REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO.83 OF 2019

MARIA IRIMBA NJIRU.....1ST APPELLANT

SESILIO NJUE NJIRU.....2ND APPELLANT

VERSUS

CARORO NJERU NJIRU.....RESPONDENT

JUDGMENT

A. Introduction

1. Before the court is an appeal against the ruling of Hon. W. Ngumi (SPM) in Siakago SPM Succession Cause No. 19 of 2009 delivered on 11/12/2019. In the memorandum of appeal filed in this court on 20/12/2019 and dated the same date, the appellant herein raised six (6) grounds of appeal which can be summarized as hereunder: -

> ***1)*** *The trial court's dismissal of the appellant's application for revocation of grant despite the same having been obtained, confirmed and rectified fraudulently by the Respondent's failure to disclose the appellant and members of the appellant's house (the deceased' first house)*
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> ***2)*** *Trial court finding that the estate was equitably distributed amongst all the beneficiaries despite the appellant's submissions that some of the members of the estate of the deceased were left out and the 2nd house benefiting more*
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> ***3)*** *Trial court finding that the application for revocation was an afterthought despite submissions to the effect that the appellant did not participate in the proceedings and therefore got wind of the succession proceedings late in the day*
>
> ***4)*** *Failure by the trial court to revoke the grant despite the appellant having proved that the grant, subsequent confirmation and rectification were fraudulent, the proceedings were defective and that the grant was obtained by means of untrue allegations of an essential point of law to justify the grant in that the Respondent did not disclose the existence of all beneficiaries of the estate of the deceased, lied as to whereabouts of some of the beneficiaries during the court sessions and failing to obtain the requisite consents to making of grant , mode of distribution and confirmation of grant from all beneficiaries of the estate.*
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> ***5)*** *The trial court's disregard to the appellant's submissions which raised pertinent issues and failure by the trial court to find the distribution by the Respondent to be unfair and discriminatory as against the 1st house and the daughters of the deceased and thus contrary to the law.*

2. The Appellant as such prayed for orders that the ruling delivered by the trial court be set aside and the appeal be allowed.

3. The appeal was canvassed by way of written submissions.

B. Submission by the parties

4. The appellant in support of the appeal submitted that the consent to obtaining the grant was made after the matter herein had been gazetted and as such, the same was sneaked in the court record and which was not signed by the appellant herein and as such the grant ought to be revoked. That the appellants were not in court neither on both the day of confirmation of the grant and the day of rectification of the same, which was contrary to Rule 26 and 40(8) of the Probate and Administration Rules. Further, that the estate was not equitably distributed as some members (daughters) from the 1st house were never provided for in the distribution. That two of the said daughters are deceased and their children were never provided for in the distribution whereas the 2nd house of the deceased benefitted more from the estate and the respondent getting 1.0 Ha whereas the rest got 0.7 Ha reasons whereof being unknown. Reliance was made on the case of **In Re Estate of**

Solomon Ngatia Kariuki (deceased) (2008) eKLR and **Stephen GitongaM'Murithi –vs- Faith Ngiramurithi (2015) eKLR.** It was submitted that the application was not an afterthought as the appellants were not aware of the proceedings and that the appellants' submissions raised pertinent issues of law and facts which were disregarded by the trial court (such as a son being the administrator of the estate of the deceased where there is surviving spouse and discriminatory distribution in disregard of section 40 of the Act). Further that the 2nd Respondent had failed to administer the estate in contravention of section 76(d) (ii) of the Law of Succession Act). As such it was submitted that the trial court erred and the ruling thereof ought to be set aside.

C. Re-evaluation of evidence

5. In exercise of its role as the first appellate court, this court ought to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**). This court nonetheless ought not to 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).**

6. In the summons before the trial court, the 1st appellant herein (1st applicant in the trial court) deposed in her supporting affidavit in support of the said summons that she was the 1st wife of the deceased and thus ought to be the rightful administrator of the estate and that the respondent herein obtained the grant without her consent and in absence of consents of the beneficiaries of the estate. That the respondent proceeded to amend the same without the consent and in absence of the beneficiaries and concealed the existence of the grant to the 1st appellant and subsequently never distributed the estate and that he allocated himself a larger share of the estate in LR Nthawa/Gitiburi/367 and proceeded to allocate the whole of LR Embu/Gangara/2530 to Nyaga Njiru who is physically disabled all to the disadvantage of other beneficiaries. Similar depositions were made by the 2nd appellant herein in his affidavit in support of the summons.

