeal herein in which they listed seven grounds of appeal in the memorandum of appeal dated November 27, 2019.
3. The appeal proceeded by way of written submissions as had been directed by this court and only the appellant complied with the directions.
4. In reference to ground 1 the appellant submitted that the learned Chief Magistrate erred in law in usurping jurisdiction over a matter which legally was beyond him. That sections 47 and 48 of the *LSA*, did not confer jurisdiction to the court as at October 28, 2019. As such, the learned Chief Magistrate addressed himself to matters that were beyond his jurisdiction per the provisions of the law.
5. On 2,4 and 5th grounds, it was submitted that the learned Chief Magistrate failed to consider section 76 of the *LSA* and further failed to refer to rules 44(1) of the *P&A Rules* and order 5 rule 17 of the *Civil*



Procedure rules. That given that the learned Chief Magistrate failed to refer to the contents of the grant allegedly the subject of his judgment, or the parties that were before his colleagues at the Runyenjes Law courts, the same translated to the fact that the learned Chief Magistrate failed to appreciate his subject, the law on the subject, issues, the burden of proof and equally the points of determination. Reliance thus was placed on the case of Re Estate of Mwaura Gituku [2016] eKLR.

6. On ground 3 whether the learned Chief Magistrate misdirected himself in holding that the appellant inherited the suit land from a fraudster Njue Munge, it was submitted that the finding of the court was convoluted and absurd in that, the appellant inherited the suitland from her very clean brother. Further that, the finding that eleven grounds of fraud were proved was not supported by the evidence adduced before the learned Chief Magistrate and therefore, the court's finding was below the threshold as prescribed by the law.
7. The 2nd respondent submitted that the learned counsel did not appreciate that the law was amended on revocation of grants by the Magistrates Courts Act in 2015 to widen the jurisdiction of the magistrates to revoke grants. Reliance was placed on the case of In the matter of the Estate of Charles Boi (Deceased) Kakamega HC Misc Succession Cause No 10 of 2018. It was submitted that the matter was properly before the court and as such, the same ground should fail.
8. On grounds 2, 4 and 5, it was submitted that the case for revocation was heard fully and both parties tendered their oral and documentary evidence and further, both parties were represented by advocates and therefore, the determination by the court was well founded on the facts and the law. That it was not true the averment by the appellant that the trial court did not call for Runyenjes court file as the High Court had previously called for the same and it formed part of the court file that was referred to the Chief Magistrate for hearing and determination. Additionally, it was submitted that the case before the Chief Magistrate proceeded by way of viva voce evidence and parties were subjected to thorough cross examination by their advocates and therefore the court did not rely on hearsay. Further that, the objection before Runyenjes court having been withdrawn without the consent of the respondents, the matter proceeded ex parte and that is why the grant was confirmed in favour of complete strangers to the proceedings, Mizizi Holdings.
9. On ground 3, it was the respondent's submission that the Chief Magistrate was right in his finding that Njue Munge was a fraudster for the reasons inter alia that Njue Munge corrected his name and thereafter was issued with a title deed for the Land Parcel No Gaturi/Weru/1XX measuring 15 acres; was charged but later acquitted on appeal for the reason that the matter was more of a civil than criminal nature. That it was clear that Njue Munge and Njue Njamunge were different persons in that they died at different times as was shown in their death certificates; further, they had different identity cards and therefore all these facts buttressed the fact that Njue Munge was a fraudster who had illegally acquired the respondents' land. That the appellants' allegation that the Chief Magistrate did not refer to the criminal case, did not give the High Court Criminal Case Number, the date of judgment were not issues in dispute during the revocation of grant case. It was contended that there was concealment of facts for the reason that the appellant during the hearing at Runyenjes Court did not inform the court the subject of the proceedings was not her relative, neither husband, father or brother.
10. I have considered and analyzed the pleadings and the submissions in this appeal and it is my view that the main issue for determination is whether the appeal herein has merits.
11. This being a first appeal, parties are entitled to and expect a rehearing, reevaluation and reconsideration of the evidence afresh and a determination of this court with reasons for such determination. In other words, a first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyze and re-consider the evidence and draw its own conclusions, of course bearing



in mind that it did not see witnesses testifying and therefore give due allowance for that. In *Gitobu Imanyara & 2 others Vs Attorney General* [2016] e KLR, the Court of Appeal stated that;

“[A]n appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that 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 allowances in this respect”

12. On whether the learned magistrate had jurisdiction to deal with the matter before him, it is no longer news that the jurisdiction of the magistrates in succession matters was expanded to include summons for revocation of grants. Initially, the jurisdiction of the magistrates in succession matters was provided in Section 48(1) of the *Law of Succession Act*, cap 160 of the Laws of Kenya (hereinafter referred to as ‘the Act’). The said provision stated as follows: -

“Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49 of this Act, a Resident Magistrate shall have jurisdiction to entertain any application other than an application under section 76 of this Act and to determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed one hundred thousand shillings:

Provided that for the purpose of this section in any place where both the High Court and a Resident Magistrate’s Court are available, the High Court shall have exclusive jurisdiction to make all grants of representation and determine all disputes under this Act.’ (emphasis added).

13. In 2015 section 48(1) of the *Act* was amended by the enactment of the *Magistrates’ Court Act, Act No 26 of 2015* (hereinafter referred to as ‘the new Act’). Section 23 of the new *Act* repealed section 48(1) of the *Act* and substituted it with the following new subsection: -

‘23. The *Law of Succession Act* is amended, by repealing section 48(1) and substituting therefore the following new subsection –

“Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49, a magistrate shall have jurisdiction to entertain any application and to determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed the pecuniary limit prescribed under section 7 (1) of the *Magistrates’ Courts Act, 2015*.’ (emphasis added).

14. The effect of the aforesaid amendment was to give jurisdiction to the magistrates to deal with applications under section 76 of the *Act* which are for revocation or annulment of the grants issued by the magistrates’ courts. I, therefore hold that the Magistrates’ Court had jurisdiction to deal with an application for revocation or annulment of a grant which was before it.

15. On 2, 4 and 5th grounds, whether the trial court failed to appreciate the subject, issues for determination before it, failed to consider section 76 of the *LSA*, and that it failed to appreciate the law on the subject, issues, the burden of proof and the points of determination, it is trite that what was before the learned Chief Magistrate was an application for revocation of grant by the respondents.



16. The said summons was based on the grounds on its face and is supported by the affidavit annexed to the application sworn by Lucy Muthee, the 1st respondent.
17. The applicants'/respondents' case was that the said grant was obtained by means of untrue allegations of facts, fraudulently by making of a false statement or by concealment from court of material facts to the case and the proceedings to obtain the grant were defective in substance. That the subject land parcel was registered first in the name of Njue Munge alias Njue Njamunge (deceased) while in real sense the land was owned by the father of the applicants/respondents herein whose is Njue Njamunge.
18. The circumstances under which a grant of representation may be revoked are provided for under section 76 (a)- (e) of the [Law of Succession Act](#) and include;
- a) Where the proceedings to obtain the grant were defective in substance;
 - b) Where 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) Where 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) Where 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) Where the grant has become useless and inoperative through subsequent circumstances.
19. What is clear from the above provision is that when a court is dealing with an application for revocation of grant, it is supposed to consider only the process of obtaining the grant. Such that issues touching on the process of confirmation of the grant and distribution of the estate amongst the beneficiaries is beyond what the court should consider as it is not covered by section 76 and thus cannot form a basis of revoking a grant but ought to be challenged through a review or appeal. [In re Estate of Prisca Ong'ayo Nande \(Deceased\)](#) [2020] eKLR, W. Musyoka, J. after analyzing section 76 and discussing the meaning of a grant within the provisions of the laws governing succession in Kenya held thus: -

“ 17. I have very closely perused through the provisions of the [Law of Succession Act](#), and I have not come across any provision that provides a remedy to a person who is aggrieved by confirmation orders. Sections 71, 72 and 73 of the [Law of Succession Act](#), which deal with confirmation of grants, do not address the question of redress for parties who are unhappy with the confirmation process, nor do they deal generally with flaws in the confirmation process. As stated above, section 76 has nothing to do with the confirmation process, and provides no relief at all to any person unhappy with the confirmation process. In the absence of any provision in the [Law of Succession Act](#), for relief or redress for persons aggrieved by such orders, the aggrieved parties have only two recourses under general civil law, that is to say appeal and review, to the



extent that the same is permissible under the Law of Succession Act. I would believe that one can also apply for the setting aside or vacating of confirmation orders, where the same are obtained through abuse of procedure.”

20. From the perusal of the application for revocation, the applicants’/respondents’ ground for seeking the revocation was mainly that the appellants obtained the grant fraudulently and having misrepresented to the court facts and further, that 1st and 2nd respondents ought not to inherit the estate of the deceased for the reason that the same was fraudulently transferred to one Njue Munge alias Njue Njamunge thus disinheriting the true beneficiaries of the suitland.[See section 66 of the Law of Succession Act].
21. The question which must then be answered is whether the succession cause at Runyenjes gave the 1st appellant valid authority deal with the suitland?
22. From the proceedings herein, prior to the 1st appellant being issued with grant at Runyenjes Law Courts, it is clear that the 1st appellant stated that she was the widow of the deceased, Njue Munge alias Njue Njamunge; while during the proceedings before the learned Chief Magistrates, the 1st appellant stated that Njue Munge alias Njue Njamunge was his brother. In the same breadth, there exists two different death certificates, one for Njue Munge alias Njue Njamunge and another one for Njue Njamunge showing two different dates of death being 14/5/1982 and 25/2/2008 for Njue Munge alias Njue Njamunge and for Njue Nyamunge respectively. Further the causes of their deaths were different as per the death certificates. Further, it was clear from the evidence before the trial court that indeed Njue Munge changed his name to include the alias Njue Njamunge and thereafter he was issued with the title deed for the subject land.
23. For all the above reasons, it is outright that for the 1st appellant to file succession cause at Runyenjes claiming that the subject land was for the estate of Njue Munge was misleading and fraudulent. It is clear from the green card that one Njue Njamunge was the owner of the suitland from November 20, 1961 and how the same land was mysteriously registered under the new owner, Njue Munge alias Njue Njamunge was not explained to court.
24. It is not lost to this court that one primary role it has is that of ensuring distribution of the estate of a deceased person to the rightful beneficiaries. As of necessity, the estate property must be identified. Thus, where issues on the ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed. And that is the very reason why rule 41(3) of the Probate and Administration Rules was enacted so that claims which are *prima facie* valid should be determined before confirmation. “[See In re Estate of Julius Ndubi Javan (Deceased) [2018] eKLR
25. In the end, I find that indeed, the 1st appellant could not have secured a good title from fraudulent actions by her so called husband and/or brother, Njue Munge alias Njue Njamunge; and further, there is absolutely no way the 1st appellant could have transferred a good title to the 2nd appellant. I adopt the view of my Brother Makau J in the case of Adrian Nyamu Kigu v Elizabeth Karimi Kiugu and Another [2014] eKLR. The court stated that:

Whereas the above section states that a transfer by a person to whom representation has been granted shall be valid notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act, I am of the considered view that such transaction can only be relied upon where the legal representative is entitled to legal representation but not where one is not and where one has obtained the grant fraudulently....I therefore find and hold the sale to be invalid.



26. On the 3rd ground that the trial court misdirected itself in holding that the appellant inherited the suit land from a fraudster Njue Munge, it was submitted that the finding of the court was convoluted and absurd in that the appellant inherited the suitland from her very clean brother. Further, that the finding that eleven grounds of fraud were proved was not supported by the evidence adduce before the learned Chief Magistrate and therefore, the court's finding was below the threshold as required by the law.
27. From the evidence before the court, it was outright that the 1st appellant acquired no good title from the alleged husband and/ or brother. Notwithstanding that the appellants have been in possession of the suit land and the title deed, the possession did not give them a good title given that the alleged succession and thereafter transmission was fraudulent with the aim of disinheriting the true beneficiaries of the land.
28. It was imperative for the trial court at the trial as it did, and now this court on first appeal, to interrogate the root of the appellants' title to the suit property namely that it stemmed from one Njue Munge alias Njue Njamunge and thereafter to the 1st appellant who fraudulently misrepresented facts which she was outrightly aware of, and that is why she initially stated that she was a widow and later on sister to Njue Munge alias Njue Njamunge. [See Court of Appeal decision in *Wambui v Mwangi & 3 others* (Civil Appeal 465 of 2019) [2021] KECA 144 (KLR)].
29. Further, a court is not bound by the finding of another court in that the court has latitude authority to take base its independent determination on facts and law as presented before it. [See SCOK decision on *SGS Kenya Limited v Energy Regulatory Commission & 2 others* [2020] eKLR].
30. In the end, I reiterate that the learned trial magistrate's finding was well founded in fact and law. The appeal herein is hereby dismissed with costs to the respondents.
31. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 8TH DAY OF MARCH, 2023.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent

