



REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL NO. 57 OF 2017

JOSEPH NDWIGA MBOGO.....APPELLANT

VERSUS

CATHERINE WANYAG NTHIGA.....1ST RESPONDENT

BONIFACE KATHEE NDWIGA.....2ND RESPONDENT

J U D G M E N T

A. Introduction

1. This is an appeal against the ruling of Embu Chief Magistrate in CMCC No. 279 of 2017 delivered on 25/09/2017.
2. The appellant herein filed summons for revocation of grant issued on the 3/09/2013 to the respondents herein on the grounds that the administrators had fraudulently obtained the grant by failing to disclose that the appellant was one of the dependants of the deceased's estate and thus entitled to a share therein.
3. In dismissing the summons for revocation of grant, the court held that the appellant had failed to discharge the burden that he was entitled to more than he already had and further that the appellant had failed to prove that he had been left out of the deceased's estate.
4. Being dissatisfied with the trial court's decision the appellant filed this appeal on 19th October 2017 based on 4 grounds that can be summarised as follows;

That the learned magistrate erred in law by holding that the appellant had failed to prove his case in complete disregard to the evidence that the appellant had not been included as a beneficiary of the deceased.

5. In rejoinder, the 1st respondent filed grounds of opposition dated 18th January 2018 in which she alleged that the appeal was bad in law, incompetent, frivolous and that the same ought to be struck out with costs.
6. The parties filed submissions to dispose of the matter.

B. Appellant's Submissions

7. It is submitted that in relying on the minutes of the meeting on how the deceased's land was to be subdivided attached to the respondents' replying affidavit to the appellant's summons for revocation of grant, the court erred since the question of distribution of the deceased's estate was not subject of the meeting.
8. It is further submitted that the court failed to address itself to the requirements of Section 26 of the Law of Succession that require a petition for grant to be accompanied by a consent signed by all beneficiaries of the appropriate renunciation of Rule 26 of the Probate and Administration rules.
9. It is further submitted that the court erred in finding that the appellant was not entitled to more than he had as the land in question, Kyeni/Kigumo/2315 did not belong to the deceased's estate but to the appellant as per the attached green card.

C. Respondent's Submissions

10. It is submitted that before the deceased, the registered owner of Ngandori/Kiriari/2279, died, he called a meeting whereby he stated his

desire to have the suit land sub-divided between himself, the 1st respondent and one minor, Nthiga Ndwiga and that he was not willing to have his sons get any land from him as he had given them land before.

11. It is submitted that the appellant renounced his right to the deceased's estate and that he was not willing to be involved in the succession cause.

12. It is further submitted that the deceased had a right to sub divide his land without the consent of any of his children and thus the respondents were only implementing the deceased's wishes.

13. Further, it is submitted that the appellant had received land from the deceased which he exchanged with land parcel no. Kyeni/Kigumo/2315.

D. Analysis & Determination

14. As the first appellate Court, my role is to revisit the evidence on record, evaluate it and reach my own conclusion in the matter. (See the case of **Selle & Ano. v Associated Motor Boat Co. Ltd (1968) EA 123**). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were not based on any evidence, or on a misapprehension that the court acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni v Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga v Kiruga & Another (1988) KLR 348**.

15. I have carefully perused the proceedings, the ruling and orders appealed against as well as the record of appeal, the grounds thereof and the parties' submissions.

16. The appellant herein filed summons for revocation of grant issued to the respondents herein on the grounds that the administrators had fraudulently obtained the grant by failing to disclose that the appellant was one of the dependants of the deceased's estate and thus entitled to a share therein. The appellant further asserted that his consent was not sought by the respondents before filing of the probate proceedings and further that no notice or citation was issued to him as required under rules 21 of the probate and administration rules. The appellant further stated that he had been left out of the deceased's estate.

17. In rejoinder, the respondents told the trial court that they instituted the probate proceedings with full knowledge of the appellant and that sometime on the 22nd March 1997, the deceased had called a meeting and stated how he wished his estate to be distributed. The respondents further stated that the 2nd respondent was a child to the appellant and that the deceased had given the appellant and his other siblings land in his lifetime but the appellant had exchanged his for land parcel no. Kyeni/Kigumo/2315.

18. The issue for determination in this appeal is whether the trial court erred in failing to revoke the grant issued to the respondents on the 3/9/2013.

19. Section 76 of the Law of Succession Act states;

“Section 76: A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion -

(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either -

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.”

20. It is the appellant's submission that he was excluded from Embu CMCC Succession Cause No. 279 of 2017. The ready answer as to whether this is true is found in the pleadings filed therein.

21. In the affidavit in support of the Petition for letters of administration intestate, the respondent deposes that the deceased died intestate and

was survived by;

- a) Catherine Wanyaga Nthiga (daughter)
- b) Bonface Kathee Ndwiga (grandson)
- c) Victor Mwenda Njiru (grandson)

22. Despite there being no rebuttal of the fact that the appellant is a son to the deceased, I note he was not included as a survivor of the deceased. In the P&A form filed in court together with the petition.

23. By failing to include the name of the appellant as a survivor of the deceased the respondents made a false statement of fact and thus concealed from the court facts that were material to the case.

24. **I am aware of the provisions of Section 51(2) of the Law of Succession Act** which provides that an application for grant shall include information as to;

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

25. I have perused minutes of the family meeting where the appellant herein somewhat forfeited his share because the issue of having been given land by his deceased father during his lifetime arose. He at first resisted that he was not entitled to a share in the deceased's estate but later agreed with the rest of the family members that it was in order to give his sister Catherine Wanyaga one (1) acre, his own son Boniface Kathee Ndwiga a grandson to the deceased, and one half (½) an acre and to another grandson of the deceased Victor Mwenda Njiru half (½) an acre.

26. Even bearing in mind that there was such an agreement among the family members, the law requires that all rightful beneficiaries of a deceased's estate be informed of any succession proceedings and be included as beneficiaries. The issues of the appellant having been given land by the deceased during his lifetime while his sister Catherine Wanyaga did not get ought to have been sorted out in the succession proceedings whereas the court would have applied the relevant law regarding to such gifts as well as consider the interests of the respondent Catherine Wanyaga.

27. In this appeal, I note that the issue of two grandsons directly inheriting the deceased's estate arises. But since it was not deliberated in the court of the first instance, I do not wish to deal with it herein.

28. Although the appellant has met the threshold of revocation of grant under Section 76 of the Act, I am of the opinion that since the grant was issued in favour of his sister the respondent, who qualifies just like the appellant himself, it will not serve any useful purpose to revoke the entire grant.

29. However, the trial court ought to have given parties an opportunity to have the issues of inheritance canvassed through evidence. It is my considered opinion that the learned magistrate erred by relying on the family meeting minutes without giving the parties a chance to be heard on their entitlements in the cause.

30. I find this appeal partly successful and make the following orders: -

- a) That the orders for distribution of the deceased's estate in particular LR. Ngandori/Kiriari/2279 made on 25/09/2017 be and are hereby set aside.***
- b) That a prohibitory order do hereby issue in respect of LR. Ngandori/Kiriari/2279 or its resultant parcels pending conclusion of the case in the magistrate's court.***
- c) That all the parties concerned be heard before the trial court or any other court on distribution of the estate.***
- d) Each party to meet their own costs.***

31. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 22ND DAY OF JANUARY, 2020.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Muriuki for Mugendi for Appellant

Both Respondents present