



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**CIVIL APPEAL NO. 62 OF 2018**

**IRENE MARIGU.....APPELLANT**

**VERSUS**

**EDWARD NYAGA KARANGI.....RESPONDENT**

**JUDGMENT**

**A. Introduction**

1. This is an appeal against the ruling of Hon. S.K. Mutai PM in Succession Cause No. 217 of 2017 which ruling was made on 22/05/2018. The matter before the trial court was coming up on the said date for hearing of an application for confirmation of grant dated 30/08/2017 and the trial court proceeded to allow the same as prayed.

2. Being dissatisfied by the said ruling/orders the appellant herein moved to this court by way of appeal and vide a memorandum of appeal dated 29/10/2018 and filed in court on 30/10/2019 and wherein she raised five (5) grounds of appeal to the effect that: -

*1) The learned trial magistrate erred in law and in fact by confirming the grant well knowing that there was an objection on record and before confirming the same.*

*2) The learned trial magistrate erred in law and in fact by disregarding the appellant's claim as an objector.*

*3) The learned trial magistrate erred in law and in fact by confirming the grant well knowing that there was an objection on record and before confirming the same.*

*4) The decision of the trial magistrate was against the weight of the evidence on record.*

3. The appellant as such prayed that the appeal be allowed and the decision of the trial court be set aside.

4. When the appeal came for hearing, parties erected to dispose the same by way of written submissions.

**B. Submission by the parties**

5. The appellant while arguing her 1<sup>st</sup> to 4<sup>th</sup> grounds of appeal submitted to the effect that the trial court confirmed the grant without confirming from the parties (including the beneficiaries) whether they were objecting to the confirmation and that the trial court failed to indicate the objection raised by the appellant's counsel when confirming the grant which was very detrimental to the appellant. After quoting the proceedings of the day in question, it was submitted that the same did not meet the threshold for confirmation of grant and which lead to the appellant's interests being disregarded. Further that the said application was not served upon the appellant prior to the confirmation and that the entire proceedings were conducted in disregard of the Appellant's right to be heard. She relied on **Margaret Isutsa Kirui –vs- Rosemary Sang (2019) eKLR** to the effect that a court ought to hear the parties before confirming a grant. Further that the trial court did not consider the evidence on record to the effect that the appellant herein was an interested party and had been participating in the proceedings since 1992 and wherein at one time she had been awarded one (1) acre out of the suit land.

6. The respondent in opposing the appeal submitted to the effect that at the time of confirming the grant, no objection was made by the counsel for the appellant and thus the said counsel failed in her duty to inform the court on the nature and status and direction of her suit. Further that the Appellant's claim was on the beneficiary who sold the land to her and who had his own share and not on the whole estate. Further that since her claim was against the beneficiary and not the estate, she was not a dependant under section 26 of Law of Succession Act and neither was she a creditor of the estate. Further that the appellant's claim was misplaced as succession courts do not have jurisdiction to entertain land matters or disputes on buying and selling land and that the appeal was misplaced as the appellant ought to have moved the court under section 76 of the Act on revocation of grant and not an appeal.

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

7. The role of the first appellate court is 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**). However, the first appellate court 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**).

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. I have also read and evaluated the proceedings and pleadings before the trial court. The appeal herein in my opinion revolves around the questions as to **whether the appellant herein had interest in the suit property and whether the trial court erred in not considering the said interest (if any)**.

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

#### **I. Whether the appellant herein had interest in the suit property**

9. It was the appellant's case that she is an interested party in the suit property and that she had taken part in the succession cause before the trial court. It was her case that as a result of the said interests, the trial court had a duty to hear her before confirming the grant but that did not happen.

10. I have taken the initiative to keenly peruse the trial court records and I have noted that vide an affidavit of protest sworn on 2/09/1992, the appellant herein protested against the confirmation of grant in relation to the estate herein on the grounds that she bought 0.41 Ha from one Simon Kambi Munyi. The record further reveals that the dispute was referred to District Office- Municipality for arbitration vide the orders of 29/07/1994. The dispute was arbitrated upon by a panel of elders which sat on 15/03/1995 wherein the panel reached an award whereby it held that the appellant herein do get 1.0 acres out of the suit land (Ngandori/Kirigi/1784). The award was read on 12/05/1995. What followed was an application by the respondent herein dated 8/06/1995 seeking setting aside of the award but the same was dismissed vide the ruling delivered on 19/09/1997.

11. The respondent made another application seeking review of the orders of 19/09/1997 but the same was also dismissed vide the orders of 08/12/1997. Another application seeking similar orders dated 17/12/1997 was then filed by the respondent herein. However, the orders of 19/9/1997 were set aside by consent 4/12/2002. The essence of this consent is that the application dated 8/06/1995 seeking setting aside of the award by the elders was reinstated. However, there is nothing on record indicating the fact that the said application was heard and determined and the award by the elders (which was adopted as an order of the court on 12/05/1995) set aside. As such, it is my opinion that the orders adopting the award are still valid.

12. As I have indicated above, the award provided that the Appellant herein get 1.0 acre from the suit land. As such, even at the time of confirmation of the grant, the appellant herein was an interested party in the estate in the form of 1 acre.

#### **II. Whether the trial court erred in not considering the said interest (if any).**

13. As I have noted above, the appellant's interest in the estate of the deceased was as a result of the alleged purchase of 0.4 Ha from a beneficiary of the deceased. However, in my opinion, upon the award having been read and adopted as a court order, the appellant herein became a beneficiary of the estate. As such, her claim ceased to be against the beneficiary who sold the land to her but against the estate itself. That being the case, she had a right to participate in the proceedings for confirmation of the grant. The question therefore is whether the appellant participated in the said proceedings?

14. The appellant submitted that she never participated in the same and that the objection by her counsel to the confirmation of the said grant was not recorded by the trial court. This in her view was a violation of her right to be heard. The respondent on the other hand laid blame on the appellant's counsel on record for failure to direct the court as to the status of her case.

15. 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 confirmed, such grant shall specify all such persons and their respective shares. This provision is similar to the provision 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.**

16. Perusal of the trial court record clearly shows that the above procedure was not complied with. The proceedings do not indicate as to who are the beneficiaries who were present in court. Further, the same does not indicate as to what the advocates or the beneficiaries responded. The application on record did not have the consent to the mode of distribution attached to it. It is therefore hard, from the perusal of the court record, to conclusively state that the beneficiaries (more so the appellant) consented to the said mode of distribution. The record is clear that the appellant did not participate in the proceedings for confirmation of grant. The court in not granting her an opportunity to be heard in my opinion was an error in law and in fact as the appellant was a beneficiary.

17. I would wish to point out that the respondent herein, by applying for confirmation of grant without indicating the appellant herein as a beneficiary ought to be seen as a total disregard of a court order. Further, I opine that the submissions by the respondent herein that the appellant's claim was with the specific beneficiary- seller (**Simon Kambi Munyi**) is further not founded. **The appellant's claim is**

pursuant to a court order and which made her a beneficiary of the estate.

18. So, what are the remedies available to the appellant? In her memorandum of appeal, she prayed that the decision of the trial court be set aside. However, the respondent submitted that the said prayer was untenable and that the appellant’s remedy was to seek revocation of the grant under section 76 of the Law of Succession Act. **In re Estate of Prisca Ong’ayo Nande (Deceased) [2020] eKLR** W. Musyoka J in considering whether a certificate of confirmation of grant can be revoked under Section 76 held that

*“16. .... 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.*

*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)...”*

It is my opinion therefore that the Appeal herein is proper before the court.

19. As for the remedies available to the appellant, in my opinion, where something is done unprocedurally, the remedy would be to set aside the proceedings leading to the same. In this case, the appellant having not been heard despite her being a beneficiary pursuant to a court order, the proceedings leading to the confirmation of the grant and the distribution of the estate ought to be set aside. In **Margaret Isutsa Kirui v Rosemary Sang [2019] eKLR**, the Court of Appeal upon finding that the appellant therein was not heard at the time of confirmation of grant proceeded to set aside the confirmation and distribution of the Estate and remitted the matter back to the High Court (which was the trial court therein) for hearing of the summons for confirmation of Grant therein. This authority emphasized on the need for the beneficiaries to be heard before a grant is confirmed.

20. It is my opinion that in the instant appeal, the most appropriate remedy would be to set aside the proceedings leading to the confirmation of the grant by the trial court and distribution of the estate and remit the matter back to the trial court for hearing of the summons for confirmation of grant dated 30/08/2017.

21. Each party shall bear its own costs of the appeal.

22. It is so ordered.

**Delivered, dated and signed at Embu this 2<sup>nd</sup> day of December, 2020.**

**L. NJUGUNA**

**JUDGE**

.....for the Appellant

.....for the Respondent