Mwaura & another v Gitau & another (Civil Appeal 329 of 2018)
[2024] KECA 839 (KLR) (12 July 2024) (Judgment)

Neutral citation: [2024] KECA 839 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 329 OF 2018

SG KAIRU, F TUIYOTT & JW LESSIT, JJA

JULY 12, 2024

BETWEEN

WALLACE KOGI MWAURA ..... 1ST APPELLANT

PAUL KARANJA ..... 2ND APPELLANT

AND

SALOME WAMBUI GITAU ..... 1ST RESPONDENT

TIRUS KAMAU MBURU (AS THE ADMINISTRATOR OF THE ESTATE OF) MIRIAM MUTHONI MBURU - DECEASED) ..... 2ND RESPONDENT

(Being an appeal against the Judgment, Order and Confirmation of Grant of the High Court at Nairobi (W. Musyoka, J.) delivered on 4th May 2018 and on 23rd May 2018 respectively In Succ. Cause No. 3002 'A' of 2003)

JUDGMENT

1. The appeal arises from the judgment of W, Musyoka, J. in respect to an application dated 8th December 2005 for revocation of the grant made to Miriam Muthoni Mburu (Deceased) and Salome Wambui Gitau the Petitioners, who are the respondents herein, on 31st December 2003. The summons for revocation of the grant was seeking revocation of the grant on the basis that the proceedings to obtain it was defective, that the grant was obtained fraudulently and that it was obtained on the basis of an untrue allegation of facts. It was the appellants' contention that the deceased, who was the mother and grandmother of the 1st and 2nd appellants respectively, [who were father and son] did not make any will, that at the time of the alleged making of the will she was too old, too sickly and senile to make one. He also alleged that the deceased was illiterate; and that she disposed of Gatamaiyu/Kamuchege/415 (hereinafter suit property) which she had no capacity to dispose of, claiming that the deceased owned only 2 acres of that property.

The Evidence by the parties.

2. The parties opted to dispose of the application through viva voce evidence. The first witness to take the stand for the appellants' case was the 2nd appellant, followed by the 1st appellant and one Nganga Gitau. The appellants testified that they were unaware of any will having been made by their late mother. Regarding the land in dispute, the suit property, the two appellants' evidence was that the land was 10.4 acres. That the 2nd appellant acquired 3 acres, the 1st appellant 5 acres while their late father acquired 2.4 acres. That as their late father had another piece of land and as the regulations did not allow a person to be registered as owner of more than one piece of land, the suit land was registered in the deceased name.

3. The 2nd appellant testified that the deceased was illiterate and died at the age of 76 and was sick and senile and could not recognize him. He also said that his younger brother Harun Gitau was named as executor, and that he predeceased the deceased.

4. The 1st appellant on his part said the deceased was old, sickly and had undergone several stomach surgeries from which she did not fully recover. He asserted that she was senile and that on 30th November 1988, when the will was alleged to have been made, the deceased could not understand anything.

5. The third witness for the appellants, Ng'ang'a Gititu, a farmer testified that he sold 3 acres of land to the 1st appellant in 1959 but that it was during demarcation and that there was no agreement as no sale agreements were required then.

6. The 2nd respondent, Salome Wambui Gitau, was the first on the witness stand for the respondent. She was a daughter in law of the deceased by reason of being a wife of the son of the deceased Harun Gitau Mwaura (also deceased). Her evidence was that the suit property belonged to the deceased and that the 1st appellant did not purchase it as he alleged, and that he was 24 years at the time he claimed he purchased the land. The 2nd respondent said that in 1966 when she got married in that home, the land was registered in the name of the deceased. She explained that the appellants were not provided for in the will as their father had given them the family's ancestral land.

7. The second witness for the respondent was the 1st respondent who was a son of Miriam Muthoni Mburu, deceased administratrix of the estate of the deceased. His evidence was that the appellants did not purchase the suit property neither was the land owned by the appellants. Regarding the deceased he said that the deceased had capacity to make the will.

8. The third witness for the respondent was Nicholas Kiania Njau, advocate, who drew the disputed will. His evidence was that prior to 30th November 1988 the deceased, who was unknown to him, went to his chambers accompanied by her daughter. That the deceased instructed him personally to draw a will for her and that she left him with the requisite details. He was also shown a title document for Gatamaiyu/Kamuchege/415 and an inventory of assets to be disposed by way of the will. He said the title to the suit property did not bespeak of a trust.

9. Mr. Njau testified that he could not tell how old the deceased was but said that she was not a young woman. He said that he formed the opinion the deceased was of sound mind. He said that he and his clerk, Mr. Gichigi witnessed the will.

10. The last witness for the respondent was Mwangi Kogi, a grandson of the deceased by her son the 1st appellant. His evidence was that the 1st appellant chased him out of the suit property.

Issues identified by the trial Judge

11. The learned trial judge, after taking the evidence and considering it against submissions filed by the parties formed the opinion that the only issue for determination in the cause was whether the will, the subject matter of the proceedings is valid. The learned judge observed that the will was professionally drawn. He also noted that one of the appellants alleged that no will was ever made by the deceased. That they challenged the will on the basis:

    i. the deceased lacked the capacity to handle it and;

    ii. that even if she had the capacity, she was illiterate and therefore incapable of understanding what she was signing and;

    iii. that the document did not properly dispose of the assets.

The Judges determination

12. The learned judge cited sections 5, 7 and 11 of the *Law of Succession Act* which dealt with the capacity of the maker of the will. After analyzing the evidence the learned judge found that apart from mere allegation that the deceased was 76 years old and therefore too old and senile, no other evidence was adduced in support of the allegation including medical evidence. That the evidence that the deceased had been in and out of hospital was for an ailment that had nothing to do with the brain.

13. The learned judge concluded that the burden of proof lay with the appellants which they failed to discharge, citing *Banks v Goodfellow* [1870] LR 5 QB549. Regarding the evidence of Mr. Kiania Njau, the learned judge was satisfied that the deceased instructed him to draw her will personally, providing all the required details, and that she was able to execute the will in the presence of the advocate. The judge found that Mr. Njau advocate was satisfied, out of his professional experience of many years that the deceased was of a sound state of mind. He found that evidence was not controverted by the appellants.

14. In regard to illiteracy, the learned judge relied on sections 5, 6 and 7 of the Act which deals with capacity to make a will and found that there was nothing in those provisions which make illiteracy of a testator an incapacitating factor and dismissed it as not being a ground to nullify a will.

15. Regarding the complaint of the will disposing that which did not belong to the deceased, the learned judge found that as the property in question was registered in the name of the deceased at the time she made the will, it was prima facie evidence the land belonged to her. On the issue of alleged trust over the suit property in favour of the appellants, the learned judge found that the existence of a trust was not apparent on the face of the title document. Further that the issue should only come up at the time the court will deal with the distribution of the estate. He also found that there was no law to suggest that disposal by will of property which does not belong to the deceased invalidates the will, but at most would render the will ineffective. With that the application dated 8th December 2005 was found to be without merit and was dismissed with an order that each party bears their own costs.

The appeal and issues for determination

16. The appellants were dissatisfied with the decision of the learned trial judge and so filed this appeal. The memorandum of appeal raises 12 grounds. We have carefully considered them and find that the issues that arise from those grounds and which calls for our determination are:

a. Whether the learned trial judge erred in finding the evidence of Nicholas Kiania Njau advocate sufficient to satisfy the requirements of sections 10 and 11 of the Act as to attestation of the will by both the deceased and the two witnesses.

b. Whether the learned trial judge erred to find that the deceased had mental capacity to make the will.

c. Whether the learned trial judge erred when he failed to consider the evidence of the appellants that the suit land was held in trust by the deceased; further whether the trial judge ought to have considered if the appellants were adequately provided for.

d. Whether the learned trial judge delivered an unprocedural judgment having realized that directions under Rule 17(6) had not been taken.

17. The appellants prayed for the appeal to be allowed, judgment dated 4th May 2018 set aside and confirmation of grant made on 23rd May 2018 be set aside and/or varied and/or dismissed and it be substituted with an order that the will of the deceased was not valid and therefore no confirmation of grant can issue. They also asked for costs.

Submissions by Counsel

18. We heard this appeal through this Courts virtual platform on the 28th November 2023. Present for the appellants was learned counsel Mr. Arusei and for the respondents was learned counsel Mr. Mandegwa.

