



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
CIVIL APPEAL NO. E090 OF 2023

VICTOR GICHIRA.....
APPELLANT

VERSUS

BENEDICTO NGURE WAGACHERE.....1ST RESPONDENT

MARTHA MUTHONI MIGWE.....2ND
RESPONDENT

LUCY NDUTA MUGO.....3RD
RESPONDENT

FAITH MUTHONI MURIUKI.....4TH
RESPONDENT

(An appeal from the Ruling of Hon. A. K. Ithuku (C.M) in Kerugoya Succession Cause No. 7 of 2017 delivered on 21/9/2023)

JUDGMENT

[1] By an application dated 6/1/2023 and filed on 11/1/2023, the Appellant, a son of the deceased herein, sought, in the main, revocation of the grant of letters of administration issued to the 1st Respondent herein (now deceased) on 18/4/2017 and confirmed on 29/6/2017.

[2] The 2nd and 3rd Respondents filed a Replying Affidavit on 17/7/2023, wherein they acknowledged that the Appellant was their brother who had received L.R No. Mutira/Kangai/943 and L.R Nos. Inoi/Kerugoya/1366, 1419, 1420, 1421, 1422 and 1423 as gifts *inter vivos* from the deceased. The application was an afterthought which was founded on greed and malice, because the distribution of the estate was free, fair and within the law.

[3] The application was heard by way of affidavit evidence and the parties duly filed their written submissions.

[4] In dismissing the application, the trial court rendered thus;

“In the present case, there is no process that was left to be done. The 1st Respondent was not administrating any estate. His duties ended on 12 09/2017 when the assets were transferred to beneficiaries. Thereafter, they were to deal as they deemed fit. The beneficiaries owned the parcels of land absolutely. As a result, I find that there is nothing to revoke. A grant does not exist in the absence of the Administrator and in the current case, the estate had conclusively been distributed. Although there was no order of winding up, from 2017 there was no grant subsisting. Further, there are third parties who have since acquired property rights over the land in question. They have not been served with the current application. I would be unjust to cancel their titles without notice. My findings lead me to conclude that this application has no merits. The same is hereby dismissed.”

The Appeal

[5] On appeal, the Appellant filed his memorandum of appeal on 19/10/2023 raising 8 grounds as follows:

1. *The learned Magistrate erred in law and fact by failing to revoke the grant dated 29th June 2017 yet the grant was obtained fraudulently and by untrue allegations despite knowing the fact that the appellant is a son of the deceased but was not included in the grant as a beneficiary.*
2. *The learned Magistrate erred in law and fact in completely disregarding the evidence put forth by the appellant.*
3. *The learned magistrate erred in law and fact by failing to appreciate that the respondents and the appellants are brothers and sisters and no good reason was given why they failed to include him in the petition forms and chief's letter yet in their replying affidavit to our summons of confirmation of grant they do acknowledge the appellant as their brother.*
4. *The Learned Magistrate erred in law and fact by failing appreciate that the administrator died after we had filed our summons for revocation of grant and*

before his death 6 months prior after we had filed and served him with our summons for revocation of grant he never opposed our application for revocation.

5. *The replying affidavit filed by the respondents was filed after the administrator had already died and therefore was irrelevant considering that the administrator was deceased already.*
6. *The learned magistrate erred in law and fact in stating that the estate of the deceased was sold to third parties who were not parties to this case yet the alleged 3rd parties did not pray to be enjoined as interested parties and neither did the respondents inform them or serve them yet they did know of their existence the applicant wouldn't have known them as he was not part of the succession and could not tell if the property was sold and even if it was sold any property obtained fraudulently the owner cannot be seen or heard to have acquired a good title deed from the owner and therefore revocation usually is the best remedy for a fraudulent transaction.*
7. *The learned magistrate erred in law and fact in failing to fairly evaluate the evidence tendered by the parties.*
8. *The learned magistrate erred in law and fact by hearing a serious summons for revocation through affidavits without parties taking proper directions on the way to proceed yet it would be better for viva voce evidence.*

Duty of the court

- [6] This being a first appeal, this court is duty bound to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same and arrive at its own independent conclusions, but always remembering that, the trial court had the advantage of seeing the witnesses testify. (See **Selle v Associated Motor Boat Co. & others [1968] E.A. 123**).

Submissions on the Appeal

- [7] The Appellant laments that he was neither notified of these proceedings nor included in the petition as a beneficiary, and thus he was denied a chance to be heard. He urges that he was not involved in the entire process as is required by the law, and cites **Gilbert Marango Mulei v Edwin Wanjala, Bungoma H.C P & A Appeal No. 69/2019 (U.R)**.

[8] The 2nd and 3rd Respondents fault the Appellant for failing to demonstrate that the distribution of the estate was illegal, unfair, biased or discriminatory, and cite *Matheka & Another v Matheka (2005) eKLR, Magangi Obuki (Deceased) (2020) eKLR and Jasbir Singh Rai & Others v Tarlochan Rai & Others (2014) eKLR.*

Analysis and Determination

[9] From the grounds of appeal, the singular issue for determination is whether the threshold for the revocation of grant under section 76 of the Law of Succession Act was met.

[10] Before embarking on the merits of the appeal, the court must resolve the preliminary issue whether the trial court erred in hearing the application by way of affidavit evidence and submissions as opposed to viva voce evidence. With respect, Article 159 of the Constitution and the overriding objectives under Sections 1A, 1B and 3A of the Civil Procedure Act enjoins the court to administer justice expeditiously, justly and efficiently. The dispute herein was relatively uncomplicated which did not require the deponents of the affidavits to be interrogated on cross examination. Moreover, there was enough material before the trial court to properly adjudicate upon the matter.

[11] On the merits, the Appellant contends that the grant was obtained by concealment of the material fact that he was a son to the deceased, and his lack of participation and/or involvement in these proceedings rendered them a nullity. In rejoinder, the 2nd and 3rd Respondents cite the gifts *inter vivos* made to the Appellant by the deceased, as the justification for excluding his name from the list of beneficiaries.

[12] The court notes the copy of green card for L.R No. Inoi/Kerugoya/1366 which was transferred to the Appellant by the deceased on 19/2/1991, and subsequent to acquiring title thereto on 28/2/1991, the Appellant thereafter subdivided it into L.R Nos. Inoi/Kerugoya/1419, 1420, 1421, 1422 and 1423. No sooner had the Appellant acquired the resultant titles deeds to the subdivision of L.R No. Inoi/Kerugoya/1366, than he transferred all of them to 3rd parties. The Appellant is thus estopped from alleging that he was disinherited, having wilfully disposed of his bequests to 3rd parties.

[13] This court finds that that the Appellant, benefitted from previous bequests by the deceased and the trial court, as mandated by the provisions of section of 42 of the Law of Succession Act duly considered them, in distributing the estate to the Respondents.

[14] The demise of the 1st Respondent herein, and the Petitioner in the trial court, on 18/6/2023 is inconsequential, given that the estate had already been fully administered as

at 26/9/2017, when Samuel Njagi Peter and Catherine Wandia Njagi jointly acquired title to L.R No. Inoi/Kerugoya/1418, whilst the 2nd, 3rd and 4th Respondents herein acquired title to L.R No. Mutira/Kangai/1059 on 30/6/2017.

ORDERS

[15] Accordingly, for the reasons set out above, the Court finds that the appeal is without merit and it is dismissed.

[16] There shall be no orders as to costs.

Orders accordingly.

DATED AND DELIVERED THIS 7TH DAY OF OCTOBER 2025.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

Mr. Kipruto for Appellant.

Mr. Ngigi for the Respondent.