



REPUBLIC OF KENYA



KENYA LAW
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Mabanga v Maho (Civil Appeal 34 of 2020) [2023] KEHC 1860 (KLR) (1 March 2023) (Judgment)

Neutral citation: [2023] KEHC 1860 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL 34 OF 2020
TA ODERA, J
MARCH 1, 2023

BETWEEN

ROBI MABANGA APPELLANT

AND

NAUMI MASEKE MAHO RESPONDENT

(Being an Appeal from Order/Ruling of Hon. D. O. Onyango CM dated 20th July, 2020 in Migori CMC Succession Cause No. 3 of 2017 Naumi Maseke Maho Versus Robi Mabanga)

JUDGMENT

1. This is an appeal filed by the petitioner against the decision of the trial court which revoked the grant and recognized the children of the objector are being children of the deceased.
2. The petitioner filed succession cause no 3 of 2017 Migori and mentioned herself and her children Henry Mabanga Chacha, Clinton Marwa Chacha and Catherine Gati Chacha as the survivors of the deceased and letters of administration were issued to her on 2.5.17.
3. The objector filed summons for revocation/annulment of grant dated 17.5.17 and re-issue in the names of objector/applicant and he petitioner respondent, inhibition order and /or conservatory order restraining he petitioner from transferring registering, disposing of alienating ,selling and or approaching assets of Joseph Cyprianus Chacha (the deceased herein) and hence comprise part of the estate of the deceased particularly LR NO.'s Bukira /Bwisaboka/631,1895, 1918,1984,2041,2773,2774,2758,3106,3206,3273,3373.3335,3661,3186,5091 and Bukira/ Buhirimonono /631 respectively which parcels of land belonged to and are registered in the name of deceased herein and hence compromise part of the estate of the deceased in any manner whatsoever and or howsoever .
4. Also that petitioner be ordered to tender accounts and contract in respect of the state of the estate of the deceased on the grounds that it was obtained. the application was based on the grounds that the petitioner /appellant herein concealed the information that deceased was survived by two wives and



several children from the said two houses and that the appellant did not disclose the true particulars of the assets of the deceased. Also that the names and or beneficiaries of the estate of deceased were not concealed.

5. The application is based on the annexed affidavit of Naumi naseke Maho dated 17.5.17 which lists the following as survivors of deceased ;

First house

1. Robi Mabanga – widow
2. Henry Mabanga chacha –Son
3. Clinton Marwa Chacha – son
4. Catherine Gati Chacha -daughter

Second house

1. Naumi maseke maho –Widow
2. LGC –Daughter (minor)
3. VGC –daughter (minor)
4. FMC son (Minor).

6. She deponed that the petitioner /appellant concealed material information about the survivors information from the court . also that land parcel numbers Bukira /Bwisaboka /2774 and 2758 were omitted form the list of assets of deceased . Further that the estate is in danger of being alienated and hence the need to preserve it.

7. The following grounds were listed in the memorandum of appeal;

- a. That the learned trial magistrate erred in law and fact in finding that the respondents three children were dependants of the deceased herein without any evidence and or proof at all and contrary to the mandatory requirement of the law.
- b. That the learned trial magistrate erred in law and fact in failing to fault the Birth certificates which were issued after the death of deceased and bore dates falling on a weekend.
- c. That the Learned trial Magistrate erred in law and fact in holding that that from the totality of the evidence on record it was clear that deceased had taken responsibility of the children of respondent while no such evidence was adduced before court.
- d. That the Learned trial Magistrate erred in law and fact in holding that the respondent had proved portions of her complaints on a balance of probability without any evidence at all .
- e. That the Learned Magistrate erred in law and fact in failing to dismiss the entire application of the respondent dated 17.5.17 upon finding that respondent and her witnesses were untrustworthy
- f. That the Learned Magistrate erred in law and fact in failing to appreciate that the dependency must be proved and cannot be assumed and or presumed which proof was not done at all by the respondent .



