



REPUBLIC OF KENYA



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**Ngaara v Njeri & another (Civil Appeal 127 of 2019)
[2023] KEHC 2107 (KLR) (10 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2107 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL 127 OF 2019
MM KASANGO, J
MARCH 10, 2023**

BETWEEN

ESTHER NUNGARI NGAARA APPELLANT

AND

MONICA NJERI 1ST RESPONDENT

MARGARET MITHIRI 2ND RESPONDENT

*(Being an Appeal from the Ruling of the Chief Magistrate's Court at Kiambu
(W. Rading, SRM) in Succession Cause No. 775 of 1994 dated 25th July, 2019)*

JUDGMENT

1. This succession cause has a long drawn out history which history for the purposes of this matter is not necessary to fully delve into. Suffice it to state the primary succession suit before the Kiambu Chief Magistrate's court from where this appeal arises relates to the estate of Lusiah Kabui Ngaara deceased. The deceased died on October 21, 1993. It is a travesty that this matter has continued to linger in the court system until today. The fact that the matter is yet to be concluded cannot be blamed on the judicial officers who have handled this matter. It is primarily due to the deceased's beneficiaries who have found it necessary to move the court from time to time.
2. It is worthwhile to set out the background of the application that was the subject of the trial court's Ruling of July 25, 2019 which Ruling concerns this appeal.
3. A grant was issued on December 30, 2004 to Esther Nungari Ngaara (Esther) whereby she substituted her deceased husband who initially was issued with a grant. That grant was challenged in Nairobi High Court Succession Cause No 2591 of 2012 and by a Ruling of Justice W Musyoka of July 22, 2016 the grant issued to Esther was revoked. The learned judge by that Ruling ordered a fresh grant be issued in Kiambu Chief Magistrate Court Succession Cause No 775 of 1994 to Esther, Monica Njeri



(Monica) and Margaret Mithiri (Margaret). That fresh grant was issued as ordered by the learned judge on October 10, 2016.

4. Monica filed an application dated February 16, 2017 seeking confirmation of the grant and thereby set out how the distribution of deceased's property Ndeiya/Makutano/403 should be shared.
5. Esther filed an affidavit of protest against the proposed mode of distribution prayed in the application dated February 16, 2017. It is worth noting that affidavit of protest filed by Esther is missing from the trial court's file.
6. On April 6, 2017 Monica's learned advocate proposed that the confirmation application and the affidavit of protest be heard by the court by vivo voce evidence. Esther's learned advocate concurred and with that concurrence, the trial court fixed the matter for hearing on June 8, 2017. A few other adjournments granted in that matter involved parties filing further affidavits and witness statements. These were filed in readiness for viva voce hearing.
7. Monica filed yet another application for confirmation of grant dated 16, 2018 this time bringing into the confirmation of grant many more properties. It is that second confirmation application and court orders made on its disposal that provoked the application dated February 18, 2019 file by Esther.
8. Esther by that application of February 18, 2019 ought the following prayers:-
 1. That this Honourable Court be pleased to strike out the summons for confirmation of Grant dated September 6, 2018 and expunge it from record.
 2. The honourable court be pleased to review, set aside and or vary the court order given on November 1, 2018 seeking to dispose of the protest herein by way of written submissions.
 3. The protest be disposed by way of viva voce evidence as had earlier been directed.
9. The trial court delivered its Ruling to that application on July 25, 2019. It is that Ruling which concerns this appeal.
10. First appellate court proceeds with an appeal by way of retrial. First appellate court is required to reconsider the evidence presented before the trial court, evaluate it for itself and draw its own conclusions: See the Court of Appeal decision of *Gitobu Imanyara & 2 Others Vs Attorney General* (2016) eKLR.
11. The trial court's magistrate in the Ruling set out the prayer Esther sought in her application and summarized the issues raised by the parties and their submissions. Having so summarized the trial court went out on a limb in the analysis of what was before him. The trial magistrate misdirected himself when he posed a question, that is; "whether or not the applicant has demonstrated sufficient grounds for the court to revoke the grant." The trial magistrate thereafter proceeded to discuss the grounds upon which a court will consider an application to revoke a grant. The concluding remarks of the trial magistrate's Ruling make it clear that the Ruling bore no semblance to the application under consideration. This is how the learned magistrate concluded that Ruling:-

"I do find that it will greatly prejudice the parties herein should this matter be reopened. Moreover, the doctrine of equity and latches come to play. Just because counsel was mistaken is not enough to tilt the equilibrium herein. In the circumstances herein, I decline the application dated February 18, 2019 with no orders as to costs."
12. To reiterate, the application dated February 18, 2019 which was under consideration by the trial magistrate was for the striking out of Monica's second application for confirmation of grant dated



September 6, 2018 and for review of the order that directed the hearing of the protest by written submissions.

13. The application was not for revocation of the grant. The trial court by its said Ruling obviously erred to determine that the application was for revocation of grant. The trial court should have determined in its Ruling whether the applicant had made out a case for striking out the second application for confirmation of grant and whether the protest would be heard by viva voce evidence.
14. I will begin by reconsidering whether the second application for confirmation was liable for striking out.
15. As stated above Justice W. Musyoka having revoked the grant issued to Esther did order a fresh grant be issued to Esther, Monica and Margaret. The application to confirm that grant was filed by Monica and is dated February 16, 2017. That application was not withdrawn and is still on record to date. Notwithstanding the pendency of that application and even though both Monica and Esther had filed their witness statements and relevant documentary evidence Monica proceeded to file yet another application seeking distribution of many other properties of the deceased.
16. Having two different applications both seeking to confirm the grant but citing different properties for distribution is undoubtedly likely to lead to confusion not only to the protestor Esther, but also the court. Much more, it is an abuse of the court process to have two similar applications filed by the same party pending determination. A case in point is [*Joseph Awino V. Advocates Dicipinary Tribunal & Another*](#) (2019) eKLR thus:-

“ 11. I have severally observed that the court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused. The black's law dictionary defines abuse as everything, which is contrary to good order established by usage that is a complete departure from reasonable use. An abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use. The situations that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. Additionally, abuse of court process arises in the following situations: -

- (a) Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.
- (b) Instituting different actions between the same parties simultaneously in different court even though on different grounds.
- (c) Where two similar processes are used in respect of the exercise of the same right.
- (d) Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.
- (e) Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the



inconvenience and inequalities involved in the aims and purposes of the action.

- (f) Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.
- (g) Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.
- (h) Where two actions are commenced, the second asking for a relief which may have been obtained in the first.

12. In several decisions of this court, I have stated that litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks.”

17. Having indeed found that Monica abused the court process by filing a second application for confirmation of grant, justice requires that second application dated September 6, 2018 be struck out.

18. My second consideration in this appeal is whether Esther made a case for revision of the order made on November 1, 2018. On that day, Esther’s learned advocate addressed the court thus:-

“Mr Nganga (advocate for Monica) has filed his proposed mode of distribution and we justify our. Thereof submissions.”

19. The trial court on receiving the above address ordered:-

“Mention on December 13, 18 for submissions.”

20. I have considered the address made by Esther’s learned advocate on November 1, 2018 and I am unable to discern a request that the protest be heard by written submissions. There was no basis in my view therefore for the trial court to reverse the previous consent of February 16, 2017 where parties clearly agreed to proceed with viva voce evidence in entertaining the protest. Following that consent, parties filed witness statement and Esther applied and was granted witness summon. There is in my view, ample evidence justifying revision of the trial court’s order to hear the protest by written submissions.

21. The order of November 1, 2018 will therefore be reviewed as provided under Order 45 Rule 1 of the [Civil Procedure Rules](#) which is in following terms:-

“Any person considering himself aggrieved:-

- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for



a review of judgment to the court which passed the decree or made the order without unreasonable delay. (underlining mine)

22. The review shall be on the basis of any other sufficient reason. The Court of Appeal in the case *Pancras T. Swai V. Kenya Breweries Limited* (2014) eKLR had occasion to consider revision on “any other sufficient reason” and stated thus:-

“29. As repeatedly pointed out in various decisions of this Court, the words, “for any sufficient reason” must be viewed in the context firstly of Section 80 of the *Civil Procedure Act*, Cap 21, which confers an unfettered right to apply for review and secondly on the current jurisprudential thinking that the words need not be analogous with the other grounds specified in the order. In *Sarder Mohamed V. Charan Singh Nand Sing And Another* (1959) EA 793, the High Court correctly held that Section 80 of the *Civil Procedure Act* conferred an unfettered discretion in the Court to make such order as it thinks fit on review and that the omission of any qualifying words in the Section was deliberate. In *Shanzu Investments Limited V. Commissioner For Lands* (Civil Appeal No. 100 Of 1993) this Court with respect, correctly invoked and applied its earlier decision in *Wangechi Kimata & Another Vs. Charan Singh* (C.A. No. 80 of 1985) (unreported) wherein this Court held that:-

‘any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the Court by Section 80 of the *Civil Procedure Act*; and that the other grounds set out in the rule did not in themselves form a genus or class of things which the third general head could be said to be analogous.’”

23. The inevitable conclusion in this appeal is that this appeal has merit and will be allowed.

Disposition

24. The appeal is allowed and the Ruling of the trial court of July 25, 2019 is set aside and is substituted with orders as prayed in prayer 3,4 and 5 of the application dated February 18, 2019. The appellant is awarded cost of that application and costs of this appeal. The costs of this appeal are assessed at Kshs 80,000/=.

25. The application dated February 16, 2017 and the protest by Esther Nungari Ngara shall be heard by *viva voce* evidence before Kiambu Chief Magistrate’s Court by any other Magistrate other than Wilson Rading, Principal Magistrate.

JUDGMENT DATED AND DELIVERED AT KIAMBU THIS 10TH DAY OF MARCH, 2023.

MARY KASANGO

JUDGE

In the presence of

Coram:

Instructed by Gathara Mahinda Advocate for appellant:- Mr. Mahinda

Instructed by Otieno Okeyo Advocates for Respondent:- Ms. Okeyo



COURT

JUDGMENT delivered virtually.

MARY KASANGO

JUDGE

