In re Estate of Marata Muringi Gachanja (Deceased) (Succession Appeal E009 of 2021) [2023] KEHC 1993 (KLR) (9 March 2023) (Judgment)

Neutral citation: [2023] KEHC 1993 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

SUCCESSION APPEAL E009 OF 2021

FN MUCHEMI, J

MARCH 9, 2023

IN THE MATTER OF THE ESTATE OF MARATA MURINGI GACHANJA (DECEASED)

BETWEEN

DANIEL KAGO GACHANJA ..... APPELLANT

AND

JOSEPH MUKIRA GACHANJA ..... RESPONDENT

(Being an appeal from the Ruling and Orders of Senior Resident Magistrate, Hon. D. M. Ireri in the Senior Resident Magistrate court in Othaya, Succession Cause No. 86 of 2019 delivered on 24th February 2021)

JUDGMENT

Brief facts

1. This is an appeal against the ruling of Othaya Senior Resident Magistrate delivered on February 24, 2021 in Succession Cause No 86 0f 2019 whereas the magistrate dismissed an application for revocation of grant filed by the appellant.

2. Being aggrieved with the decision of the magistrate, the appellant lodged this appeal citing 16 grounds that can be summarised into 3 as follows:-The learned Magistrate erred in law and in fact in:-

    a. Failing to consider the wishes of the deceased made on 12/3/2002 and November 15, 2012 as a valid will pursuant to section 11 of the *Law of Succession Act* and thus occasioning a miscarriage of justice by invalidating the said wills;

    b. Finding that the appellant had not demonstrated sufficient grounds for the revocation of grant dated January 9, 2020;

c. Finding Winfred Wangari Muringi as a beneficiary to the estate;

3. Parties disposed of the appeal by written submissions.

The Appellant's Submissions

4. The appellant filed very lengthy submissions, which touched on various issues not related to this appeal but mostly to the entire succession cause. This court will only restrict itself to the submissions that are relevant to issues relating to the appeal.

5. It is the appellant's submission that the magistrate erred in failing to revoke the grant despite having found that the procedure within which the grant was obtained was not procedural. The appellant argues that the respondent did not follow the laid down procedure in filing the cause and for that reason the court ought not to have issued letters of administration to him without affording the appellant a hearing during citation proceedings. The appellant further argues that the grant therefore ought to be revoked as failing to follow the laid down procedure. This flow was not a technicality, that could be cured by article 159(2) of the *Constitution* as the court purported to do. Additionally, the appellant submits that the respondent obtained the grant by fraudulent means as he provided false information through a letter by the chief which indicated that the family of the deceased held a meeting nominating him as the administrator of the estate. The appellant argues that since he obtained the grant on the authority of the said letter, the said grant was obtained fraudulently and ought to have been revoked.

6. In the same breadth, the appellant argues that the said letter indicating the respondent was nominated the administrator of the deceased family, amounts to untrue allegations under section 76 (c) of the *Law of Succession Act* and therefore ought to be revoked.

7. The appellant further argues that the respondent admitted that he had not complied with section 76 (d)(i) of the *Act* and thus this is a ground for revocation of grant which the trial court refused to acknowledge. Moreover, the appellant contends that the respondent failed to disclose to the court that the deceased left behind a written will and thus the succession cause ought to have been filed as a testate proceedings. The appellant further argues that the magistrate erred by requiring him to prove that the wishes of the deceased amounted to a will. According to the appellant, the documents dated 12/3/2002 and November 15, 2012 are wills, with the document dated November 15, 2012 being a continuation of the will dated 12/3/2002. The said will dated November 15, 2012 revoked the earlier bequest to Peter Wangodu by setting out conditions that he was required to meet but he never met.

8. Furthermore, the appellant submits that the trial court erred in its interpretation of an independent witness by finding that Jenelica Wairimu, a spouse of a beneficiary, was an independent witness and failing to take into consideration that Elizabeth Wambui, Veronica Wairimu and Consolata Wachinga were independent witnesses and not beneficiaries of the will. The appellant further submits that the validity of a will can only be determined by section 11 and 13 of the *Law of Succession Act* is unconstitutional.

9. The appellant argues that Winfred Wangari was not a child of Peter Wangodu and therefore she is not entitled to benefit from the deceased's estate. The appellant further argues that the said Winfred Wangari is not a dependant under section 26 and 29 of the *Law of Succession Act* and thus is not entitled to a share in the deceased's estate. It is the appellant's case that Peter Wangondu was never married and had no family of his own. Therefore, the appellant contends that Winfred Wangari ought to be ousted from the succession proceedings.

The Respondent's Submissions

10. The respondent submits that the trial court evaluated the evidence presented before it and concluded that the alleged wills dated March 12, 2002 and November 15, 2012 were invalid, although the appellant maintains that the two documents were valid wills appointing him and another person as executors of the same.

