



**Cheruiyot v Korir & 3 others (Civil Appeal 117 “A” of 2018)
[2023] KECA 19 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KECA 19 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL 117 “A” OF 2018
FA OCHIENG, LA ACHODE & WK KORIR, JJA
JANUARY 26, 2023**

BETWEEN

ZEDDY CHEMUTAI CHERUIYOT APPELLANT

AND

JOSEPH KIPKURUI KORIR 1ST RESPONDENT

LEONARD KORIR 2ND RESPONDENT

MIKE K. KORIR 3RD RESPONDENT

STANLEY K. KENDUIWO 4TH RESPONDENT

(An Appeal from the Ruling of the High Court at Bomet (M. Muya, J.) dated 6th March, 2018 in HC Misc. Application No. 1 of 2017)

JUDGMENT

1. Zeddy Chemutai Cheruiyot is before us on an appeal against the ruling of the High Court in Miscellaneous Application 1 of 2017. Before the High Court, the appellant had filed summons for revocation of the grant of letters of administration issued to the respondents by Senior Magistrate Court at Bomet in Succession Cause No 4 of 2003. The High Court dismissed the said application by the appellant prompting the appellant to lodge the present appeal.
2. In the memorandum of appeal, the appellant raises five grounds of appeal which we reproduce as below;
 - i. The Learned Judge erred in law and in fact by failing to take judicial notice from the certificate of confirmation that there is prima facie evidence from the list of the various properties of the vast estate that the value of the estate is indeed over Kshs 100,000/= hence the magistrates court did not have the requisite jurisdiction to handle the estate of the deceased.



- ii. The Learned Judge erred in law and fact that by holding that the sisters of the appellant renounced their right to inheritance on behalf of all the daughters of the deceased.
 - iii. The Learned Judge erred in law and fact by finding that the appellant consented to the succession process without any documentary evidence from the respondents herein in the form of a duly executed consent form.
 - iv. The Learned Judge erred in law and fact by imputing that there is a limitation of time for an aggrieved heir to filing of revocation proceedings and that the whole ruling is neither sound nor grounded on sound legal principles.
 - v. The learned Judge erred in law and fact by failing to distribute the estate fairly and equally among all the children/beneficiaries of the deceased as per the provision under the *Law of Succession Act* Chapter 160 Laws of Kenya.
3. Our mandate is provided for under rule 31(1) of the *Court of Appeal Rules, 2022*. In short, we are required to independently reappraise the evidence and draw our own conclusions. In that regard, we are guided by the threshold set by this Court in *Abok James Odera T/A A. J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, stating that:
- “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.”
4. The appellant’s case was that her late father, Joshua Kipkorir Sitonik died on December 25, 2003 and his estate was to devolve to his 10 children. She averred that the deceased left behind several parcels of land and shares with various institutions. She alleges that in 2013, the respondents went behind her back and acquired letters of administration of the estate. And that subsequently, the respondents disinherited her sisters while allocating her a plot measuring 29 feet by 90 feet. She avers that the respondents went ahead and registered part of the estate in favour of 3rd parties who were not beneficiaries to the deceased’s estate. She therefore sought revocation of the said grant on grounds that the Magistrate’s Court lacked jurisdiction on the matter as the deceased’s estate was valued in excess of Kshs 50,000,000; that the said grant of administration was procured by fraud; that the said distribution was against the right to equality and that the estate was shared to 3rd parties who were not beneficiaries to the estate.
5. The respondent’s case was built on the affidavit sworn by the 1st respondent. In his response, the 1st respondent averred that the application lodged by the appellant was incompetent in law, mischievous and misleading and the same is an abuse of the court process and deserves dismissal. He denied allegations that the appellant never issued her consent to the filing of the succession cause No 4 of 2006. He said that the succession cause was commenced with the knowledge and consent of all the beneficiaries, and with no dispute or disagreements regarding its filing. He further averred that the appellant and her sisters were all catered for in the distribution. It was also the respondent’s case that the appellant was allocated a prime piece of land along the Sotik-Ndanai highway and which she had developed and that the said parcel initially measured 25 feet by 100 feet but was partially acquired by Kenya National Highway Authority (KeNHA) with compensation channeled to the appellant to the tune of Kshs 953,465. The 1st respondent further averred that the appellant was fully aware about the purchase of parts of the subject estate by 3rd parties and never complained about it. On the value of the estate, he averred that the same is currently valued at approximately Kshs 20 Million and that the



value was much less as at the time of filing the succession suit. His prayer to the Court was that the application ought to be dismissed.

6. When this matter came before us in plenary on 3rd October, Mr Onesmus Lang'at appeared for appellant, with no representation for the respondent. The respondents did not file any submissions on this matter. Mr Lang'at informed the court that he was relying on his written submissions filed by the firm of M/S Onesmus Lang'at & Co. Advocates, and which are dated November 18, 2021.
7. In the written submissions, counsel identified three issues for determination. However, they abandoned the first issue which was with regard to the jurisdiction of the Magistrate's court in Bomet Succession Cause No 4 of 2003. Counsel proceeded to submit on the place of daughters in succession. On this issue, it was submitted that the appellant's alleged inheritance was a meagre 25 feet by 90 feet plot against the entire deceased's estate which was approximated at 30 acres. Counsel also reiterated that the appellant's name did not feature anywhere in the certificate of grant thereby leaving her at the whims of her brothers, the respondents. Counsel submitted that the estate of the deceased ought to have been devolved in adherence to Section 35(5) and 38 of the Law of Succession Act as read together with Article 27 of the Constitution of Kenya so as to ensure equity in the shares of all the children of the deceased. Counsel placed reliance in the case of Rono v Rono [2008] 1 KLR 803 to buttress her view and called for equality amongst all children of the deceased.
8. Counsel also implored us to invoke Article 159(2) of the Constitution and apply substantive justice as opposed to procedural justice. On remedies, counsel urged us to issue orders revoking the grant issued to the respondents, and to reverse the entries registered against the parcels of lands originally belonging to the deceased. He also sought an order restraining persons not entitled to benefit from the deceased's estate from trespassing or interfering in any manner whatsoever with the estate.
9. We have given due consideration to the record of appeal, the submissions for the appellant and the authorities cited. The appellant has abandoned the ground of appeal challenging the jurisdiction of the Magistrate's court in the matter. That being the case, the following are the issues which require determination in this appeal, namely; whether the respondents fraudulently acquired the letters of administration challenged herein; whether the appellant and her sisters were disinherited; whether there were non-beneficiaries allocated part of the deceased's estate; and finally, whether the grant issued to the respondents should be revoked.
10. The main objective of the application by the appellant herein was to have the grant of letters of administration issued to the respondents revoked. The gist of the appellant's case was premised on the allegations of fraud by the respondents.
11. The circumstances under which a grant can be revoked are provided for under section 76 (a) - (e) of the Law of Succession Act and include;
 - a) Where the proceedings to obtain the grant were defective in substance;
 - b. Where the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case; (emphasis ours)
 - c. Where the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
 - d. Where the person to whom the grant was made has failed, after due notice and without reasonable cause either—



- i. to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or
 - ii. to proceed diligently with the administration of the estate; or
 - iii. to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
- e. Where the grant has become useless and inoperative through subsequent circumstances.”

12. It is trite law that whoever asserts a fact to which he desires the court to believe, must proceed and prove the existence of that assertion to the satisfaction of the Court. In this case, the appellant is under obligation to satisfy this Court as to the existence of fraudulent actions of the respondents in the acquisition of the grant of letters of administration of the suit estate. With regard to standard of proof where there are allegations of fraud, the pronouncement of this Court in *Kinyanjui Kamau v George Kamau* [2015] eKLR comes to play. This Court stated thus:

“It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo v Ndolo* (2008) 1 KLR (G&F) 742 wherein the Court stated that:

“...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”

