Kibunya v Kariuki & another (Civil Appeal 308 of 2019)
[2024] KECA 1274 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KECA 1274 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CIVIL APPEAL 308 OF 2019

SG KAIRU, FA OCHIENG & WK KORIR, JJA

SEPTEMBER 20, 2024

BETWEEN

MARY WAMBUI KIBUNYA ..... APPELLANT

AND

PETER KARIUKI ..... 1ST RESPONDENT

JAMES NGUGI ..... 2ND RESPONDENT

(An appeal from the Ruling and Orders of the High Court of Kenya at Eldoret (S.M. Githinji, J.) dated 9th October 2019 in Succession Cause No. 304 of 2001)

JUDGMENT

1. The appellant, Mary Wambui Kibunya, through the summons dated November 26, 2018 moved the High Court at Eldoret seeking orders for the substitution of Joseph Njuguna Mugethe (hereinafter referred to as the 2nd deceased) by the 1st respondent (Peter Kariuki), the 2nd respondent (James Ngugi) and Teresiah Mukuhi Muriithi as the administrator of the estate of Kangethe Mwega (hereinafter referred to as the 1st deceased). She also sought that upon substitution, letters of administration in respect to the estate of the 1st deceased be issued to the proposed administrators and administratrix. The summons was supported by the grounds on its face and an affidavit sworn by the appellant.

2. S.M. Githinji, J. dismissed the application through a ruling delivered on October 9, 2019. In doing so, the learned Judge held that the estate was wound up leaving nothing to be administered. He also held that if there was any other undistributed property of the estate, the appellant or any other beneficiary was at liberty to take out letters of administration in respect of such property. The learned Judge additionally found that the application had been overtaken by events.

3. The appellant was dissatisfied with that decision and is now before us raising 13 grounds of appeal, which we reproduce verbatim as hereunder:

i. That the learned judge erred in law and in fact in failing to appreciate that without substitution the cause could not be moved to the next level and as such that this was a classic case why Article 159(2)(d) & (c) of the *Constitution* 2010 and Section 47 of the *Law of Succession Act* exists;

ii. That The learned Judge erred in law and in fact in failing to appreciate the import of Article 159(2)(d) & (e) of the *Constitution* 2010 and Section 47 of the *Law of Succession* [Act] in a unique situation where the *Law of Succession* [Act] does not have express provisions.

iii. That the learned Judge erred in law and in fact in failing to appreciate that the eyes of the law cannot be shut to a process of succession that was marked by fraud and concealment of facts as was the case herein;

iv. That the learned Judge erred in law and in fact in legally sanctioning parties to reap benefits from an irregular, fraudulent and skewed process that benefitted 3rd parties and locked out daughters of the deceased from inheriting their father's estate;

v. That The learned Judge erred in law and in fact in failing to invoke the inherent powers and allow the application for substitution as this is necessary for the ends of justice to allow the prosecution of the summons for revocation dated the 17.8.2006.

vi. That the learned judge erred in law and in fact in failing to appreciate that courts must right past wrongs and deliver justice to all parties without undue regard to technicalities and that the wrong must have a remedy which remedy was in substituting the administrator for purpose of having the application for revocation heard and decided on merit as there is no contention from the parties that the appellant and the siblings are daughters of the deceased.

vii. That the learned Judge erred in law and in fact in failing to recognise the fact though the sole asset of the deceased does not belong to the late Kangethe Mwega, the process in which the parcel of land changed hands has been brought to question in the application for revocation which though filed is yet to be prosecuted.

viii. That the learned Judge erred in Law and in fact by failing to appreciate that that the appellant and her siblings have no other cause of action as they cannot petition for administration as the sole asset of the estate had been fraudulently transferred through a process that had been challenged by the summons for revocation of grant, which application was pending prosecution after an administrator is appointed;

ix. That the Learned Judge erred in law and in fact in failing to properly apply the law and principles applicable in granting an application for substitution;

x. That The learned Judge erred in law and in fact in failing to consider the merit of the appellant's affidavit [and] submissions;

xi. That The learned Judge erred in law and in fact in disregarding decisions rendered by other High Court Judges when faced with similar circumstances and failing to give a reason for such disregard and/or reason for non-persuasion;

xii. That The learned Judge erred in law and in fact in failing to appreciate that the application for substitution has not been overtaken by events as there was an application for revocations filed on the 17th of August that was yet to be heard and determined because the administrator died before its hearing and hence the need to substitute the administrator;

xiii. That the learned Judge erred in law and in fact in failing to properly analyse the evidence and submissions presented by the appellant.

