



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**CIVIL APPEAL NO. 53 OF 2018**

**(Being an Appeal from the judgment of Honourable B.M Kimemia (Ms) SPM in Runyenjes Succession Cause No. 114 of 2014 delivered on 25<sup>th</sup> September 2018)**

MERCY KIURA KITHAKA.....1<sup>ST</sup> APPELLANT

AMOS KITHAKA.....2<sup>ND</sup> APPELLANT

ALVAN NJIRU KITHAKA.....3<sup>RD</sup> APPELLANT

JENIFFER IRERI KITHAKA.....4<sup>TH</sup> APPELLANT

MARY WARUE KITHAKA.....5<sup>TH</sup> APPELLANT

**VERSUS**

EDITH NJOKA KITHAKA.....RESPONDENT

**JUDGMENT**

**A. Introduction**

1. The appellants herein approached this court for an appeal vide a memorandum of appeal challenging the trial court's judgment in Runyenjes Succession Cause No. 114 of 2014 and wherein the appellants raised eight (8) grounds of appeal and which can be summarized as hereunder: -

1. The learned trial magistrate erred in law and in fact in failing to revoke the grant and hence finding the same to be proper and thus dismissing the appellants' application.
2. The appellant thus prayed that the appeal be allowed and the grant issued to the respondent be revoked.
3. At the hearing of the appeal, the parties took directions to have the same canvassed by way of written submissions.

**B. Submission by the parties**

4. The appellants submitted to the effect that the proceedings leading to the issuance of the grant were defective as the consents of the appellants were not sought and thus the absence of the signatures on the face of the forms filed in court was fatal to the grant obtaining process. Reliance was made on the case of in the matter of the **Estate of Muriranjia Mboro Njiri Nairobi HC Succession Cause No. 890 of 2003 and ETR -vs- JKR (2015) eKLR** on the effects of the failure to obtain consent from the beneficiaries. It was further submitted that there was no citation issued on the beneficiaries who did not participate in the proceedings and thus the contestation that the appellants had refused to participate in the proceedings could not hold water.

5. The respondents on her part submitted that she revealed all the material facts pertaining to the deceased's estate and thus the grant could not be revoked under section 76 of the Law of Succession Act; that she never made false statement in form P&A 80 as she filed consent and which not all the beneficiaries had agreed to sign the said consent and that the respondent revealed to the court all the beneficiaries in the said consent and in the letter from the chief. Further that the proceedings were not defective as the appellants participated in the proceedings and even gave testimonies on how the estate was to be distributed. The respondents submitted further that the appellants were privy to the process and even made oral objections which were decided on merit, that the appellant did not give sufficient reasons as to why the grant ought to be

revoked and further that the authorities relied by the appellants were never relevant. The Respondents relied on in **Re Estate of Stephen Kurgat Kimwei (Dcd) (2017) eKLR** to the effect that the Respondent did not tell a lie neither was she guilty of falsehood and misrepresentation since she revealed all the material facts to the court.

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

6. It is now well settled that the role of this court, as a first appellate court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of **Selle&Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**). However, this 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**). In the re-evaluation of the trial court’s evidence, there is no set format to which this court ought to conform to but the evaluation should be done depending on the circumstances of each case and the style used by the first Appellate Court and that what matters in the analysis is the substance and not its length. (See Supreme Court of Uganda’s decision in **Uganda Breweries Ltd v. Uganda Railways Corporation [2002] 2 EA 634** and **Odongo and Another vs. Bonge Supreme Court Uganda Civil Appeal 10 of 1987 (UR)**).

7. I have certainly perused and understood the contents of the pleadings, proceedings, judgment, grounds of appeal, submissions and the decisions referred to by the appellant. As I have noted, the application before the trial court was for revocation of grant. The grounds as appears from the supporting affidavit are that all the appellants herein were adult children and as thus would have qualified to be appointed administrators and that their consent to appoint the respondent was not sought and which consent were a prerequisite to the grant of letters of administration and the respondent told falsehood in Form P & A 80 when she indicated that the consent had been given by “*every person having an equal or prior right to a grant of representation.....*” As such the grant was obtained fraudulently by making a false statement or by concealment from court of something material to the case and by means of untrue allegation of the fact essential in point of law to justify the grant notwithstanding that the allegation was made ignorantly or inadvertently. In opposition to the application the respondent deposed to the effect that the documents filed in court included all the names of the children of the deceased and who failed to give consent to the respondent to file the petition for letters of administration and none of the appellants herein filed for objection or protest neither of them was claiming that he/ or she had been disinherited as a result of the confirmation of the grant. The trial court dismissed the said application and thus the instant appeal.

