

**IN THE COURT OF APPEAL
AT NYERI**

(CORAM: KANTAI, LESIIT & ALI-ARONI,

JJ.A.) CIVIL APPEAL NO. 84 OF 2020

BETWEEN

ALICE WAIRIMU MWANIKI.....APPELLANT

AND

**MARY WAIRIMU MWANIKI 1ST
RESPONDENT**

**EUNICE WANGUI MWANIKI 2ND
RESPONDENT**

*(Being an appeal from the Judgment of the High Court of Kenya at
Nyeri (Mumbua T. Matheka, J.) delivered on 23rd May 2019*

in

Succession Cause No. 118 of 2013)

JUDGMENT OF THE COURT

1. This is a first appeal from the judgment of the High Court at Nyeri (T. Matheka, J.) delivered on 23rd May 2019, in Succession Cause No. 118 of 2013. The appeal challenges the decision of the learned Judge for revoking the grant of letters of administration issued to the appellant; finding that the respondents were the deceased's children and therefore beneficiaries of the estate; and for distributing the estate.
2. A brief summary of the pleadings filed will suffice to give

context to the background of this matter. The appellant,
Alice Wairimu

Mwaniki, and her sister, **Lydia Wamuyu Wachira**, petitioned the High Court for a grant of letters of administration intestate in the Estate of Moses Mwaniki Gathu (the deceased), who died intestate on 9th September 2012. In the affidavit supporting the petition, the following individuals were listed as the deceased's survivors:

Alice Wairimu Mwaniki - wife
Samuel Wachira Mwaniki - son
Ann Wangui Mwaniki - daughter
Mary Wanjiru Mwaniki - daughter
Agnes Gathigia Mwaniki - daughter

3. The grant of letters of administration was confirmed on 30th July 2013, to the appellant and Lydia Wamuyu Wachira. Subsequently, the respondents filed summons for revocation of the grant dated 2nd September 2013, citing several grounds, reiterated in the supporting affidavit of the 1st respondent, Mary Wairimu Mwaniki, sworn on 2nd September 2013, namely; the deceased had two wives, Purity Gathoni Gatimu, as the first wife, and the appellant as the second wife; that there was Nyeri High Court Succession No. 446 of 2013 related to the deceased succession, where the appellant was cited and served; yet the appellant filed another Succession Cause No. 118 of 2013 claiming sole beneficial interest in LR. Konyu/Ichuga/696; a grant of letters of administration, and the confirmation of the grant was issued to the petitioners on 13th May 2013 and 30th July 2013, respectively.
4. Further, it was claimed that the grant was obtained

fraudulently, based on false statements and the concealment of

material facts, as not all wives and children were disclosed or included in the succession proceedings; the 1st respondent's consent to the grant or confirmation of the grant was neither sought nor obtained by the appellant; the succession cause was filed in secrecy, without her knowledge or consent, with the intent to deprive the respondents of their rightful share of the estate.

5. In response, the appellant, Alice Wairimu Mwaniki, filed a replying affidavit sworn on 2nd October 2013 contesting the summons for revocation of the grant. She asserted that the claim that the deceased had two wives was untrue, maintaining that she was the only wife; she was unaware of any other children of the deceased during their marriage or the deceased lifetime; further the deceased did not inform her of any other spouse or children; and she denied making any false statements or concealing any material information from the court, asserting that the applicants are neither beneficiaries of the deceased nor entitled to inherit his estate.
6. On 27th June 2014, the parties agreed by consent to proceed by way of oral evidence. The 1st respondent was **PW1** and testified that the deceased was her father and the appellant was her stepmother. She did not know Lydia Wamuyu Wachira, the appellant's co-administratrix. She further testified that while they were young, they lived with their father and stepmother, and after their father passed away, they moved to live with their mother in Magutu. Further, the

appellant refused to unite the
two families on their father's passing on, which necessitated
the

issuance of a joint burial permit; the respondents filed a succession cause but later discovered that the appellant had also filed her own.

7. **PW2**, the 2nd respondent, testified that the deceased was her father, and the 1st respondent was her sister. She confirmed that the appellant was her stepmother and that she did not know Lydia Wamuyu. The 2nd respondent stated that their mother had three children. Following their father's death, she left home due to disagreements with the appellant and expressed a desire for their father's land to be divided equally between their mother and their stepmother.
8. **PW3, Grace Nyachomba Mwaniki**, testified that she was friends with the deceased and recognised the appellant as the deceased's second wife, while the respondents were his daughters. She did not know Lydia Wamuyu Wachira either. PW3 met the deceased through her cousin, who was married to the deceased's brother. She described Purity Gatheru as the deceased's wife and the mother of the respondents and one Tabitha. She stated further that after Purity left, her children lived with their father, the deceased.
9. The appellant, **DW1**, testified that the deceased was her husband. She married him in 2002 and found that he was living alone, maintaining that the respondents were not living with him at that time. She claimed that she was unaware of any other wife. On her part, she had four children with the deceased.

10. In its determination on 23rd May 2019, the High Court found that by concealing the existence of the other children of the deceased, the appellant offended the provisions of **section 76(b) and (c)** of the Law of Succession Act ('the Act'). The court found that there was sufficient evidence to confirm that the respondents were indeed the deceased's children. The court noted that the appellant's claim of ignorance of their existence was unbelievable, especially since a joint burial permit was issued to her and the 1st respondent. The court concluded that the appellant acted in "bad faith" and knowingly excluded the respondents when she filed the succession cause.

11. In the end, the court issued the following orders; -

“(a) The grant issued to the appellant and her co-administrator was revoked, a fresh one was issued jointly to Alice Wairimu Mwaniki and Mary Wairimu Mwaniki.

(b) The land Konyu/Ichuga/696 is 0.81 ha. Divided into 9 units, it gives 0.09. For 1st house $0.9 \times 4 = 0.36$, 2nd house $0.9 \times 5 = 0.45$ ha. Taking into consideration that the 2nd house lived with the deceased till he passed on, they were entitled to his personal effects, which the appellant must have taken possession of.

***(c) A certificate of confirmation of the grant was issued in the terms that the estate Konyu/Ichuga/696 to be shared as follows:
0.45 to the appellant and her co-***

administrator Lydia Wamuyu Wachira to hold in trust for the appellant for herself and her children, 0.36 ha to be registered in the joint names of the respondents, their

mother, Purity Muthoni and their sister, Tabitha Wanjugu Kiraya.”

12. Aggrieved by the judgment of the High Court, the appellant lodged this appeal, raising six grounds in her memorandum of appeal dated 13th June 2020, on the grounds that: the learned Judge erred in law and fact; by arriving at a judgment against the weight of evidence; by relying on documents that were never marked or produced as exhibits; by considering the respondents' evidence but excluding the appellant's uncontroverted evidence in determining that they were children of the deceased; in issuing orders on entirely new and unpleaded issues; by distributing the estate of the deceased to strangers and by disregarding material contradictions and inconsistencies in the evidence presented by and on behalf of the respondents.
13. At the hearing of this appeal, the parties canvassed the same by way of written submissions. Learned counsel for the appellant filed submissions dated 17th October 2023. It was submitted that the High Court Judge erred by considering the respondents' evidence and ignoring the appellant's uncontroverted evidence. Counsel maintained that the appellant's evidence, which states the deceased had only one wife (the appellant) and that the respondents were strangers, was ignored. Counsel points out contradictions in the respondents' testimonies regarding when they left their father's home and claimed that if the learned Judge had considered

these contradictions, the judgment would have been in the appellant's favour.

14. Counsel submits further that the Judge erred by relying on documents—such as birth certificates, a KCPE certificate, a burial permit, and a eulogy - that were never formally marked or produced as exhibits in court. In support, counsel relied on **Keneth Nyaga Mwige vs. Austin Kiguta & 2 Others [2018] eKLR**, where this Court held that once a foundation for a document is laid, the witness must move the court to have the document produced as an exhibit and part of the record. If a document is not marked as an exhibit, it is not part of the record.
15. On unpleaded matters, counsel contended that the learned Judge addressed and made orders on matters that were not pleaded in the case, as the application before the High Court was solely for the revocation of the grant, and did not include the distribution of the deceased's property. Counsel complained that the Judge went ahead and distributed the estate without hearing from all beneficiaries, including the 2nd petitioner, Lydia Wamuyu Wachira; Purity Gathoni Gatimu; Eunice Wangui Gatimu; and Samuel Wachira Mwaniki, or the appellant in this matter, which is a misdirection. To support this contention, counsel relied on **David Sironga Ole Tukai vs. Francis Arap Muge & 2 Others [2014] eKLR**, where this Court stated that it will not grant a remedy which has not been sought for or that it will not determine issues which parties have not pleaded.

- 16.** On the judgment being against the weight of evidence and distribution having been made to strangers, counsel argued that the matter before the court, and the evidence led by the parties, was on the sole issue of revocation of the grant under **section 76** of the Act. Having revoked the grant, there was no basis upon which to distribute the estate as envisaged under **section 71** of the Act. The appellant reiterated this Court's position in **Kenya Commercial Bank Ltd vs. Sheikh Osman Mohammed, Nairobi Civil Appeal 179 of 2010.**
17. In opposing the appeal, learned counsel for the respondents, in his submissions dated 16th November 2023, dismissed the appellant's claim on contradictions regarding the year of marriage and when the respondents left their father's home. Counsel argued that the core issue is not when the respondents left home, but whether they were entitled to inherit from their deceased father, which they are. Counsel further submitted that the children of a deceased should not be disinherited simply because their mother left their deceased father.
18. On reliance on exhibits not produced in evidence, counsel submitted that the Judge did not err in relying on the documents, which were produced by the 1st respondent on 20th February 2019, including her birth certificate, KCPE certificate, burial permit, and eulogy, and relied on them as a bundle. Counsel further highlighted that the appellant's advocate did not object to the production of the documents.

19. On distribution of the estate to strangers, counsel submits that the appellant was categorical that the respondents were strangers to the estate of the deceased. She maintained that the deceased was living alone and did not have any children when she got married. The trial Judge found as a fact that the two respondents were children of the deceased. The learned Judge relied on the letter from the Office of the Assistant Chief, the eulogy, and the burial permit, which were produced in evidence.
20. Counsel asserted further that the deceased, having died intestate, his estate and distribution thereof were subject to the rules of intestacy. He submitted that the learned Judge rightly applied the provisions of **section 29** of the Act, which provides for the persons who can stake a claim on the estate of a deceased person. The dependents of the deceased are listed in the record. Counsel also placed reliance on the provisions of **section 40** of the Act.
21. On whether the learned Judge gave orders based on unpleaded issues, counsel submits that even if they did not ask for distribution of the estate, the trial court's duty was to evaluate the evidence and come to a just conclusion. Counsel submitted that the learned Judge gave the full meaning of **section 40** of the Act, which is to do justice to the parties.
22. This being a first appeal, it is our duty in addition to considering submissions by the appellants and the

respondents, to examine, analyze and re-assess the evidence on record afresh

and to reach our own independent conclusion in the matter, also warning ourselves that we did not have the advantage of seeing and hearing the witnesses, as expressed in **Selle vs. Associated Motor Boat Co. [1968] EA 123**, where the Court stated:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E.A.C.A 270.”

23. Having carefully considered the record of appeal, the judgment of the High Court, the grounds of appeal and the rival submissions by counsel, the issues that arise for determination in our view are the following:

a) Whether the learned Judge erred in finding that the respondents were beneficiaries of the estate of the deceased and sought to revoke the grant issued to the appellant.

b) Whether the learned Judge considered unpleaded issues.

c) Distributing the estate of the deceased after revoking the grant.

24. On whether the respondents were beneficiaries of the deceased, the record shows that the 1st and 2nd respondents testified that they were daughters of the deceased, and their testimony was supported by the evidence of PW3, who knew the family of the deceased. The learned Judge also relied on documentary evidence, including the burial permit, the eulogy and the letter from the Office of the Assistant Chief dated 28th February 2013, which listed the members of the deceased's family. The letter clearly indicated that the respondents and their mother were part of the deceased's household.

25. We agree with the learned Judge who held; -

“There is sufficient evidence that indeed the 2 protesters are children of the deceased. Firstly, the area assistant chief Kahuro sub-location where the deceased hailed confirmed the same vide her letter of 28th February 2013 where she listed the widow - petitioner/respondent and all the deceased children. This was also evidenced by the Eulogy read at the deceased's funeral which the petitioner/respondent attempted to disown by saying that she saw it after the funeral. Surely that cannot be true - the deceased was described as a prominent vegetable and fruit farmer acquiring the nick name "Mboga". He was known and so was his family. The people tasked with drawing the Eulogy could not have put strangers in the Eulogy. It is evident that his 1st wife was not mentioned because again it must have been

***in the public domain that she had left him.
The burial permit was issued jointly to
Alice - the***

widow and Mary the 1st protester because she is a daughter of the deceased for a reason.

What other explanation could there have been except that the larger family knew the children of the deceased? The deceased was not a young man and it is not possible that his death, funeral and burial were not dealt with by community elders.”

26. The learned Judge found that the appellant failed to disclose the existence of other beneficiaries of the deceased when she petitioned for the grant. **Section 76** of the Act empowers the court to revoke a grant where it is obtained fraudulently by the making of false statements or by the concealment of material facts. The evidence on record supports the finding that the respondents were not disclosed despite being children of the deceased. In those circumstances, the learned Judge cannot be faulted for holding that the threshold for revocation had been met.
27. The learned Judges made a further finding, which we equally agree with, that:

“The only problem is that after being served with the citation, she went not to the sub location assistant chief who had issued the all-inclusive letter but to the location chief who gave her a different letter showing that she and her children were the only heirs of the deceased. This action demarcates the difference between her and the protesters - they acting in good faith, acknowledged her - she, acting in what can only be bad faith, excluded them.”

The petitioner/respondent was aware of the protesters existence all along even as at the time she filed the cause and she lied to the court when she failed to disclose that the deceased was survived by other children. Even if she became aware of them at the time of the burial-which I found unbelievable- she was seized off the fact as at the time of filing the cause and ought to have listed the three siblings as surviving the deceased in addition to her children.
(Emphases added)

28. This Court in *Sophia Salim Gathiaka & Another vs. Mariam Mbuve Abdalla & 9 Others* [2016] KECA 834 (KLR), buttressed the position that concealing facts from the court is a valid ground for revocation of the grant, as was in the instant case. The Court stated:

“However, as this court has previously held ... a grant obtained on the strength of false claims and on the basis of facts concealed from the court, is liable to revocation or annulment in this case as the two are alternative remedies.”

29. In *Nyaga Cottolengo Francis vs. Pius Mwaniki Karani* [2017] KECA 422 (KLR), this Court held; -

“1. A grant may be revoked either by application by an interested party or on the court’s own motion.

2. Even when revocation is by the court upon its own motion, there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by the making of a false

statement or by concealment of something material to the case or that the grant was obtained by means of untrue

allegation of facts essential in point of law or that the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the estate.

3. The grant may also be revoked if it can be shown to the court that the person to whom the grant has been issued has failed to produce to the court such inventory or account of administration as may be acquired."

30. Similarly, in ***Ngoima vs. Wambeti & Another (Civil Appeal E455 of 2023) [2025] KECA 1477 (KLR)***, this Court held that:

"It is a statutory requirement under Section 51 of the Law of Succession Act that the application for a grant of representation shall include the names of "all surviving... children...of the deceased" and the deliberate omission to include them in the list of surviving beneficiaries is tantamount to "concealment from the court of something material to the case..."

31. From the cases cited above, clearly, the appellant cannot be heard to complain, as she is the author of her own misfortune for omitting the names of the respondents from the grant she sought, with full knowledge that they existed.

32. The appellant contended that the learned Judge relied on documents that were not marked as exhibits. What our analysis demonstrates is that during hearing, PW1 sought to rely on her affidavit in support of the revocation of grant

dated 2nd September 2013. In that affidavit, her first annexure is the letter dated 28th February 2013 from the assistant chief, which

lists out the beneficiaries of the deceased as two wives and seven children, marked as “MWM1”. Equally, the appellant during hearing stated that she sought to rely on her affidavit sworn on 2nd October 2013. So it is rather strange for the appellant to turn round and say the High Court only considered the respondent’s evidence which was not produced.

33. In any event, the finding by the learned Judge was not based on documents alone but also on oral testimony which she found credible. We see no reason to interfere with that finding. The learned Judge had the advantage of hearing the witnesses and assessing their demeanor, and nothing has been shown to us to demonstrate that her findings were based on no evidence or on a misapprehension of the evidence.
34. The appellant also argued that it was an error for the learned Judge to only consider the respondents' evidence and ignore the appellant's uncontroverted evidence. According to the appellant, her evidence that the deceased had only one wife (the appellant) and that the respondents were strangers was ignored. We are unable to agree. The fact that the learned Judge did not arrive at the conclusion urged by the appellant does not mean that her evidence was not considered. In ***Mbogua Kiruga vs. Mugecha Kiruga & Another [1988] KECA 122 (KLR)***, this Court stated that findings of fact will not be interfered with unless they are based on no evidence or on a misapprehension of the evidence. In the present

case, the learned Judge considered the evidence tendered by both sides

but found the respondents' evidence credible. We find no basis for interfering with that finding.

35. The appellant further argued that the learned Judge erred in distributing the estate after revoking the grant, on the ground that distribution had not been pleaded and that the dispute before the High Court related to the administration of the estate of a deceased person who died intestate, yet, once the court found that the respondents were beneficiaries of the estate of the deceased and that the grant had been obtained through concealment of material facts, it went ahead to distribute the estate.

36. We note that, indeed, the respondents' application before the court, which is the subject of this appeal, was on revocation of the grant.

The only asset of the estate is the suit property. The letter from the Office of the Assistant Chief set out the members of the deceased's family as follows:

Purity Gathoni Gatimu	-	1 st wife
Alice Wairimu Mwaniki	-	2 nd wife
Tabitha Wanjugu Karaya	-	daughter
Eunice Wangui Gatimu	-	daughter
Mary Wanjiru Mwaniki	-	daughter
Samuel Wachira Mwaniki	-	son
Anne Wangui Mwaniki	-	daughter
Mary Wanjiru Mwaniki	-	daughter
Agnes Gathigia Mwaniki	-	

daughter

37. As seen from the preceding paragraph, the letter provided details of the beneficiaries of the estate and was consistent with

the oral evidence tendered by the respondents and their witness. The learned Judge was therefore entitled to rely on it together with the rest of the evidence in determining the composition of the deceased's family. Once the Judge determined who the beneficiaries are and saw that there is only one asset for distribution, the Judge proceeded to consider distribution, which the appellant challenges as a ground.

38. In acknowledging the need to confine determination to issues pleaded, this Court appreciated situations where justice of the case militates towards consideration of issues that are not necessarily pleaded but emerge in the course of the proceedings. In **Nyaga Cottolengo Francis vs. Pius Mwaniki Karani [2017] KECA 422 (KLR)**, that:

“The combined effect of the provisions of the law cited above is to clothe the court with considerably wide powers to do justice in any particular estate of a deceased person on case by case basis. The discretion exercisable is in terms unfettered but, of course, it must be guided by the law and reason but not whim or caprice.

We have considered the appeal fully. On the outset we agree with the appellant on the objective of pleadings in an adversarial system that the court can only lawfully determine issues that are specifically pleaded and proved before it and that the court cannot base its decision on an unpleaded issue. This has been restated times without number but we take it from Gandy v. Caspair Air Charters Ltd. (1956) 23 EACA 139 where Sir Sinclair, V-P, said: -

“The object of pleadings is, of course, to secure that both parties shall know what are the points

in issue between them, so that each may have full information on the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent. As a rule, relief not founded on the pleadings will not be given."

14. However, there are exceptions to that rule even under the strict adversarial system, where the court was generally warned against descending into the arena of litigation lest it be blinded by the dust of it. The exception was noted in the case of Odd Jobs v. Mubia [1970] EA 476, where Duffus P. while considering the question whether an unpleaded issue can form the basis of a decision, rendered himself as follows: -

"Generally speaking pleadings are intended to give the other side fair notice of the case that it has to meet and also to arrive at the issues to be determined by the court. In this respect a trial court may frame issues on a point that is not covered by the pleadings but arises from the facts stated by the parties or their advocates, and on which a decision is necessary in order to determine the dispute between the parties." (Emphasis added)

39. We do not fault the trial Judge for having distributed the assets of the estate, since the issues bedevilling the matter were two, namely, identification of beneficiaries and sharing of the estate, featured throughout the proceedings. The beneficiaries were identified, and the only asset of the estate was known; the Judge, on identifying the beneficiaries, went ahead to deal with the next issue in dispute between the parties in a bid to once and for all conclude the matter in the interest of the parties and in spending scarce judicial time

prudently.

40. In the end, we are satisfied that all the evidence necessary to determine the dispute was placed before the trial court, properly considered and correctly analysed. There would therefore be no useful purpose in disturbing the judgment of the High Court or ordering that the matter be heard again.
41. Accordingly, we find that the appeal lacks merit and the same is hereby dismissed with costs to the respondents.

Dated and delivered at Nyeri this 24th day of April, 2026.

S. ole KANTAI

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JUDGE OF APPEAL

J. LESIIT

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**JUDGE OF
APPEAL ALI-**

ARONI

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·
JUDGE OF APPEAL

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

Signed
DEPUTY REGISTRAR