



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, GATEMBU & M'INOTI, J.J.A.)

CIVIL APPEAL NO. 62 OF 2019

BETWEEN

JANE NJERI NDERI.....APPELLANT

AND

RACHEL WANGARI NDERI Sued through her personal

Representative JOHN KURIA NDERI.....RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya at Nairobi (Musyoka, J.) dated 24th October 2014 in Succession Cause No. 26390 of 2011)

JUDGMENT OF THE COURT

This appeal relates to the estate of *Jonathan Nderi Kuria (the deceased)*, who died on 15th May 1986 at *Gathangari Sub-location, Kiambu County*. The deceased was survived by his widow, *Rachel Wangari Nderi*, who is now deceased and eight children namely, *Jackson Kariuki Nderi, John Kuria Nderi (the respondent), Ruth Nyambura Kimani, Jane Njeri Nderi (the appellant), Tabitha Waithera Nderi, James Ngomi Nderi, George Muya Nderi* and *Herman Njoroge Nderi*.

By a grant of letters of administration intestate, the widow was appointed the administrator of the estate on 21st November 2003. The letters of administration were subsequently confirmed on 17th June 2004 and the main asset of the estate, *Githunguri/Gathangari/1040*, devolved to the widow. Thereafter the widow subdivided the said asset into six parcels, namely *Nos. 3003, 3004, 3005, 3006, 3007* and *3008* measuring *0.20 ha* each and another parcel, *No. 3009*, measuring *0.359 ha.* on which stood the homestead where some of the children had semi-permanent homes. Next, the widow distributed the six parcels to the appellant, the respondent and their siblings, Jackson Kariuki Nderi, James Ngomi Nderi, Herman Njoroge Nderi, and George Muya Nderi.

Some seven odd years after the confirmation of the grant, on 23rd November 2011, the appellant, the respondent and Herman Njoroge Nderi applied in the High Court for revocation of the grant issued to the widow on the grounds that the deceased died testate, that both the grant and the confirmation thereof were obtained fraudulently without informing them, and that the distribution of the estate was faulty. The widow opposed the summons, maintaining that the deceased had died intestate; that all her children had consented to the issuance of the grant of letters of administration to her and the subsequent confirmation of grant; and that she had distributed the net estate equally and fairly.

The High Court (*Musyoka, J.*) heard the summons and by the ruling impugned in this appeal, held that the three applicants had failed to adduce evidence to show that the deceased died testate; that although the applicants did not sign the consent to the grant of letters of administration, the widow had priority over the children and therefore did not require their consent; that there was no evidence that the consent to the confirmation of grant was obtained fraudulently; and that although the devolution of the estate was not strictly in accordance with *section 35* of the *Law of Succession Act*, the widow had nevertheless distributed the net estate equally among the children. Accordingly he dismissed the summons for revocation of grant with costs.

This appeal is by Jane Njeri Nderi only. Herman Njoroge Nderi is not a party. John Kuria Nderi, who was Jane's co-applicant in the application for revocation of the grant, has since become the personal representative of the widow and is thus in the unenviable position where he must either concede the appeal and be seen to be advancing his own interest for revocation of the grant or oppose the appeal and be seen to have made a 360 degrees turn in favour of sustaining the grant. Being all too human, he readily concedes the appeal.

Mr. Kamau, learned counsel for the appellant, submitted that the learned judge erred by failing to revoke the grant of letters of administration even after finding irregularities in the manner in which it was obtained and confirmed; for finding that the beneficiaries had consented to the distribution; and for holding that fraud was not proved.

Counsel argued, relying on his written submissions, that having found that the three applicants had not consented to the grant of the letters of administration to the widow, the learned judge had no choice under section 76 of the Act but to revoke the grant. As regards consent to confirmation of grant, counsel urged that by dint of **Rule 40(8)** of the **Probate and Administration Rules**, the consent of all dependants is required before confirmation of grant. He added that the learned judge erred by holding that all the defendants consented to the confirmation of the grant, even though the respondent, who is literate, was indicated as having thumb printed the consent. He accordingly urged us to hold that, contrary to the finding of the trial court, fraud was adequately proved. Lastly, counsel submitted that the devolution of the estate was in breach of **section 35** of the Law of Succession Act to the extent that the net estate was transferred to the widow first before she subsequently distributed it to the defendants. He further contended that transferring the whole of the net estate to the widow was in violation of the law and for that reason, the grant ought to have been revoked.

As we have already stated, Mr John Kamau Nderi, one of the nemesis of the widow in the High Court, is now her personal representative and readily concedes the appeal. The other affected parties, though duly served, did not attend during the hearing of the appeal.

We have carefully considered the record of appeal, and in particular the memorandum of appeal, the impugned ruling of the High Court and the oral and written submissions by the appellant. We shall address the three issues that appellant raised in the order in which her learned counsel addressed them.

To begin with, it is common ground that the consent to the making of a grant of letters of administration intestate, pursuant to which the widow obtained the grant of letters of administration was not signed by the three applicants who applied for revocation of the grant. We agree with the reasoning of the learned judge that failure of the three to sign the consent did not invalidate the grant because they are children of the deceased. By dint of **section 66** of the **Law of Succession Act**, their mother (the widow), as a surviving spouse of the deceased, had priority over them. Further, **rule 26** of the **Probate and Administration Rules** requires consent to be obtained when the person whose consent is sought is entitled to petition in the same degree or in priority to the petitioner. (See **Musau v. Musau [2002] 1 EA 182** and **In the Matter of the Estate of Ngali Gathumbi alias James Ngaii Gathumbi (deceased) HCSC No. 783 of 1993**). In the instant appeal, the three applicants, as children of the widow, were not entitled to petition in the same degree or in priority over her. It follows therefore that their consent was not necessary and lack of it cannot invalidate the grant. This ground of appeal has no merit.

The second issue relates to the alleged lack of consent to the confirmation of the grant. In this respect, the appellant's contention is that the consent to confirmation of grant was not signed by the John Kamau Nderi, because he was shown to have thumb printed rather than signed the consent, yet he is literate. As we understand it, that is the basis of the appellant's contention that there was fraud as regards the consent to confirmation of grant. The learned judge found as a fact that the defendants had signed the consent for the confirmation of grant.

Again, we cannot, in the circumstances of this appeal, fault the learned judge's conclusion. It does not *ipso facto* follow that a literate person cannot thumb-print a document. Cogent evidence must be adduced to satisfy the court that the person in question did not thumb-print the document. In this case, the appellant did not adduce any evidence, other than inviting the court to surmise that because John Kamau Nderi was literate, he could not have thumb-printed the consent to confirmation of grant. Not only that, the appellant did not adduce any evidence to show that the thumb-print in question was not his or that it was impossible for him to have thumb-printed the consent.

The court cannot find fraud proved by mere conjecture or speculation, which is what the appellant is inviting us to do when she contends that John Kamau Nderi could not have thumb-printed the consent because he is literate. The appellant was obliged to adduce cogent evidence to satisfy the court, beyond a balance of probabilities, that the widow obtained John Kamau Nderi's signature or thumb-print on the consent order by fraud. In **R. G. Patel v. Lalji Makanji [1957] EA 314**, the former Court of Appeal for Eastern Africa stated thus on proof of fraud:

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

And in **Richard Akwesera Onditi v. Kenya Commercial Finance Co Ltd, CA. No. 329 of 2009**, this Court reiterated that:

“fraud is a serious accusation and requires a very high standard of proof, certainly above mere balance of probability.”

(See also **Koinange & 13 Others v. Koinange [2008] 1 KLR (G&F) 698**).

For that reason, we find that the second ground of appeal is equally bereft of merit and we accordingly reject it.

The last issue is whether having found that the devolution of the net estate to the widow was contrary to **section 35** of the Act, the learned judge erred by failing to revoke the grant. The learned judge found that under section 35 of the Act, the estate of the deceased should have devolved upon the widow absolutely so far as chattels are concerned, with a life interest in the whole residue of the net intestate estate. Instead, the net estate was devolved absolutely upon the widow, who however, subsequently distributed it to the beneficiaries.

The learned judge reasoned that the irregularity notwithstanding, the beneficiaries, including the three applicants, signed the consent to confirmation of grant and that the widow divided and distributed the estate equally among the beneficiaries. Our reading of **section 76** of the Act is that the court has discretion whether or not to annul a grant and that it does not follow that any irregularity in the issuance or confirmation of the grant must necessarily result in nullification of the grant. The court must first be satisfied that the proceedings pursuant to which the grant was obtained were **“defective in substance”**, to warrant an order for revocation of the grant. In **In the Matter of the Estate of Thareki Wangunyu, HCSC No. 1996 of 1999, Khamoni J.** stated that under **section 76** of the Law of Succession Act, revocation of a grant is discretionary rather than mandatory.

Githinji, J. (as he then was), took the same view in ***In the Matter of the Estate of Wilson Wamagata (deceased) HCSC No. 261 of 1998***. In an application for revocation of a grant, the learned judge found that the consent pursuant to which a grant of administration was issued was a forgery because two of the children of the deceased who had allegedly signed it were out of the country at the material time; that one of the parties was not informed of the application for confirmation of the grant; that some of the four administrators were kept in the dark about the administration of the estate; and that the respondent had arbitrarily distributed the bulk of the estate to himself. Nevertheless, he declined to revoke the grant and opted to revoke only the confirmation of the grant to enable a proper and equitable distribution of the estate.

In this appeal the learned judge was satisfied that the defect he had noted did not go to the root of the proceedings because the widow subsequently divided the net estate and transferred it to the beneficiaries in equal portions. That fact is borne out by the evidence on record, which shows each of the six dependants obtained 0.20 ha of ***Githunguri/Gathangari/1040***. Like the learned judge, we are satisfied that the irregularity in failing to comply strictly with **section 35** of the Act did not, in the circumstances of this appeal, justify revocation of the grant.

For all the foregoing reasons, we find that this appeal has no merit and the same is hereby dismissed in its entirety. We direct each party to bear their own costs. It is so ordered.

Dated and delivered at Nairobi this 8th day of May, 2020

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR