



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO. 74 OF 2019

BERNARD MUNYI MUGO.....APPELLANT

VERSUS

ENID IGONJI MBOGO.....RESPONDENT

JUDGMENT

A. Introduction

1. The appeal herein was commenced by way of a memorandum of appeal dated 28.11.2019 and filed in court on 29.11.2019 and wherein the appellant raised the following grounds: -

- 1) *The learned magistrate erred in law exceeding her mandate by redistributing the estate instead of revoking the grant*
- 2) *The learned magistrate erred in law and fact by failing to find that the respondent's share was ultimately bigger than the appellant's.*
- 3) *The learned magistrate erred in law and fact by failing to consider the evidence placed before her in entirety before arriving at an erroneous decision.*
- 4) *The learned magistrate erred in law and fact by allocating a share of the estate to one Esther Njura who had expressly stated that she did not want any share.*
- 5) *The learned magistrate erred in law and fact by delivering an ambiguous ruling incapable of being executed.*
- 6) *The learned magistrate erred in law by delivering a ruling against the weight of evidence.*

2. Directions were taken that the appeal be dispensed with by way of written submissions and which directions were fully complied with. Pursuant to the said directions, each of the parties proceeded to file submissions in support of their rival positions.

B. Analysis of evidence in the trial court

3. As the first appellate Court, it is now well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of **Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) v Stephen Njoroge Macharia [2020] eKLR**). However the first appellate court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. (See **Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga –versus- Kiruga& Another (1988) KLR 348**).

4. In a nutshell, one Obadiah Muthee Njiru (now deceased) petitioned the lower court for letters of administration intestate vide Runyenjes Principal Magistrate Court's Succession Cause No. 125 of 2012 and which letters of administration intestate were granted to him on 18.10.2012 and the same confirmed on 19.04.2013. In the certificate of confirmation of grant, the estate/suit land being LR. Gatari/Nembure/2069 was distributed amongst Obadiah Muthee Njiru, and his two sons namely Bernard Munyi Mugo Francis and Henry Kinyua Muthee.

5. What followed is that Julius Mbogo Kathara (now deceased) filed summons in court dated 20.01.2014 and wherein he sought revocation of the above-mentioned grant. The grounds in support of the said application were that the proceedings to obtain the grant in the names of

Obadiah Muthee Njiru and the subsequent confirmation and distribution of the estate of the deceased were fraudulent and false as the respondent concealed from the court material facts which if disclosed, the court would have given different orders; that the respondent (then) Obadiah Muthee Njiru forged his (Mbogo Kathara-applicant then) signature on Form No. 38 and the affidavit sworn on 17.04.2013 in which it was alleged that he had given his consent to the filing of the petition for letters of administration and the distribution of the estate; that the respondent in the application for revocation assumed himself as the sole administrator of the deceased's estate and disinherited him (the applicant in the summons for revocation) and his family yet they were the only two surviving children of the deceased and the applicant in the summons for revocation lives and has developed part of the estate/suit land.

6. The summons were opposed by way of a replying affidavit sworn by Obadiah Muthee Njiru and wherein he deposed that Julius Mbogo Kathara (applicant for revocation) was aware of the whole process and he executed documents to allow him as the petitioner; that the applicant had been given Land Parcel No. Gaturi/ Nembure/ 2542 and thus the applicant was aware that he was not entitled to any portion of the suit land as he had his own land and as such, the application for revocation was an afterthought, malicious, designed to frustrate his efforts to settle himself and his children.

7. Both the respondent in the summons for revocation of grant (Julius Mbogo Kathara) and the applicant in the summons for revocation of grant (Obadiah Muthee Njiru) passed on various dates and were substituted by the appellant and respondent herein respectively.

8. Vide the orders of 23.03.2017 the application was transferred to Runyenjes Chief Magistrate's Court for hearing and determination. The application was heard and determined and wherein the court (Hon. S. Ouko- RM) in a ruling delivered on 31.10.2019 proceeded to revoke the grant and ordered that the estate be distributed equally between the three children Julius, Obadiah and Esther amongst other orders. It is this ruling and/ or the orders therein which forms the subject of this appeal.

C. Issues for determination

9. I have certainly perused and understood the contents of the pleadings before the trial court, proceedings and the ruling therefrom, the grounds of appeal and the rival submissions filed herein. It is clear that the appeal herein revolves around the trial court's order revoking the grant made to the appellant's father, its application of the relevant law on the evidence before it and further proceeding to distribute the estate. It is my considered view that in the circumstances, the main issues for determination are:-

a) Whether the respondent made a case before the trial court for revocation of grant of letters of administration made to Obadiah Muthee Njiru (now deceased).

b) Whether the trial court ought to have distributed the estate after revoking the said grant.

D. Determination of the issues

a) Whether the respondent made a case before the trial court for revocation of grant of letters of administration made to Obadiah Muthee Njiru (now deceased).

10. It is clear that the summons for revocation of grant before the trial court was premised on the fact that the grant was obtained fraudulently and by concealment of material fact, that the signature by the respondent's father on Form No. 38 and the affidavit sworn on 17.04.2013 in which it was alleged that he had given his consent to the filing of the petition for letters of administration and the distribution of the estate was forged and that the appellant's father misrepresented to the court that he was the sole administrator of the estate and thus disinheriting the respondent's father and his family.

11. The grounds under which a grant of representation may be revoked are provided for under section 76 (a) - (e) of the Law of Succession Act Cap 180 of the Laws of Kenya. From the face of the application which was before the trial court as I have analyzed above, it is clear that the application is premised on conditions (a), (b) and (c) and which provides that, *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.*

12. It is now trite that it is incumbent upon any party making an application for revocation or annulment of a grant to demonstrate the existence of any, some or all the above grounds (for revocation of grant). However, the court is bestowed with the powers to revoke the grant on its own motion so long as there is evidence of the existence of any of the conditions provided under section 76. (See **Matheka and Another –vs- Matheka [2005] 2 KLR 455**).

13. In the case of **Albert Imbuga Kisigwa –vs- Recho Kawai Kisigwa, Succession Cause No.158 Of 2000**, Mwita J. held that; -

“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 and order to revoke or annul 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.”

14. The deceased herein died on 28.08.1985 and as such pursuant to Section 2 of the law of Succession Act Cap 160 Laws of Kenya, his estate was subject to the said Act. Under the said Act, and as a general rule of procedure, a petition for letters of administration intestate is commenced by filing of a petition. Section 51(2) of the Law of Succession Act provides that the petitioner is supposed to include information as to:-

(g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then.

15. I have perused the petition and indeed the respondent's husband was included as a beneficiary.

16. Rule 26(1) of the Probate and Administration Rules 1980 further requires that letters of administration should not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant. Sub-rule 2 provides that 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, 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. It is this provision which the respondent herein seems to have invoked while seeking revocation of the grant herein by averring that his signature was a forgery but which averments the appellant refuted on the basis that the respondent was aware of the process in the lower court and executed the documents to allow him be the administrator.

17. I have perused the petition herein and I note that the appellant's father annexed to the petition the "consent to the making of grant of administration intestate to persons of equal or lesser priority" dated 18.07.2012 and which is signed by one Julius Mbogo Kathara (the respondent's husband). It is my considered view that the respondent's averments in the lower court that the said Julius Mbogo Kathara did not consent to the grant being made to the appellant's father cannot stand.

18. There was an averment to the effect that the said signature was a forgery. It is trite law that where fraud is alleged **fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.** The onus to prove fraud in a matter is on the party who alleges it. The standard of proof *required where fraud is alleged* is higher than in ordinary civil matters (balance of probabilities) *but it ought not to be one beyond a reasonable doubt as in criminal cases.* {See **Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) –vs- Stephen Njoroge Macharia (supra)** and **Central Bank of Kenya Ltd -vs- Trust Bank Ltd & 4 Others [1996] eKLR**}.

19. *In the instant case, there was no evidence which was tendered before the lower court to prove the said fraud on the part of the appellant's father. It is my considered view therefore that the trial court erred in law and in fact by revoking the grant made to Obadia Muthee Njiru (the appellant's father) on the basis of forgery of the signature on the consent to the grant being made to the appellant's father.*

20. The trial court in its ruling held that; -

"I have noted that although there is no proof of forgery of the applicant's signature, there's evidence that the respondent was less than honest in his application. It is clear that the applicant and his family were residing on the deceased's land. it therefore seems highly unlikely that he would opt out of participating in the administration of the same property"

With all due respect to the Learned Magistrate, it is my considered view that the trial court in holding as above proceeded to impute fraud from the facts of the case whereas the same was not proved.

21. Upon perusal of the trial court's record, I also note that the letter from the Chief attached to the petition indicated that the deceased was survived by the appellant's father (Obadia Muthee Njiru), Julius Mbogo Kathara (the respondent's husband) and one Esther Njura Kimotho who is indicated as the daughter of the deceased. However, the said daughter is indicated to be deceased. It therefore means that she could not have signed the consent to the making of grant of administration intestate to the appellant's father) being a person of equal priority to her.

22. By dint of section 51(2) of the Law of Succession Act a petitioner is supposed to include in the petition information as to;- **(g) in cases of total or partial intestacy, the names and addresses of.....the children of any child of his or hers then deceased.** As I have already noted, the letter from the Chief annexed to the application indicates that the deceased had a daughter but who is also deceased. By dint of section 51(2) above, the children of such a deceased beneficiary ought to have been included in the petition as beneficiaries.

23. However, I have perused the trial court's record and there is no indication as to the deceased beneficiary having left any child/ children and neither was their whereabouts mentioned by the parties herein. The same has not been brought to the attention of this court also. It therefore means that the appellant's father did not make any material non-disclosure which would have made the trial court to revoke the grant even *suo moto*.

24. It is my considered view therefore that the trial court erred in fact and in law and misapplied the facts to the law applicable in revoking the grant herein.

b) Whether the trial court ought to have distributed the estate after revoking the said grant.

25. The appellant raised a ground to the effect that the learned magistrate erred in law exceeding her mandate by redistributing the estate instead of revoking the grant. However, as I have already opined, the trial court erred in law and in fact in revoking the grant subject of this appeal. As such, it therefore means that any subsequent distribution of the estate was illegal and unfounded. However, since the issue has been raised by the parties herein, it is my considered view that this court ought to address the same. The parties made rival submissions in relation to the said issue and which I have considered.

26. Indeed, Section 38 of the Law of Succession Act provides that where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of Sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.

27. I have perused the trial court's ruling and the record and I indeed note that the trial court proceeded to distribute the estate in three equal

shares. However, upon the delivery of the said ruling, Mr. Ithiga addressed the court and wherein he sought orders for letters of administration to be granted in the names of the substituted parties. The trial court proceeded to make an order that parties to file for fresh confirmation of grant with the names of all the beneficiaries and further directed that the parties do file for confirmation jointly. As such, the ground of appeal in respect that the trial court proceeded to redistribute the estate ought to fail as it is clear that those were not the final orders of the court. However, the orders to the effect that the parties herein do file for confirmation of grant jointly should not stand as the grant was properly made.

28. The appellant further raised a ground to the effect that the learned magistrate erred in law and fact by failing to find that the respondent's share was ultimately bigger than the appellants. The appellant in support of this ground submitted that the Julius Mbogo had been bequeathed LR. Gatari/ Nembure/2542 by the clan as the first born son of the deceased and thus a customary trust can be inferred but nonetheless the appellant has no claim over the said land parcel. In response it was submitted that the trial court was fair and just in distributing the estate equally.

29. I have perused the trial court's record and I note that the issue as to the existence of the above-mentioned land parcel was brought by the appellant's father who in his replying affidavit to the summons for revocation of the grant deposed that the applicant therein was aware that he was not entitled to any portion of the suit land herein as he has his own land being LR. Gatari/ Nembure/ 2542. Parties took directions that they do file witness statements and documents and which were later admitted as evidence by consent. The appellant filed a witness statement by one Kamwere Rutere on 19.07.2018 and a list of documents which included the green card for LR. Gatari/ Nembure/ 2542. From the said green card and as it was admitted in the respondent's submissions before the trial court, the respondent's husband is the 1st registered owner and having been registered as Julius Francis but which name he corrected later. However as the trial court rightfully found, there was no evidence that the said land initially belonged to the deceased herein so as the registration of the same in the names of the respondent's husband can be taken into account while distributing the estate of the deceased herein. As such, save for the fact that the court erred in revoking the grant, it could not have been in error to give the respondent an equal share of the deceased's estate. LR. Gatari/Nembure/2542 was not a bequest or a gift *inter-vivos* by the deceased herein to the respondent's husband. However, the fact that the same was given to him by the clan having not been disputed, the appellant can proceed in the proper court and have a customary trust declared in his favour.

30. The appellant further raised a ground to the effect that the learned magistrate erred in law and fact by allocating a share of the estate to one Esther Njura who had expressly stated that she did not want any share. As I have already noted, despite the chief's letter having indicated that the said Ester Njura was a daughter of the deceased, it is not disputed that she was also deceased as at the time of petitioning the court for grant of letters of administration. Further as I have already stated, there is nothing on record indicative as to her having been survived by any spouse and/or any child/children. It is my considered view that without such evidence, the trial court indeed erred in proceeding to allocate a share of the estate to her spouse and or issue(s) surviving. In my view, the trial court was speculative as opposed to applying the evidence presented before it. However, since as I have indicated, her children ought to have been included in the petition, it is my view that if there is any of them surviving, he or she ought to apply for the revocation of the grant.

c) Whether the appeal herein is merited?

31. Having considered all the above and rendered myself as such, it is my considered view that the appeal herein is merited. The trial court erred in revoking the grant whereas there were no sufficient grounds for the same and/or neither were the grounds proved by sufficient evidence. The orders made on 31.10.2019 issuing the grant to Obadia Muthee Njiru are hereby affirmed. However, since the said Obadia Muthee Njiru is now deceased, an amended grant should be issued to the appellant herein as he is the administrator of the estate of Obadia Muthee Njiru.

32. As for the mode of distribution, I note that the respondent in the summons for revocation of grant before the trial court averred that the proceeding of obtaining the grant and the subsequent confirmation and distribution of the estate were fraudulent. However, it is trite that Section 76 of the Law of Succession Act deals with revocation of grant and not the process of confirming the grant or the certificate of confirmation of grant (See **re Estate of Prisca Ong'ayo Nande (Deceased) [2020] eKLR**). As such, the trial court could not have considered fraud in the process of confirming the grant. However, upon perusal of the court records, it is clear that the respondent's husband consented to the mode of distribution vide the consent to the mode of distribution dated 17.04.2013. The same was not challenged and neither was any fraud imputed and proved in relation to the same. The said respondent's husband having consented to the said mode of distribution, this court does not have any other alternative other than to adopt the said mode of distribution.

33. Being a succession cause involving family members, each of the parties herein shall to bear their own costs.

34. It is so ordered.

Delivered, dated and signed at Embu this 9th day of June, 2021.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent