IN THE HIGH COURT OF KENYA AT KIAMBU

CORAM: D. S. MAJANJA J.

CIVIL APPEAL NO. 69 OF 2018

BETWEEN

GEORGE NJOROGE NGARUIYA.....APPELLANT

AND

FRANCIS NJENGA NJOROGE..... 1ST RESPONDENT

MICHAEL KAGUTA NJOROGE..... 2ND RESPONDENT

(*Being an appeal from the Judgment and Decree of Hon. B. Bartoo, RM dated 7th December 2017 at the Thika Magistrates Court in Succession Cause No.87 of 1994*)

JUDGMENT

1. This is an appeal against the judgment and decree of the trial court declining to revoke the grant of letters of administration issued to the respondents and duly confirmed. Before I deal with the matters in issue, it is important to set out the history and background of the matter.

2. This matter concerns the estate of Njoroge Kaguta ('the deceased") of Gatundu in Kiambu County who died on 23rd August 1989. The petition was filed by his wives; Tabitha Nyakiyo Njoroge and Jane Nduta Njoroge. According to the affidavit in support of the petition (Form P & A 5), he was survived by his widows and the following children; Michael Kaguta Njoroge ("Michael"), Margaret Njeri Njoroge ("Margaret"), Thomas Ngaruiya, Francis Njenga Njoroge ("Francis"), Joseph Mbugua Njoroge and Paul Kariuki Njoroge. The disclosed list of assets was as follows: Plots 289, 1150, 615 and 262 at Kyanjau Farmers' Co-operative Society and Thika Municipality/Block 17/725.

3. Following Summons for Confirmation for grant filed by the widows dated 26th April 1995, the grant was confirmed and a certificate of confirmation of grant issued on 19th May 1995 stating that all the aforementioned properties would be shared between the two widows. After both widows died the respondents; Francis and Michael, filed a chamber summons dated 26th January 2004 seeking orders that the they be substituted for the widows and a fresh certificate of confirmation be issued in the respective names. A fresh certificate of confirmation dated 1st March 2004 was issued in the respondents' names distributing the properties as follows;

Francis Njenga Njoroge: Share No. 17/725, Athena Farmers Co-operative Society (solely)

Michael Kaguta Njoroge – Share No. 289 Kyanjau Farmers and Co-operative Society

Francis Njenga Kaguta – Plot No. 1217

Michael Kaguta Njoroge – Plot No. 1150

Margaret Njeri Njoroge – Plot No. 615

4. In due course, the respondents filed a summons dated 21st April 2015 in which they applied that the certificate of confirmation issued to them be amended/rectified to include Land Parcel Thika Municipality/ Block 18/1930 which it was stated was erroneously left out of the list of assets. They applied that the same be registered in the names of Francis and David Nganga Kaguta.

5. That application was followed by another summons for amendment of grant dated 11th January 2016 in which the respondent sought an order that the certificate of confirmation of grant and schedule thereto dated 1st March 2004 be amended by *"deletion of MARGARET NJERI NJOROGE as one of the beneficiaries herein"* and that the certificate of confirmation of grant dated 1st March be amended so that Plot 615 reads Thika Municipality Block 18/615. In the joint supporting affidavit sworn on 11th January 2016, the respondents deponed that Margaret

had now died and was survived by themselves and that Plot 615 which had been given to her had now changed to Thika Municipality Block 18/615. They proposed that the property be allocated to them in equal shares. The court allowed the application and an amended certificate of confirmation dated 12th February 2016 was issued granting the respondents that property in equal shares and also THIKA MUNICIPALITY 18/1930 to Francis and David Nganga Kaguta.

6. George Njoroge Ngaruiya ("George"), the appellant herein, moved the court by a summons for revocation dated 2nd August 2016 in which he applied to have the amended certificate of confirmation dated 12th February 2016 revoked. He stated that he was the son of Thomas Ngaruiya ("Thomas"), a son of the deceased, who had also died. He claimed that the deceased had a written will in which he had given Plot 615 to Margaret solely and that she had sold the plot to him for Kshs. 150,000/-. He contended that by amending the certificate of confirmation of grant to remove the name of Margaret, the respondent improperly allocated the property to themselves.