4. This appeal was before us on the virtual platform on April 24, 2024 when learned counsel Ms. Kinyanjui appeared for the appellant whereas learned counsel Mr. Kipkemboi represented the respondents. The submissions for the appellant were dated July 30, 2023 while those of the respondents were dated August 8, 2023. Counsel for the parties made oral highlights on top of the written submissions.

5. The key issue identified for determination by learned counsel for the appellant was whether Teresiah Mukuhi Muriithi should be appointed an administratrix of the estate of the 2nd deceased. Counsel restated the factual background of the dispute and submitted that it was in the interest of justice that Teresiah Mukuhi Muriithi be appointed as an administratrix. According to counsel, the substitution would enable the beneficiaries of the 1st deceased to distribute the estate afresh. Counsel referred to *Re Estate of the Late Havaton Kavava Maingi* [2019] eKLR in support of the proposition that a succession court has inherent jurisdiction under section 47 of the *Law of Succession Act* to issue orders to meet the ends of justice. Counsel also relied on *Veronica Kere Mbindu & 2 others v. Cecilia Muthoni Kamuru & 2 others* [2017] eKLR to point out the powers and relevance of an administrator in driving the succession process. Counsel argued that the appellant was entitled to seek the substitution of the 2nd deceased so that the grant can be revoked. She also submitted that it was only through the revocation of the illegally obtained grant that the beneficiaries could reclaim the estate property disposed using the grant. Counsel adverted to Article 159 of the *Constitution* and section 47 of the *Law of Succession Act* and asked us to issue orders to meet the ends of justice. In conclusion, counsel urged us to allow the appeal so that the appellant can pursue the summons for revocation of grant that is pending before the High Court.

6. In opposing the appeal, learned counsel for the respondents submitted that the application for substitution by the appellant was *res judicata* since the issues raised in the summons were determined through a ruling delivered on January 26, 2007. Counsel referred to the cases of *Evans Mucangi Mwaniki v. Spiranda Njoki* [2015] eKLR and *John Mureithi Gatogo v. Lawrence Munene Ndambiri* [2020] eKLR to urge that courts have no power to substitute a deceased administrator. He asked us to dismiss the appeal, arguing that the estate of the 1st deceased had been fully administered by the 2nd deceased.

7. This is a first appeal and by virtue of rule 31(1)(a) of the *Court of Appeal Rules, 2022* we are called upon to re-appraise the evidence and draw our independent inferences and conclusions. This mandate was explained in *Abok James Odera t/a A.J Odera & Associates v. John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR as follows:

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

8. The undisputed facts in this appeal as gleaned from the pleadings on record are that the 1st deceased passed away on April 16, 2000. Subsequently the 2nd deceased filed *Succession Cause No. 304 of 2001* at Eldoret High Court seeking to administer the estate of the 1st deceased. A Grant of Letters of Administration Intestate was issued to the 2nd deceased on October 17, 2002 and confirmed on May 9, 2005. Thereafter the 2nd deceased transferred LR No. Muguga/Kahuho/428, the only asset in the estate of the 1st deceased, to himself and sold it to third parties. On August 17, 2006, the appellant

took out summons seeking to revoke the Grant of Letters of Administration Intestate issued to the 2nd deceased. A few days later, on August 26, 2006, the 2nd deceased passed away. It is also not disputed that the 2nd deceased inherited the sole property of the 1st deceased to the exclusion of his sisters being the appellant, Annah Mwaura Muchai and Teresiah Mukuhi Muriithi.

9. Upon review of the record and the submissions of the parties, the main issue for determination in this appeal is whether the application for substitution was merited. In addressing this issue, we must appreciate the sphere within which a grant of letters of administration operates. In this case, the appellant contends that she filed an application dated August 17, 2006 seeking to revoke the grant issued to the 2nd deceased. The 2nd deceased died on August 26, 2006, approximately 9 days after the summons was taken out. The respondents' position is that upon the death of the 2nd deceased, the grant issued in his name ceased to operate and stood revoked by the operation of the law. The respondents also submit that because the estate of the 1st deceased had been fully administered, there was nothing left to be administered by new administrators and administratrix.

10. The learned Judge in his ruling noted that the grant previously issued to the 2nd deceased stood revoked under section 76(e) of the *Law of Succession Act*. The cited provision states that:

> " A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—
>
> (e) that the grant has become useless and inoperative through subsequent circumstances."

11. The position adopted by the learned Judge cannot be faulted.

The grant had not only become useless and inoperative as a result of the demise of the 2nd deceased but the purpose for which it had been issued had been achieved by the completion of the succession process. The appointment of new administrators could have only been necessary if the administration of the estate of the 1st deceased had not been concluded at the time of the death of the 2nd deceased.

12. The appellant contends that she has a pending application for revocation. She argues that she is unable to pursue the same since there has not been any substitution. Despite the existence of her application for the revocation of the grant issued to the 2nd deceased, the appellant seems to have appreciated the difficulty in which she found herself by seeking the appointment of new administrators and administratrix in the application for substitution. Were her application for substitution and appointment of new administrators to succeed, there would be no need to pursue the pending application for the revocation of the grant issued to the 2nd deceased. As correctly pointed out by the learned Judge in his ruling, the grant previously issued to the 2nd deceased stood revoked as a result of his death and the appellant could not be heard to argue that she wished to pursue the summons for revocation of the grant that she had filed against the 2nd deceased before his demise.

13. There was also the argument that the substitution is needed to enable the appellant to pursue the preservation of the 1st deceased's estate. As already stated, the 1st deceased's estate was only made up of LR No. Muguga/Kahuho/428, which had been transferred to third parties by the time the application for revocation of the grant was being made. In the circumstances, even if we allow the application for substitution and appoint the respondents and Teresiah Mukuhi Muriithi as the administrators and administratrix of the estate of the 1st deceased, we shall be appointing them to manage a shell estate as there is nothing left of the estate to be administered. As correctly held by the learned Judge, the appellant's application had been overtaken by events.

Although courts have a duty to render substantive justice, sometimes parties arrive in court when it is too late for the courts to assist them. We therefore do not find fault in the learned Judge's declination of the application for substitution. It is apparent from the record that the 2nd deceased had fully administered the estate of the 1st deceased.

14. Learned counsel for the appellant also strongly urged us to invoke Article 159 of the *Constitution* and section 47 of the *Law of Succession Act* and issue orders aimed at meeting the ends of justice. In response to this submission, we reiterate our finding that there is no estate to protect or preserve as the same was already wound up. Even the appellant herself acknowledged that the 2nd deceased had completed the administration of the estate of the 1st deceased. The jurisdiction donated to the 2nd deceased by the succession court had lapsed. Indeed, the 2nd deceased who is the person alleged to have fraudulently obtained the letters of administration in respect to the estate of the 1st deceased is no more. The respondents cannot answer for the sins, if any, of their father. The responsibility bestowed upon the 2nd deceased with respect to the administration of the estate of the 1st deceased was not one to be shared with his offspring. Indeed, substituting the 2nd deceased with the respondents and even revoking the grant that was issued to the 2nd deceased in respect to the estate of the 1st deceased would be an exercise in futility. It would be an exercise in futility for this Court to allow the appeal knowing well that the asset the appellant is after is beyond reach. There is no allegation that the purchasers of the property knew of the alleged defect in the grant issued to the 2nd deceased. We are of the view that section 93 of the *Law of Succession Act* would protect the titles of the purchasers. Reopening the succession proceedings will take the parties through fruitless litigation which is likely to add pain to the appellant by way of costs.

15. The appellant's complaint is that the 2nd deceased surreptitiously obtained letters of administration to the estate of their father to the exclusion of herself and her two sisters. The 2nd deceased died before the application for the revocation of the grant could be heard. He did not even file a response to the summons for revocation of the grant. Teresiah Mukuhi Muriithi who is one of the people proposed to be appointed in the place of the 2nd deceased cannot surely defend the interests of the 2nd deceased. Additionally, even though the respondents are the sons of the 2nd deceased, they are not in a position to defend the 2nd deceased for they never assisted him in administering the estate of the 1st deceased. The parties who bought the land from the deceased are not parties to the succession proceedings. Allowing the appellant's application for substitution will put the properties of the purchasers at risk yet they have not been heard. Further, and as correctly submitted by the respondents, the estate of the 1st deceased was distributed and nothing remains to hassle over.

16. In summary, we find no reason to fault the learned Judge for dismissing the appellant's application. This appeal is therefore for dismissal.

17. The final issue relates to the costs of this appeal. Even though ordinarily costs follow the event, the court for good reason retains the discretion to decide otherwise. We note that the parties in this appeal are relatives. Even though the appellant ought to be saddled with costs for her unceasing litigation, we appreciate that she may be pained that their late brother took everything that their deceased father left for them when he exited this world. Considering those circumstances, we are convinced that this is one case where costs should not follow the event. We therefore direct the parties to meet their own costs of the appeal.

18. In the end, we find the appeal to be without merit and it is dismissed. Parties shall bear their own costs of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER 2024

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR