IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: ASIKE-MAKHANDIA, MUSINGA & GATEMBU, JJ.A.)

CIVIL APPEAL NO. 176 OF 2016

BETWEEN

PRISCA WANJIKU KIMANGA.....1ST APPELLANT

STEPHEN MAINA KIMANGA.....2ND APPELLANT

AND

ALICE WANJIKU MWANGI.....1ST RESPONDENT

MARY WAITHERA MWANGI.....2ND RESPONDENT

JANE WAMAITHA KIMANGA.....3RD RESPONDENT

GERALD IRUNGU.....4TH RESPONDENT

ALICE WANJIRU.....5TH RESPONDENT

(Being an appeal against the Judgment of the High Court of Kenya at Nairobi (Muchelule, J.) dated 11th December, 2015

in

Succession Cause No. 1728 of 2000)

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JUDGMENT OF THE COURT

1. Based on the inventory of his assets, Mwangi Kamangu, deceased, was evidently a prosperous and well invested businessman who left behind a vast estate upon his death on 17th November 1989. On 15th August 2000, the appellants, Prisca Wanjiku Kimanga and Stephen Maina Kimanga, in their capacity as widow and son respectively of the deceased, petitioned the High Court at Nairobi in Succession Cause No.1728 of 2000 for Letters of Administration Intestate in respect of the estate of the deceased. In the affidavit in support of the petition, the appellants deposed that the deceased died intestate and that he was survived by the two of them and two other children, Fredrick Njora Mwangi and Moses Kimanga Mwangi.

2. The record shows that on 2nd November 2000, prior to the Grant of Letters of Administration being issued, ***Angawa, J.*** before whom the matter was placed, perhaps intuitively, ordered the "*Deputy Registrar to confirm if there is…a 2nd wife from the applicant. Are there any children, has another wife if any*.(sic)". The record is however silent on whether inquiries in that regard were indeed made.

3. On 19th March 2001, the court issued a Grant of Letters of Administration Intestate in favour of the appellants.

4. Subsequently, on 7th December 2004, the appellants applied, for the confirmation of the Grant indicating that the identification and shares of the persons beneficially entitled to the estate had been ascertained and determined. On that basis, the High Court confirmed the Grant and issued a certificate of Confirmation of Grant dated 20th December 2004 in which the respective shares of the heirs were identified.

5. Approximately eleven years later, on 8th September 2015, Alice Wanjiku Mwangi, Mary Waithera Kimanga and Jane Wamaitha Kimanga applied to court under Section 76 of the Law of Succession Act, for the revocation and/or annulment of the Grant issued to the appellants. They claimed that when petitioning for the Grant, the appellants concealed from the court material facts, namely, that Alice Wanjiru Mwangi was the estranged first wife of the deceased, having been married to the deceased under Kikuyu customary law; and that Mary Waithera Kimanga and Jane Wamaitha Kimanga (and two other children indicated as deceased) were the children of the deceased.

6. In opposition to that application, the appellants in their grounds of opposition stated, among other grounds, that the estate of the deceased "*was distributed in accordance with his written Will dated 27th June 1994 which Will the applicants have not sought to challenge*.".

7. In his replying affidavit to the application, the second appellant deposed that the claims by the respondents were wild and false and that the respondents had no colour of right to the deceased's estate. He deposed further in that affidavit that after the death of the deceased, they (appellants) applied for letters of administration intestate "*for we were not aware of any written will he (deceased) had left behind*" and that before the Grant was confirmed they were informed of the existence of the Will and after reading and understanding it, they sought confirmation of the Grant "*in strict adherence to my late father's wishes*…"

8. On 2nd November 2015, Justice Muchelule on whom the task of hearing the summons for revocation of Grant fell, noted that reference to a Will had been raised in a matter that had proceeded on the basis that the estate was intestate and directed the parties to address themselves to the ramifications thereof. The Judge then directed the advocates for the parties to file written submissions and after considering the same, the Judge rendered the impugned judgment in which he expressed that the appellants had intentionally failed to disclose the fact that there was a Will and that the Grant had been confirmed on the basis that the deceased had died intestate.

9. With that, the Judge ordered the revocation of the grant issued to the appellants on 19th March 2001 and confirmed on 20th October 2004 and further ordered that any transactions carried out in respect of the assets of the deceased be cancelled and the ownership of each asset to revert to the name of the deceased. The court further directed that the executors of the Will should immediately petition for grant of probate "*wherein the applicants shall file the necessary objection*." Aggrieved, the appellants lodged this appeal.

10. Based on the memorandum of appeal and the submissions by counsel, the critical issue for determination is whether the Judge erred in disposing of the matter on that basis and in failing to determine the application that was before him on merits.

11. Urging the appeal before us, ***Mr. Paul Njuguna***, learned counsel for the appellants submitted that the Judge fell into error and misdirected himself in disposing of the application for revocation of grant on grounds, other than those on which the application was based; that it was not open to the Judge to interrogate the question that the court itself raised, namely whether the estate was testate or intestate; and that the Will of the deceased "*had already been admitted by the High Court when confirming the Grant*" and was not in issue between the parties. In support of the proposition that it was not open to the court "*to canvass its own matters in its judgment*", the case of ***Thika Coffee Mills vs. Mikiki*** ***Farmers Co-op Society & another [2013] eKLR*** was cited.

12. Counsel stressed that the Judge wrongly determined the entire motion *in limine* on the basis of an uncontested issue, which issue could not have disposed of the Summons for revocation of Grant; that in "*basing the determination of the entire Summons on an issue that was not before him, not contested and an issue which a court of competent jurisdiction had already entertained in confirming the Grant*", the Judge erred. It was submitted that the Judge ought to have heard the parties and determined the Summons on the basis of the grounds raised therein, the grounds of opposition and the replying affidavit but failed to do so with the result that the Summons for Revocation of Grant was never heard on merit.

13. It was submitted on the strength of the decisions in ***Joyce Ngima*** ***Njeru & another vs. Ann Wambeti Njue [2012] eKLR*** and ***Matheka and another vs. Matheka [2005] KLR 455*** that for a court to revoke a grant on its own motion, there must be evidence that the proceedings to obtain the same were defective in substance or that the grant was obtained fraudulently by making of a false statement or by concealment of something material to the case, or that the grant was obtained by means of untrue allegation of facts essential in point of law; that in the present case, the issue of the Will was brought to the attention of the Judge who issued the confirmed Grant and it was not open to the Judge to rehear a matter that had already been dealt with by the court; that there was accordingly no defect in substance on the basis of which to revoke the Grant.

14. It was submitted further that the respondents are strangers to the estate of the deceased and the Judge erred in assuming that the respondents were interested parties with *locus standi* to present the application for revocation of the grant under Section 76 of the Law of Succession Act. Citing the Supreme Court case of ***Francis Karioki Muruatetu & another vs. Republic & 5 other [2016] eKLR***, and the decision of this Court in ***Ansazi Gambo Tinga & another vs. Nicholas Patrice Tabuche [2019] eKLR*** it was submitted that it was incumbent upon the respondents to demonstrate they had a stake in the matter or show an interest in the estate in order to bring themselves within the provisions of Section 76 of the Law of Succession Act.

15. Furthermore, it was submitted, the respondents were not named in the Will of the deceased as beneficiaries and the learned Judge failed to interrogate whether the respondents were indeed beneficiaries within the meaning of Section 29 of the Law of Succession Act and thereby ran into error. The decision of this Court in ***Ngengi Muigai & another vs. Peter Nyoike Muigai & 4 other [2018] eKLR*** was cited.

16. According to counsel, the application of the grant of letters of administration on the basis that the estate was intestate is a curable "*defect in form that does not affect the substance*" (***Nicholas Kiptoo Arap Salat vs. IEBC & 6 others [2013] eKLR)*** case was cited for this proposition and which did not prejudice the rights of the parties and the Judge therefore misdirected himself in making the orders that he did. Article 159(1)(d) of the Constitution was also cited.

17. It was submitted further that the Judge failed to consider that the appellants had already disposed of some of the assets of the estate to third parties when it ordered cancellation of any transactions in respect of the assets of the estate undertaken by the appellants. Furthermore, it was urged, those orders affected persons who were not privy to the proceedings and who were therefore not heard. Counsel concluded by

urging that the decision of the Judge was wrong in its entirety and should be set aside.

18. Opposing the appeal, ***Mr. Wangalwa Oundo***, learned counsel for the respondents submitted that it was in order, based on the material presented to the court, for the Judge to raise the question and invite the parties to address the court on whether the estate was testate or intestate; that both parties were heard on the issue and the Judge acted properly and within the law in inviting the parties to address the matter; and that in any event, it was open to the court under Section 76 of the Law of Succession Act under which the respondents moved the court to revoke or annul the grant on its own motion and the court could not shut its eyes and properly concluded that the process of obtaining the grant was a nullity.

19. It was submitted that the uncontested matter of the existence of the Will formed part of the pleadings before the court having been raised by the 2nd appellant. In any case, and as an exception to the general rule that issues for determination flow from the pleadings, a court is at liberty to pronounce judgment on issues not necessarily flowing from the pleadings where, as here, the statute expressly permits it. In support, counsel cited the case of ***Galaxy Paints Co. Ltd vs. Falcon Guards Ltd EALR (2000)2 EA 385*** and the case of ***Henry Njagi Muruariua vs. A. O. Okello, District Commissioner Mbeere District & another [2014] eKLR***.

20. It was submitted that contrary to the submission by the appellants, it was not necessary for the court to first determine whether the respondents were beneficiaries of the estate of the deceased in light of the grounds upon which an application for revocation or annulment of grant can be made under Section 76 of the Law of Succession Act. In any case, it was submitted, the respondents clearly demonstrated in their supporting affidavit that they had a genuine claim to the estate which the court ought to take cognizance of.

21. Counsel made reference to Section 53 of the Law of Succession Act and pointed out that the same provides two main modes under which grant of letters of administration may be applied for depending on whether the estate is testate or intestate; that once the appellants discovered that there was a Will in existence, they should have withdrawn the petition under Section 53(b) of the Law of Succession Act and filed a fresh one under Section 53(a) of that Act.

22. We have considered the appeal and the submissions by learned counsel. Based on the grounds of appeal and the submissions, two main issues arise for our determination. The first is whether the Judge was right in ordering the revocation of the grant of letters of administration in favour of the appellants on the ground that the proceedings leading to its issuance and confirmation were defective in substance in that a grant of letters of administration was applied for, granted and confirmed on the basis that the estate was intestate when in fact the estate was testate. The second issue is whether the Judge erred in basing his decision on that question, which the court raised on its own motion. We will address both issues together.

23. Section 76 of the Law of Succession Act which the respondents invoked deals with "*revocation or annulment of grant*" and provides 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 an interested party* ***or of its own motion***, among other things that the proceedings to obtain the grant were defective in substance; that 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; that the grant was obtained by means of an untrue allegation of fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.

24. Under those express provisions, the court was empowered, of its own motion, and irrespective of whether the grant was confirmed or not to revoke or annul the same upon being satisfied that any of the grounds were established to the required standard. As already indicated, when it dawned on the Judge that reference had been made to a Will of the deceased when the grant had been issued and confirmed on the basis that the estate was intestate, the Judge invited and directed the parties to address the ramification thereof as a preliminary issue. In that regard the record shows that the Judge directed as follows:

> ***"I can see a Will introduce (sic) in the replying affidavit of 2nd respondent. The grant was confirmed on the basis that this was an intestate succession. I would like the parties to express to the court on whether this was a testate or intestate succession as a prevailing*** *(read preliminary)* ***issue."***

25. Thereafter the Judge considered the submissions from both parties before rendering the impugned judgment. The issue was properly before the Judge, the parties were duly heard on the issue. In ***Joyce Ngima Njeru & another vs. Ann Wambeti Njue*** (above) to which counsel for the appellant referred, this Court was not in any doubt that under Section 76 of the Act, the court can, of its own motion revoke or annul a grant if circumstances warrant. In that case, the Court expressed that:

> ***"We are also aware that this provision [Section 76 of the Law of Succession Act] has been construed and the law on this aspect crystallized by the decision of this court in the case of Matheka and another versus Matheka (2005) KLR 455 wherein it was held inter alia that: -***
>
> ***(1) A grant may be revoked either by application by an interested party or on the courts own motion.***
>
> ***(2) Even when revocation is by the court upon its own motion, there must be evidence that the proceedings to obtain the grant were defective in substance; or that the grant was obtained fraudulently by the making of a false statement or by concealment of something material to the case, or that the grant was obtained by means of untrue allegation of facts essential in point of law or that the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the estate.***
>
> ***(3) …."***

26. What then were the circumstances in this case? Counsel for the appellants submitted the court that confirmed the grant of letters of

administration in favour of the appellants was alive to the fact that the deceased left behind a Will and that the distribution of the estate accorded strictly with the wishes of the deceased as expressed in the Will. Although the distribution of the estate may have been done in accordance with the will, the assertion that the confirming court was alive to the fact that the deceased had a Will and that the estate was testate is not borne out by the record.

