



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, OKWENGU & ASIKE-MAKHANDIA, J.J.A)

KISUMU CIVIL APPEAL NO. 11 OF 2018

BETWEEN

MESHACK OTIENO AIDAH.....1ST APPELLANT

SUNDAY AYUB AIDAH.....2ND APPELLANT

AND

SHARON ATIENO AIDAH.....1ST RESPONDENT

MOUREEN ACHIENG AIDAH.....2ND RESPONDENT

BRENDA ADHIAMBO AIDAH.....3RD RESPONDENT

OSCAR ENOKA AIDAH.....4TH RESPONDENT

STACYE AIDAH.....5TH RESPONDENT

BOAZ OSIR AIDAH.....6TH RESPONDENT

CALEB MIYUMO AIDAH.....7TH RESPONDENT

APOLLO OGUTU AIDAH.....8TH RESPONDENT

*(Being an Appeal from the Ruling and Order of the High Court of Kenya at Kisumu (D.S. Majanja, J.) dated and delivered on 6th February, 2018*

*in*

*H.C. Succ. Cause No. 143 of 2008)*

\*\*\*\*\*

**JUDGMENT OF THE COURT**

1. In the impugned ruling W. Korir, J. revoked the grant of letters of administration issued on 6th March, 2009 in favour of the 1st and 2nd appellants and the 6th, 7th and 8th respondents, with respect to the estate of Eli Enoka Aidah (deceased). According to the grant, each of the over fifty plots situated within Kisumu city comprising of the deceased's estate were to be registered in the names of the 1st and 2nd appellants and the 6th, 7th and 8th respondents, who are sons to the deceased, to hold in equal shares as stipulated in the said grant.

2. By an application dated 2nd July 2017, the 1st, 2nd, 3rd, 4th and 5th respondents herein, filed objection proceedings before the High court seeking revocation of the said grant. Their relationship to the deceased is that they are the children of the late Samuel Imbo Aidah, who was a son to the deceased; the deceased was therefore their grandfather.

3. The application was premised on grounds, *inter alia*, that the grant was obtained fraudulently as it was based on false statements, untrue allegations and concealment of material facts from the court.

4. It was supported by an affidavit sworn by the 1st respondent where she deposed that the administrators concealed the fact that their father, Samuel Imbo Aidah who died on 6th August, 2005 and their aunt, Joyce Aida, who lived in the United States of America, had been excluded from the distribution of the estate of their father, Eli Enoke Aidah.

5. The appellants opposed the application vide the 1st appellant's replying affidavit sworn on 30th October, 2017 in which he vehemently denied the 1st respondent's averments deposing *inter alia* that she and her siblings had already been adequately provided for through maintenance over a long period of time, to a tune of approximately ten (10) million, by the extended family after the passing of their father. Further, that in any event, the 1st respondent's father, Samuel Imbo Aida, did not deserve a share of the estate due to his troubled relationship with the deceased.

6. The trial Judge in his ruling found in favour of the 1st, 2nd, 3rd, 4th and 5th respondents as follows:-

***“5. The fact that a direct heir of the deceased was neither named nor disclosed is not denied. Neither is the fact that the applicants are children of the deceased's son. The reason given by the administer for failing to disclose is not sufficient in law. The duty of disclosure is paramount in succession proceedings. Under section 51 of the Law of Succession Act (Chapter 160 of the Laws of Kenya), an applicant for letters of administration is required to include information as to, “(g) ..... the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased.”***

***6. I would add that while grandchildren of the deceased are not direct heirs, when their parents die they become direct heirs by virtue of the principle of representation which is applicable (see Christine Wangari Gachigi v Elizabeth Wanjiru Evans and 11 Others NKU CA Civil Appeal No. 221 of 2007 [2014] eKLR). There is no reason why direct heirs should be disinherited in an intestate succession. They ought to have been named in the petition and their consent sought. This was admittedly not done.***

***7. For the reasons I have set out above, I therefore revoke the grant issued and confirmed in these proceedings.”***

7. Aggrieved, the appellants proffered this appeal against the impugned ruling in its entirety. However, vide an application for leave to withdraw the appeal, the 2nd appellant, proceeding *pro se*, caused his appeal to be withdrawn by an order of this Court dated 16th December, 2016 pursuant to **Rule 96(5)** of this Court's rules. This appeal is consequently by the 1st appellant only.

8. The appeal is premised on 3 grounds being that the learned Judge erred by: failing to afford the appellants a fair hearing; disregarding the fact the not all parties had been served with the application for revocation of grant before the trial court, which was a procedural technicality undermining the legality of the proceedings before the trial court and; granting orders for the revocation of the grant to the disadvantage of persons not before this Court.

9. At the plenary hearing of the appeal, learned counsel Mr. Odeny for the 1st, 2nd, 4th and 5th respondents also holding brief for Mr. David Otieno for the appellant and Mr. Onsongo for the 6th and 8th respondents informed the Court that they all opted to proceed by way of the written submissions already filed and did not wish to make any oral highlights. Urging the Court to allow the appeal, counsel for the appellant informed the Court that he was abandoning ground 3 in the memorandum of appeal and was only submitting on the 1st and 2nd grounds.

10. He submitted that the trial Judge erred by not affording him a fair hearing since the application was not heard *viva voce* but through affidavit evidence. He argued that after the trial Judge heard the application before him, he directed that the appellants and the 6th to 8th respondents show cause why the grant should not be revoked but declined to orally hear their testimonies. He maintained that had the matter gone to trial, the appellant would have had the opportunity to lead evidence that would have established his case to the required threshold.

11. He maintained that the manner in which the matter was conducted was discriminatory against the appellant as he was denied the same opportunity as the 1st to 5th respondents who presented their case before the Court.

12. Counsel argued that the learned Judge erred by proceeding with the matter despite the fact that the 6th to 8th respondents had not been served contrary to directions of the Court that they be served. Further, that since the 7th respondent had passed on, there ought to have been substitution as per Order 24 of the Civil Procedure Act.

13. He urged the Court to allow the appeal.

14. Supporting the appeal, counsel for the 6th and 8th respondent citing **Article 50(1)** of the Constitution and **Kiai Mbaki & 2 Others v. Gichuhi Macharia & Another, Nairobi Civil Appeal No. 178 of 2002**, submitted that the learned Judge erred by proceeding to hear and determine the matter before him despite the fact that the 6th to 8th respondents had not been heard. He maintained that they were not served with a hearing notice hence they were neither present during the hearing of the matter nor during delivery of the ruling revoking the grant. He contended that this was an error in law as the 6th to 8th respondents were administrators of the estate.

15. Opposing the appeal, counsel for the 1st to 5th respondents submitted that the 1st appellant in his replying affidavit before the trial court conceded to the fact that the 1st to 5th respondents were children to the late Samuel Aida who was a son to the deceased and that they had been left out in the distribution proceedings.

16. On the issue of fair hearing, counsel submitted that from the proceedings before the trial court it was evident that the appellant's allegations that he was not afforded an opportunity to be heard were untrue. He maintained that it was evident that the appellant was given sufficient opportunity to show cause why the grant ought not be revoked.

17. Counsel submitted that the learned Judge in his findings observed that the 1st to 5th respondents had a legitimate right to be included in the distribution of the estate. Citing **section 51** and **section 76** of the Law of Succession Act counsel urged that the fact that the 1st to 5th respondents who are legitimate heirs to the estate, were excluded, was enough to sustain an order for revocation of grant.

18. On the issue that the 6th to 8th respondents were not served, counsel submitted that it was not detrimental to the revocation proceedings as the said parties did not raise issues of non-service before the trial court.

19. On the issue of substitution of the 7th respondent upon his demise during proceedings for revocation of grant, counsel, citing **Rule 63** of the Probate and Administration Rules, contended that the appellant had grossly misapprehended the law as substitution was not necessary in the circumstances of this case as this was a succession matter and not an ordinary civil matter governed by the Civil Procedure Rules. He urged the Court to dismiss the appeal.

20. Having considered the pleadings, evidence and the rival parties' submissions, the issues falling for determination before this Court are as follows:

*i. Whether the 1st appellant was afforded a fair hearing.*

*ii. Whether the 6th to 8th respondents were not served with the objection application and if so, whether it was detrimental to the validity of the proceedings before the trial Court.*

*iii. Whether failure to substitute the 7th respondent invalidated the proceedings before the trial Court.*

21. On the first issue, it was the appellant's argument that he was not afforded a fair hearing as the matter was not conducted viva voce; that had he been given a chance to orally testify and lead evidence before the trial court, he would have sufficiently proved his case.

22. **Rule 44** of the Probate and Administration Rules made under the Law of Succession Act provide as follows:-

***“44. Revocation or annulment of grant***

***(1) Where any person interested in the estate of the deceased seeks pursuant to the provisions of section 76 of the Act to have a grant revoked or annulled he shall, save where the court otherwise directs, apply to the High Court for such relief by summons in Form 107 and, where the grant was issued through the High Court, such application shall be made through the registry to which and in the cause in which the grant was issued or, where the grant was issued by a resident magistrate, through the High Court registry situated nearest to that resident magistrate's registry.***

***(2) There shall be filed with the summons an affidavit of the applicant in Form 14 for revocation or annulment identifying the cause and the grant and containing the following particulars so far as they are known to him -***

***(a) whether the applicant seeks to have the grant revoked or annulled and the grounds and facts upon which the application is based; and***

***(b) the extent to which the estate of the deceased has been or is believed to have been administered or to remain unadministered, together with any other material information.***

***(3) The summons and affidavit shall without delay be placed by the registrar before the High Court on notice in Form 70 to the applicant for the giving of directions as to what persons (if any) shall be served by the applicant with a copy of the summons and affidavit and as to the manner of effecting service; and the applicant, upon the giving of directions, shall serve each of the persons so directed to be served with a notice in Form 68, and every person so served may file an affidavit stating whether he supports or opposes the application and his grounds therefor.***

***(4) When the persons (if any) so directed to be served (or such of them as the applicant has been able to serve) have been served with a copy of the proceedings, the matter shall be placed before the High Court on notice by the court to the applicant and to every person so served, and the court may either proceed to determine the application or make such other order as it sees fit.***  
*(Emphasis supplied)*

23. It is clear from the above provisions that the motion for revocation can proceed by way of affidavit evidence but the court has the leeway to proceed in any way it deems fit, which would include where necessary calling for viva voce evidence. The issue before the learned Judge was simple and straight forward, were all beneficiaries included in the list of survivors or were they not. There was concession that they were not, so viva voce evidence was not going to change that position. Therefore, the appellant's ground that he was not accorded a fair hearing as the matter was not heard viva voce is totally devoid of substance.

24. On the second issue, a close perusal of the record shows an affidavit of service dated 18th July, 2017 and filed on 20th July, 2017 in which it is deposed:-

***“3. THAT on 18th July 2017 at about 2.00 o'clock in the afternoon at the offices of the 3rd Respondent situated along Makasembo Road next to Modern Industrial Engineering within Kisumu Town, I personally served in this Succession copies of the above mentioned documents upon MR. MESHACK OTIENO AIDAH...***

**4. THAT on the same day at about 4.55 o'clock in the afternoon at the residential house of the 5th Respondent situated opposite Shajanand within Tom Mboya Estate, I personally served in this succession copies of the above mentioned docs upon MR. SUNDAY AYUB AIDAH who also accepted service for 1st, 2nd, and 4th Respondents ....”**

25. We take judicial notice that the parties herein are all members of the same extended family. It cannot be true that the 6th to 8th respondents were not aware of the proceedings for revocation for grant for reasons that they were not served with hearing notices. From the proceedings before the trial Court, it is evident that the respondents were served with summons and some of them attended court and tendered replying affidavits against the respondents’ application for revocation of grant. Moreover, if indeed they wanted to object to the summons for revocation, the respondents should have filed a protest which would have been given due consideration by the Court.

26. The fact that 6th to 8th respondents did not file their replying affidavits in opposition to the application for revocation is not enough to show that they were unaware of the proceedings therefore this cannot be said to be detrimental or to invalidate the proceedings before the trial Court. In any event in the circumstances of this case where there was no dispute that some of the parties who were supposed to appear in the list of survivors were left out, even the court could *suo motu* revoke the said grant. We have not been told what prejudice the appellants suffered as a result of the revocation. The issue of distribution of the estate will be determined at the opportune time and we are certain that all the parties will have opportunity to be heard on the mode of distribution.

27. On the third issue, **Section 81** of the Law of Succession Act provides as follows:

**“81. Powers and duties of personal representatives to vest in survivor on death of one of them**

**Upon the death of one or more of several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executors or administrators shall become vested in the survivors or survivor of them:**

***Provided that, where there has been a grant of letters of administration which involve any continuing trust, a sole surviving administrator who is not a trust corporation shall have no power to do any act or thing in respect of such trust until the court has made a further grant to one or more persons jointly with him.”***

(Emphasis supplied)

28. As provided above, upon the death of the 7th respondent, all his powers and duties as an administrator of the estate of the deceased became vested in the other administrators i.e. the 1st and 2nd appellants herein and the 6th and 8th respondents herein. Therefore, substitution was not necessary in the circumstances of this case.

29. We find this appeal totally devoid of merit and dismiss it with no order as to costs.

**Dated and delivered at Nairobi this 9th day of October, 2020.**

**W. KARANJA**

.....

**JUDGE OF APPEAL**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

**ASIKE - MAKHANDIA**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**