7. He also stated that the deceased bequeathed Plot No. 1930 to Thomas, Michael and Margaret but the respondents gave the said plot to Francis and David Nganga Kaguta, a son of one of the co-administrators. That they altered the mode of distribution in respect of Plot No. 242 which had been given to John Njoroge Kaguta and George Njoroge Kaguta and instead gave it Michael and that Michael allocated himself Plot 289 yet the deceased had allocated it to Tabitha Nyakio Njoroge now deceased.

8. The respondents opposed the application by their joint affidavit sworn on 25th August 2016. They stated that Plot 615 had been allocated to their sister Margaret and following her death, they applied for amendment for the certificate of confirmation so that the property is transferred to them equally. They denied that Margaret sold the property to George during her lifetime. They also contended that the sale agreement produced by George was null and void. They also stated that the document purporting to be a will was false as no such document had been proved and that in any case, the deceased did not bequeath his property to anyone as alleged during his lifetime.

9. After hearing oral testimony from the parties, the trial magistrate was convinced that the appellant had not made out a case for revocation of grant under **section 76** of the ***Law of Succession Act (Chapter 160 of the Laws of Kenya)*** ("the ***LSA***") on the ground that the sale agreement was not proved and it appeared to have been made when the respondents were administrators of the estate and that he had not demonstrated that he was entitled to ownership of Plot 615. The court pointed out that the appellant did not show that the parcels of land he was claiming were part of the deceased's estate and that he had not shown that his father was entitled to inherit any parcel of land.

10. In his memorandum of appeal dated 18th January 2018, the appellant complained that the trial magistrate erred by not finding that the respondent's had deliberately failed to involve the appellant as a grandson of the deceased which amounted to a material non-disclosure of the facts contemplated under **section 76** of the ***LSA***. That the trial magistrate erred by voiding a valid contract of sale which was prima facie evidence of his beneficial ownership and that the trial magistrate disregarded the deceased will which stipulated how the property should be distributed.

11. As this is a first appeal, I am alive to the principle that the first appellate court is required to reconsider the evidence, evaluate it and draw its own conclusions making an allowance for the fact that it neither heard nor saw the witnesses testify (see ***Selle v Associated Motor Boat Company Ltd*** **[1968] E.A. 123**).

12. The deceased died on 23rd August 1989 hence his estate was subject to the ***LSA***. Since he died intestate, his wives took out a petition for grant of letters of administration intestate. From the evidence on record, all his children were alive at the time and there was no indication that there was a will. If there was one, I have no doubt that the matter would have been raised by any of his wives and children, I therefore find and hold that the deceased died intestate and since he was a polygamous man, his estate was subject to distribution according to **Part V** of the ***LSA*** dealing with intestacy.

13. The reason I took the trouble to set out the procedural history of this matter is that the parties and indeed the learned magistrates who dealt with this matter made several procedural and substantive missteps that would have been avoided had the provisions of the ***LSA*** and the ***Probate and Administration Rules*** been adhered to scrupulously.

14. When the widows applied for and were granted the certificate of confirmation of grant, the deceased's estate was shared by the widows equally. This was contrary to **section 40** of the ***LSA*** which stipulates as follows:

> *40.(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.*
>
> *(2) The distribution of the personal and household effects and the residue of the net intestate within each house shall then be in accordance with the rules set out in sections 35 to 38.*

15. I suppose that the parties expected that the deceased's wives would then transfer to each beneficiary his or her share. But before this could take place, the widows passed away and the respondents applied to be substituted as administrators and for a fresh grant to be issued. Once both administrators died, the grant became useless and inoperative and was liable to be revoked either by the court on its own motion or an application by the beneficiaries under **section 76(e)** of the ***LSA***. In ***Re Estate of Edward Kanyiri Kunyiha (Deceased)*** **NBI HC Succ. No. 598 of 1985 [2013] eKLR** Musyoka J., observed as follows:

> *Regarding the death of the co-administrator, the position is that the grant...has become inoperative. The grant was made jointly to the applicant and his mother, who has now died. It was intended that the two act together in the administration of the estate. A grant is a certificate. It is issued to a particular person or persons. If the holder of the grant dies the grant becomes useless, as it cannot be transferred to another person. If it was made to two persons and one dies it becomes inoperative. Under section 76 of the Law of Succession Act such grant is liable to revocation. It should be revoked and another grant made.*

16. From the record, a fresh certificate of confirmation was issued not on the same terms as the earlier certificate of confirmation but on difference terms. In essence, the earlier grant was revoked and confirmed afresh at the same time but on different terms. It is not clear from the record whether all beneficiaries who were named in Form P & A 5 consented or were present at the time of confirmation given that only three of the deceased survivors benefitted from the entire estate. I also note that the record states, *"All parties present"*. It is important in such instances to record the presence of the parties present as it is not clear who *"all parties"* refers to. Further, I note that the application which was in essence an application for confirmation was not accompanied by a consent of all beneficiaries as required by **Rule 40(8)** of the ***Probate and Administration Rules*** which provides as follows:

> *Where no affidavit of protest has been filed the summons and affidavit shall without delay be placed by the registrar before the court by which the grant was issued which may, on receipt of the consent in writing in Form 37 of all dependants or other persons who may be beneficially entitled, allow the application without the attendance of any person; but where an affidavit of protest has been filed or any of the persons beneficially entitled has not consented in writing the court shall order that the matter be set down as soon as may be for directions in chambers on notice in Form 74 to the applicant, the protester and to such other persons as the court thinks fit.* [Emphasis mine]

17. The proper procedure at this point was to revoke the grant and appoint a new administrator and direct that they make a fresh application for confirmation bearing in mind the provision of **section 71** of the ***LSA*** which provides that a grant may be confirmed after the expiry of a period of six months from the date of issue and in cases of intestacy such as the present one, the grant cannot be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled. This is why it is important during the confirmation stage to insist on the presence of the parties and the consent, if any. As concerns this case, I refer to **section 71** because it is not clear what happened to the shares of Thomas Ngaruiya, Joseph Mbugua Njoroge and Paul Kariuki Njoroge who were named as beneficiaries in form P & A 5 and who were entitled to benefit under **section 40** of the ***LSA***.

18. The errors in the proceedings were compounded by the death of Margaret who was a beneficiary and had been bequeathed Plot 615 which was now Thika Municipality/ Block 18/615. She was an adult owning a specific property that she had inherited hence the estate ought to have been administered separately. What the respondent purported to do is to administer Margaret's estate within these proceedings. There is no provision under the ***LSA*** that permits administration of the deceased's person's estate through the estate of another by purporting to amend the grant to distribute what is in effect the estate of that other person and in this case the estate of Margaret by amendment of the grant.

19. Further amendment of a grant falls under the rubric of rectification provided for under **section 74** of the ***LSA*** which provides as follows:

> *74. Errors in names and descriptions, or in setting forth the time and place of the deceased's death, or the purpose in a limited grant, may be rectified by the court, and the grant of representation, whether before or after confirmation, may be altered and amended accordingly.*

From above the provision and **Rule 43** of the ***Probate and Administration Rules***, the power to rectify grants is extremely restricted to the three circumstances prescribed that is: errors in names and descriptions of persons or things, errors as to time or place of death of the deceased and in cases of a limited grant, the purpose for which such limited is made.

20. An application for rectification cannot be the basis for further distribution of the deceased's property or for changing beneficiaries. As Gitari J., noted in ***Re Estate Peter Mbobi Maregwa (Deceased)*** **KRG HC Succ. No. 96 of 2013 [2018] eKLR**, *"The death of a beneficiary or administrator is not a matter for rectification since the grant issued was without errors or mistakes on names, descriptions, time or place of death of (the) deceased."*

21. In this case, the only order permitted under **section 74** aforesaid was to change Plot No. 615 to Thika Municipality Block 18/615. The court could not change the status of the property which now belonged to the estate of Margaret and grant it to Francis and David Nganga Njoroge. David Nganga Njoroge was a stranger to the estate as he was not even named as a beneficiary of the deceased estate in Form P & A 5 and no reasons were given in the supporting affidavit why he was a beneficiary.

22. This brings me to the summons for revocation of grant made by the appellant. He is the son of Thomas, a son of the deceased and a named beneficiary in Form P & A 5. He is not a direct beneficiary of the deceased but since his father is dead he and his siblings were entitled to their father's share. Unless permitted by law or valid will, the first persons entitled to an estate are the children of the deceased. Grandchildren, unless they are dependants of the deceased as permitted by law, would ordinarily claim the share of their late parent under the doctrine of representation. The Court of Appeal in ***Christine Wangari Gachigi v Elizabeth Wanjira Evans and 11 Others*** **NKU CA Civil Appeal No. 221 of 2007 [2014]eKLR** stated this principle as follows:

> *Although Sections 35 and 38 of the Laws of Succession Act is silent on the fate of surviving grandchildren whose parents' pre-deceased the deceased, the rate of substitution of a grandchild for his/her parent in all cases of intestate known as the principle of representation is applicable. The law on this is section 41. If a child of the intestate has pre-deceased the intestate then that child's issue alive or en ventre sa mere or that date of the intestate's death will take in equal shares per stirpes contingent on attaining the age of majority. Per stirpes means that the issue of a deceased child of the intestate takes between them the share their parents would have taken had the parent been alive at the intestate's death.*

23. The appellant was thus entitled to claim a share of his father estate. However, the issue before the trial court was not his father's estate but a share of Margaret's estate which he stated he had purchased. As I have set out above, Margaret's estate could not be the subject of the deceased's property. It had to be administered separately. The reason for this is to ensure that any beneficiaries or claimants having an interest therein are duly notified as required by the ***LSA*** and the ***Probate and Administration Rules*** so that they can make the claim. By taking a shortcut and purporting to distribute the estate of Margaret in this case, the respondents were in effect abusing the legal process.

24. On the other hand, if the appellant had a claim against the estate of Margaret he would be entitled to either sue the estate independently to

enforce his contractual claim or lodge a protest at the stage of confirmation in the process of administration of that estate. I would also point out that it is not an answer to the claim by the appellant that Margaret did not have any spouse or children. In this instance, her estate would be governed by **section 39** of the ***LSA*** which provides that where an intestate has left no surviving spouse or children, then the net estate shall devolve to the parents in order of priority then to the brothers and sisters. By virtue of the doctrine of representation, the appellant and his siblings would be entitled to share of her estate on account of the entitlement of their deceased father. It is for this reason that her estate must be administered separately to determine her lawful beneficiaries and give any claimants to her estate the benefit lodging their claims against the estate for determination by the court.

25. The record also shows that an additional property Thika Municipality Block 18/1930 was included in the certificate of confirmation yet it does not appear in the original Form P & A 5. The affidavit supporting the summons dated 11th January 2016 did not give reasons why the property of the deceased was being given to Francis and a person who is not a named beneficiary. If it belonged to the estate of the deceased, then it must be subject to a fresh application for confirmation so that any claim to it by any other beneficiaries are determined in line with **section 40** of the ***LSA***.

26. The appellant's claim was properly dismissed as the claim was against the estate of Margaret which, as I have stated, ought to have been determined in another forum. However, that is not the end of the matter. Had the trial magistrate considered the issues I have raised, she would have come to the conclusion that the grant ought to be revoked even by the court on its own motion under **section 76** of the ***LSA***.

27. Under **section 78(2)** of the ***Civil Procedure Act (Chapter 21 of the Laws of Kenya)***, this court on the hearing of an appeal has the same powers as the subordinate court and may make any order that the subordinate court would have made in its original jurisdiction. For the reasons aforesaid, quite apart from the application, this court is entitled to revoke the certificate of grant on its own motion as the proceedings used to obtain the grant were defective in substance.

28. For the reasons I have set out above, I allow the appeal on the following terms;

(a) The summons dated 2nd August 2016 is allowed and the Certificate of Confirmation amended on 12th February 2016 be and is hereby revoked.

(b) For the avoidance of doubt, the property known as **Thika Municipality/Block 18/613** shall remain in the name of **Margaret Njeri Njoroge** and her estate shall be administered separately.

(c) The administrators shall file an amended **Form P & A 5** to include **Thika Municipality/ Block 18/1930** and shall apply for confirmation in the normal way.

(d) For avoidance of doubt, the property known as **Thika Municipality Block 18/1930** shall revert to the name of the deceased and the administrator shall apply for confirmation in the normal manner.

(e) As this is a family matter, there shall be no order as to costs.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED and DELIVERED at KIAMBU this 16th day of JANUARY 2020.

R. N. SITATI

JUDGE

Mr Muiruri instructed by Muturi Njoroge and Company Advocates for appellant.

Respondents in person.