



REPUBLIC OF KENYA



Nyaga v Nyaga (Civil Appeal 75 of 2019) [2023] KEHC 1683 (KLR) (8 March 2023) (Judgment)

Neutral citation: [2023] KEHC 1683 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL 75 OF 2019
LM NJUGUNA, J
MARCH 8, 2023**

BETWEEN

NGONDI NYAGA APPELLANT

AND

JACOB KITHAKA NYAGA RESPONDENT

JUDGMENT

1. The appeal herein was instituted vide a memorandum of appeal dated November 25, 2019 and wherein the appellant challenged the ruling of the trial court (Hon MN Gicheru) CM in Succession Cause No 21 of 2017 and which ruling was delivered on October 28, 2019. The appellant raised the following grounds of appeal that ;-
 - i. The Learned Magistrate erred in law and fact by failing to find that the petitioner failed to obtain consent from rightful heirs of the deceased as a mandatory statutory requirement.
 - ii. The Learned Magistrate erred in law and fact in inferring extraneous issues without any evidence being adduced in court.
 - iii. The Learned Magistrate erred in law and in fact in finding that the respondents had obtained letters of administration of the deceased's estate legally and on the mode of distribution proposed by the respondent being fair to all beneficiaries.
 - iv. The Learned Magistrate erred in law and in fact in failing to find that the land given to the appellant was clan land which never formed part of the deceased's estate.
 - v. The Learned Magistrate erred in law and in fact in failing to find that the letters of administration and the certificate of confirmation of grant issued to the respondent were obtained fraudulently and by material non-disclosure of facts and as such ought to be revoked.
2. The appellant prayed for orders that the judgment and decree of the Learned Magistrate delivered on October 28, 2019 be set aside; that the summons for revocation of grant dated January 8, 2019 be



found meritorious; the certificate of confirmation of grant issued to the respondent be revoked and costs of the appeal herein be borne by the respondent.

3. The appeal was canvassed by way of written submissions and wherein only the appellant complied with the said directions.
4. The appellant submitted that section 76 of the LSA and Rule 44 of the *P&A Rules* provides for instances when the court can revoke a grant. That in the case herein, the appellant and the respondent being siblings, they inherently are bonafide beneficiaries of the deceased's estate herein. Further that, Rule 26 (1) and (2) of the P&A Rules provides that letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant. It was contended that from the evidence, the respondent did not give notice to the appellant and other beneficiaries and further, no consent was obtained from the other beneficiaries and neither did they renounce their rights. That the respondent could not have been given clan land given that by that time, he had not been born. The respondent placed reliance on the case of *Anthony Karukenya Njeru vs Thomas M Njeru Meru Succession Cause No 663 of 2011*. This court was therefore urged to allow the appeal herein.
5. I have considered the appeal, submissions by counsel for the appellant and the authorities relied on. 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'

[See also *Abok James Odera t/a AJ Odera & Associates Vs John Patrick Machira t/a Machira & Co Advocates [2013] e KLR*].

6. In re-evaluating the decision of the lower Court, I will heed to the principles set out in the case of *Mbogo & Another vs Shah [1968] EA* where the Court held as follows;

' An appellate Court will not interfere with the exercise of the trial Courts discretion unless it is satisfied that the Court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous or unless it is manifest from the case as a whole that the Court has been clearly wrong in the exercise of judicial discretion and that as a result there has been injustice.'

7. Of importance to note is the fact that this court is charged with the responsibility as was determined in *In re Estate of Julius Ndubi Javan (Deceased) [2018] eKLR* the court stated as follows;

' The primary duty of the Probate Court is to distribute the estate of the deceased 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 prima facie valid should be determined before confirmation.'

8. From the proceedings, the respondent stated that the estate herein belongs to the deceased who is their father. That they are five brothers and the land forming the estate of the deceased is 15 acres; further, that Ngondi Nyaga had another land parcel already given to him. It was his case that the 4th and 5th applicants being children of Wilson Mbui, they should equally inherit from their father respectively. It was his case that Ngondi was given 2 parcels of land to wit four acres at Kathungu and another four acres at Kagaari; Ezekiel also got four acres of land at Kagaari and Kathungu; Wilson Mbui got four acres at Kagaari and Kathungu while Shadrack and the petitioner did not get land from either Kagaari or Kathungu.
9. That the appellant sold his land parcel No Kagaari/Weru/3125 comprising of eight acres, a fact that the appellant confirmed citing reasons that he sold the parcels of land because he had problems. It was his defence that he got that land before Shadrack and the petitioner were born. Ezekiel also confirmed that he was also given land at Kagaari and Kathungu. Agatha on the other hand also confirmed that Wilson Mbui got four acres of land at Kagaari but Shadrack and the petitioner were never given land at Kagaari and Kathungu.
10. From the record herein, as I have already noted before, the appeal was provoked by the application by the appellant to revoke the grant issued to the respondent herein. It is noted that when the matter came up before the court, counsel for the appellant herein proposed to have the said application canvassed by way of written submissions, and the court upon considering the facts herein and the law, gave its ruling on October 28, 2019.
11. Counsel for the appellant has contended that the grant herein was obtained without the consent of the appellant and further, the mode of distribution proposed by the respondent herein was not fair to all the beneficiaries.
12. 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.



13. 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 of the LSA 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.'

14. From the perusal of the application that gave rise to this appeal, the applicant's ground for seeking the revocation is mainly that the respondent obtained the grant fraudulently and thereby adopted a mode of distribution unfair to the beneficiaries of the estate.

15. Section 66 of the *Law of Succession Act* bestows this court with the discretion to as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made. The court in exercise of the said discretion is mandated to accept as a general guide the following order of preference;-

- a. Surviving spouse or spouses, with or without association of other beneficiaries;
- b. Other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;
- c. The Public Trustee; and
- d. Creditors:

16. Section 39 on the other hand stipulates that (1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority—

- a. Father; or if dead
- b. Mother; or if dead

brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none



17. Rule 26 provides that letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant. Further that, in an application for grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.
18. The effect of the above provisions is that where a person is applying for a grant of letters of administration intestate, he must get consent from persons of equal or lower priority than him; but in this case, could the same apply?
19. In the instant case, the respondent did not inform the appellant of the filing of the succession cause, yet, he is equally a child of the deceased herein. The respondent did not controvert that fact, indeed the appellant is his brother and his main contention is that the appellant had previously inherited clan land and therefore, was not expected to benefit from the estate herein. It follows, therefore, that the respondent ought to have sought the consent of the appellant when filing the succession cause as he is a person equal in priority to him.
20. It is my view, therefore, that the said grant was obtained pursuant to proceedings which were defective in substance. The respondent ought to have obtained consent from not only the appellant but also his fellow brothers and sister-in-law.
21. As a consequence of the above, I am inclined to make the following orders:
 - i. Both the certificate of confirmed grant and the amended grant issued to the respondents on August 17, 2019 are hereby revoked.
 - ii. Both the appellant and respondent are hereby appointed as administrators to the estate of the deceased.
 - iii. The administrators or either of them to file summons for confirmation of the grant within 30 days from today for hearing before the trial court.
 - iv. Each party to bear its own costs of the appeal.

Delivered, dated and signed at Embu this 8th day of March, 2023.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent

