



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: E. M. GITHINJI, HANNAH OKWENGU & J.**

**MOHAMMED, J.J.A)**

**CIVIL APPEAL NUMBER 178 OF 2016**

**BETWEEN**

**REBECCA Njeri Muturi.....APPELLANT**

**AND**

**VIOLET Wambui Muturi.....RESPONDENT**

**(An appeal from the ruling of the High Court of Kenya**

**at Nairobi, (Achode, J.) dated 15th February, 2016**

**in**

**H. C. SUCC. CAUSE NO. 142 OF 2003)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

**Background**

[1] This is an appeal against the ruling of the High Court (Achode, J.) where the learned Judge ordered that the titles acquired pursuant to the subdivision of **LR. No. 3057 Ol joro Orok** (the suit property) be nullified and cancelled and that the suit property be sub divided into two equal portions or in the alternative that the appellant shall relinquish two of the three subdivisions and retain the subdivision on which her matrimonial home stands.

[2] A brief background of the appeal is that **Johnson Muturi Muchemi** (the deceased) who was domiciled in Kenya died intestate on 13th May, 2002. He was survived by two widows, namely,

**Rebecca Njeri Muturi** (the appellant) and **Violet Wambui Muturi**, (the respondent). The deceased was also survived by seven children. From the house of the appellant, the deceased had four children, namely, **Alice Wairimu, Mary Wangui Muturi, William Muchemi**

**Muturi** and **Asaph Mwangi Muturi**. From the house of the respondent, the deceased had three children, namely, **Richard**

**Wainaina Muturi, Joseph Iringu Muturi** and **Jacqueline Wangui Muturi**. It is not disputed that all the deceased's children were adults at the time of his death.

[3] On 24th January, 2003, the appellant and the respondent jointly petitioned for a grant of letters of administration of the estate of the deceased in Nairobi High Court Succession Cause Number 142 of 2003. Grant of Letters of Administration intestate was issued on 2nd May, 2003 to the two widows of the deceased and confirmed on 29th September, 2004.

Distribution of all assets of the estate as listed in the schedule to the Certificate of Confirmation of Grant was effected save for the suit

property.

[4] On 10th February, 2006, the respondent who was leaving the country for the United States of America duly executed and registered a General Power of Attorney in favour of **Dickson Richard Wainaina Muturi (Richard)**.

[5] On 14th March, 2008, the appellant made an application to court for orders that she be allowed to solely execute all the necessary and required transfer and other documents to facilitate the sub division of the suit property pursuant to the order of confirmation of Grant of Representation issued by the court on 29th September 2004. The said application was heard *ex parte* and on 8th July 2008 **Rawal, J** (as she then was) ordered:-

**“1. That Rebeccah Njeri Muturi be and is hereby allowed to solely execute all the necessary and required transfer and other documents to facilitate the division of LR No. 3057 Ol Joro Rok pursuant to the order of confirmation of Grant of Representation issued by the court on 29th September 2004.**

**2. That the Registrar shall be a cosignatory of the documents mentioned.”**

[6] By way of Summons for Revocation or Annulment of Grant dated 17th August, 2015, the respondent, acting through **Richard** as her duly appointed Attorney, sought orders that the “grant of probate [letters of administration] to **Violet Wambui Muturi and Rebeccah Njeri Muturi** confirmed and issued on 29th September 2004 be revoked [annulled]” on the ground that:-

**(1) The distribution which has so far been undertaken by one administratrix, Rebeccah Njeri Muturi without the participation and/or consultation with the other co-administratrix, Violet Wambui Muturi has been unfair and contrary to the terms set out in the certificate of confirmation of grant issued on 29th September 2004.**

**(2) The said co-administratrix has, further to her unfair and unequal distribution proceeded to market for sale the portions that she has allocated to herself with the sole intention of gaining an unfair material advantage over the co-administrator Violet Wambui Muturi.**

**(3) That the said co-administratrix be compelled to surrender the titles she acquired after the subdivision, if at all.**

**(4) That in the alternative, the Honourable Court orders thereto be a redistribution of the estate of the deceased herein in accordance to the schedule laid out in the certificate of confirmation of grant issued on 29th September 2004 having due regard to the size and value of the estate with the supervision of this Honourable Court.**

**(5) Costs be borne by the Respondent.**

[7] The application was supported by the affidavit of **Richard** who described himself as a holder of a Power of Attorney from the respondent. The instrument of appointment, being the General Power of Attorney dated 10th February 2006 that appointed one **Dickson Richard Wainaina Muturi** as the Attorney for the respondent.

[8] The Attorney deposed, *inter alia*, that he is the son of the deceased and the respondent herein; that the Certificate of Confirmation of Grant proved that the estate of the deceased was to vest in the two widows’ households in equal proportions to the effect

that each widow holds the accruing respective portion as life tenant and as trustee for their respective children; that he (the Attorney) carried out an official search in respect of the suit property and found out that the suit property had been sub divided into three portions being Title **No. Nyandarua/Ol Joro Orok West/5191, 5192 and 5193**; that the appellant allocated to herself the portion reserved for the family grave yard which was intended to be in the joint names of the appellant and the respondent; that the family had agreed that each house would forfeit a total of 0.25 acres to serve as a family grave yard; that the appellant had refused to set aside the land meant for the family grave yard and that a valuation carried out on the portions of land indicated that the portion claimed by the appellant was valued at Kshs.9,700,000/= while the respondent’s portion was valued at Kshs.7,500,000/=. The Attorney urged the court to compel the appellant to distribute the estate of the deceased in accordance with the Certificate of Grant as issued or in the alternative, the court to supervise the said distribution to ensure that justice is done.

[9] The application was opposed by way of a Replying Affidavit sworn by the appellant and filed on 22nd October, 2015. The appellant deposed that the Administrators were required to obtain Land Control Board consent in respect of the suit property; that the respondent travelled to the United States of America before the Land Control Board consent to sub divide the suit property was obtained and did not send any representative to appear on her behalf; that the survey in respect of the suit property was done in the presence of the Attorney who arranged for the surveyor’s visit and the fixing of beacons to mark the respective boundaries of the resultant subdivisions; that the suit property was sub divided into three equal portions; that there was no agreement to set aside a portion of land to act as a family grave yard and neither was this contained in the Certificate of Confirmation of Grant; that the permanent dwelling house in her occupation constitutes her matrimonial home where she has lived for 39 years and which she has extensively improved by undertaking various renovations and that the respondent has never lived in the said house nor claimed entitlement thereto.

[10] The High Court by a ruling dated 15th February, 2016 determined that:-

**“The application dated 17<sup>th</sup> August 2015 has merit. The Court is of the view however, that to revoke or annul the grant already in place will not serve the interests of the Estate since distribution of all the assets of the Estate as listed in the**

schedule to the Certificate of Confirmation of Grant was effected in accordance with the agreed mode of distribution save for the property described as LR No. 3057, Ol-Joro-Orok.”

The court ordered as follows:

“(i) The titles acquired pursuant to the subdivision of LR No. 3057 Ol Joro Orok are hereby nullified and cancelled.

(ii) The administratrix in the Estate is hereby ordered to subdivide the parcel of land known as LR No. 3057 Ol Joro Orok into two portions having regard to the size and developments thereon so that the two portions shall be as nearly equal as possible in value, and each widow shall be entitled to one portion.

(iii) In the alternative to (ii) above, the Administratrix shall relinquish two of the three portions as already subdivided and return the portion on which her matrimonial home stands, if the two portions shall be equal to the one portion together with the developments thereon.”

[11] Aggrieved by this decision, the appellant filed this appeal on the grounds that the learned trial Judge erred in law and fact in; failing to hold that **Richard** had no legal capacity to act as the attorney of **Violet Wambui Muturi** (the respondent herein) in respect of the Summons for revocation of grant dated 17th August 2015; in ordering the cancellation of titles issued pursuant to sub-division of the suit property without any legal justification for the same; in ordering that developments effected upon the estate be taken into consideration during distribution without any regard to the substantial improvements effected by the appellant on her matrimonial home and the estate in general; and in making an order whose effect was to change the agreed mode of distribution of the estate and whose effect was to work an injustice against the appellant by disregarding her contribution towards the improvement of the estate.

The appellant seeks the following orders:-

- a) An order allowing the appeal with costs
- b) An order dismissing the summons dated 17<sup>th</sup> August 2015 with costs
- c) Any other or better relief deemed fit by the honourable court.

#### Submissions

[12] The appeal was heard by way of written submissions with brief oral highlighting. Learned counsel, **Mr Gakuhi** appeared for the appellant and submitted that the deponent of the supporting affidavit of the respondent’s summons to revoke the Confirmation of Grant had no legal authority to swear the supporting affidavit on behalf of the respondent; that the administrator of an estate cannot delegate their powers to an Attorney under the law; that the only justification for ordering cancellation of titles issued pursuant to subdivision of the suit property was only in the event of the appellant’s failure to comply with the Certificate of Confirmation of Grant; that the appellant had complied with the Certificate of Confirmation of Grant and there was therefore no justification for ordering a cancellation of titles; that on 14th March, 2008 the appellant made an application to the court seeking to be allowed to access all the necessary documents to facilitate sub-division of the suit property since the respondent had relocated to the United States of America since 2006 and was therefore unavailable; that the High Court allowed the application and there was no application to set aside, review or appeal against the orders granted.

[13] It was counsel’s further submissions that the respondent’s application for revocation of the Grant was not brought within the parameters of the Law of Succession Act (Cap 160) and the grounds set out therein were not proved; that the schedule of distribution was arrived at through an application made by both administrators; that this explained why the respondent did not invoke any of the grounds under section 76 of the Law of Succession Act and that the High Court had no jurisdiction to make orders for cancellation of titles.

[14] Counsel further submitted that the equity envisaged in the Certificate of Confirmation of Grant was in respect of the size of the land to which each house was entitled and that this could not have included the residential house and other improvements effected by the appellant on the estate as it would disrupt the status quo obtaining in the estate prior to the deceased’s demise; and that the learned Judge’s order for re-distribution of the estate had no legal basis as it went contrary to the Certificate of Confirmation of Grant which was arrived at by consent. Counsel urged us to allow the appeal.

[15] Learned counsel, **Ms. Onsare** for the respondent filed written submissions and made oral submissions in opposition to the grounds of appeal. **Ms. Onsare** submitted that the Power of Attorney by the respondent to the donee allowed the donee to institute a suit. On the issue of the discrepancies in the name of the donee in the Power of Attorney and the name of the person who deponed the Supporting Affidavit, **Ms. Onsare** submitted that the Appellant had not proved the allegation that the donee of the Power of Attorney was a different person from the deponent of the Supporting Affidavit; that the deponent of the supporting affidavit in issue had not purported to take on the role and place of the Administrator in the estate of the deceased; that the allegation that was made by the appellant that the deponent of the supporting affidavit had no capacity to bring the action in the trial court was misleading as the deponent of the supporting affidavit swore an affidavit in support of the respondent’s application; that the Power of Attorney executed by the respondent in favour of the deponent of the Supporting Affidavit to the Summons dated 17th August, 2015 availed the said deponent adequate authority to swear the Supporting affidavit.

[16] Counsel further submitted that the appellant had failed to inform the respondent that the appellant had obtained ex parte orders allowing the appellant to execute the necessary documents to facilitate the division of the suit property; that the appellant omitted several material facts relating to the issuance of the ex parte orders; that the appellant failed to consult her co-administrator on the sub-divisions and transfers of the suit property; that the orders issued by the High Court on 8th July, 2008 allowing the appellant to administer the estate of the deceased

were based on an untrue state of affairs that was presented to the court by the appellant; that the trial court had jurisdiction to cancel the titles in respect of the suit property, that the titles were procured in an improper scheme that was aimed at isolating the respondent and disinheriting the respondent and her children from their 50% entitlement to the estate; that while the size of the parcels as divided between the appellant and the respondent appear equal, an assessment of the value of the parcels indicates that the appellant had allocated herself parcels whose value exceeded the value of the parcel allocated to the respondent by Kenya Shillings Two Million Two Hundred Thousand. Counsel urged that on this basis, the distribution of the parcels between the two administrators was not on a 50:50 basis as the appellant's portion was of a higher value than the respondent's.

[17] Ms. Onsare referred us to Article 45(3) of the Constitution of Kenya, 2010 in support of her contention that the estate of the deceased should be divided equally between the appellant and the respondent. Counsel urged us to dismiss the appeal.

### **Determination**

[18] We have considered the submissions, the authorities cited and the law. This is a first appeal and this Court must subject the entire evidence adduced before the learned Judge to a fresh evaluation.

[19] This Court has previously in many cases stated the principles that apply on a first appeal. In the case of **Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates** [2013] eKLR, this Court said the following with regard to the duty of a first appellate court:-

*“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze 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. See the case of Kenya Ports Authority versus Kusthon (Kenya) limited (2009) 2EA 212 wherein the Court of Appeal held, inter alia, that:-*

*“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”*

[20] On the question whether an administratrix can delegate her power to her attorney,

In **Re Estate of Haji Mohamed (Deceased)** 2016 eKLR the High Court in Mombasa determined a related question as follows:

*“16. Kimaru, J in Re Estate KRISHAN MURTI MAINI (DECEASED) [2011] eKLR, had occasion to consider the issue of delegation of power bestowed by a Grant and had this to say;*

*“It is therefore clear that when a court issues letters of administration or grants a probate of written will, such letters or grants are issued personal to the person applying to administer the estate of the deceased. The person applying for letters of administration or grant of probate cannot on his part delegate the powers granted to him by the court to someone else to administer the estate (in the case where the deceased died intestate) or to execute the will (in the case where the deceased left behind a written will) on his behalf.”*

*17. In his book “The Law of Succession” Law Africa at page 246, Musyoka, W. M. writes on the power of delegation thus:-*

*“The extent to which personal representatives can delegate their duties is the same as for trustees and is governed by the Trustee Act. Under the said Act, personal representatives may employ an agent to transact any business or do any act in the administration of the estate and may remunerate such agent out of the estate.*

*Under Section 24 of the Trustee Act, the personal representative can engage an advocate or a bank to arrange the collection of the assets of the estate, discharge of debts and other liabilities, and distribution of the estate. It can also be used to employ an estate agent to sell land forming part of the estate, or to engage a stockbroker to value or sell shares. The provision does not allow personal representatives to delegate any discretion in matters relating to the administration of the estate. The decision making power of the estate remains with the personal representatives and not the appointed agent. The creation of a power of attorney may lead to a delegation of decision making power.*

*18. It is clear from the above that the law does not allow personal representatives to delegate any discretion in matters relating to the administration of estates. The power of attorney donated by the Administrators herein to the Respondent has led to the delegation of decision making power.”*

[21] In the instant case the Grant of letters of administration was granted to the two widows of the deceased. The confirmed Grant distributed the net intestate estate of the deceased to the two households represented by the two widows in equal proportions and each widow was to hold the accruing respective portions as life tenant and as a trustee for their respective children. The estate was distributed to the two households before the respondent Violet Wambui Muturi left for America except for LR No. 3057 Ol-Joro- Orok (suit property). The appellant applied for and obtained an *ex parte* order allowing her to solely execute all the necessary and required transfer and other documents to facilitate the sub-division of the un administered suit property. Where there is more than one administrator or executor and one or more dies, all the powers and duties of the administrator or executors become vested in the survivor or survivors of them (Section 81) of the Law of Succession Act.

[22] In this case Violet Wambui Muturi was still alive although outside the jurisdiction when the appellant obtained an *ex parte* order. The correct procedure should have been for the appellant to apply for revocation of the grant given to the respondent under Rule 76 (e) of the Law of Succession Act as the grant had become inoperative through her leaving the jurisdiction. That would have left the appellant as the sole administrator solely capable of performing the duties of an administrator under Section 83 of the Law of Succession Act including completing the distribution of the suit property and giving the necessary assents. Alternatively, the appellant would have applied for revocation of the grant and issuance of replacement grant to her jointly with any of the three children of the 1st respondent preferably her attorney Richard Wainaina Muturi. The *ex parte* order granted by Rawal J (as she then was) was with due respect erroneous as it would not supersede the joint grant given to the two widows.

[23] Under the authority of the *ex parte* order the appellant proceeded to sub-divide the suit property and execute the appropriate transfers. It is that distribution which precipitated the application by Dickson Richard Wainaina Muturi, the respondent's attorney, to apply for the revocation of the grant. The respondent has no power to delegate her powers and duties as a co-administrator of the estate by donating a power of attorney. Indeed, the Donee of the power of Attorney would not have any power by virtue of the power of Attorney to perform his statutory duties and exercise the powers of the administrator such as completing the administration of the estate or giving the requisite Assents or executing transfers. Those duties can only be performed by an administrator appointed by the Court.

[24] However, Richard as a beneficiary of the estate has powers under Section 76 of the Law of Succession Act and Rule 44 (1) of Probate and Administration Rules to apply as of right for revocation of the grant. Thus, he had capacity to institute the proceedings. The fact that he invoked power of attorney to make the application does not render his application incurably defective. The High Court was entitled to consider his application on the merits. Further, even if Richard was acting under the power of Attorney to institute proceedings it is clear that he was pursuing the personal interest of the respondent in the estate and not exercising or performing statutory duties exclusively conferred to the respondent by law as administrator of the estate. To that extent the respondent cannot be said to have delegated the power and duties of her office as administrator to Richard. Similarly, the High Court was entitled to entertain the respondent's protest or objection to the distribution of the suit property through her attorney.

[25] Furthermore, the High Court declined to revoke the grant of letters of administration. Neither the appellant nor the respondent is aggrieved by that decision. Thus the capacity of Richard to apply for revocation of the grant is a non-issue.

[26] The High Court appreciated that the real dispute related to the distribution of the suit property. Richard complained that the appellant sub-divided the land without the participation or consultation of the respondent; that the distribution was unfair and that the appellant had offered the portions she allocated to herself for sale. Richard sought orders, *inter alia*, for the redistribution of the suit property. The appellant justified the sub-division of the suit land into three portions and stated that she was entitled to the portion where there is the permanent house as a permanent house was her matrimonial home. The High Court nullified and cancelled the three titles and ordered the appellant to sub-divide the said land into two portions which should be nearly equal as possible in value and allocated each widow one portion. The High Court granted an alternative relief sub-division into two equal portions that:

***“The Administratrix shall relinquish two of the three portions as already sub-divided and return the portion on which her matrimonial home stands, if the two portions be equal to the one portion together with the developments thereon.”***

[27] Since the appellant unilaterally sub-divided the suit property into three portions contrary to the confirmed grant that the intestate estate be vested in the two households in equal proportions, the order of the High Court nullifying and cancelling the three sub-divisions was justified and should not be interfered with. The second order would have resolved the dispute if the parties were to agree on the values of sub-divided portions. However, the respective affidavit evidence and submissions show that there is no agreement on the values. The alternative relief provided room for further disputes. It seems to us that the dispute can only be resolved by adduction of oral evidence after which the court should determine the specific acreage to be allocated to each house based on the value of each portion and the other relevant considerations.

[28] In the premises, the appeal partially succeeds. Accordingly,

- 1. The appeal against the first order nullifying and cancelling the three titles created from LR No. 3057 Ol-Jorok is dismissed.***
- 2. The appeal against the second order requiring the said suit property to be sub-divided into two equal portions nearly equal in value and allocation of one portion to each widow and also against the alternative relief is allowed and the second order and alternative order are set aside.***
- 3. The case is remitted to the High Court, Family Division for determination through oral evidence or as the High Court may direct the acreage to be allocated to each of the two households and the demarcation thereof in conformity with the confirmed grant.***
- 4. The dispute to be heard by a judge other than Achode, J.***
- 5. The cost of the appeal shall be costs of the retrial and at the discretion of the trial court.***

Orders accordingly.

Dated and delivered at Nairobi this 21<sup>st</sup> day of June, 2019.

E. M. GITHINJI

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**JUDGE OF APPEAL**

**H. M. OKWENGU**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**