



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCA NO. 3 OF 2019

IN THE MATTER OF THE ESTATE OF MESHACK NYANGI ALIAS NYANGI KABUGA (DECEASED)

JOSEPH BUNDI NYANGI..... APPELLANT

VERSUS

FELIX CIRA MISHECK.....RESPONDENT

(Being an Appeal from the ruling and orders of Hon. J.M Njoroge (CM) delivered at Chuka on 13th February 2019 in Succ. Cause No. 36 of 2018)

J U D G E M E N T

1. **JOSEPH BUNDI NYANGI**, the Appellant herein had moved the lower court in ***Chuka Chief Magistrate's Court Succession Cause No.36 of 2018*** for revocation of grant issued to **FELIX CIRA MISHECK**, the Respondent herein on 6th July 2018.
2. The grounds upon which the Appellant had moved the lower court for revocation of the said grant were that the same had been obtained secretly and fraudulently through false statements made to the trial court.
3. The trial court was called upon to determine the summons for revocation of grant dated 30th July 2018 but the said court found that it lacked jurisdiction to entertain the application and struck it out with no order as to costs.
4. The Appellant felt aggrieved and preferred this appeal raising the following grounds namely:-
 - i. That trial magistrate erred in law and in fact by holding that it lacked jurisdiction to hear and determine the Summons for Revocation of Grant dated 30th July 2018.*
 - ii. That the learned trial magistrate erred by failing to consider Sections 48, 49 of Law of Succession Act.*
 - iii. That the learned magistrate erred by striking out the Summons for Revocation of Grant dated 30th July 2018 against the weight of evidence presented.*
5. In his written submissions dated 2nd August, 2019 done through learned Counsel Ramadhani M. Abubakar, the Appellant contends that **Section 23** of the **Magistrate's Court Act No. 26 of 2015** caused an amendment to **Section 48** of **Law of Succession Act** which amendment in his view gave magistrates the power to entertain any application made under the Act. The Appellant submits that the trial court should have entertained the application and considered it on merit. In his view the trial court erred by failing to consider the provisions of **Sections 48 and 49** of **Law of Succession Act** with the amendments thereof.
6. The Appellant avers that the trial magistrate erred when it struck out the Summons for Revocation of Grant against the weight of evidence presented. In his view, he tabulated reasons why the Respondent was not fit to be the administrator of the estate of the late Mershak Nyangi alias Nyangi Kabuga (deceased). The Appellant claims that he is a son to the deceased and that the grant was obtained through fraud as he did not sign consent in Form 38 to give the Respondent leeway to apply for grant of letters of administration.
7. The Appellant alleges the Respondent had filed another Succession Cause No.335 of 2016 which was withdrawn due to forgeries of some of the signatures of the beneficiaries and more specifically the signature of Joyce Wangai Murage as a result of which he was charged in court. It is on that basis that the Appellant felt that the Respondent did not qualify to be appointed an administrator. The Appellant in this appeal has relied on two authorities which found that a magistrate's court has jurisdiction to determine an application brought under **Section 76** of **Law of Succession Act**. The decisions are;

a) *Turfena Anyango Owour & Another -vs- Mary Akinyi Rengo [2018] eKLR.*

b) *Joseph Odera Ombayo -vs- Robert Ombayo Wambogo [2019] eKLR.*

8. Felix Cira Misheck, the Respondent herein has opposed this appeal through written submissions by learned Counsel I.C Mugo Advocate. The Respondent contends that **Section 23** of the **Magistrate's Court's Act** which amended **Section 48** of the **Law of Succession Act** did not specifically say that magistrate's would have jurisdiction to hear and determine summons for revocation of grant. He insists that while the provisions **Section 48** of the **Act** expressly stated that magistrates lacked jurisdiction to determine Summons for Revocation of Grant, **Section 23** of the **Magistrate's Court Act** did expressly provide that jurisdiction. He further contends that parliament could not have forgotten to grant jurisdiction if it intended so.

9. The Respondent points out that **Rule 44** of Probate and Administration Rules have not been amended or repealed and that in his view informed the trial court's holding that it had no jurisdiction to deal with Summons for Revocation of Grant. He submits that the amendment to **Section 48** of the **Act** did not confer jurisdiction arguing that it only the High Court which can deal with **Section 76** of the **Act**.

11. The Respondent has further opposed this appeal contending that the Summons for Revocation of Grant in the lower court had no merit insisting that the Appellant simply did not want to be a co-administrator with the Respondent. He denies that there was any concealment faulting the Respondent for failing to co-operate with him.

12. **Determination:**

Revocation or annulment of a grant whether confirmed or not is provided under **Section 76** of the **Act**. The grounds upon which a grant may be revoked is listed under that Section. This include;

- a) Defect in the proceeding leading to the grant of letters of administration.
- b) Fraud that if the grant was obtained through fraud or concealment of material facts or misleading information.
- c) Mistake or inadvertence
- d) Where a grant is rendered useless due to occurrence of an event.

13. The procedure for revocation of grant is provided for under **Rule 44(1)** of Probate and Administration Rules and this is where the grey area begins. Under **Rule 44(1)** a party seeking revocation or annulment of grant is required to do it through the High Court if the grant was issued by the Subordinate Court. Prior to amendment of **Section 48(1)** of the **Act**, the law provided as follows:-

" Notwithstanding any other written law which limits jurisdiction but subject to the provisions of Section 49, a Resident Magistrate shall have jurisdiction to entertain any application other than an application under Section 76 and to determine any dispute under this Act....." (Emphasis added)

14. Parliament through legal Notice No.26 of 2015 amended **Section 48** of the **Act** which now provide as follows:-

" Notwithstanding any other written law which limits jurisdiction but subject to the provision of Section 49, a Magistrate shall have jurisdiction to entertain any application and to determine any dispute under this Act and pronounce such degrees and make such orders thereon as may be expedient in respect of any estate the gross value of which does not exceed the pecuniary limit prescribed under Section 7(1) of the Magistrates' Courts Act 2015"

(Emphasis added).

The amendment in my considered view granted the magistrates court to entertain any application and determine any dispute under Law of Succession Act. That amendment expressly granted jurisdiction to magistrates to deal with any application including those brought under **Section 76** save for monetary limit under **Section 7(1)** of the **Magistrate's Court Act**. Under **Section 7(1)** of the **Magistrates' Courts Act**, the magistrates are granted jurisdiction to entertain proceedings of civil nature whose value does not exceed;

- a) For Chief Magistrates - 20,000,000/- (Twenty million Shillings)
- b) For Senior Principal Magistrates - 15 million (Fifteen million shillings)
- c) Principal Magistrates - 10 million (Ten million shillings)
- d) Senior Resident Magistrates- 7 million (Seven million shillings)
- e) Resident Magistrates- 5 million (Five millings shillings).

The Chief Justice may from time to time revise by notice the pecuniary limits of any magistrate.

15. The value of the estate in the cause before the trial court in this matter is given "**over 1 million**" but none of the parties has raised any issue regarding the monetary jurisdiction of the lower court to determine that cause.

16. The effect of the aforestated amendment to **Section 48** of the **Law of Succession Act** was to give power to the lower court to entertain and determine all applications under that Act. The amendment in my view must have been informed by the necessity to give jurisdiction to magistrates to deal with disputes under the Act so long as value of the subject matter are within monetary limits of those courts as provided under the cited Magistrates' Courts Act. The basis of the amendment in my view must have been informed by such factors as expediency and costs of litigation. Given the express effect of the amendment to **Section 48** of the **Act**, I find and hold that Magistrate's Courts have jurisdiction to entertain and determine all application including Summons for Revocation of Grant under **Section 76** of the Act. The Rules Committee should have by now amended **Rule 44** of the Probate and Administration Rules to be in tandem with the clear provisions of **Section 48**. Failure to amend the said provisions, cannot be interpreted to mean that jurisdiction granted by a statute is taken away by subsidiary legislation. Subsidiary legislation cannot override clear provisions if a parent statute. This court is persuaded by the holding of the following decisions;

i. Turfena Anyango Owuor -vs- Mary Akinyi Dengo [2018] eKLR

ii. Joseph Odera Ombayo -vs- Robert Ombayo Wambogo [2019] eKLR

17. The Appellant has asked this court to determine the Summons for Revocation of Grant dated 30th July 2018 but looking at the ruling from the Chief Magistrate, the court did not determine that matter on merit and it would be improper for this court to usurp the jurisdiction and determine the matter. The proper thing to do owing to my finding is to give the same court a chance to determine the Summons for Revocation of Grant dated 30th July 2018 on the merits.

In the foregoing, this appeal is allowed in part. The finding by the trial court to strike out the Summons for Revocation of Grant dated 30th July 2018 for want of jurisdiction is set aside. That court shall now proceed and determine that application on merit. I will not make any order as to costs in this appeal as this is a family matter.

Dated, signed and delivered at Chuka this 13th day of November 2019.

R. K. LIMO

JUDGE

13/11/2019

Judgment dated, signed and delivered in the open court in presence of Githaiga for Appellant and in presence of Respondent.

R.K. LIMO

JUDGE

13/11/2019