11. The respondent refers to sections 3(1), 11 and 13 of the *Law of Succession Act* and submits that the documents dated March 12, 2022 and November 15, 2012 do not amount to a will. The respondent argues that the document dated March 12, 2002 is titled "Meeting of Marata Muringi Gachanja Children" and is in the form of minutes and resolutions taken during a meeting held on the said date. The document does not contain a legal declaration of the deceased's wishes but rather indicates people present at the meeting collectively making deliberations. The document dated November 15, 2012 closely resembles a will bit it is closer to a gift inter vivos. The document is vague and unclear; the deceased's intention in the document cannot be ascertained; the purported will does not list or mention any specific pieces of land or property to be bequeathed and the wording does not indicate that the deceased intended for the alleged wishes to take effect after her demise.

12. The respondent submits that the appellant acknowledged in his affidavit in support of probate of will dated December 27, 2019, that the deceased allocated her six (6) children portions of land. According to the appellant's statement dated December 13, 2019, the deceased sub divided the family land into 6 portions namely Othaya/Kihugiu/2260, 2261, 2262, 2263, 2264 and 2265. These six portions were distributed to Marata Muringi, Paul Murage, Daniel Kago, Peter Wangodu, Joseph Mukira and Gabriel Migwi. The respondent further submits that the beneficiaries of the said parcels received relevant letters and transfer documents to aid their ownership. Thus, if land parcel Othaya/kihugiu/2263 did not pass to Peter Wangodu during the deceased's lifetime, it remains the property of the deceased's estate to be administered for the benefit of Peter Wangodu's heir because the rest of the family members had taken possession of their respective land parcels.

13. The respondent relies on the case of *Fadhiya Salim Faraj vs Faiz Mohamoud Abdalla* [2019] eKLR and argues that even if the two documents were in the nature of a will, they would still fail the validity requirements under the Act. The document dated November 15, 2012 was attested by two beneficiaries and thus the bequests would fail as the appellant and Consolata Wachinga signed the document allegedly bequeathing themselves properties and did not have additional independent witnesses to attest to the same.

14. The respondent further argues that the two documents did not legally convey the wishes of the deceased. Further, the documents may both be in writing ad signed by different beneficiaries but they are not wills. The first signed and attested document evidences resolutions made in a family gathering whereas the second document mentions a number of people presumed to be beneficiaries without specifying the relevant properties. The respondent further contends that not a single property listed in the first document is mentioned in the second documents and thus it is not clear which properties the deceased was referring to in the document. The respondent submits that even if the two documents were valid wills, the resulting construction would be absurd because they purport to bequeath the same properties if read together. Yet the second one is not by any means a codicil. As such, since the two documents are not valid wills, they cannot be subject of grant of probate and therefore the appellant has no basis asking the court to issue a grant of probate to himself, Paul Murage and Gabriel Migwi.

15. The respondent contends that the appellant sought for revocation of grant on the grounds of concealing material facts, defective proceedings and the making of untrue allegations of fact in

obtaining the grant. The respondent argues that the appellant did not present sufficient evidence in the trial court to prove any of the grounds for the revocation of grant and the trial court found rightly so. The appellant claimed that the grant was obtained by untrue allegation of fact but did not prove that the respondent misrepresented facts to the court. The appellant further claimed that the deceased had appointed an administrator, a point that the trial court found to be untrue as the appellant failed to show that the deceased had named a specific person to be the administrator of her estate. The respondent further argues that the allegation that he failed to diligently administer the estate was found to be unmerited because the appellant had delayed administration process through court action. The respondent contends that the notable issue raised by the appellant was the approach taken when filing the intestate proceedings. The respondent argues that the procedural technicalities relating to filing of a citation should not clog the wheels of justice as the same can be cured by article 159(2)(d) of the *Constitution* and rule 73 of the *Probate Rules*. The respondent contends that he did not strictly follow the intestacy procedure but the same was not fatal to the petition or the subsequent process.

16. The respondent submits that Winfred Wangari Muringi is a daughter of the late Peter Wangodu and thus she has a right to inherit the said property whether it was conferred upon Peter Wangondu by intestacy or otherwise. The respondent further submits that the prayer regarding her application in the court below is irrelevant and misplaced. The respondent maintains that Winfred Wangari Muringi is a dependant of Peter Wangodu and she ought to benefit from his estate as provided in section 29 of the *Law of Succession Act*. Moreover, the appellant did not present evidence to disprove her relation with Peter Wangodu or Marata Muringi.

17. The respondent submits that the appellant is not entitled to the orders sought because he has only made allegations against him and Winfred Wangari Muringi without any factual evidence or proof as required by section 107 of the *Evidence Act*.

