Oluoch v Obala (Civil Appeal E040 of 2021)
[2023] KEHC 2371 (KLR) (16 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2371 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CIVIL APPEAL E040 OF 2021

RE ABURILI, J

MARCH 16, 2023

BETWEEN

ARTHUR OOKO OLUOCH ..... APPELLANT

AND

ZAKAYO OBALA AKA OBALA OMBIRO ..... RESPONDENT

(An appeal arising out of the Ruling by the Honourable C.I. Agutu in the Senior Resident Magistrate's Court at Ukwala delivered on the 25th May 2021 in Ukwala PM's Court Succession Cause No 232 of 2018)

JUDGMENT

Introduction

1. This appeal was filed out of time with leave of court granted on 15/12/2021 vide Siaya High Court Misc Civil Application No E025 of 2021.

2. The history of the matter is that the respondent herein Zakayo Obala alias Obala Ombiro filed summons for revocation of grant dated 27th January 2020 in the lower court in which he sought revocation/annulment of the grant of letters of administration intestate issued to the appellant Arthur Ooko Oluoch on the 12.2.2019 on the grounds that the appellant herein had obtained grant of letters of administration intestate over the estate of James Oduor Ogwindi and Omira Ogwindi fraudulently through the non-disclosure of material facts.

3. It was the respondent's case that he was the son to the deceased Omira Ogwindi whereas the appellant was the son to one of his deceased's brothers and as such, he, the respondent, ranked in priority over the appellant in applying for grant.

4. On his part the appellant pleaded and submitted that the respondent was mistaken in demanding to be the sole administrator of the deceaseds estates on account of being the sole surviving son of the family

patriarch as the two intestates were absolute co-proprietors of land parcel number South Ugenya/ Simenya/289 together with the respondent and one Timothy Oluoch Ombiro in equal shares of ¼ each.

5. In her ruling, the trial magistrate found that the grant of letters of administration issued to the appellant was defective as the same was obtained fraudulently by concealing material facts owing to the exclusion of existing legal beneficiaries. The trial magistrate further proceeded to declare the respondent as the only surviving son of the late Ombiro Ogwindi and that therefore he was the only person entitled to petition for grant in respect of the land parcel number South Ugenya/ Simenya/289.

6. Aggrieved by the said ruling, the appellant filed his Memorandum of appeal dated 28th December 2021 in which he raised 10 grounds of appeal as follows:

   i. That the learned trial magistrate erred in law when she proceeded to not only revoke but also annul the certificate of confirmation of grant issued on 12th February 2019 when in law she could only either revoke or annul the same.

   ii. The learned trial magistrate erred in law and fact in purporting to revoke a grant to the estate of Ombiro Ogwindi issued to Arthur Ooko Oluoch on 10th September 2018 and confirmed on 12th February 2019 when the subject grant was not in relation to the estate of Ombiro Ogwindi.

   iii. The learned trial magistrate erred in law and in fact by revoking a non-existent grant in the subject cause.

   iv. The learned trial magistrate made an erroneous fining of fact and misdirected herself by declaring that the respondent had no knowledge of the subject succession cause when the evidence on record was unequivocal to the effect that from the institution of the cause till the confirmation of grant, the respondent was privy to the proceedings.

   v. The learned trial magistrate erred in law and fact in making a declaration that the respondent was the rightful person to take out letters of administration in respect of land parcel South Ugenya/Simenya/289.

   vi. The learned trial magistrate erred in law and in fact in making a declaration that the respondent was the rightful person to take the letters of administration in respect of land parcel South Ugenya/Simenya/289 and thereby effectively locked out the rightful beneficiaries of the other common registered proprietors from succedding their benefactors.

   vii. The learned trial magistrate erred in law and in fact and over reached into issues that fall squarely within the jurisdiction of the environment and land court and not the succession court.

   viii. The learned trial magistrate erred in law and in fact by making a finding that the appellant had not filed submissions in opposition to the summons for revocation when the court record clearly confirmed the appellant's submissions are on record and therefore violated the appellant's right to a fair hearing.

   ix. The decision of the learned trial magistrate was grossly at variance with the evidence on record.

   x. In view of the circumstances set out herein above, the learned trial magistrate totally misdirected herself in delivering judgement in favour of the respondent by failing to consider and appreciate the evidence on record tendered on behalf of the appellant.

7. The appeal herein was canvassed by way of written submissions, with only the appellant complying.

The Appellant's Submissions

8. The appellant submitted that the ruling of the trial magistrate was erroneous and legally untenable and ought to be set aside as it was not open to the trial magistrate to annul and at the same time revoke the grant as the consequences from both actions was different.

9. It was submitted that the trial magistrate abdicated her duty of perusing the court record and instead relied on the respondent's submissions which action prevented her from noticing that the grant in issue was with respect to the estates of James Oduor Ogwindi & Omira Ogwindi and not in respect of the estate of the respondent's father, Ombiro Ogwindi. He further submitted that it was evident from the court record that the respondent's father, Ombiro Ogwindi, was never registered as proprietor of the parcel South Ugenya/Simenya/ 289.

10. The appellant submitted that there was no need to notify the respondent about the filing of the letters for administration as the respondent was an uncle to the deceased and not a son and as such was not to be informed as the deceaseds' widows were informed of the proceedings.

11. The appellant submitted that the respondent filed his application for revocation of grant because he disputed the mode of distribution of the suit parcel, a matter that had been settled at adjudication and was not to be reopened in a succession cause.

12. The appellant prayed that costs be awarded in this instance.

Analysis and Determination

13. As a first appellate court, this court's role is to subject the whole of the evidence to a fresh and exhaustive scrutiny and reach its own independent conclusions, bearing in mind that unlike the trial court, this court did not have the opportunity of seeing and hearing the witnesses first hand. This duty was well stated in *Selle & another v Associated Motor Boat Co. Ltd. & others* (1968) EA 123 and the Court of Appeal for East Africa took the same position in *Peters v Sunday Post Limited* [1958] EA.

14. The question that arises for determination in this appeal is whether this court should interfere with the learned trial magistrate's exercise of discretion. For this court to do so, it must be satisfied that the learned magistrate misdirected herself in some matter and as a result arrived at a wrong decision. As held by this Court in the often cited case of *Mbogo and another v Shah* [1968] EA 93:

> " A Court of Appeal should not interfere with the exercise of the discretion of a single judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice."

15. I have considered the appeal and the submissions by learned counsel. As stated above, this court can only interfere with the exercise of discretion by the trial court if it is satisfied that she misdirected herself in some matter and as a result arrived at a wrong decision or if it is manifest that the trial court was clearly wrong in the exercise of discretion with the result that there has been a miscarriage of justice.

16. The respondent herein sought revocation of the grant issued to the appellant on the 12.2.2019. The Certificate of Confirmation of Grant was said to be in regard to the estate of the deceased James Oduor Ogwindi and Omira Ogwindi. The suit property comprising the estate of the aforementioned deceased was land parcel South Ugenya/Simenya/289.

17. An examination of the Certificate of official search annexed to the appellant's petition for grant of letters of administration intestate reveals the ownership of the suit parcel to be; Timothy Oluoch, Obala Ombiro, James Oduor Ogwindi and Omira Ogwindi all who are stated to own ¼ share of the whole suit property.

18. From the Certificate of Official Search on record, the said property was registered under the *Registered Land Act*, Cap 300, Laws of Kenya, now repealed. It was registered in the joint names of the deceased and indicated the divided shares of each of the four proprietors above named.

19. Registration of property in the names of more than one person is provided for under sections 101, 102 and 103 of the said Act. The relevant provisions state as follows: -

> " 101
>
> (1). An instrument made in favour of two or more persons, and the registration giving effect to it, shall show –
>
> (a) whether those persons are joint proprietors or proprietors in common; and
>
> (b) where they are proprietors in common, the share of each proprietor ...
>
> 102
>
> (1). Where the land, lease or charge is owned jointly, no proprietor is entitled to any separate share in the land, and consequently –
>
> (a) dispositions may be made only by all the joint proprietors; and
>
> (b) on the death of a joint proprietor, his interest shall vest in the surviving proprietor or the surviving proprietors jointly...
>
> 103
>
> (1). Where any land, lease or charge is owned in common, each proprietor shall be entitled to an undivided share in the whole, and on the death of a proprietor his share shall be administered as part of his estate. ..."

20. Under section 118 of the Registered Land Act-now repealed,

> " If one of two or more joint proprietors of any land, lease or charge dies, the Registrar, on proof to his satisfaction of the death, shall delete the name of the deceased from the register."

21. I have therefore to determine whether or not the property was held jointly or in common for that has consequences upon the demise of one or more of the co-owners. The distinction between two was brought in *Isabel Chelangat v Samuel Tiro Rotich & 5 others* (2012) eKLR, in the following terms –

> " At this juncture, I must distinguish between joint ownership of land and land held in common. These are two different types of tenancies by which two or more people are entitled to simultaneous enjoyment of land...

> A joint tenancy imparts to the joint owners, with respect to all other persons than themselves, the properties of one single owner. Although as between themselves joint tenants have separate rights, as against everyone else they are in the position of a single owner. Joint tenancy carries with it the right of survivorship and "four unities". The right of survivorship (*jus accrescendi*) means that when one joint owner dies, his interest in the land passes on to the surviving joint tenant. A joint tenancy cannot pass under will or intestacy of a joint tenant so long as there is a surviving joint tenant as the right of survivorship takes precedence. ....
>
> Tenancy in common on the other hand is different from joint tenancy. In a tenancy in common, the two or more holders hold the property in equal undivided shares. Each tenant has a distinct share in the property which has not yet been divided among the co-tenants. In other words, they have separate interests only that it remains undivided and they hold the interest together. The largest factor that distinguishes a joint tenancy from a tenancy in common is the absence of the doctrine of survivorship in the latter. The share of one tenant is not affected by the death of one of the co-owners. The share of the deceased, devolves not to the other co-owner, but to the estate of the deceased co-owner. Although the four unities required for a joint-tenancy may be present, only one, the unity of possession is essential."

22. In the instant case the register in respect of South Ugenya/Simenya/289 the aforementioned case law it is clear that the suit parcel was held in common among the deceased persons with each being entitled to ¼ shares meaning, upon death on intestacy, their respective shares would pass to the bona fide heirs of each common owner or proprietor.

23. Having concluded that South Ugenya/Simenya/289 was held by the deceased persons in common, it follows then that following the demise of the four deceased persons-proprietors in common, each of the family members of the common proprietors was entitled to apply for a grant in respect of their own specific share of the estate or suit property and not the whole property.

24. In this case, the appellant herein petitioned for grant in respect of the entire property upon which he purported to share the estate of the four deceased persons to the beneficiaries of each co proprietor.

25. This brings me to the question as to whether the trial court erred in revoking the grant of letters of administration intestate issued to the appellant herein. Revocation of grant is provided for under section 76 of the *Law of Succession Act*. The grounds upon which the grant may be revoked are provided therein. The said section provides that revocation can either be at the instance of an applicant or can be by the court suo moto. However, it is a prerequisite that the conditions for revocation as set out under section 76 must be proved. In the case of *Jamleck Maina Njoroge v Mary Wanjiru Mwangi* (2015) eKLR the court discussed circumstances under which a grant can be revoked. The court observed that:

> " 11. The circumstances that can lead to the revocation of grant have been set out in Section 76 Law of Succession. For a grant to be revoked either on the Application of an interested party or on the court's own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law."

26. The power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the court to invoke section 76 of the *Law of Succession Act* and order for revocation or annulment of a grant. And when a court is called upon to exercise this discretion, it must take into

account interests of all beneficiaries entitled to the deceased's estate and ensure that the action taken will be for the interest of justice. Generally, the trial court has jurisdiction to revoke a grant if the conditions under section 76 of the Act are satisfied.

27. For avoidance of doubt, Section 76 of the *Law of Succession Act* provides that:

> " 76. Revocation or annulment of grant
>
> 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 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) that the grant has become useless and inoperative through subsequent circumstances."

28. Section 76 of the Act was explained by the court *In re Estate of Prisca Ong'ayo Nande (Deceased)* [2020] eKLR where it was stated that:

> " Under section 76, a court may revoke a grant so long as the grounds listed above are disclosed, either on its own motion or on the application of a party. A grant of letters of administration may be revoked on three general grounds. The first is where the process of obtaining the grant was attended by problems. The first would be where the process was defective, either because some mandatory procedural step was omitted, or the persons applying for representation was not competent or suitable for appointment, or the deceased died testate having made a valid will and then a grant or letters of administration intestate was made instead of a grant of probate, or vice versa. It could also be that the process was marred by fraud and misrepresentation or concealment of matter, such as where some survivors are not disclosed or the Applicant lies that he is a survivor when he is not, among other reasons. The second general ground is where the grant was obtained procedurally, but the administrator, thereafter, got into problems with the exercise of administration, such as where he fails to apply for confirmation of grant within the time allowed, or he fails to proceed diligently with administration, or fails to render accounts as and when required. The third general ground

is where the grant has become useless and inoperative following subsequent circumstances, such as where a sole administrator dies leaving behind no administrator to carry on the exercise, or where the sole administrator loses the soundness of his mind for whatever reason or even becomes physically infirm to an extent of being unable to carry out his duties as administrator, or the sole administrator is adjudged bankrupt and, therefore, becomes unqualified to hold any office of trust."[emphasis added]

29. The respondent invited the trial court to revoke the grant of letters of administration intestate for the reasons that the appellant obtained the confirmed grant by way of concealment of a material fact that the respondent was entitled to the suit land being one of the registered owners and a brother of the deceased persons herein. The respondent is Zakayo Obala alias Obala Ombiro and one of the co-owners of the said parcel of land as per the certificate of official search dated 22nd June 2018 is Obala Ombiro.

30. Having established that the suit property South Ugenya/Simenya/289 was held in common among the respondent and the other three deceased persons, consequently, if at all succession was to be done it would be in the individual owners' estate and not wholly as was done by the appellant.

31. Further, it is evident that the respondent had an interest in the suit property being listed as one of the co-owners of the suit property as was evident from the certificate of official search and therefore he ought to have been involved in the said succession proceedings.

32. From the grant issued on 10th September 2018, it is clear that the appellant herein was empowered to administer the estate of James Oduor Ogwindi and Omira Ogwindi following Gazzette Notice No 79 of 2018 of 10th August, 2018. The estate of Timothy Oluoch Ombiro singularly, from the lower court records, was already being administered by Arthur Ooko Oluoch the appellant herein vide grant issued to him on 21st September, 2016 vide Succession Cause No 24 of 2016 at Ukwala.

33. I further observe that the appellant herein only filed for succession in respect of the estate of James Oduor Ogwindi and Omira Ogwindi following an order issued by Hon. G.Adhiambo, Principal Magistrate Ukwala law Courts on 16th July 2018, following a citation by the appellant against two widows Abigael Oduor Ogwindi and Anastacia Awino Omira in Succession cause No 63 of 2016 after which he was issued with Certificate of Confirmed grant on 12th February 2019.

34. My other observation is that there have been disputes between the respondent and the appellant's family over what the respondent claims that he owned the whole parcel of land to the exclusion of the other co- owners and t from the minutes of the meeting held on 12/11/2019, the respondent was being adamant saying that he had already distributed the land in issue to his sons hence he was not willing to surrender it.

35. With utmost respect to the respondent, whereas he is one of the co- owners of the said land, he is only the legal owner and it is apparent on record that his share is ¼ of the entire piece of land and not more hence he could not have had the power to distribute the shares and estate of the other deceased co owners to his sons.

36. Furthermore, the issue of ownership of the other shares of the said land had already been settled vide Land Disputes Tribunal proceedings in LTD Case No. 109 of 2008; Nyanza Appeals Committee Case No 92 of 2008 and Siaya LTD No 57 of 2008 as elaborately discussed in Siaya HC Misc Civil Application No E020 of 2022 between the respondent herein and the appellant herein. In addition, the shares in question are as per the adjudication register as discussed in the Misc Civil Application No E020 of 2022.

37. This court has had occasion to deal with part of this dispute between the same parties in an application for leave to appeal out of time vide Siaya HC Misc Application No E020 of 2022 above, challenging the ruling of Hon Sarapai, Principal Magistrate, Ukwala Law Courts delivered on 10th March, 2022 in Ukwala PM Succession Cause No 24 of 2016 wherein the appellant herein was granted leave to petition for grant of letters of administration intestate of ¼ share in the land parcel No South Ugenya/ Simenya/289. I dismissed the application for leave to appeal out of time on 24th October, 2022 on the grounds, among others, that the appellant was entitled to so petition to administer the ¼ share of the estate belonging to his late father although the respondent was claiming that he had sole ownership of the entire land which claim was not supported by the land register and adjudication register produced into court which showed he only owns ¼ share of the entire parcel.

38. In my view, the appellant herein having realized his mistake of petitioning for grant in the Succession Cause No 232 of 2018 subject of this appeal, was right in seeking to petition only in respect of ¼ share of his late father's estate.

39. Having said the above, one of the grounds for revocation of the grant was that the respondent herein Zakayo Obala alias Obala Ombiro was not involved in the succession proceedings. Rule 26(a) and (2) of the Probate and Administration Rules provides that:

(1) 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.

(2) An application for a 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."

40. From the reading of the above Rule, it is mandatory for every applicant who wishes to be an administrator of an estate to give notice to every person entitled in the same degree as or in priority to the applicant. Further, such person of equal or lower priority must give consent or renunciation of interest during filing of succession cause.

41. *In re Estate of Magangi Obuki (Deceased)* [2020] eKLR the court cited the case of *Re Estate of Moses Wachira Kimotho (Deceased)* Succession Cause 122 of 2002 [2009] eKLR, and underscored the importance of disclosing all material facts before a court of Law while seeking letters of administration and confirmation thereof. The Court observed that:

> " I am certain that had the applicants been made aware of the application for the confirmation of grant by being served they would have brought to the fore their aforesaid interest in the estate of the deceased and the resultant grant would have taken care of those interests. Further had the respondent been forthright and candid and included the applicants as beneficiaries of a portion of the estate of the deceased as purchasers for value, the court in confirming the grant would have taken into account their interest in the estate of the deceased. As it is therefore the grant was obtained fraudulently by making of a false statement and or concealment from court of something material to the cause. The respondent knew of the applicants' interest in the estate of the deceased yet she chose to ignore them completely in her petition of letters of administration intestate. She also ignored them completely when she applied for the confirmation of the grant."

42. Gikonyo J in *Re Estate of Julius Ndubi Javan* (2018) eKLR (Deceased) added his voice and stated that:

> " ...in any judicial proceedings, parties must make full disclosures to the court of all material facts to the case including succession cases.
>
> ...non-disclosure of material facts undermines justices and introduces festering waters into pure streams of justice; such must, immediately be subjected to serious reverse osmosis to purify the streams of justice, if society is to be accordingly regulated by law."

43. I am satisfied that, there is ample evidence that the appellant concealed material facts. He went also misrepresented facts to the court. The respondent demonstrated within the purview of Section 76 that the grant was obtained without disclosure of material facts and misrepresentation.

44. It is therefore this court's finding, that the Grant issued to the Respondent is a proper candidate for revocation so that he can petition only to administer the share of his late father's estate which is 1/4/ of Land Parcel No South Ugenya/ Simenya/ 289 and not the whole parcel.

45. Turning to the appellant's grounds of appeal, the appellant pleaded that the trial magistrate erred by revoking and annulling the grant issued to him as these were two separate actions that could not be ordered by court.

46. The *Black's Law Dictionary*(https://thelawdictionary.org/) states that to revoke means to call back; to recall; to annul an act by calling or taking it back whereas it provides that to annul means to cancel; make void; destroy. To annul a judgment or judicial proceeding is to deprive it of all force and operation, either a6 initio or prospectively as to future transactions.

47. In my view these two words mean the same thing and do not mean different thigs as pleaded and submitted by the appellant. This ground thus lacks merit and is dismissed.

48. The second and third grounds of appeal regarding the revocation of a non-existent grant similarly lack merit as has been shown herein that the grant sought to be revoked is that issued to the appellant of the 12.2.2019 and which involved the suit property of which the respondent was also registered as a co-owner. This ground similarly lacks merit and is dismissed.

49. Grounds 4,5 and 6 of appeal have already been dealt with as the court has established that the appellant ought to have applied for grant specifically for the share of the estate of his deceased father from whom he was claiming beneficial interest and not the whole parcel of land failure to which, the respondent was entitled to be informed of the succession proceedings therein. The said ground similarly lacks merit and is hereby dismissed.

50. Turning to grounds 7,8,9 and 10, it is clear that the trial court considered the appellant's defence as well as the evidence on record prior to arriving at its conclusion, as submissions are not evidence.

51. On what orders this court should make, I observe that the trial court in revoking the grant issued to the appellant made the following order at page 3 of the ruling impugned herein:

> " The Court also declares that the objector herein Obala Ombiro to be the only surviving son of the late Ombiro Ogwindi thus the rightfiul person to take out letters of administration in respect of land parcel number South Ugenya/Simenya/ 289.
>
> The objector's application is allowed with costs."

52. In view of my analysis above, I find that the above declaration by the trial court was in error because it is not true that the respondent herein was the sole and only person entitled to administer the land

in question as he is a co-owner of ¼ share and if his father Ombiro Ogwindi owned 1/4/ share thereof as well, then the respondent could only petition to administer ¼ share of his late father and not the whole parcel. If the respondent was allowed to do so, he would also fall into the same mistake as did the appellant herein.

53. Taking all the above into consideration, I find that the trial magistrate did not err in revoking the grant issued to the appellant herein. To that extent, this appeal is dismissed. However, I find that the trial magistrate erred in declaring the respondent to be the only survivor who was entitled to petition for grant of letters of administration intestate in respect of the land parcel number South Ugenya/ Simenya/ 289. To that latter extent only, the appeal herein succeeds but the grant issued to the appellant remains revoked and the appellant can only petition to administer the ¼ estate of his father out of land parcel number South Ugenya/ Simenya/ 289.

54. Each party to bear their own costs of this appeal and costs of the lower court as parties are close family members. I so order.

55. This file is closed.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 16TH DAY OF MARCH, 2023

R.E. ABURILI

JUDGE