Samwel v Kinyoti (Sued as the Legal Representative of the Estate of Sicilia Mutitu) (Civil Appeal 59 of 2017) [2024] KECA 1261 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KECA 1261 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 59 OF 2017

W KARANJA, AO MUCHELULE & J MOHAMMED, JJA

SEPTEMBER 20, 2024

BETWEEN

LUCIA IRUKI SAMWEL ..... APPELLANT

AND

HARRIET KANINI KINYOTI (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF SICILIA MUTITU) ..... RESPONDENT

(An appeal from the Ruling of the High Court of Kenya in Embu (F. Muchemi, J.) dated 4th April 2016 in Succession Cause No. 679 of 2002)

JUDGMENT

1. Samuel Kinyoti (the deceased) died on 6th March 1987, and his family is still in court battling over the distribution of his estate. He died intestate leaving behind two widows, Lucia Iruki Samwel, the appellant, and Sicilia/Siciria Mutitu, the respondent. The respondent, however, died during the pendency of the suit and she was substituted by Harriet Kanini Kinyoti (hereafter, the respondent).

2. In 1995 his son Richard Nyaga filed a succession cause and he was appointed as the administrator of the deceased's estate on 29th November, 1995. He did not apply for the confirmation of the Grant for nine (9) years and this drove his mother (Siciria Mutitu) also deceased, to move the High Court for revocation of the said Grant. Her application was successful and the Grant was accordingly revoked.

3. Siciria was appointed the administratrix of her deceased husband's estate on 17th November, 2004 and the Grant was confirmed two (2) years later on 23rd November, 2006. The property, comprising Plot No. Ngandoli/Kirigi/832 and Plot No. Ngandoli/Kirigi/1048 was then distributed according to the schedule proposed in Siciria's confirmed Grant. Subsequently, Siciria's co-wife (Lucia Iruki Samuel) filed an application challenging the mode of distribution and seeking review of the same.

4. The application was dismissed by Ongudi, J. vide a Ruling delivered on 13th March, 2013. Undeterred, Lucia Iruki Samuel filed the application dated 1st April, 2014 seeking revocation of the Grant issued to Siciria on 23rd November, 2006, and that she, Lucia be made a co-administratrix of her late husband's estate. In the alternative, she sought orders that the mode of distribution be reviewed and that she be allocated Plot No. Ngandoli/Kirigi/832 and that the co-wife be given Plot No. Ngandoli/Kirigi/1048. The High Court (Muchemi, J.) heard the application.

5. The evidence adduced before the learned Judge was that the deceased had two wives with the 1st wife having 4 children and the 2nd wife (the appellant) having nine. The deceased had settled the appellant and her nine children on Ngandoli/Kirigi/832 measuring 5 acres while Sicilia Mutitu, the 1st wife and her children were settled on Ngandoli/Kirigi/1048 measuring 6.2 acres. It was further stated that one of Sicilia Mutitu's sons, Richard Nyaga, lives with the appellant on the smaller portion on LR. Ngandoli/Kirigi/832. It was argued that the grant was defective and was obtained fraudulently by concealment of facts material to the case and by giving false information. It was further argued that Sicilia Mutitu and her family have never developed their land while the appellant has developed hers.

6. Sicilia Mutitu, on her part stated that she got married to the deceased on 10th May 1943 and established their matrimonial home on Ngandoli/Kirigi/832. She made developments on the land by planting coffee bushes and macadamia trees which are still on the land. She stated that she was forced to relocate to Ngaridori/Kirigi/1048 together with her children after her husband started cohabiting with the appellant. According to the respondent, Ngaridori/Kirigi/1048 is unproductive and rocky. She stated that her home is Ngandoli/Kirigi/832 and not Ngaridori/Kirigi/1048. According to her the estate was distributed fairly among all beneficiaries.

7. The learned Judge found that the appellant had not filed any protest when the Grant was confirmed to Siciria and distribution made. According to the learned Judge, the issue of the re-distribution of the estate was an afterthought. The learned Judge found that the distribution of the estate was done fairly and equitably, as the two widows had shared the 2 parcels of land in equal shares irrespective of the fact that the respondent (Siciria) had extensively developed L.R. Ngandoli/Kirigi/832 before the applicant married the deceased.

8. The learned Judge also made a finding that the applicant failed to satisfy the court that the grant was obtained fraudulently or by concealment of facts material to the case and dismissed the prayer for revocation of the grant along with the prayer seeking to injunct the respondent from dealing with the property.

9. Still aggrieved, Lucia Iruki Samwel, filed this appeal against the said ruling and orders raising a prolix 29 grounds, which we need not paraphrase for purposes of this judgment. The main issue was whether the learned Judge erred in failing to revoke the grant issued to the respondent.

10. Parties, through their respective learned counsel, Ms. Mukami for the appellant, and Ms. Ndorongo for the respondent, filed submissions which counsel briefly highlighted at the plenary hearing of the appeal. Ms. Mukami submitted that the learned Judge erred in failing to revoke the grant issued to the respondent as the application for revocation of grant dated 1st April 2014 was mainly on the grounds that the proceedings to obtain the grant were defective in substance, as the grant issued to the respondent was issued without notice to the appellant; and on the ground that the deceased had settled each of his two houses on their respective parcels of land and that the mode of occupation proposed by the respondent does not reflect the mode of occupation of the two families of the deceased.

11. Counsel emphasized that section 76 of the *Law of Succession Act* and Rule 40(8) of the Probate and Administration Rules set out the procedure to be followed when considering an application for

revocation of a grant. She stated that based on the said provisions, it was necessary for the consent by the beneficiaries to be obtained and that where no protest is filed, the grant may only be confirmed on the receipt of a consent by all beneficiaries and that where any of the beneficiaries has failed to consent, the matter ought to be set down for directions. It was contended that in this matter, no consent was filed together with the confirmation of grant and as such the appellant did not consent to the mode of distribution proposed by the respondent.

12. Counsel went on to state that the Grant ought to have been revoked as the deceased had during his lifetime, from the onset, settled each of the houses on their respective portions of land and the mode of distribution adopted does not reflect the wishes of the deceased. That the respondent's house which is the first house was settled on land parcel number Ngandoli/Kirigi/1048 measuring 6 acres and that that house comprises 5 children, two of whom are deceased, leaving only 3 members. That the second house belonging to the appellant was settled on land parcel number Ngandoli/Kirigi/832 measuring 5 acres and that that household is comprised of 9 children who are all alive.

13. It was submitted that the respondent's 3 members have settled on the bigger parcel of land which measures 6 acres while the appellant's 9 children have settled on the smaller parcel of land measuring 5 acres and that each of the two families have occupied their respective homesteads for their respective lifetime, a period in excess of sixty (60) years. Further it was submitted that to buttress the argument that indeed the respondent had been settled on land parcel number Ngandoli/Kirigi/1048, the appellant provided pleadings in Embu Resident Magistrate's Court Civil Land Case No.15 of 1984 where the respondent had sued the deceased for a vesting order of the said land and that she also admitted in the said case that her matrimonial home is on the said land.

14. It was also submitted that the appellant's house has extensively developed land parcel number Ngandoli/Kirigi/832 having built several permanent houses and that the respondent failed to tender any evidence that she lives on land parcel number Ngandoli/Kirigi/832 or that she had developed the said land in any way and that at no time has the respondent ever occupied that parcel of land.

15. It was submitted that some of the members of the appellant's house would be evicted from the two houses that they have been comfortable in and that there is no evidence that any of them raised any complaints in their occupation during the lifetime of the deceased. Hence it was contended that it is only fair and in the interests of justice that the two houses retain the portions of land they have occupied for over 60 years. Reliance was placed in the case of Scolastica Ndululu Suva -vs- Agnes Nthenya Suva [2019]eKLR and In Re Estate of the Late Siwanyang Ngilotochi [2021]eKLR.

16. According to learned counsel, from the authorities cited above, in determining the mode of distribution, the court ought to have considered the hostility between the two houses which was highlighted by the appellant in the summons for revocation of grant. It was contended that having the two houses share the same portion of land would occasion great animosity between the houses, breach of peace and fights which may lead to death; and thus, that it is in the interest of maintaining peace that the two houses of the deceased should retain the pieces of land they currently occupy. It was submitted that the respondent having been satisfied with how the deceased had settled his two families for over 50 years is estopped from laying claim over the land the appellant's house has settled on. We were urged to allow the appeal.

17. In a short reply to those submissions, Ms. Ndorongo submitted that the application made by the appellant for revocation of grant had not met the threshold set by Section 76 of the Act as there was no concealment of material facts.

18. As to whether there was fairness in distribution, it was submitted that at paragraph 26 of the ruling, the learned Judge observed –

> "Both parties agreed that LR No.1048 is rocky and unproductive while LR No 832 is potential for agriculture."

Hence that the sharing of the two parcels equally between the two widows of the deceased was fair and just to the family. Further, that both properties were distributed to the widows so that each one of them could give a share to their respective children who are rightful beneficiaries of the estate of the deceased.

19. Finally, it was submitted that since this matter has dragged in court since 1995 it was only fair that the same is put to rest by upholding the decision of the High Court and allowing the beneficiaries to proceed with distribution accordingly. Counsel urged us to dismiss the appeal.

20. We have carefully considered the record of appeal along with the rival submissions while being cognizant of our role as a first appellate court which enjoins us to proceed by way of re-hearing and to subject the entire evidence to a fresh and exhaustive re-evaluation so as to arrive at our own independent conclusions. See rule 31(1)(a) of the Court of Appeal Rules, 2022; Selle -vs- Associated Motor Boat Co. [1968] EA 123).

21. The main issue for determination in this appeal is whether the learned Judge erred in declining to revoke the confirmed grant as entreated to do by the appellant. There was also the alternative prayer for re-distribution of the estate, which the learned Judge declined. We note that the issue of the redistribution was predicated on the ground that the appellant and her family were not informed of the date of the confirmation and that is the reason they had failed to file a protest. We have perused the record and note that as confirmed by the learned Judge, the summons for confirmation had been served on the appellant's family and they had even engaged a lawyer who had appeared in court on several occasions on their behalf.

22. We too find that the appellants knew about the summons for confirmation of the grant and they could have filed a protest if they were unhappy with the distribution. They did not do so. We note further, that the appellant had earlier on filed an application for review of the mode of distribution, and what the learned Judge (Ong'undi J.) termed as an application for revocation of the same grant through the back door. The application was dismissed and the appellant had not preferred an appeal against it. The application before Muchemi, J. giving rise to this appeal was filed one year after that dismissal.

23. Having considered the decision of the trial court, the affidavit evidence that was before it and the provisions of the law, as appreciated by the learned Judge, the appellant had the opportunity to file an appeal against the ruling by Judge Ong'undi or a protest against confirmation of the grant issued to Siciria. She did neither.

The appellant did not even file submissions before the trial court to support her position. The learned Judge distributed the deceased's estate fairly and equitably, and in absence of any protest or other proposals to the contrary, the mode of distribution adopted by the learned Judge cannot be faulted.

24. Ultimately, we find this appeal devoid of merit and we dismiss it, but with no order as to costs, this being a family dispute.

25. It is so ordered.

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

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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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