7. The respondent filed his replying affidavit to the said summons and wherein he deposed amongst other things that his duty in administration of the estate was only in relation to LR. Embu/ Gangara/367 and which he did but the Appellants have frustrated the process. This was since LR Nthawa/Gitiburi/92 had already been shared by the deceased in his oral will. He further deposed that the appellants herein were aware of the succession and the grant was obtained lawfully and in an open court. The appellants filed their further affidavit wherein they denied the depositions in the respondent's replying affidavit and reiterated that the grant was obtained fraudulently and further deposed that they were never aware of the oral will by the deceased, that one Nyaga Njiru was always under care of his mother and being physically challenged, he ought to get a share of LR. Nthawa/Gitiburi/92 for easy parental care. The parties then proceeded to file their written submissions after which the trial court rendered itself in the ruling delivered on 11/12/2019.

D. Issues for determination

8. I have read through and considered the memorandum of appeal, the submissions of both counsels and the authorities referred to by each counsel to support their legal propositions in the matter. Further I have read and evaluated the record of appeal and evidence adduced before the trial court by the parties herein. As I have already stated, what was before the trial court was summons for revocation of grant. It is my opinion that the issue which this court is invited to decide on, is whether the grant issued to the respondent herein on 22/07/2010 ought to be revoked. In other words, did the appellants herein make a case for revocation of grant before the trial court?

E. Determination of the issue

9. The circumstances under which a grant of representation may be revoked are provided for under section 76 (a)- (e) of the Law of Succession Act and include: -

> ***a) Where the proceedings to obtain the grant were defective in substance;***
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> ***b) Where 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;***
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> ***c) Where 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;***
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> ***d) Where the person to whom the grant was made has failed, after due notice and without reasonable cause either—***
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> > ***i to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; 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) Where the grant has become useless and inoperative through subsequent circumstances.***

10. The above provisions of law were well explained by the court in **re Estate of Agwang Wasiro (Deceased) [2020] eKLR** (W. Musyoka J) where the Learned Judge held that: -

"Under section 76 of the Act, a grant of representation is liable to revocation on three general grounds. The first ground would be where the process of obtaining it was attended by glaring difficulties, such as where the same was defective, say because the person who obtained representation was not qualified to be appointed as personal representative, or the procedural requirements were not met for some reason or other. It could also be because the petitioner used fraud or misrepresentation or concealed important information in order to obtain the grant. The second general ground is where the grant is obtained procedurally, but the administrator subsequently runs into difficulties during the process of administration of the estate. Such difficulties include his failure or omission to apply for confirmation of his grant within the period allowed in law, or where he fails to exercise diligence in administration of the estate, such as where he omits to collect or get in an asset, or where he fails to render accounts as and when he is required to do so by the law. The third general ground is where the grant has become inoperative or useless on account of subsequent circumstances, such as where the sole administrator died or loses the soundness of his mind or is adjudged bankrupt."

11. From the analysis of the pleadings which were before the trial court, the issues which comes out are that: -

a) The grant was issued to the respondent herein despite the two spouses of the deceased being alive

b) That the appellants herein did not sign Form 38 (consent to making of grant of letters of administration intestate to persons of equal or lesser priority)

c) That the appellants were not aware of the grant

d) That some of the beneficiaries were never disclosed to the court and others were left out.

e) That the appellants herein were not present or even aware of when the grant was confirmed

f) That the mode of distribution was not equitable

So the question then is whether these reasons amounts to grounds for revocation of grant under Section 76 of the Law of Succession Act so as to make the grant issued to the respondent liable for revocation?

12. As to the respondent petitioning for letters of administration intestate even when the deceased's both surviving spouses are alive; the appellants having not signed Form 38 and that they were not aware of the grant, the appellants submitted that they did not give consent to the respondent to file the succession cause and were not aware of the same. Rule 7(7) of the Probate and Administration Rules requires that a person with a lesser right to administration ought to obtain the consent of the person or persons with a greater priority to administration, or get that person or persons to renounce their right to administration or cause citations to issue on them requiring them to either apply for representation in the estate or to renounce their right to so apply. Rule 26 further provides that: -

"(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. Section 66 of the Law of Succession Act sets out the order of preference with regard to who ought to apply and be appointed administrator in intestacy. Priority is given to surviving spouses, followed by the children of the deceased.

14. As such, the respondent herein being not a person in the order of preference as set out above, ought to have obtained consents from the surviving spouses as they rank higher in the priority. (See also what Koome J (as she then was) stated in **The Matter of the Estate of Ngari Gatumbi Alias James Ngari Gatumbi (Deceased Nairobi High Court Succession Cause No.783 Of 1993** (persuasively) that: -

"A grant will be revoked where a person who is entitled to apply is not notified by the petitioner of their intention to apply and that person's consent to the petitioner's application is not sought.

15. I have perused the trial court's record and I note that the respondent filed Form 38 (consent to making of grant of letters of administration to persons of equal or lesser priority). The said form bears the signature by the two appellants herein (signatories number 1 and 7). The appellants do not seem to have renounced the said signatures but only submitted that they did not consent to the grant being made to the respondent herein. It cannot, therefore, in my view, be argued that Rules 7(7) and 26 Probate and Administration Rules were not complied with and that the grant was not obtained procedurally. There was neither defect nor fraud in the process. Even if they had pleaded the same, they still had the burden of proving the same. I am persuaded by F. Gikonyo J's decision in **Augustine Johnstone Moi Kirigia v Catherine Muthoni Isumali Kirimi [2017] eKLR** that he who alleges fraud bears the burden of proving the same.

16. It is my opinion, therefore, that in absence of such evidence (of fraud in putting the said signatures on the said document or the said signatures having been put by them), then it can only be concluded that the appellants herein consented to the respondent being the administrator of the estate. They cannot thus turn around and claim that they were not aware of the grant made to the respondent herein.

17. Whether some of the beneficiaries were never disclosed to the court and/or left out. The appellants submitted that one of the daughters of the deceased, that is, Esteria Ngai Njiru is deceased but left children who were under the care of the 1st appellant. In the submissions by the

appellants before the trial court, I note that they submitted that the said Esteria predeceased the deceased herein. However, there was no attachment to the application and neither was the death certificate of the said Esteria. Further, there was no evidence tendered in court as to there being children who were left behind by the said Esteria. It should be borne in mind that the onus or burden of proof of such a contention lay on the applicants (appellants herein) and which burden they failed to discharge. I concur with the trial court's finding that the beneficiaries as they appear on the Chief's letter were all disclosed to the court in Form P & A 5. There was no evidence tendered to prove the existence of other beneficiaries.

18. I am alive to the fact that S**ection 51(2)** of the **Law of Succession Act** requires 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."***

19. Nonetheless, without evidence of the death of the said Esteria and/ or the existence of the children said to have been under the care of the 1st appellant, this court and the trial court cannot revoke the grant for failure to disclose some of the beneficiaries. Otherwise, had evidence been tendered, it would have been a ground for revocation of the grant herein.

20. It is my opinion therefore that considering the above issues, it cannot be said that the same presents a case for revocation of the grant. The appellants did not prove any of the grounds provided under Section 76 of the Act.

21. As to the appellants herein not being present or even aware of the confirmed grant and the mode of distribution not being equitable, the appellants raised a ground of appeal (ground 4) that the grant, subsequent confirmation and rectification were fraudulent, the proceedings were defective and that the grant was obtained by means of untrue allegations of an essential point of law to justify the grant for the reasons that the Respondent failed to obtain the requisite consents to the mode of distribution and confirmation of grant from all beneficiaries of the estate.

22. The process of confirming a grant is provided for under section 71 of the Law of Succession Act and Rules 40 and 41 of the Probate and Administration Rules. The proviso to section 71 provides that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirming such grant shall specify all such persons and their respective shares. This provision is similar to that of **Rule 40(4) of the Probate and Administration Rules. Under Rule 41, the court at the hearing of the application for confirmation of grant is obligated to** first read out in the language or respective languages in which they appear, the application, the grant, the affidavits and any written protests which have been filed and shall then hear the applicant and each protester and any other person interested, whether such persons appear personally or by advocate or by a representative.

23. I have perused the trial court's record and I note that there is no indication as to the above procedure having been complied with. The coram of the day of the hearing of the summons for confirmation of grant does not indicate the beneficiaries who were present in court. The respondent herein addressed the court to the effect that they had agreed on the sharing of the estate as per paragraph 5 of the supporting affidavit sworn on 7/07/2010. There is nothing on record as to the court having confirmed the same from the beneficiaries present (if any). The trial court record further does not have any evidence as to the said beneficiaries having consented to the mode of distribution. It was expected that the beneficiaries would have signed an affidavit consenting to the mode of distribution.

24. I note that the application for confirmation of grant lists the respective shares to include the surviving spouses and the sons of the deceased. The mode of distribution is also not equal. This being the case, it is hard, from the perusal of the court record, to conclusively state that the beneficiaries consented to the said mode of distribution which to me appears not equitable and further discriminatory. (See **Stephen Gitonga M'murithi Vs. Faith Ngira Murithi [2015] eKLR** where the Court of Appeal held that Section 38 of Law of Succession Act enshrines the principle of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender and whether married and comfortable in their marriage or unmarried.) However, as I have indicated above, the proceedings before the trial court and which are subject of this appeal relates to revocation of grant and thus governed by the provisions of section 76 of the Law of Succession Act. The grounds upon which a grant can be revoked are well outlined therein. Important to note is that the said section deals with revocation of grant.

25. In re Estate of Prisca Ong'ayo Nande (Deceased) [2020] eKLR and which authority I am persuaded by, W. Musyoka J held as thus: -

> ***"16. Section 76 of the Law of Succession Act has nothing to do with confirmation of grants. It carries no provisions which relate to what a court should do with confirmation orders or certificates of confirmation of grant. Indeed, the provision says nothing about the powers prescribed in it being used for the purpose of the court intervening in the confirmation process, once orders are made on a confirmation application. The only connection between confirmation of grants and revocation of grant is that set out in section 76 (d) (i) of the Law of Succession Act. It has nothing to do with a grant having been confirmed, rather it deals with situations where a personal representative or holder of a grant or administrator has failed to apply for confirmation of their grant. Section 76 of the Act relates to confirmation of grants to that very limited extent, not with confirmation itself, but the failure to apply for confirmation. A person who is aggrieved by the orders made with respect to a confirmation application, which are encapsulated in the certificate of confirmation of grant, has no remedy under section 76 of the Law of Succession Act, for that provision does not envisage revocation of certificates of confirmation of grants.***
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> ***17. I have very closely perused through the provisions of the Law of Succession Act, and I have not come across any provision that provides a remedy to a person who is aggrieved by confirmation orders. Sections 71, 72 and 73 of the Law of Succession Act, which deal with confirmation of grants, do not address the question of redress for parties who are unhappy with the confirmation process, nor do they deal generally with flaws in the confirmation process. As stated above, section 76 has nothing to do with the confirmation process, and provides no relief at all to any person unhappy with the confirmation process. In the absence of any***

provision in the Law of Succession Act, for relief or redress for persons aggrieved by such orders, the aggrieved parties have only two recourses under general civil law, that is to say appeal and review, to the extent that the same is permissible under the Law of Succession Act. I would believe that one can also apply for the setting aside or vacating of confirmation orders, where the same are obtained through abuse of procedure (emphasis mine)….."

26. It is my opinion that the issue as to the appellants having not been present in court and having consented to the mode of distribution (and which I opine is most likely) does not constitute a ground upon which a grant can be revoked under Section 76 above. The said section deals with obtaining the grant and not confirmation of the same. The appellant's recourse ought to be either appeal against the order confirming the grant or reviewing the same.

27. In the circumstances herein and considering all the above, it is my opinion that the appellants herein did not satisfy any of the conditions for revocation of grant as provided for under section 76 of the Law of Succession Act. As such, the trial court did not err in its finding in relation to the summons for revocation of grant which was before it. The recourse available to the appellants herein was not to apply for revocation of the grant of letters of administration made to the respondent herein but to appeal against the orders confirming the said grant.

28. The appeal as such ought to fail and the same is hereby dismissed.

29. Each party to bear its own courts of the appeal.

30. It is ordered.

Delivered, dated and signed at Embu this 2nd day of November, 2020.

L. NJUGUNA

JUDGE

…….…….for the Appellant

…….……..for the Respondent