13. Having laid down the basis of our assessment of the first issue herein, we then ask ourselves whether the evidence on record satisfactorily proves the existence of fraud on the part of the respondents. Sometimes in the year 2013, the respondents begun demarcating various properties belonging to the deceased. When the appellant made an enquiry she was informed that the only share she had was a plot measuring 25 feet by 90 feet at Manaret market and to which she was required to make certain payments for her title to be processed. She denied ever being a party to the initial application for letters of grant and further avers that her other sisters who had live dependents were also disinherited. It was also her case that non- beneficiaries were allocated part of the deceased’s estate contrary to the law. She contends that the said grant was acquired premised on fraudulent information; to wit that the deceased was only survived by sons and concealing from the court the fact that the deceased also had daughters
14. To rebut this evidence, the respondents advanced a case that the appellant was in fact made aware when the succession was set in motion. Contrary to the averments of the appellant that her sisters were disinherited, the respondent brought forth affidavits sworn by the dependents of the appellant’s sisters confirming that they were allocated their parent’s shares of the estate. Further, the respondents averred that the appellant took possession of her share of the estate, developed it and even took for herself, the proceeds of part of that portion which was acquired by KeNHA. This assertion was never contested by the appellant.



15. We also find that the appellant has not tendered any explanation for the delay in bringing forth her application to revoke the grant. The grant was confirmed in 2007. The appellant alleges that she became aware of the succession in the year 2013. It therefore took her five (5) years to file her application during the period which she enjoyed peaceful occupation of her share of the estate. This period is inordinately long in the circumstances as it is possible that the other dependants had also developed their respective shares of the estate, which they have had since 2007. The appellant had not met the threshold for proof of fraud or of concealment of material facts.
16. Considering the evidence tabled by the appellant against that of the respondents, the appellant must have been aware of the succession process. Additionally, she took possession of her share of the estate, developed it, and even transacted on it. It is also evident that there was no concealment from the court as to the existence of sisters on the part of the respondents.
17. We hold that the appellant had failed to set out the particulars of the alleged fraud, and also failed to prove any incidents of fraud which were perpetrated by the respondents.
18. The next issue is whether the appellant and her sisters were disinherited. The appellant's main contention on this issue is premised on the averment that she alongside her sisters were disinherited from the estate of their deceased father. This fact has however been disproved by the respondents by tendering sworn affidavits of the dependents of the late sisters. The evidence tendered by the respondents shows all children of the deceased were accounted for in the distribution of the deceased estate. Had it been proved that the appellant and sisters were disinherited as alleged, we could have been forced to intervene. We wish to reiterate this Court's decision in *Stephen Gitonga M'murithi v Faith Ngira Murithi* [2015] eKLR, where it considered the import of section 38 of the *Law of Succession Act* as follows:

“Section 38 enshrines the principle of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender and whether married and comfortable in their marriage or unmarried.”
19. She was not disinherited. And she has failed to satisfy the court that the respondents had acted fraudulently when putting forward proposals for the distribution of the estate.
20. On the issue of whether there were non-beneficiaries allocated part of the deceased's estate, we concur with the learned Judge of the High Court that the alleged third parties were purchasers for value. In fact, the part of the estate was disposed off with the consent of all parties, so as to fund the process of succession herein
21. In the result, we find that this appeal is with no merit, and that the learned Judge of the High Court properly dismissed the application by the appellant seeking to revoke the grant. We too are inclined to dismiss the appeal which we hereby do.
22. The final issue for determination is who should bear the cost of this appeal.
23. The Supreme Court in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2014] eKLR stated as follows with regards to award of costs:

“(15) ... in the classic common law style, the Courts have to proceed on a case by case basis, to identify “good reasons” for such a departure. An examination of evolving practices on this question shows that, as an example, matters in the domain of public interest litigation tend to be exempted from award of costs ...



(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.

(22) Although there is eminent good sense in the basic rule of costs – that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.”

24. In this case, we note that the appellant despite having had her share of the estate dragged the respondents back to the corridors of justice almost 10 years after the grant was confirmed. The respondents have had to live with the cost and anxiety borne of this judicial journey for the past close to six years. In the circumstances, we find that it is fair and reasonable that the respondents be jointly awarded the cost of this appeal as against the appellant.

25. The upshot of the foregoing is that this appeal is with no merit and is hereby dismissed. The cost of the appeal shall be borne by the appellant.

26. It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 26TH DAY OF JANUARY, 2023.

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

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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