18. The respondent further submits that the trial court's ruling is proper and was made in consideration of the law and facts presented by both parties. The appellant raised three major grounds for the revocation of grant but none of them was found to have merit. Furthermore, the alleged wills having been invalidated there was no need for the respondent to notify the court of their existence. The respondent further contends that he obtained the grant procedurally and did not conceal any material facts regarding the estate of the deceased.

19. The respondent submits that the lower court in its wisdom and in the exercise of its discretion amended the grant of letters of administration dated January 9, 2020 to include the names of the appellant and Elizabeth Wambui. All the three persons named in the grant are children of the deceased and have an equal right to administer the estate. Therefore, the respondent contends that there is no valid reason under the Act warranting the removal of the respondent's name in the grant of letters of administration dated January 9, 2020 as amended on February 24, 2021.

Issue for determination

20. The main issue for determination is whether the magistrate-erred in failing to revoke the grant, in appointing two additional administrators and in finding that the deceased did not leave a valid will.

The Law

21. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another vs Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:

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

22. It was also held in *Mwangi vs Wambugu* [1984] KLR 453 that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence.

23. Dealing with the same point, the Court of Appeal in *Kiruga vs Kiruga & Another* [1988] KLR 348, observed that:-

> " An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand."

24. Therefore this court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering and giving allowance for it, that the trial court had the advantage of hearing the parties.

Whether The Appeal Has Merit.

25. 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.

26. The applicant in the court below argued that the grant ought to be revoked because the respondent failed to disclose to the court that the deceased had left behind a written will and thus the succession proceedings ought to have been filed as testate. The trial court evaluated the evidence presented before it and reached the conclusion that the documents dated 12/3/2002 and November 15, 2012, though they expressed the wishes of the deceased, did not amount to valid wills.

27. Section 11 of the *Law of Succession Act*, provides for the validity of written wills. It states:-

No written will shall be valid unless:-

i. The testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;

ii. The signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;

iii. The will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will or have seen some other person sign the will in the presence and by the direction of the testator or have received from the testator a personal acknowledgment of his signature or mark or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time and no particular form of attestation shall be necessary.

28. Section 13(2) of the *Act* provides:-

> A bequest to an attesting witness (including any direction as to payment of costs or charges) or a bequest to his or her spouse shall be voided unless the will is also attested by at least two additional competent and independent witnesses, in which case the bequest shall be valid.

29. The magistrate observed that it was not in dispute that the documents dated 12/3/2002 and November 15, 2012 expressed the wishes of the deceased. The court made it clear that what was in dispute was whether said documents amounted to valid wills. I have perused the document dated 12/3/2002, titled Maratas Family Meeting held 12/3/2002 at her home, which is split into two parts. Part one dated 12/3/2002 and the other part is dated November 15, 2012. The document contains wishes by the deceased in Kikuyu language with English translation done by the appellant. The names of the appellant, respondent and some of the beneficiaries are contained in the said minutes and all have signed the minutes dated 12/3/2002. Some of the persons present in the meeting were the children of the deceased who were named as beneficiaries of the deceased in the documents. It is noted that the said beneficiaries have signed the documents but there are no independent witnesses who attested to the wishes of the deceased. Particularly, the document dated 12/3/2002 indicates that it was witnessed by one Jenelica Wairimu Migwi and Lucy Gathoni Mutiga. However, the said two witnesses did not append their signatures on the document and neither were they called as witnesses to confirm that they saw the deceased sign or affix his thumbprint to the document. In the case of *Anthony Njoroge Gathogu vs Isaac Gitau* [2018] eKLR where the court held:-

> Was the will executed in accordance to law? A perusal of the will shows that it was attested before Benson Karina Advocate and two witnesses Wycliffe Ahuya Kidake and Samson Esikote Kutwa. However, none of the witnesses ever gave evidence to confirm that the deceased was the one who attested or executed the will. The evidence of witnesses attesting the will is for purposes ascertaining that the deceased did indeed execute a will.

> It is unbelievable that even the advocate before whom the will was executed and the maker of the document never testified. For the petitioner/executor (DW1), he was neither a witness during execution of the will nor was David Mbugua (DW2) a son to the deceased. In the absence of any evidence from the advocate one Karina or witnesses Samson Esikote Kutwa or Wycliff Ahuga Kidake, there is no proof that the signature appended on the will was made by the deceased or somebody else under the deceased's direction.

30. In my view, the document dated November 15, 2012 is in my view not clear for it does not give the particulars of the land parcels to be bequeathed to the beneficiaries. Even if the court were to presume that the said document expressed the wishes of the deceased, it was only signed by the deceased, the appellant and one Consolata Wachinga. The section 13(2) of the *Act* was not complied with and as such the document dated November 15, 2012 does not constitute a valid will. In this regard, the magistrate clearly pointed out the shortcomings of the said documents. In my considered view, the magistrate was right to find that the deceased died intestate and that the proceedings as filed by the respondent were property in their intestate nature.

31. Additionally, since the magistrate found that the documents dated 12/3/2002 and November 15, 2012 did not constitute a valid will, it could not have issued a grant of probate to the appellant as well as Paul Murage and Gabriel Migwi. In any event, the trial court exercised its discretion under section 76 of the *Act* and appointed Elizabeth Wambui and Daniel Kago as co-administrators to join the respondent for a wider representation of the beneficiaries. It is noted that the three administrators are children of the deceased and therefore have an equal right to administer the estate under section 66 of the *Act*.

32. The appellant further argues that the proceedings to obtain the grant dated 9/1/2020 were defective in substance in that they were filed by way of citation. Upon perusal of the record, it is noted that this cause was commenced by way of a citation. The record shows that the court was not moved to hear the parties on the citation. A grant was later issued I favour of the respondent. The trial court however rendered its ruling on 25/9/2020 to the effect that the respondent did not strictly follow the procedure of filing a succession cause per se. However, the court invoked the provisions of article 159(2) (d) of the *Constitution* and overlooked the procedural lapses in order to administer substantive justice to the parties. It is my considered view the procedural lapse was a procedural technicality which was curable under article 159(2)(d) of the *Constitution*. Additionally rule 73 of the *Probate and Administration Rules* gives a court inherent powers to make such orders as may be necessary for the ends of justice and to prevent the abuse of the court process. The parties herein approached the court to have the estate of the deceased distributed and thus the court overlooked the technicality and proceeded to distribute the estate. It is my considered view, that albeit the procedure not being strictly adhered to, it did not render the succession proceedings defective in substance.

33. The appellant further submits that the grant dated 9/1/2020 was obtained through fraud as the respondent presented a letter by the chief indicating that the family had nominated the respondent as the administrator of the estate. I have perused the court record and noted that the respondent admitted that he was not nominated by the family to be an administrator. The magistrate was alive to this fact and observed that such nomination was not a requirement of the law. He proceeded to find that the appellant did not prove his allegations of fraud. I am in agreement with the respondent that the trial court did not err in its observations and finding on the said issue.

34. On the contention that the grant ought to have been revoked in pursuant to section 76 (d) (i) and (ii) of the *Act*, since it had become in operative, the magistrate pronounced himself that the respondent could not proceed to distribute the estate after the appellant filed the application for revocation of grant dated September 29, 2020. The court found that the respondent was not to blame for the delay.

The record shows that the appellant filed his application for revocation of grant on September 29, 2020 which is 8 months after the grant was issued. By the time the said application was filed, the one year period prescribed by the law for execution of the grant had not expired. As such it is my considered view that the respondent was not to blame for any delay in executing the grant.

35. The applicant has further argued that Winfred Wangari is not a beneficiary of the deceased and asked the court ought to oust her from the proceedings. The trial court in its ruling observed that it could not make a determination of whether Winfred Wangari was a beneficiary of the estate since he was dealing with an application. The contentions of whether Winfred Wangari is a beneficiary or a dependant of the deceased was not relevant to the said application. Neither is the issue relevant in this appeal since the magistrate abstained from making any finding.

36. The appellant has made allegations of a criminal nature towards the respondent that he committed perjury and gave false information. He urges this court to deliberate on these allegations. The same issues were raised in the court below and the magistrate directed that the appellant ought to approach the relevant institutions for investigations. I would have nothing more to add to the observation by the magistrate.

37. In his submissions, the applicant introduced a prayer for stay of execution. Such a prayer would have been applicable before the hearing of the appeal. It is trite law that stay cannot be granted at the conclusion of an appeal because the purpose of orders for stay is to put on hold execution of a decree pending hearing and determination of an appeal.

38. It is my finding that the appellant before the court below failed to establish any of the grounds he relied on for revocation of grant. Having delved into the grounds of appeal and as discussed in this judgement, I am of the considered view, that the appellant has failed to demonstrate that the magistrate erred in law and, or fact in his findings in his ruling delivered on February 24, 2021.

39. I find no merit in this appeal and I hereby dismiss it accordingly.

40. With due consideration that this is a succession cause involving members of one family, this court hereby spares the appellant from meeting the costs of this appeal.

41. Each party will meet the costs their own costs.

42. It is hereby so ordered.

DATED AND SIGNED AT NYERI THIS 9TH DAY OF MARCH, 2023.

F. MUCHEMI

JUDGE

RULING DELIVERED THROUGH VIDEO LINK THIS 9TH DAY OF MARCH, 2023