27. In their application for confirmation of grant dated 7th December 2004, the appellants sought an order that the grant of letters of administration intestate made to them be confirmed. In the affidavit sworn by the 2nd appellant in support of that application, no reference whatsoever was made to the Will of the deceased. In paragraph 5 of that affidavit, the 2nd appellant deposed that the identification and shares of all persons beneficially entitled to the said estate had been ascertained and determined without the slightest hint or suggestion that the deceased had a Will. In effect, the fact that the deceased had a Will was concealed. It was on that basis that the certificate of confirmation of grant was issued by the court on 20th December 2004.

28. It was not until the respondents filed the application for revocation when the appellants, for the very first time, revealed that the deceased had a Will. In ground 5 of the grounds of opposition dated 13th October 2015 the appellants averred that the estate "*was distributed in accordance with the written Will dated 27th June 1994 which Will the applicants have not sought to challenge*." In his replying affidavit sworn on 13th October 2015 in opposition to the application, the 2nd appellant deposed that after the death of the deceased in 1999 "*we did apply for letters of administration intestate for we were not aware of any written will he had left behind*"; that before the grant could be confirmed they were informed by a Mr. Githongo Advocate that the deceased had a Will and that having read and understood the contents of the Will, "*we proceeded to seek for confirmation in strict adherence to my late father's wishes and therefore the allegations that we concealed and/or fraudulently distributed the estate of the deceased otherwise than he had wished are without any factual or legal basis*." However, as already noted, at the time the application for confirmation of grant was made, there was absolutely no mention of the Will or the fact that the estate was testate.

29. Under Section 51(2) of the Law of Succession Act, it is a requirement that every application for a grant of representation should include information as to whether or not the deceased left a valid will. It is also a requirement that the addresses of any executors appointed by such Will be provided. See also Rule 7(1)(c) of the Probate and Administration Rules, 1980. Granted, the appellants were not aware of the existence of a Will by the time they petitioned for the grant of letters of administration. However, by their own admission, they were alive to the existence of the Will when they applied for confirmation of the grant but they did not disclose that fact at the time.

30. Therefore, the Grant should not have been confirmed on the basis that estate was intestate. The confirmation of the grant on that basis was, with the full knowledge of the appellants, flawed. Section 55 of Law of Succession Act prohibits distribution of capital assets or division of property unless and until the grant has been confirmed. Under Section 71 of Law of Succession Act, the court to which an application for confirmation of grant is made, may confirm the grant "*if it is satisfied that the grant was rightly made to the applicant*" or "*if it is not so satisfied, issue to some other person or persons*" in accordance with Sections 56 to 66 of the same Act. The more reason the appellants ought to have disclosed the existence of the Will at the time they made the application for confirmation of the grant is because under the Will, the deceased entrusted his sons Stephen Maina Kimanga (the second appellant), Fredrick Njora Mwangi, his nephew Paul Kimari Mwangi and his brother Jotham Githinji to be his executors and trustees of his will. The first appellant was not among them.

31. In the foregoing circumstances, we are fully in agreement with the learned Judge when he expressed in his judgment that the appellants

> ***"…may not have known that the deceased had left a will, but they concede that before the grant was confirmed they became aware of the existence of the will. The grant was therefore confirmed on the basis that the deceased had died intestate. It matters not that they may have used the contents of the will to propose how the estate should be shared. They did this without letting the court know that there was a will. There was intentional non-disclosure of the fact that there was a will. Secondly, in proceeding on the basis that this was an intestate succession when there was in fact a will, the proceedings were defective in substance."***

We respectfully agree.

32. The confirmed grant was therefore a nullity and every proceeding which is founded on it is also bad, to borrow the language in ***In Macfoy vs. United Africa Co. Ltd [1961] 3 All E. R 1169*** to which counsel for the appellants referred.

33. This appeal is devoid of merit. It is accordingly dismissed with costs to the respondents.

Dated and delivered at Nairobi this 20th day of November, 2020.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

D.K. MUSINGA

…….……

JUDGE OF APPEAL

S. GATEMBU KAIRU, (FCIArb)

……..……

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR