



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**CIVIL APPEAL NO. 50 OF 2018**

**JOHN MUCHANGI NYAGA (Acting on behalf of**

**MARY RWAMBA NJAGI).....APPELLANT**

**VERSUS**

**MARY IGOKI IRERI.....RESPONDENT**

**JUDGMENT**

1. The succession cause herein relates to the estate of the late HELENIA SHIUTHARA ALAN. It was first filed in the Principal Magistrate's Court at Runyenjes as Succession Cause No. 137 of 2012.
2. It was then transferred to the High Court at Embu where it was registered as Misc. Succession Cause No. HC 29 of 2013.
3. On the 15<sup>th</sup> October, 2012, grant of letters of administration was issued to the respondent in this appeal in Runyenjes Succession Cause No. 137 of 2012 and subsequently the same was confirmed on the 28<sup>th</sup> February 2013. The application was made on the grounds that the grant was obtained fraudulently by making of a false statement and by concealment from the court of facts that are material to the case.
4. It was also alleged that the grant and the confirmation was obtained by means of untrue allegations of facts.
5. The application for revocation of the grant was heard by Bwonwonga, J. and in a ruling delivered on the 24<sup>th</sup> November, 2015 revoked the confirmed grant and ordered the parties to re-start the confirmation proceedings. The judge found that the protestor had made a case for the revocation of the grant that had been issued to the respondent on the 28<sup>th</sup> February, 2012.
6. Looking at the proceedings before the High Court, the parties dealt with the issue of ownership of land reference No. Kagaari/Kanja/2885 though that was not the issue before the court. This fact was noted by the Court in the ruling.
7. Following the ruling, aforesaid, the respondent in this appeal filed summons for confirmation of grant at Runyenjes Court, in Succession Cause No. 10 of 2017. The same is dated the 23<sup>rd</sup> February, 2018. She urged the court to confirm the grant of Letters of Administration Intestate issued jointly to her and Mary Rwamba Njagi and she set out the proposed mode of distribution in paragraph 9 of the affidavit in support of the summons. According to her, the only property comprising the estate of the deceased which is LR. Kagaari/Kanja/2885 was to be distributed equally with each of them getting 1 acre each.
8. The record shows that one, John Muchangi Nyaga filed what appears as a supporting affidavit but which is indeed an affidavit of protest. He is the son of the appellant herein. In the said affidavit he opposed the proposed mode of distribution for the reason that the respondent herein and her late husband have their family land at Kaimaru which she can inherit. He also contended that the deceased, Hellen Shiuthara Alan who was the mother to the respondent had said she had no interest in the land parcel No. Kagaari/Kanja/2885. In support of his assertions, he referred to the proceedings before the court for the revocation of the grant.
9. As noted by the learned magistrate in his ruling, which is the subject of this appeal, the application dated 23/02/2018 proceeded by way of written submissions which the parties duly filed. In his ruling, he stated that the allegation made by the protestor that the deceased had expressed her disinterest in the estate for she owned another land was not proven. He then proceeded to confirm the mode of distribution as per the respondent's proposal.
10. In the witness statement of John Muchangi Nyaga dated 29/06/2018, he has stated that the disputed parcel of land which is the only property forming the estate of the deceased was registered in the name of the deceased Nyaga Allan and later because of substance abuse and fear of him disposing off the same, they were jointly registered with his mother, Hellen Shiuthara Alan, the deceased herein.

11. This evidence came out before the High Court but which the Judge did not consider, but rightly so, because that was not the issue before him.

12. The learned magistrate ought to have interrogated that evidence together with the other evidence to the effect that the respondent has another piece of land. By failing to do so, he did not do justice to the parties. He ought to have taken *viva voce* evidence so that the credibility of this evidence could be tested by way of cross-examination. It was not enough for him to state that the appellant did not prove that the respondent's mother, who is the deceased herein had another piece of land and proceed to allow the suggested mode of distribution for that reason alone.

13. In view of the foregoing and bearing in mind that this is an appeal and the same shall be final, I find that it is only fair and just that the proceedings relating to the application for confirmation of the grant and the consequent ruling be and are hereby set aside.

14. I hereby direct that the matter be remitted to the Runyenjes Principal Magistrate's Court for hearing of the application dated 23/02/2018 and the same to proceed by way of *viva voce* evidence and before a different court from the one that initially heard the matter.

15. Each party shall bear its own costs of the appeal.

16. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 3<sup>RD</sup> DAY OF MARCH, 2021.**

**L. NJUGUNA**

**JUDGE**

.....for the Applicants

.....for the Respondent