



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 19 OF 2018

TIRUS MWANIKI NJIRU.....APPELLANT

VERSUS

JANE IGANDU.....RESPONDENT

JUDGMENT

A. Introduction

1. Vide summons dated 19/11/2014 in Embu CM's Succ. No.342 of 2016, the respondent herein filed summons for revocation of grant of letters of administration intestate issued to the appellant herein by the trial court on 30/08/1985 and confirmed on 1202.1986 in Embu RM's Succession Cause No 7 of 1984 and citing the grounds as provided under Section 76(a) (b) (c) (iii) of the Law of Succession Act Cap 160 Laws of Kenya. The summons proceeded for hearing and in a ruling delivered on 7/05/2018, the trial court (Hon. M.N Gicheru C.M) ordered that the grant be revoked unless each son of Julia Gichuku gets one acre of the land in dispute.

2. It is this ruling which necessitated the appeal herein and which was instituted by way of memorandum of appeal dated 23/05/2018 and wherein the appellant raised five (5) grounds challenging the said ruling. The said grounds of appeal can be summarized as hereunder: -

- 1) *The learned trial magistrate erred in law and in fact in making an order that the sons of Julia Gichuku (deceased) do get one acre each whereas those sons were not parties to the suit and did not testify.*
- 2) *The learned trial magistrate erred in law and in fact in failing to make a determination as to whether the said sons were dependants of the deceased or are being maintained by the appellant.*
- 3) *The learned trial magistrate erred in law and in fact in correctly making a finding that the respondent was not entitled to orders for revocation of grant then proceeded and made a contradicting finding that there are grounds for revocation of grant, which grounds were not genuine to the issue in the case.*
- 4) *The learned trial magistrate erred in law and in fact in failing to make a finding that the claim against the appellant or his brother Joseck Njue Njiru could only have been by way of a civil suit and not in succession proceedings.*
- 5) *That the ruling was against the weight of the evidence and the applicable laws.*

3. The appellant thus prayed that the appeal be allowed, the orders given in Embu CM's Succ. No.342 of 2016 be set aside and for costs of the appeal.

4. The appeal was disposed of by way of written submissions.

B. Submission by the parties

5. The appellant submitted that the sons of Juliet were given one acre each yet they were never parties to the suit and neither did they testify and they never at any time attended court despite the fact that they were aware of the revocation proceedings and who were being taken care of by the appellant and the appellant's brother. Further that the court relied on unsubstantiated evidence that the said Julia was not married and allocated land to the said sons without evidence that she remained unmarried and thus failed to prove the conditions for revocation of grant under section 76 of the Law of Succession Act (to the effect that the said Julia remained unmarried). Reliance was made on the case of **Albert Imbuga Kisigwa –vs- Recho Kavai Kisigwa Succession Cause No.158 of 2000** that there must be evidence of wrongdoing for the court to invoke section 76 and revoke or annul a grant. The appellant further submitted that the respondent was not able to prove that the two sons were dependants of the deceased within the meaning of section 29(b) of the Law of Succession Act and no evidence was called in that respect. Reliance was made on **re estate of M'Muthamia Mwendwa (deceased) (2016) eKLR** to the effect that grand-children are not

automatically entitled to inherit from their grandfather and they had to prove that they were being maintained by him prior to his death. Further that the court erred in law and fact in failing to find that the claim against the appellant and his brother was a civil claim and not a claim in a succession cause.

6. The respondent on her part submitted that the Embu customary law which precluded women from inheriting their father's estate was illegal and discriminatory and those customary laws which are repugnant to justice and morality and inconsistent with any written law ought not to apply. Reliance was made on **re Estate of Leorinka Ole Ntutu (deceased) 2008 eKLR**, articles 2(4) and 27 of the Constitution of Kenya 2010, section 38 of the Law of Succession Act amongst other authorities. The respondent further submitted that the two sons were dependants of the deceased within the meaning of section 29 of the Act as they relied on the suit land herein for their livelihood up to the point when the appellant unlawfully kicked them out of the suit property. The respondent as thus prayed for consolidation of the resultant titles into the original LR Kagaari/ Kanja/183 and subsequent distribution of the same between the appellant, the respondent and the two sons (in three equal parts of 2.3 acres each).

C. Issues for determination

7. As a first appellate court, this court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, before drawing a conclusion from that analysis. The court has however to bear in mind the fact that it did not have an opportunity to see and hear the witnesses first hand. This duty is captured by *Section 78 of the Civil Procedure Act* which espouses the role of a first appellate court which is to: *'..... re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions.'* This was buttressed by the Court of Appeal in the case of **Peter M. Kariuki v Attorney General [2014] eKLR** where it was held that:

*"We have also, as we are duty bound to do as a first appellate court, to reconsider the evidence adduced before the trial court and reevaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence.....(See **Ansazi Gambo Tinga & another –vs- Nicholas Patrice Tabuche [2019] eKLR**)"*

8. However, there is no uniform method for evaluation of the evidence on record. What is expected of a trial court is to identify the legal and factual issues for consideration and to analyze the evidence tendered to determine what facts have been proved or disliked. (See **John K. Malembi –vs- Trufosa Cheredi Mudembei & 2 others [2019] eKLR**). Neither is there any set format to which this court ought to conform to, in the re-evaluation of the trial court's evidence but the evaluation should be done depending on the circumstances of each case and the style used by the first Appellate Court. What matters in the analysis is the substance and not its length. I am guided by the Supreme Court of Uganda's decision in **Uganda Breweries Ltd –vs- Uganda Railways Corporation [2002] 2 EA 634** and **Odongo and Another vs. Bonge Supreme Court Uganda Civil Appeal 10 of 1987 (UR)**.

9. I have certainly perused and understood the contents of the pleadings which were before the trial court, proceedings and judgment therefrom, the grounds of appeal as set out in the memorandum of appeal filed herein and rival submissions by the parties before me. It is clear from the said analysis that the appeal herein revolves around the decision of the trial court in finding in favour of the respondent and revoking the grant issued in favour of the appellant.

10. It is my view therefore that the issue which this court is invited to decide on, is whether the trial court erred in revoking the grant and in allocating each of the two sons of one Julia one acre of the suit land each.

D. Determination of the issue

11. **As to whether the trial court erred in revoking the grant herein, 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. However, from the analysis above, it appears that the relevant provision is section 76(a)(b) and (c) as the application before the trial court related to the obtaining of the grant. Under the said provisions, *a grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by an interested party or of its own motion on the grounds either that the proceedings to obtain the grant were defective in substance; that the grant was obtained fraudulently by making of a false statement or by the concealment from the court of something material to the case; or that the grant was obtained by means of untrue allegation of a fact essential in point of law to justify the grant not withstanding that the allegation was made in ignorance or inadvertently. These grounds ought to be proved with evidence as the power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds but not to be exercised whimsically or capriciously.* (See **Albert Imbuga Kisigwa –vs- Recho Kavai Kisigwa, Succession Cause No.158 OF 2000**). *Even when revocation is by the court on its own motion, there must be evidence to satisfy the grounds for revocation of grant* (See **Matheka and Another –vs- Matheka [2005] 2 KLR 455**).

12. **It is clear that the main reasons as to why the respondent herein sought revocation of the grant is that the appellant is in possession of the whole of land parcel number Kangaru/ Kanja/ 1875; that only the appellant and Joseck Njue Njiru were present during the issuance of grant of letters of administration and confirmation of the same; that the grant was issued and confirmed to the appellant herein without notice to her; and without involving all the children/ beneficiaries of deceased' estate. The appellant in opposition to the application deposed that the respondent herein and her sister were both married at the time of applying for letters of administration and that all the family members were involved in the process and they were aware that he was the owner of the suit land and that was why no one protested. He pleaded that under the Kiambu customary law, the respondent herein was not entitled to inherit the deceased's property.**

13. **As such, the dispute, in my view, is on the failure on the part of the appellant (or otherwise) to involve the respondent in the succession process (both during the issuance of grant of letters of administration and confirmation of the same).** However, since the application before the trial court was for revocation of the grant, I will consider only the process of obtaining the said grant. The process of confirmation of the grant and subsequent registration of the suit land in the names of the appellant is not covered by section 76 and thus cannot form a basis of revoking a grant but ought to be challenged through a review. (See **In re Estate of Prisca Ong'ayo Nande**

(Deceased) [2020] eKLR). The main focus should be on the failure by the applicant to involve the applicant in the process of obtaining the grant.

14. I note that the deceased died on 4/03/1975 and which was before the commencement of the Law of Succession Act. Under section 2(2) of the Act, the administration of his estate is subject to the Law of Succession Act though the distribution thereof is not governed by the Law of Succession Act but by written laws and customs applying at the time of the death of the deceased. (See in **Re Nduati Mbuthia (Deceased) (2015) eKLR**). As such, **section 38 of the Act (which deals with distribution of the deceased's estate where he died intestate and being survived by children) does not apply to the distribution of the estate herein.**

15. Section 51 of the Act provides that application for grant ought to be by way of a petition. The contents of the petition are provided under section 51(2). Rule 26 of the **Probate and Administration Rules provides that:** -

“26. (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.”

16. The import of this rule is that where for instance a petitioner is a child of the deceased, the consent from the other children of the deceased ought to be obtained. This is because they rank equal to the proposed petitioner. In **the matter of the Estate of Isaac Kireru Njuguna (deceased) Nairobi HC Succession Cause 1064 of 1994** the court found that a grant is liable for revocation where all the heirs have not consented to the mode of distribution and all the properties which make up the estate are not taken into account or distributed. (See also **Antony Karukenya Njeru v Thomas M. Njeru [2014] eKLR** and **In the Matter of the Estate of Muriranja Mboro Njiri, Nairobi H.C. Succ. Cause No. 890 of 2003** where in both cases, a grant of letters of administration was revoked for failure by persons with equal priority to consent to the petitioners therein applying for grant of letters of administration).

17. In the instant case, the respondent herein was a daughter to the deceased and thus generally her consent was required. However, as I have already noted, the applicable law is the Embu customary law. Under Embu inheritance customary law just like Kikuyu inheritance customary law and which is documented in **Eugene Cotran's Restatement of African law, Kenya Volume 2: The Law of Succession 1969 (London, Sweet & Maxwell)**, inheritance under Kikuyu customary law is patrilineal. The pattern of inheritance is based on the equal distribution of mans property among his sons, subject to the proviso that the eldest son may get a slightly larger share. Daughters are normally excluded, but may also receive a share if they remain unmarried. (See **In Re The Estate of Mugo Wandia (Deceased) [2009] eKLR**). Thus, succession was based on the patriarchal system and favoured male beneficiaries over females and the said customs did not contemplate married daughters as heirs to the estate of their deceased father. As such, the respondent herein having been married as at the date of death of the deceased, it would therefore be immaterial that she was not informed when the succession cause was filed.

18. Therefore, failure by the appellant to inform her of the succession cause having been the main ground for the application for revocation of grant before the trial court, it is my view that such was not a ground for revocation of the grant herein as she was not a heir and thus not entitled to the notice. As such, it is my view that the trial court did not err in finding that the grant herein was not subject to revocation on that ground.

19. However, as I have noted, unmarried women were entitled to inherit the estate of their deceased father under the Kiambu customary law which custom is documented and thus notorious. It is not disputed that the deceased had another daughter by the names Julia Gichuku, who was unmarried and who is now deceased. The said daughter was indicated to have survived the deceased herein and though the appellant submitted to the effect that there was no evidence that she remained unmarried, the fact that she was not married was never disputed in the trial court (but raised in the submissions before this court and which in my view is an afterthought). That being the case, it therefore means that her consent to the applicant petitioning for the grant of letters of administration was required. If she was mentally unstable (as was alleged at the hearing of the summons for revocation), then an affidavit to that effect ought to have been filed or evidence to that effect tendered in the trial court. Further, the consent of one Joseck Njue Njiru ought to have been obtained as he was a person of equal priority with the appellant herein.

20. I have perused the court record and it is clear that the appellant did not file the consent form (consent to the issuance of grant of letters of administration to person of equal or lesser priority). The records indicate that at the time of grant of the said letters of administration intestate, the said Joseck and the appellant appeared before F.N Muchemi Ag. RM (as she then was) and thus it can be implied that he consented to the appellant being granted the said letters of administration intestate. However, as for Julia Gichuku, there is no evidence that she consented to the appellant being granted the letters.

21. Under section 76, a grant can be revoked by the court either on its **own motion or upon application by any interested party**. What the court needs to be satisfied with is evidence to support the grounds for revocation of grant {See **Matheka and Another –vs- Matheka (supra)**}. It is my view that failure by the appellant to get the consent from his sister (Julia Gichuku) who was unmarried and thus a beneficiary and a person of equal priority amounted to obtaining the grant fraudulently by making of a false statement and by the concealment from the court of something material to the case. He ought to have disclosed that the said Julia was not married and thus get her consent for him to being the petitioner. This, therefore, means that the said grant was obtained by means of untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently. The allegations being that the only persons who were entitled to inherit the estate was him and his brother Joseck. In my view, this led to the said Julia missing out on the estate and resulted to her being buried in a cemetery (a fact which the appellant did not dispute). It is this non-disclosure which has even led to her children being left to be maintained by the appellant and his brother. It is my view that the grant issued to the appellant ought to be revoked for reasons above.

22. The appellant raised a ground to the effect that the trial court erred in failing to make a determination as to whether the said sons were

dependants of the deceased or are being maintained by the appellant. In his submissions, he averred that the respondent did not tender evidence that the two sons were dependants of the deceased within the meaning of section 29(b) of the Law of Succession Act. In response to the issue, the respondent submitted that the said sons were dependants of the deceased within the meaning of section 29 of the Act as they relied on the suit land herein for their livelihood up to the point when the appellant unlawfully kicked them out of the suit property.

23. In my view, this is a misconstruction of law on the part of the counsel. Despite being trite law that grandchildren can only be termed as “dependants” within the meaning of Part III of the Act only upon prove that they were being maintained by the deceased immediately prior to his death (section 29(b), from the reading of section 26 of the Act (which provides for provisions for dependants not adequately provided for by will or on intestacy) it is clear that for an issue of whether a person was a dependant or not to be determined by a court, the person must have died after the commencement of the Act and further that there must be an application by or on behalf of a dependant. Further under Section 30, an application under Part III cannot be brought (before a court) after a grant of representation in respect of the estate to which the application refers has been confirmed as provided by Section 71.

24. In the instant case, the deceased died before the Act and neither was there any application on dependency before the trial court. Further, at the time of the ruling by the trial court, the grant had already been confirmed. As such, it is my view that the trial court had no business determining as to whether the said sons were dependants of the deceased. In my view, the trial court allocated the said land to the two sons on the strength of the fact that they were entitled to inherit the share which ought to have been inherited by their mother and who was by then deceased.

25. The appellant further raised a ground to the effect that the trial court erred in making an order that the sons of Julia Gichuku (deceased) do get one acre each whereas those sons were not parties to the suit and did not testify. In his submissions, he averred that the said sons were given one acre each yet they were never parties to the suit and neither did they testify and they never at any time attended court despite the fact that they were aware of the revocation proceedings and that they were being taken care of by the appellant and the appellant’s brother. The court records are clear that the trial court offered the appellant a chance to produce the said sons before court. This was for the purposes of ascertaining the averments that the said sons were being provided for by the appellant and his brother (Joseck) but they were never produced. It is therefore not clear as to whether the averments by the appellants were true. In fact the respondent’s case was that the said sons were living as squatters.

26. In my view, the most appropriate remedy available was to have the grant revoked and a fresh grant issued. It is at the hearing of the summons for confirmation of the grant that the said sons (being beneficiaries of the estate) should appear before the court and indeed confirm as to whether they were interested in the estate herein. In my view, the appellant’s brother having forfeited his share of the estate (as it is evident from the court records), the suit land ought to be shared equally between the appellant and the deceased sister and thus the sons ought to share the mother’s share equally.

27. The appellant raised the ground to the effect that the trial court erred in correctly making a finding that the respondent was not entitled to orders for revocation of grant then proceeded to make a contradicting finding that there are grounds for revocation of grant, which grounds were not genuine to the issue in the case. Further that the ruling (by the trial court) was against the weight of the evidence and the applicable laws.

28. However, there were no submissions made in this respect but nonetheless, as I noted elsewhere in this judgment, the duty of the first appellate court is to reconsider the evidence adduced before the trial court and reevaluate it to draw its own independent conclusions and to satisfy itself that the conclusions reached by the trial magistrate are consistent with the evidence. From my analysis of the evidence before the trial court, it is my view that applying the evidence before the trial court to the applicable laws, the same was sufficient to warrant the revocation of the grant issued by the appellant herein.

29. *Taking into consideration all the above, it is my considered view that the grant issued to the appellant herein ought to be revoked and a new grant issued. The proceedings leading to the confirmation of the same and the resultant certificate of confirmation ought to be set aside. Any transactions under the said grant ought to be declared null and void for all intents and purposes. Fresh summons for confirmation of the grant in compliance with all the requirements of Section 71 of the Law of Succession Act and Rule 40 of the Probate and Administration Rules should be filed and which application ought to be served upon the two sons of Julia Gicuku. The said sons, if dissatisfied with the proposals made in the application to be filed should be at liberty to file affidavits of protest making their own proposals on distribution and thereafter attend court on the date to be appointed for the hearing of the confirmation application to state their position.*

30. The appeal being a succession cause involving family members, each party should bear their own costs.

31. It is so ordered.

Delivered, dated and signed at Embu this 3rd day of February 2021.

L. NJUGUNA

JUDGE

.....**for the Appellant**

.....**for the Respondent**