19. Mr. Arusei relied on his written submissions dated 24th November 2023, which he also highlighted. Counsel, relying on section 26 of the *Law of Succession Act*, urged that it is common ground and it is not disputed that the deceased left out her two sons, the appellants herein, from inheriting the property. Counsel urged that despite the appellants making a case of total disinheritance before court, the learned trial judge never gave that matter any treatment or circumspection or at all and the trial Court's full attention was overly directed to the "written Will" and in the appellants submissions, the learned judge fell into grave misdirection and the judgment was wrong,that even after coming to the conclusion that the Will was valid, the learned judge was required to deal with the matter under section 26 of the *LSA*, which he did not do. He invited us to be persuaded by the High Court decision of Koome, J. (as she then was) in James Ngengi Muigai (Deceased) Nairobi High Court Succession Cause 523 of 1996 where the Court found the Will valid under section 5 of *LSA* and went ahead to consider whether reasonable provision was made for the beneficiaries and dependants, the Court invoked Section 26 of the *LSA* and Rule 73 of the *Probate Administration Rules* to make reasonable provision for family members who were found not to have been reasonably provided for.

20. Counsel faulted the learned trial judge for believing the evidence of one legal professional, Nicholas Kiania Njau. Counsel urged that the law required that for there to be a valid Will it must be attested by two or more competent witnesses each of whom must have seen the testator sign or affix his mark to the Will or have seen some other person sign the Will in the presence and by the direction of the testator or have received from the testator a personal acknowledgement of his signature or mark or of the signature of that person and each of the witnesses must sign the Will in the presence of the testator. He urged this was not demonstrated.

21. Mr. Mandegwa for the respondents responded to the grounds of appeal by arguing that Grounds 1 and 2 touch on the testimony of the attesting witnesses and the mental state of the Deceased at the time of making the will. Counsel urged that the appellants seek to challenge attestation based on the fact that only one witness testified. Mr. Mandegwa submitted that the reasons espoused in the provisions of Sections 10 and 11 of the *LSA* did not include the grounds relied on to annul the Will. He urged that

even the witnesses to the Will were deceased and therefore not available to testify at the trial, and that their failure to testify would not invalidate the Will. He argued that the appellants never adduced any evidence such as would demonstrate that the Deceased did not have the soundness of mind to make the will, and that all they claimed was that she was old and illiterate.

22. Mr. Mandegwa, in respect to grounds 3, 8 and 9 stated that what was under challenge was the learned trial judge's failure to consider that the appellants were co-owners of the suit property, having purchased the same together with their late father, and that the Deceased was only holding it in trust. Counsel urged that no evidence was led to that effect. That the appellants claimed to have been adults and working but failed to produce any evidence to demonstrate their allegations. He urged that it therefore follows that the doctrine of jus accresendi has no play as the deceased, Zipporah Njeri Mwaura was, during the lifetime of her late husband the legitimate registered and sole owner of the suit property.

23. In response to grounds 4, 5, 6 and 7 Mr. Mandegwa urged that the learned trial judge was faulted for having failed to find that even though the Will was valid, the appellants ought to have received adequate provisions and that the judge ought to have inquired and made a finding whether or not the appellants had been totally disinherited from their mother's estate. Counsel urged us to note that other than the fact that the appellants did not invoke the provisions of sections 26 and 29 of the *LSA*, to seek adequate provision.

24. In response to grounds 10, 11 and 12 Mr. Mandegwa urged that the appellants' position was that the application of Rule 17(6) was necessary. He urged that the appellants were misguided as the learned judge delivered his judgement after hearing the Parties oral testimony, and after considering the evidence and the merits and/or lack thereof.

25. This is a first appeal and that being the case it behooves this Court to subject the evidence adduced before the trial court to a fresh examination, analysis and evaluation and to draw our own conclusions. See *Selle and another v Associated Motor Boat Co. Ltd & others* [1968] EA 123. We are also mindful that we can only depart from the findings of the trial Court if they are not based on the evidence on record; or where the said court is shown to have acted on wrong principles of law as held in *Jabane v Olenja* [1986] KLR 661; or if its discretion was exercised injudiciously as held in *Mbogo & another v Shah* [1968] E.A.

26. We do note that the appellants filed a Notice of Appeal dated 7th May 2018 challenging the whole of the judgment of the trial court delivered on 4th May 2018. The gravamen of the appeal is the validity of the will. The application for revocation of grant was based on grounds the proceedings to obtain the grant were defective in substance, that the grant was obtained fraudulently by making false statement or by the concealment from the court of something material to the case by the respondents and that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant. From the evidence adduced by the appellants and submissions of counsel the will was challenged for being a forgery or being fraudulent on four (4) grounds:

    a. The deceased was very old, senile.

    b. The deceased was illiterate.

    c. Attestation of the will did not satisfy the law.

    d. There was in-sufficient provision for the 'would be' beneficiaries.

27. Starting with the challenge on the deceased state of mind and level of literacy we cite *Banks v Goodfellow* (*supra*) which the learned judge relied on. It deals with the principles applicable in determining the soundness of the mind of a testator. The Court should be satisfied that the testator:

a. Had an understanding of the nature of the business in which he is engaged;

b. Had a recollection of the property meant to be disposed of;

c. Had a recollection of the persons who are the objects of the bounty;

d. Had an understanding of the manner in which it is to be distributed between the beneficiaries; and that,

e. There must be evidence to show the testator was capable of making his will.

28. Section 5 of the Act deals with capacity of a testator and under 5(1) gives the permissive clause that any person of sound mind and who is not a minor may dispose of all or any of his free property by will. Under 5(3) provides the deeming clause that any person making or purporting to make a will shall be deemed to be of sound mind and under 5(4) gives burden of proof that the testator was at the time of making a will not of sound mind upon the person who alleges.

29. What constitutes unsoundness of mind is listed under section 5(3) as "...he is at the time of executing the will, in such a state of mind, whether arising from mental or physical illness, drunkenness, or from any other cause, as not to know what he is doing."

30. In support of the allegation the deceased was incapacitated to make a will at the time it is alleged she made one, the appellants gave two reasons, one that she was 76 years old and therefore too old and senile. The 1st appellant said she was senile on the grounds she could not recognize him. Secondly, for being illiterate and thus incapable of understanding what she was doing.

31. *In Re Estate of Gatuthu Njuguna (Deceased)* [1998] eKLR concerning the issue of capacity to make a Will, Githinji,J. stated:

> " As regards the testators mental and physical capacity to make the will, the law presumes that the testator was of sound mind and the burden of proof that the testator was not of sound mind is upon the person alleging lack of sound mind, in this case, the applicant (S.5(3) and 5(4) of the *LSA*). However paras 903 and 904 of Volume 17 of *Halsbury's Laws of England* show that, where any dispute or doubt of sanity exists, the person propounding a will must establish and prove affirmatively the testators capacity and that where the objector has proved incapacity before the date of the will, the burden is shifted to the person propounding the will to show that it was made after recovery or during a lucid interval. The same treatise further shows that the issue of testators capacity is one of fact which can be proved by medical evidence, oral evidence of the witnesses who knew testator well or by circumstantial evidence and that the question of capacity is one of degree, the testator's mind does not have to be perfectly balanced and the question of capacity does not solely depend on scientific or legal definition. It seems that, if the objector produces evidence which raises suspicion of the testators' capacity at the time of the execution of the will which generally disturbs the conscience of the court as to whether or not the testator had necessary capacity, he had discharged his burden of proof and the burden then shifts to the person setting up the will to satisfy the court that the testator had the necessary capacity."

32. The Halsbury's text suggests, and that is the correct position, that the issue of the capacity of a testator to make a Will is a matter of fact to be proved by evidence. Secondly, that it can be proved by medical evidence, oral evidence of persons who knew the testator well and by circumstantial evidence. Thirdly, the party that claims incapacity should adduce evidence to establish the same, and once they succeed in so doing, the burden shifts to the opponent to satisfy the court that the testator had such capacity.

The bottom line being that there must be evidence adduced to support either allegation. This view was repeated by *Zorbas v Sidivo Poolous* [2009] NSWA 197, an Australian Court which held:

> " Medical condition of a deceased may of course be highly relevant, and may sometimes directly support or deny a capacity in the deceased to have understanding of the matters, in the Banks v Good Fellow criteria. However, evidence of such understanding may come from non-expert witnesses. Indeed, perhaps, the most compelling evidence of understanding would be reliable evidence (for example, a tape recording) of a detailed conversation with the deceased at the time of the Will displaying understanding of the deceased's assets, the deceased family and the effect of the Will. It is extremely unlikely that medical evidence that the deceased did not understand these things would overcome, the effect of such conversation."

33. The issue is whether the appellants adduced any evidence to prove that the deceased was incapacitated to make the Will at the time she is said to have made it; and whether there was a shifting of burden to the respondents. The learned judge found no such evidence, only bare allegations. We too have analyzed and evaluated the entire evidence afresh and find that no evidence whatsoever was adduced to show that, for one or other reason, the deceased could not have had capacity to make the impugned Will.

34. As to the issue of being illiterate being a ground of incapacity, we agree with the learned judge that the law does not give illiteracy as one of the grounds that would render a testator incapacitated.

35. The appellants faulted the judge for relying on the evidence of the advocate who drew the Will for the deceased. We have considered the evidence of Mr. Kiania Njau advocate. His evidence was that being an advocate of long experience in the field he was careful to take note of the deceased to satisfy himself as to her state mind and ability to make the Will. He said the deceased is the one who instructed him, provided all the relevant material and details required and subsequently duly signed the will. He was positive she was in a right state of mind.

36. We find that the evidence of Mr. Njau a professional and one who had occasion to deal with the deceased at the time she instructed him and later when she signed the Will, was not controverted. He was aware of the need to ensure the mental capacity of the deceased before taking her instructions. He dealt with her at the time that is relevant to the issue of capacity. We are of the view that the evidence of Mr. Njau was circumstantial evidence as to the mental capacity of the deceased and that it establishes that she had a clear understanding of what she was doing, was clear of the property she was disposing, the persons she was disposing to and that her instructions to the lawyer who made her Will were clear. She did provide all the details and documents required for the exercise. The learned judge was right in believing that evidence being the only evidence adduced that was relevant to the matter in issue. He cannot be faulted for the conclusions he reached on this point.

37. The third basis of challenging the will was on grounds of attestation. The appellants faulted the judge for accepting evidence of only one witness. They claimed that the law required both witnesses to the Will to testify, quoting section 10 and 11 of the Act. Section 10 of the *LSA* deals with proof of oral Will and is inapplicable as we are in this case dealing with a written Will. Section 11 of the *LSA* is the relevant provision on the issue of validity of a will and attestation. It provides as follows:

> " 11. Written wills
>
> No written will shall be valid unless-

a. the testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;

b. the signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;

c. the will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

38. The appellants needed to be specific and disclose exactly what aspects of attestation of the Will they were challenging. Section 11 of the *LSA* is replete with factors that could invalidate a written Will. The appellants did not rely on any of these factors. Neither did they raise any grounds upon which a Will could be invalidated. The burden of proof lay with the appellants to first of all identify and specify the factors they were relying on, and secondly adduce evidence to substantiate the same. The appellants did not make any attempt to substantiate their claims. Instead, what the appellants have done is to set down the areas challenged in their grounds of appeal, and specifically ground No 1 of the memorandum of appeal, and in their submissions. It is trite that submissions, and indeed even grounds of appeal cannot take the place of evidence. Submissions cannot be verified, and accepting them as evidence will be tantamount to ambushing the opponent. As was held by Mwera, J (as he then was) in *Erastus Wade Opande v Kenya Revenue Authority & another* Kisumu HCCA No 46 of 2007:

> " Submissions simply concretise and focus on each side's case with a view to win the court's decision that way. Submissions are not evidence on which a case is decided."

39. As stated by the Court of Appeal in *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR:

> " Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."

40. We find that as there was lack of specificity of aspects of attestation of the Will relied upon as grounds to have the Will invalidated, and no evidence adduced in support thereof, we find the claim unsubstantiated and accordingly, it fails.

41. As to the argument that both witnesses of the attestation must give evidence in court, the learned trial judge observed that the Will was professionally drawn. He did not agree with the argument that both witnesses required to be called to testify as to its validity. We have looked at the Will. Two persons

signed to witness the attestation by the maker of the Will. The two witnesses are described as advocate of firm which prepared the will and his clerk. The clerk was not called as a witness. Mr. Mandegwa in his submissions stated that the clerk was deceased. Mr. Njau identified his own signature and that of his clerk as those who witnessed the Will. Mr. Njau's evidence suffices to prove that the Will was signed by the deceased in their presence. Whether deceased or not, there is no law requiring that all persons who attest a Will must be called as witnesses. It is not a valid argument that both witnesses of the attestations should testify in Court, especially where their signatures are not under challenge. We find nothing turns on this ground.

42. The fourth ground for our determination is whether the learned judge erred for failing to consider the appellants' evidence that the deceased held the suit property in trust for them and further for failing to consider whether the appellants were adequately provided for. The learned judge declined to consider the issue of existence of a trust stating that the Court had no jurisdiction.

43. There are two complaints, the first one being failure to consider the evidence on trust. Article 162 (2) (b) of the *Constitution* demarcates the jurisdiction of the ELC Court by enacting that it shall have power to hear and determine disputes:

> "a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
>
> b. relating to compulsory acquisition of land;
>
> c. relating to land administration and management;
>
> d. relating to public, private, and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and e. any other dispute relating to environment and land." [Emphasis added]

44. Article 162 (2)(b) gives the jurisdiction of the Environment and Land Court, which includes title to land that includes consideration whether, inter alia, a trust exists. The issue of trust is the exclusive jurisdiction of the Environment and Land Court. If the appellants wished to pursue that line they should have filed a suit in that court. The mandate of the probate court under the *LSA* is limited. It does not extend to determining issues of ownership of property and declaration of trusts. A party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land Court.

45. The second issue raised related to whether the trial judge should have considered whether there was adequate provision for the appellants as beneficiaries or dependants. Under Section 26 of the *LSA* it is the responsibility of the beneficiary or dependant that feels they have not reasonably been provided for to bring an application under Part 111, after which the Court will make a determination. There is no provision for the Court to make a determination suo moto. The section provides:

> " 26. Provision for dependants not adequately provided for by will or on intestacy
>
> Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that

dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate."

46. As to whether the judge erred to deliver a judgment when directions under Rule 17(6) of the *Probate and Administration Rules* were not taken. Mr. Mandegwa's position was that the appellants were misguided as the learned judge delivered his judgement after hearing the Parties oral testimony, and after considering the evidence and the merits and/or lack thereof.

47. Rule 17 deals with objections, answers and cross-applications in challenge to grants, and gives the procedural time frames for filing of the objections generally and the steps to be taken for earing or withdrawal of the objection. In this case, the appellants filed summons for revocation of grant, which was heard through viva voce evidence, submissions filed, considered and judgment delivered, out of which this appeal arises. We are of the view that the issue being raised here by the appellants is a challenge to procedural technicality. As the case was heard and determined, and as the appellants filed this appeal, we find that Article 159 of the *Constitution* cures any procedural infraction complained of. Nothing turns on this issue.

48. The final point has to do with the statement on the face of the memorandum of appeal that the appellants were challenging both the judgment of the learned trial judge dated 4th May 2018 and the Order and Confirmation of Grant of the High Court made on 23rd May 2018. The prayers sought also touch on both the judgment and the order confirming the grant. The notice of appeal is filed pursuant to Rule 77 of the *Court of Appeal Rules* which prescribes:

> "77. Notice of appeal
>
> 1. A person who desires to appeal to the Court shall give notice in writing, which notice shall be lodged in two copies, with the registrar of the superior court.
>
> 2. Each notice under sub rule (1) shall, subject to rules 84 and 97, be lodged within fourteen days after the date of the decision against the decision for which appeal is lodged."

49. A cursory look at the notice of appeal reveals that it was filed on 7th May 2018 challenging the whole of the judgment of the learned judge dated 4th May 201. It also challenged the order confirming grant made on the 23rd May 2018. The notice is showing that it was filed 3 days after the judgment of the Court, and 17 days before the order of confirmation of grant was delivered. Rule 77 requires that each notice under sub rule

(1) shall, subject to rules 84 and 97, be lodged within fourteen days after the date of the decision for which appeal is lodged". [Emphasis added] The appellants filed the notice challenging the confirmation of grant before the order was made, which flouts Rule 77 rendering the notice of appeal against the confirmation incompetent, not only for filing one notice in respect of two appeals, but most importantly because of being lodged 17 days before the order intended to be appealed from was made. What the appellants should have done is to file separate notices in respect of each order or judgment intended to be appealed. The prayer seeking to set aside the order of confirmation of the grant is incompetent, has not legs to stand on and is consequently struck out.

50. Having considered the appellants appeal, we find that the appeal lacks merit and fails in its entirety. We dismiss the appeal accordingly. The judgment of the High Court, (W. Musyoka, J). dated 4th May 2018 is confirmed.

51. As the appeal involves family members, we make no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF JULY, 2024.

S. GATEMBU KAIRU, FCIArb.,

JUDGE OF APPEAL

.....

F. TUIYOTT

JUDGE OF APPEAL

.....

J. LESIIT

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR