



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**CIVIL APPEAL NO. 58 OF 2019**

**BILIA WAMBETI JOTHAM.....APPELLANT**

**VERSUS**

**JANET GACHEKE NGUO.....RESPONDENT**

**JUDGMENT**

**A. Introduction**

1. The appellant herein filed summons for revocation of grant dated 18/08/2018 and filed in court on 14/08/2018 in Embu CM's Succession Cause No. 312 of 2017 wherein she relied on the grounds that she was not informed when the respondent herein filed for the said succession cause and neither was she served with citation to accept or refuse letters of administration intestate but only learned of the same when she saw surveyor come to sub-divide the suit land. Further that she never signed any documents concerning the said cause. The said summons was opposed by the respondent herein by way of a replying affidavit wherein she denied the depositions by the appellant. In a ruling delivered by Hon. M.N Gicheru PM, the court dismissed the said summons and awarded costs to the respondent. The court further lifted the restriction which had been registered by the appellant.

2. It is this ruling which necessitated the appeal herein and which was instituted by way of memorandum of appeal dated 7/10/2019 and which was amended on 27/01/2021 and wherein the appellant raised seven (7) grounds to the effect that;-

1) *The learned magistrate erred and misdirected himself in concluding that the respondent should inherit the parcels LR Ngandori/Kirigi/6181 and Ngandori/Kirigi/6182 at the exclusion of the appellant*

2) *That the learned magistrate erred in law and in fact by relying entirely on the evidence presented by the respondent at the exclusion of that of the appellant.*

3) *That the learned magistrate erred in law and in fact in ignoring that the appellant had contributed to the purchase of LR. Ngandori/Kirigi/5385 and hence this should not have been considered as part of the estate of the deceased in distribution of the estate*

4) *That the learned magistrate erred in law and in fact by considering extraneous issues instead of confining himself to the pleadings, issues and submissions placed before him by the parties.*

5) *That the learned magistrate erred in law and in fact by deciding the appellant begun constructing on LR Ngandori/ Kirigi/6181 after the case was filed.*

6) *That the learned magistrate erred in law and in fact by disinheriting the appellant.*

7) *That the learned magistrate erred in law and in fact by failing to give proper directions on the manner in which the application for revocation of grant should be heard.*

3. The appellant thus prayed that the appeal be allowed, the orders of Magistrate Court of 16/09/2019 be set aside, the appellant be awarded LR. Ngandori/Kirigi/6181 and for the costs of the appeal.

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

**B. Submission by the parties**

5. Arguing grounds 1 and 2 of the memorandum of appeal, it was submitted on behalf of the appellant that the trial court erred in relying on the evidence of the respondent and the photographs presented before the court to reach to a conclusion that the appellant entered the land during the proceedings of the application and further in finding that the appellant's family inherited a bigger portion yet the family was not present in court and which finding was contrary to the provisions of section 40 of the Law of Succession Act and further dismissing the application without considering the entire evidence that the appellant was in occupation of the land which was a gift *inter vivos*. On grounds 3, 4 and 5, it was submitted that the trial court ignored the appellant's evidence that she contributed to the purchase of LR Ngandori/Kirigi/5385 and which should not have been considered as part of the estate of the deceased and the evidence to the effect that she was given 1 acre of the suit land by the deceased vide an oral will.

6. In support of ground 6 and 7, it was submitted that the trial court did not give directions as to whether the application should be heard orally or through affidavit evidence or submissions and which was a gross error going to the very tenets of fair hearing under Article 50(1) of the Constitution as it denied the appellant an opportunity to give evidence on how she bought LR Ngandori/ Kirigi/5385, why it was registered in the deceased's name, when she settled on LR Ngandori/Kirigi/ 6181 and when she begun construction on the said land parcel. Reliance was made on the case of **Gerald Macharia Njogu –vs- Samuel Macharia (2016) eKLR.**

7. The respondent in opposing the appeal submitted (on grounds 1 and 2) that the **trial court was right in dismissing the application which was before it and in deciding as it did as the same did not meet the conditions for revocation of grant under Section 76 of the Law of Succession Act and that the applicant's case before the trial court was aimed at trying to have the appellant get more land yet there is clear evidence that she had already benefitted from the estate. That she is the registered owner of LR Ngandori/Kirigi/5385 and her mother being the registered owner of Ngandori/Kirigi/5382, it is only fair that she (together with her children) inherit the two land parcels whose part thereof has already been taken by the government for construction of a road.**

8. **In regards to grounds 3, 4 and 5, the respondent submitted that there was no evidence tendered in court to the effect that the appellant herein bought the said land from one Njeru Thirikwa before land demarcation and which land was initially named as Ngandori/Kiriari but which was later changed to Ngandori/Kirigi/5385 or to prove that the deceased bequeathed the said land to her by way of oral will and that she did not prove the oral will which she claimed to have been left or the conditions for gift *inter vivos* and the conditions for the same. She further submitted that the appellant did not tender evidence to prove that she (respondent) had been shown LR Ngandori/Kirigi/6182 by the deceased but the same was not transferred to her as she had left in 1974 and came back after the death of the deceased in 2006. In response to grounds 6 and 7 she submitted that the law of succession Act does not make a provision as to how an application for revocation should be heard and that the parties herein filed their documents and statements which formed part of court record and which were considered by trial court in its ruling.**

9. **Further that since the appellant's case was hitched on the fact that she ought to be given land parcel number LR Ngandori/Kirigi/6181, the same is not a ground upon which a grant can be revoked under Section 76 of the Act thus the application was doomed and ought to have failed. Further that the appellant is her step daughter and ranks lower than her in the order of priority as provided under the law of succession Act.**

### **C. Issues for determination**

10. 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. (See **Peter M. Kariuki –vs- Attorney General [2014] eKLR** and **Ansazi Gambo Tinga & another –vs- Nicholas Patrice Tabuche [2019] eKLR**). However, it is trite that there is no 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 is immaterial. 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)**.

11. 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 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 dismissing the appellant's application for revocation of the grant issued to the respondent herein. It is my view therefore that, the issue which this court is invited to decide on is whether the trial court erred in dismissing the said application for revocation of grant and in doing so, failed to consider the evidence presented before it.

### **D. Determination of the issue**

12. As I have already stated, the application before the trial court was for revocation of the grant issued to the respondent herein. From the reading of the application, the evidence presented therein and further from the submissions tendered before me, it is clear that the application for revocation was generally premised on the grounds that the appellant herein was disinherited LR Ngandori/ Kirigi/6181 and which land she deposed had been given to her by the deceased before his demise and that she was not informed of the succession cause or served with citations to accept or refuse letters of administration intestate and that she never signed any document in relation to succession of her deceased father.

13. **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. Under the said section, 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 notwithstanding 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 the grant (See **Matheka and Another –vs- Matheka [2005] 2 KLR 455**).

**14. What is conspicuously 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 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.”***

**15. As such, the submissions by the appellant before the trial court to the effect that she ought to have been allocated LR Ngandori/Kirigi/6181 are misplaced and the trial court ought not to have considered the evidence in that respect. The trial court was supposed to limit its focus to the process of acquiring the grant and examine as to whether the conditions for revocation of the same had been proved. As such, it is my view that the trial court erred in considering evidence from both the appellant and the respondent in that respect. In fact, the whole of the trial court’s ruling touched on the issue.**

**16. However, the appellant deposed in the affidavit in support of the application that she was not informed of the succession cause or served with citations to accept or refuse letters of administration intestate and that she never signed any document in relation to succession of her deceased father. As I have stated elsewhere in this judgment, the duties of this court in determining an appeal includes analysis of the evidence which was presented before the trial court. Section 76 bestows a court handling an application for revocation of grant to proceed *suo moto* where the conditions for revocation of grant are present. It is not in dispute that the deceased was the registered proprietor of LR Ngandori Kirigi/6181 and 6182 as the certificates of official search filed in court indicates so.**

**17. Further, from the court record, there is a letter from the chief- Ngandori East Location indicating that the deceased had two wives but one is deceased. The letter further reveals that both families had 5 children each. Though a chief’s letter is not a legal requirement in filing succession cause, it is presumed that since the chief is well familiar with the family of a deceased person, he is the only person who can inform the court of the beneficiaries left behind by a deceased. In the Form P & A 5 (affidavit in support of petition for letters of administration intestate) the beneficiaries listed seems to be from the second house only. All the beneficiaries of the estate of the deceased are not listed in the said form. Though the respondent is the surviving spouse of the deceased herein and as such ranks superior in priority hence making it unnecessary for the other beneficiaries to sign consent to grant letters of administration to persons of equal or lesser priority, she nonetheless ought to have listed all the beneficiaries.**

**18. Though the appellant’s statement filed in court on 30/05/2011 indicates that the deceased had shared his properties amongst his children and only left 5 acres, the law dictates that the petition for letters of administration should be accompanied by affidavit in support of the same (P & A. 5) and all the assets, liabilities and beneficiaries surviving the deceased should be listed. The respondent herein failed to do so. It is then clear that the grant of letters of administration was obtained fraudulently by concealment of material facts to the court. It is my view that the said grant was defective as the same was obtained fraudulently and by concealment from court of material facts and the same ought to be revoked on that ground. (See **in re Estate Shem Kitanga (Deceased) [2018] eKLR**).**

**19. In my view therefore the trial court erred in not considering the fact that there was non- disclosure of material facts and thus dismissing the summons for revocation of grant before the trial court. The grant issued to the respondent herein ought to be revoked and it is hereby revoked.**

**20. The grant having been revoked, a fresh grant ought to be issued to the respondent and after which she ought to proceed and file for confirmation of the same within 30 days and in so doing list all the all the beneficiaries of the estate. The said beneficiaries ought to be present at the time of confirmation of the said grant. In my view, allowing the mode of distribution as suggested by the appellant will be unfair to the other beneficiaries more so now that it is not clear whether they are agreeable to the same. Despite there being an averment that the deceased had distributed his property amongst his children, they ought to be present in court so as to confirm the same.**

**21. It is so ordered.**

**Delivered, dated and signed at Embu this 3<sup>rd</sup> day of March, 2021.**

**L. NJUGUNA**

**JUDGE**

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

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