



**Mwiti v Karimba & another (Civil Appeal 292 of 2019)
[2024] KECA 761 (KLR) (21 June 2024) (Judgment)**

Neutral citation: [2024] KECA 761 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 292 OF 2019
J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA
JUNE 21, 2024**

BETWEEN

PILISCILA KIENDE MWITI APPELLANT

AND

JENNIFER MUGITO KARIMBA 1ST RESPONDENT

JAMES MBAABU M'TONGA 2ND RESPONDENT

*(An appeal from the ruling and orders of the High Court of Kenya at Meru
(F. Gikonyo, J.) dated 16th July 2019 in Succession Cause No. 518 of 2014)*

JUDGMENT

1. We are alive to the fact that this is a first appeal from the decision of the High Court at Meru (F. Gikonyo, J.) that was rendered on 16th July 2019. Our responsibility is to re-evaluate and re-analyse the recorded evidence and judgment and determine whether the conclusions arrived at by the learned Judge are supportable on the facts and law (See Kenya Ports Authority -vs- Kuston (Kenya) Limited [2009]2 EA 212).
2. The facts of this appeal are as follows. The deceased Arimba Rithaa alias M'Arimba M'Rithaa died intestate on 18th November 2013. He was survived by his widow, Margaret Nkuene Karimba, daughters Anastacia Nanci Karimba, Juliana Ncabira Muthuri, Jennifer Mugito Karimba (1st respondent), Mercy Kanana and Piliscila Kiende Mwiti (appellant). The appellant's late husband Silas Mwiti was the son of the deceased. He predeceased the deceased.
3. The deceased's estate comprised land parcel Nkuene/Ngonyi
144.



4. The 1st respondent petitioned the High Court at Meru for the grant of letters of administration intestate. It does not appear to be in dispute that all the beneficiaries provided their consent to the petition. A grant was issued on 15th December 2014. An application dated 13th October 2015 was filed to have the grant confirmed. In the application, the 1st respondent indicated that the appellant had died. She swore that the beneficiaries had agreed that the parcel of land goes to James Mbaabu M'Itonga (the 2nd respondent) who, on 2nd September 2015, had bought the parcel of land from her. On that basis, the grant was confirmed.
5. Under sections 45 and 85 of the Law of Succession Act (Cap. 16), it was illegal for the 1st respondent to sell the deceased's parcel of land to the 2nd respondent at the time that she did. She was not a holder of a certificate of confirmation at the time. The grant that she held had not been confirmed. She intermeddled with the estate of the deceased. She committed a crime in selling the parcel of land when she did not have a confirmed grant.
6. Secondly, it was not true that the appellant was dead. She was alive. It was fraudulent for the 1st respondent to depone that the appellant was deceased. It was on her false allegation that the appellant was dead that she excluded her from the process of the confirmation of the grant. Under Rules 40 and 41(1) of the Probate and Administration Rules, all persons beneficially entitled to the estate of the deceased have to consent to the application for confirmation and have to be present during the hearing of the application. (See Nanzala -vs- Mulunda, Succession Appeal No. 1 of 2021 [2023 KEHC 2829 (KLR) 24th March 2023 (the Judgment)].
7. What happened was that, the confirmation of the grant was done without the consent or attendance of the appellant. This made her to file an application dated 19th January 2017, under Rules 15, 40(5) and (8) and 73 of the Probate and Administration Rules, and Order 45 Rule 1 of the Civil Procedure Rules seeking that the orders confirming the grant be reviewed and/or set aside and that she be heard on the application before final orders are issued. She swore that the 1st respondent had lied on oath by stating that she was deceased which had led to the application for confirmation being heard in her absence and without her knowledge, as a result of which she had been disinherited and the whole estate given to the 2nd respondent. She sought orders for the cancellation of the title to the 2nd respondent. She stated that she was living on this parcel of land from which she had been evicted as a result.
8. The 1st respondent swore a replying affidavit to oppose the application. She deponed that she had sold the deceased's parcel to the 2nd respondent following agreement by all beneficiaries and in her capacity as the administratrix of the estate of the deceased. She stated that the appellant had never occupied this parcel of land. The deceased's widow swore that the deceased had given the appellant's husband, Silas Mwiti a separate piece of land on which the appellant lived with her children.
9. On the question of the averment that the appellant was deceased at the time of applying for the confirmation of the grant, this is what the 1st respondent deponed:-
 - “ 16. THAT there occurred an error in the application for confirmation of grant and instead of indicting the applicant as the wife of the deceased Silas Mwiti, some words were mistakenly omitted.”
10. The learned Judge treated the application as if it sought the revocation of grant under section 76 of the Law of Succession Act (the Act). In the appeal before us, the appellant took issue with this claiming that her application was for review and not for the revocation of the grant. We consider that the learned Judge was correct in treating the application as one that was seeking the revocation of the grant as



confirmed. This is because the effect of the appellant's prayers was to have the grant as confirmed revoked and the certificate of confirmation set aside and/or recalled.

11. However, the learned Judge went on to find that the appellant never lived on the land, and that the averment by the 1st respondent in the application for confirmation that the appellant was deceased was a mere error which was excusable.
12. We do not agree with the learned Judge. The 1st respondent did not only swear that the appellant was dead, she did not get her to consent to the application and she did not either serve her with the application for the confirmation or inform her that the application was coming for hearing. The appellant was completely excluded from the proceedings leading to the confirmation of the grant. It is our finding that the statement by the 1st respondent that the appellant was deceased was deliberate, false and fraudulent. The intention was to exclude the appellant from the process of confirmation. Now that she had illegally sold the parcel of land to the 2nd respondent, something she had kept away from the appellant, the intention was to deny the appellant and her children the opportunity to lay claim to the estate of the deceased.
13. It is material that while filing the petition for the grant of letters of administration intestate, the 1st respondent had declared that the appellant was a beneficiary of the estate of the deceased. We find that, under section 76 of the Act, the appellant had made a clear case for the revocation of the grant as confirmed. We have already found that the sale of the deceased's parcel of land to the 2nd respondent was illegal, and a nullity.
14. The appellant was aggrieved by the decision of the learned Judge who dismissed her application in a ruling that was delivered on 16th July 2019. In her grounds of appeal, she complained that the learned Judge had erred in not revoking the grant after the 1st respondent had conceded that she had indicated in the application for confirmation that she was deceased; that the learned Judge had erred in not finding that by failing to be informed about the application and not having participated in the application, she had been disinherited; and that the learned Judge had erred by arriving at a decision wholly against the weight of evidence.
15. On the reasons that we have given in the foregoing, we find merit in the appeal. We allow the appeal with costs to the appellant against the respondents. The ruling and orders of the High Court dated 16th July 2019 are hereby set aside and substituted with the orders as follows:-
 - a. the application dated 19th January 2017 by the appellant is allowed in terms that the grant confirmed to the 1st respondent on 10th December 2015 is revoked and the certificate of confirmation dated 3rd March 2016 is set aside and recalled;
 - b. the sale of land parcel Nkuene/Ngonyi/44 by the 1st respondent to the 2nd respondent on 2nd September 2015 is nullified, and the title to the parcel of land that was subsequently registered in the name of the 2nd respondent is hereby cancelled and the title shall revert into the name of the deceased;
 - c. the 1st respondent shall file afresh an application for the confirmation of the grant that was issued to her on 15th December 2014, with notice and service to all beneficiaries, including the appellant;
 - d. the application shall be heard by another Judge; and
 - e. the costs in the application dated 19th January 2017 shall be to the appellant against the respondents.



DATED AND DELIVERED AT NYERI THIS 21ST DAY OF JUNE 2024

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