8. This appeal therefore revolves around the issue of **whether the trial court erred in failing to revoke the grant made on 4.05.2015 to Edith Njoka Kithaka?**

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

9. Section 76 of the Law of Succession Act 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-**

- a. that the proceedings to obtain the grant were defective in substance;
- b. 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;
- c. 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;
- d. ....”

10. The above provision was construed by the court of appeal in the case of **Matheka and Another vs Matheka [2005] 2 KLR 455** where the court laid down the following guiding principles.

**“i. A grant may be revoked either by application by an interested party or by the court on its own motion.**

**ii. Even when revocation is by the court upon its own motion, there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by the making of a false statement or by concealment of something material to the case or that the grant was obtained by means of untrue allegation of facts essential in point of law or that the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the estate.”**

11. **It is clear therefore that the** grounds upon which a grant may be revoked or annulled are statutory and 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.

12. The appellants’ submissions were to the effect that their consents were not sought at the time of filing the petition. Rule 26 of the **Probate and Administration Rules** that states: -

**“26. (1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.**

**(2) 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 in Form 38 or 39, 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.”**

13. The import of this rule is that where for instance a petitioner is a son of the deceased, the consent from the other children of the deceased ought to be obtained. This is because they rank equal to the proposed petitioner. The other import is that where the petitioner is a son of the deceased and there is a surviving spouse, the said spouse ought to give consent to the petitioner to apply for the letters of administration. This is because the said spouse ranks superior in priority to the said petitioner. In the instant case, the Respondent herein was a surviving spouse of the deceased. All the appellants herein except Mercy Kaura Kithaka were children of the deceased. It is my opinion therefore that the only consent which was required was that of the said Mercy Kaura Kithaka who was a co-wife to the Respondent herein. The only time when the consent by the beneficiaries is needed is when it comes to confirmation of the grant and whereby the beneficiaries are supposed to consent to the mode of distribution (See in **the matter of the Estate of Isaac Kireru Njuguna (deceased) Nairobi HC Succession Cause 1064 of 1994** where the court found that a grant is liable for revocation where all the heirs have not consented to the mode of distribution and all the properties which make up the estate are not taken into account or distributed.) *I thus opine that the Appellants’ submissions to the effect that they ought to have signed Form P&A 38 is misplaced. The question therefore is whether the failure by the Respondent to obtain the consent of the said Mercy Kaura Kithaka was fatal to the application for the grant of petition?*

14. Again I turn to rule 26 of the Probate and Administration Rules which requires consent from persons of equal degree or priority to the petitioner. By dint of this section, the consent by the said Mercy Kaura was mandatory. She was a surviving spouse of the deceased herein and thus was a person of equal priority whose consent was required. She had not renounced her right to petition for the grant. It follows that the proceedings leading to the grant were defective in substance, and therefore the grant should be revoked. I rely on the persuasive authorities in **Antony Karukenya Njeru v Thomas M. Njeru [2014] eKLR** where J.A Makau J while revoking a grant on the ground that the consent of a person of equal priority held as thus: -

**“The respondent was required to file Form 38 as per provisions of Rule 26(2) of the Probate and Administration Rules which mandates a petitioner to obtain consent to the making of the grant of administration intestate to person of equal or lesser priority. The applicant who is of equal priority by virtue of Rule 26(2) of the Probate and Administration Rules did not execute any consent in favour of the respondent nor did he renounce his rights to petition for the grant and as such the proceedings to obtain grant before subordinate court were defective in substance and grant was obtained by means of untrue allegation of facts essential in point of law.**

**The respondent in Form P&A 80 stated that every person having an equal or prior right to a grant of representation had consented or renounced such right or has been issued with a citation to renounce such right and apply for a grant of representation and not done so. Are the contents of the Form P&A 80 which duly signed by the respondent true? The answer is obvious. The Form has untrue allegation and it is clear the respondent is in breach of Rule 26(2) of the Probate and Administration Rules. He lied to the court to obtain grant of letters of administration of the deceased estate...”**

(See also **In the Matter of the Estate of Muriranja Mboro Njiri, Nairobi H.C. Succ. Cause No. 890 of 2003**).

1. It is my view therefore that the grant issued to the Respondent herein which was given without her co-wife having consented to the same or even without citation having been issued to her was defective in substance and the same ought to be revoked.

16. Section 66 of the Law of Succession Act bestows this court with the discretion to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made. The court in exercise of the said discretion is mandated to accept as a general guide the following order of preference: -

- a. surviving spouse or spouses, with or without association of other beneficiaries;
- b. other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;
- c. the Public Trustee; and
- d. creditors:

17. In the end, the appeal herein succeeds. The appellant is awarded the costs of the Appeal.

**DELIVERED, DATED and SIGNED at EMBU this 11<sup>th</sup> day of November, 2020.**

**L. NJUGUNA**

**JUDGE**

In the presence of: -

.....for the Appellants

.....for the Respondent