8. Appellant submitted that she is only aggrieved by the part of the order which declared the 3 children of the respondent as beneficiaries of the estate of deceased and thus making respondent a co – administrator of the estate of deceased.
9. On whether the children of deceased are entitled to inherit the estate of deceased , appellant submitted that section 3(2) provides that a child whom a deceased male person had and expressly recognized or accepted as his own as his own or for who he has accepted permanent responsibility . Further that there must be proof of paternity to a child born out of wedlock and that this was not done. She submitted that production of a Birth certificate is not proof of paternity but DNA test as was held in the case of *S.M versus C* (2017)eKLR . She pointed out flaws in the birth certificates to wit;
 - a. All of them were issued on dates falling over the weekend.
 - b. That one of the children was born before respondent knew deceased and yet he bears the name of deceased.
 - c. That he birth certificates were issued after 20.5.2016 when section 12 of the *registration of Births and death Act* was declared unconstitutional as was held in the case of *LNW versus Attorney general and 3 others.*
10. Also that it was not proved that deceased maintained the 3 children by providing the basic needs.
11. It was submitted that the trial magistrate found that the respondent and her witnesses were untrustworthy and unreliable and thus cannot be heard to rely on the evidence of the same respondent to find that the children belong to deceased.
12. Respondent submitted that the allegations of fraud were not proved and that PW3 said he issued the birth certificate of Lucy Gati at the instance of deceased on 26.12.15 (Pexh 2)when he was working . Further that the one for valentine Gati(Pexh 3) was registered on 24.3.2013 while that of Fidel chacha was issued on 24.6.13 (Pexh 4). Further that is was not unusual for death certificate to be issued severally as the date of registration , entry number and serial numbers remain the same .further that fraud was not specifically pleaded and proved as required by law (see *Ndolo vs Ndolo* (2008) eKLR. It was also submitted that the deceased acknowledged the children as his own and that though there were flaws in the Birth certificates the same are still admissible was held *in re- estate of Charles Muraguri Kuguru* (2021)eKLR. It was further Submitted that the children belong to deceased by virtue of section 3(2) and 29 of the *law of succession Act.*
13. Respondent submitted that the issue raised by the appellant was the date of issuance and not the date of registration and that this issue first came up during appeal and thud it is a new issue which cannot be raised now . Also that the4re is no law which bars public officers form working over the weekends.
14. Respondent told this court that the law on revocation of grants is Section76 of the *law of succession Act* and the grounds therein must be proved. She said the grant was properly revoked.
15. Respondent denied that the trial court found her and her witness to be unreliable and unbelievable but that it was her evidence on marriage and not paternity which was found to be unreliable.
16. The appeal proceeded by way of written submissions.



17. This is a first appellate court and it has a duty to re-evaluate the evidence and arrive at its own conclusions bearing in mind that it had no opportunity of seeing the witnesses as was held in the case of *Gitobu Imanyara & 2 others V Attorney General* (2016) eKLR, where it was stated;

..... 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”

18. The only issue for determination is whether it was proved that the children of respondent belong to deceased.

19. The appellant’s case is that the children of respondent do not belong to deceased as paternity was not proved and that the birth certificates were forgeries made to suit this case. PW3 the registrar of persons said that deceased went to his office and applied for the birth certificates and that the birth of one for L. G was registered on 26.12.15 while that of VG was registered on 24.3.13 .On cross examination, PW3 admitted that he did not have the primary documents i.e Birth notification or affidavits in its place, the forms signed by the area chief required for registration in court though they were in his office . The registration of birth of L.G on 26.12.15 is questionable as the date fell on boxing day which is usually a holiday and also official working days in Kenya are between Monday and Friday of every week . PW3 did not explain what compelled him to work on 26.12.15 during boxing day. In any event Lg is the same child that Dw2 Tobia Mwita claimed to have sired with respondent before they parted ways and he produced her health card and Birth notification (Dexh 1 and 2) which were not challenged. PW3 said deceased went to his office and applied for the certificates but he never produced the primary documents used to make the applications though he admitted that they were in his office. PW3 was the custodian of the documents used in support of the application for registration of births herein and he had a duty to assist the court to arrive at a just determination of the case by producing all the required documents . The said documents were crucial to this case and failure to avail them leads to an inference that they either had adverse information or they were not in existence. The certificates were all issued after the demise of the deceased and the court was not told why the process took long after the alleged applications were made. I find that the credibility of PW3 was suspect and the authenticity of the said birth certificates to be questionable. No DNA testing was done to show the paternity of the children of respondent and the evidence adduced herein by respondent is so scanty , most of her witnesses did not even mention the names and ages of her children yet she said that before the death of deceased she was living with him in his home . There is also no mention of the schools the children were attending and no witness corroborated the evidence of respondent on the issue of maintenance of the children by deceased . Section 26 of the *Law of Succession Act* provides “ Section 26 of the *Law of Succession Act* provides as follows: -

For the purposes of this Part, "dependant" means—

- a) The wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
- b) Such of the deceased’s parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and
- c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.



In the case of *Beatrice Ciamutua Rugamba .v. Fredrick Nkari Mutegi & Others*, Chuka Succ. Cause No. 12 of 2016 held as follows: -

“From the foregoing, a dependent under section 29 (b) and (c) must prove that he/she was being maintained by the deceased immediately prior to his demise. It is not the mere relationship that matters, but proof of dependency.”

20. In the cited case of *SM v SC* [2017] eKLR Justice Githinji held “ The respondent has stated clearly that the applicant is a stranger to him, they have never had a relationship, sex or even cohabited. He expressed that he will seek leave of the court for a DNA examination. The produced birth certificate was obtained on 8th February, 2016 while the suit and the application were filed on 11/02/2016. It is therefore clear that the birth certificate was obtained for the purpose of filing this suit and the application.
21. The respondent stated that he did not give consent for his name to be indicated as the father of the child in the birth certificate, and the said birth certificate was fraudulently obtained. I wish in that regard to state here that appearance of a person’s name as a parent of a child in the birth certificate, where the authenticity of such birth certificate is not established and where a party disputes parenthood, the birth certificate cannot safely be held as prima facie evidence that the person named is the child’s parent”
22. It is my considered view that it has not been established that the children of respondent belonged to deceased and/ or that they were his dependants . The Birth certificates were hurriedly made to suit the succession cause in the lower court.
23. On whether the respondent met the threshold for revocation of grant , Section 76 of the *Law of Succession Act* provides:

“ 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



e) That the grant has become useless and inoperative through subsequent circumstances”.

24. Having found that it has not been established that the children of respondent belonged to deceased and were his dependants under section 29 of the *law of succession Act.* , I find that the respondent did not establish grounds for revocation of grant under section 76 of the *law of Succession Act.*
25. The trial magistrate thus erred in finding that the respondent had established that the children were dependants of deceased during his life time.
26. The appeal is thus merited and I allow it in its entirety .orders dated 20.7.20 are hereby overturned grant issued to petitioner on 2.5.17 is hereby reinstated and grant issued in join names of the appellant and the respondent pursuant to the ruling of lower court dated 20.7.20 is hereby revoked each party to bear his own costs .

T.A ODERA - JUDGE

1.3.2023

DELIVERED VIA TEAMS PLATFORM IN THE PRESENCE OF;

Kisera For Appellant,

Wafula For Respondent,

Court Assistant; Apondi

T.A ODERA - JUDGE

1. 3.2023

Kisera: I am for appellant. I seek leave to appeal.

Wafula: No objection

Order: Leave to appeal is granted.

T.A ODERA - JUDGE

1. 3.2023

