



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI**

Civil Appeal 176 of 1995

**AGA WANJIRU MWANIKI.....
.....APPELLANT**

AND

**JANE WANJIRU MWANIKI.....
RESPONDENT**

(Appeal from the ruling of the High Court of Kenya at Nairobi (Mr. Justice Githinji) delivered the 25th day of May, 1995

IN

SUCCESSION CAUSE NO. 914 OF 1991)

JUDGMENT OF THE COURT

This is an appeal, with leave, by the executrix and widow of the deceased Sospeter Mwaniki against the Order of the superior court (Githinji, J.) given on May 25, 1995 setting aside the grant of representation made to the appellant and setting aside and revoking the certificate of confirmation of the grant dated July 10, 1992. The court had also dismissed the respondent's application for extension of time to make a claim for provision for dependants from which there is no cross-appeal.

On October 5, 1985 Sospeter Mwaniki Gachinga died and the appellant obtained a grant of letters of administration on November 14, 1991. The grant was confirmed on July 10, 1992. The respondent filed an application for extension of time to make a claim for provision for dependants under section 26 of the Law of Succession Act (the Act) out of time. This latter application was made on November 24, 1994. The respondent had consented to the grant being issued to the appellant and so did all the heirs.

The superior court heard the application whereupon the learned judge made two fundamental findings: first, he dismissed the application for extension of time to make a claim for dependants under section 26 of the Act but, secondly, on his own motion under the powers given to court by section 76 of the Act set aside the order of July 10, 1992 confirming the grant and revoked the Certificate of confirmation of the grant dated July 10, 1992. It is against the second limb of the Ruling of the superior court that the present appeal has been filed.

At the hearing of the appeal, Mr. Iseme for the appellant in the main argued only one fundamental ground. He complained that the learned judge erred in revoking the grant on his own motion under section 76 of the Act when the same was never argued nor did the learned judge invite anyone to argue the same. It was contended that this vitiated the orders. Mr. Kariithi for the respondent contended that section 76 of the Act empowered the court of its own motion to revoke the grant in specified cases and that the learned judge was well within his power to do so.

Having carefully considered the arguments submitted to us, we have reached a clear conclusion that the appellant's contention is well founded. Whilst it is true that section 76 of the Act does empower the court on an application of a party or of its own motion to revoke a grant in specified cases, this does not in any way detract from the principles of natural justice. The issue of the revocation of grant was not before the court and it is trite law that the court should only decide issues on the record. We should like to refer yet once again to the words of Scrutton, L. J. in Blay v. Pollard and Morris (1930) 1 K.B. 682:-

“Cases must be decided on the issues on the record; and if it is desired to raise other issues they must be placed on the record by amendment. In the present case the issue on which the Judge decided was raised by himself without amending the pleading, and in my opinion he was not entitled to take such a course.”

This passage was cited with approval in Captain Harry Gandy v. Caspair Air Charters Limited (1956) 23 EACA 139.

In the present case the issue of revocation of the grant was neither raised nor canvassed by any party. Nor was it amongst the issues before the court. With respect, it was not open to the learned judge in this case to deal with this issue: If this issue had to be dealt with he should have invited the advocates for the parties to make submissions on it. This was not done. A principle of natural justice that parties should be heard before being condemned was ignored and a decision reached in defiance thereof. Such a verdict cannot be sustained.

Accordingly and, for the reasons above stated, we allow the appeal and vary the Order appealed from by setting aside the following two paragraphs therefrom:-

2. THAT the Order dated 10th July, 1992 confirming the Grant be and is hereby set aside and revoke the Certificate of Confirmation of the Grant dated 10th July, 1992.
3. THAT the Respondents Application dated 4th June, June, 1992 and filed on 7th July, 1992 shall be heard a fresh and Applicant be and is hereby at Liberty to file an objection/protest to the application within 21 days from today.”

The appellant shall have the costs of this appeal and in the court below.

Dated and delivered at Nairobi this 9th day of May, 1997.

J. E. GICHERU

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL

G. S. PALL

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR