



IN THE COURT OF APPEAL

AT ELDORET

CORAM: GITHINJI, OKWENGU & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO 92 OF 2016

BETWEEN

BENSON CHAMPU KAPAREWO.....APPELLANT

AND

RABECA CHEPKUTO KIPERENGE.....RESPONDENT

(an appeal from the ruling of the High court of Kenya

at Kitale (Jaden, J.) made on 26th May 2016

in

H.C. Succ. Cause No 191 of 2006)

JUDGMENT OF THE COURT

BACKGROUND

1. This appeal relates to the estate of the **late Kiperenge Paparewa Miapen** (the deceased), who died intestate on 24th December 2000. Following his death, his son, **Benson Champu Kaparewo**, the appellant herein, applied for a grant of letters of administration in order to administer the estate of the deceased. The grant was issued to him on the 23rd July 2007 and was later confirmed on 13th November 2008. On 27th April 2015, the respondent **Rabeca Chepkuto Kiperenge** who is a daughter to the deceased applied for a summons seeking various orders that:

- a) the grant of letters of administration in respect of the estate of the deceased issued to the appellant be revoked or annulled;
- b) the appellant be restrained from further administering the estate or disposing off the estate;
- c) that the Court do nullify the proceedings leading to the confirmation of the grant; and
- d) that the summons for confirmation of the grant be heard *de novo*.

2. The respondent based her application on various grounds *inter alia* that: the proceedings leading to the confirmation of the grant were defective in substance; that there were persons who had already benefitted from the gift of a separate piece of land while the deceased was still alive were listed in the summons for confirmation of grant as beneficiaries; that the respondent is protecting the interest of her children who were also to inherit a portion of the deceased's estate and; that the appellant misled the court by concealing material facts.

3. The appellant opposed the application, arguing that the respondent had no *locus standi* to seek the orders sought, and urged the court to strike out the application. In addition, the appellant argued that the application was misconstrued and in bad faith as the respondent was cited on 25th September 2006. In this citation, she was asked to appear and make representations on the grant of representation but she failed to do so. Thereafter, when the grant was confirmed in the appellant's favour on 13th November 2008, the respondent was in court, and was represented by counsel, but she did not protest. In the appellant's view, this was an indication that the proceedings culminating in the confirmation were open and regular.

4. The appellant further argued that there was a long and inordinate delay in bringing the application for revocation of the summons, and that in the interim period of seven years since the grant had been confirmed, **Land Parcel No. West Pokot/Siyoi/275 (the suit property)** had already been transferred to the beneficiaries pursuant to the confirmation.

5. After considering the submissions of counsel for the parties, the trial court observed that:

“the grant was issued on 23/7/2007 (Hon J.A. Ochieng’, J). Although a citation to accept or refuse letters of administration intestate had been filed earlier on within this file (H.C. Succ. Cause No. 191/2006), the fate of the citation proceedings is not clear. The record has no entry which reflects whether the said citation was heard by the court and any orders made. No such orders have been exhibited by the respondent whose stand is that the citation was served on the citees. No consent by the beneficiaries was filed in court before the grant was issued. The grant was therefore issued irregularly without notice to the applicant and all the other persons beneficently entitled to the estate of the deceased. This was contrary to the provisions of section 26(1) Law of Succession Act”

6. Thus, the trial court allowed the application holding that the proceedings for issuance and confirmation of the grant were defective in substance, that the respondent, being the deceased's daughter, had *locus standi* to contest the confirmation of the grant, and that there was no evidence to show that the suit property had been transferred as claimed by the appellant.

7. This is the ruling which has sparked the present appeal. The appellant's memorandum of appeal raises various grounds upon which he impugns the ruling of the trial court, and these include that: the learned judge erred in law in failing to consider that the respondent had participated fully in the proceedings leading up to confirmation of the grant and therefore the proceedings were not defective in substance; that the learned judge failed to appreciate that the respondent did not comply with rule 60 of the Probate and Administration Rules; and that there had been a long, inordinate and unexplained delay in bringing the application for revocation of the grant.

8. In support of these grounds, the appellant filed written submissions which were highlighted orally during the hearing of this appeal. The appellant's first submission was that the trial court erred in finding that the proceedings leading to the confirmation of the grant were defective. He contended that he fully complied with **section 51(2)(g)** of the Law of Succession Act and **Rule 7(1)(e)(i)** which provide for the requirements and procedure for obtaining a grant of representation. The appellant contended that he complied fully with the law, and that the proceedings to obtain the grant were not defective in substance.

9. The appellant further faulted the decision of the trial court for stating that there was no consent by the beneficiaries for the appellant to have the letters of administration issued in his name; that the trial court disregarded the appellant's replying affidavit in which he stated that before the grant was confirmed, the respondent together with others were cited and failed to respond to the citation; that this averment was not

contested by the respondent, and therefore if the court had doubt as to whether or not the respondent had actually been cited, then she should have called oral evidence to determine whether or not they had been indeed cited instead of simply revoking the grant.

10. It was the appellant's further submission that the trial court failed to appreciate that the respondent had instructed counsel to represent her during the proceedings for confirmation of the grant. Despite this, the respondent's counsel did not file appearance as required under rule 60 of the Probate and Administration Rules. The appellant further faulted the trial court for granting the application as prayed despite the long, unexplained and inordinate delay on the part of the respondent. For these reasons, counsel urged us to allow the appeal and set aside the ruling of the trial court.

11. The respondent on her part relied on the submissions that she had filed during hearing of the application in the High Court. She submitted that the proceedings that led to the confirmation of the grant in favour of the appellant were irregular and defective as the appellant concealed information regarding the beneficiaries of the deceased, and petitioned to be the sole administrator yet he had several sisters whom he failed to consult, and he did so with the intention of disinheriting them. In addition, the people that the appellant listed as beneficiaries had already been bequeathed a separate property during the lifetime of the deceased. The respondent therefore submitted that this was material concealment of facts as outlined by section 76 of the Law of Succession Act, and was a ground for revocation of the grant.

12. Respondent further contended that there were no consents from the other beneficiaries of the estate of the deceased, and this by itself was enough to show that the grant was obtained in an unprocedural manner. The respondent denied being cited and maintained that she was never included in the process for confirmation of the grant.

13. Moreover, the respondent faulted the confirmation of the grant as it indicated that the appellant was the only heir to the property despite the fact that there were other beneficiaries, and that the appellant was required to file an agreed mode of distribution, but he failed to make adequate provision for the other heirs, in particular the respondent, and her sisters.

DETERMINATION

14. In this first appeal, our duty is to re-evaluate, re-assesses and re-analyse the evidence given in the court below and reach our own conclusion on the issues raised. This duty was set out by this Court in *Eva Naima Kaaka & another v Tabitha Waithera Mararo [2018] eKLR (Civil Appeal 132 of 2017)* as follows:

“This being a first appeal, the duty of this Court is to consider the evidence, re-evaluate it and make its own conclusion bearing in mind that an appellate court would not normally interfere with a finding of fact by the trial court unless it was based on misapprehension of the evidence or that the Judge was shown demonstrably to have acted on a wrong principle in reaching such conclusion.”

15. We have carefully considered the pleadings and the rival submissions of the parties herein. In this appeal, in considering whether or not the learned trial court was right in issuing orders for revocation of the grant of representation that was confirmed in favour of the appellant, section 76 of the Law of Succession Act is relevant. That section states that:

76. Revocation or annulment of grant –

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

(a) that the proceedings to obtain the grant were defective in substance;

(b) 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;

(c) that 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;

16. The law provides that a grant, whether confirmed or not, may be revoked at any time. While it is true, as the appellant pointed out that there was a long delay in bringing the application, there is no limitation as to time as to when such an application may be brought, or entertained by the court. What is important is that for the court to grant such an order, it must be satisfied that the conditions set out in **section 76** of the **Law of Succession Act** are met.

17. It was the respondent's claim that the appellant petitioned to be the sole administrator of the estate of the deceased; that she was excluded from succession proceedings which amounted to material concealment within the provisions of section 76 of the Law of Succession Act which constituted a ground for revocation or annulment of the Grant. The respondent further claimed that there was no consent filed by the beneficiaries indicating the agreed mode of distribution.

18. The learned Judge in her judgment stated as follows:

“There is no indication on the record of the presence of any of the beneficiaries. There was no consent filed showing the mode of distribution...I hold that the proceedings herein were defective in subsistence (sic)”

19. We agree with the trial court that the issue whether or not the respondent was cited was not properly proved, and therefore it was impossible to tell whether she was privy to the making of the grant. As the record is unclear on this, there would have been need for the calling of further evidence to support these allegations as the procedure leading to the confirmation of the grant was indeed, questionable. The respondent urged us to find that the trial court ought to have called oral evidence to determine this point, as was the case in *Zealia Wanjiru Moguku v Florence Wangechi Kabiri [2014] eKLR (Civil Appeal No 27 of 2014)*.

20. We have also considered that the respondent contested the distribution of the estate which saw the appellant inherit the whole of the deceased's estate, and has alleged that the appellant was attempting to disinherit her and her siblings. These are matters which, under section 76 of the Law of Succession Act, would entitle the court to revoke the grant. Confronted by these allegations, the appellant contended that the respondent did not voice her objections during the hearing of the application to confirm the grant. We have considered the record, and we note that despite the fact that the respondent was in court on that date, it seems that there was no objection made. However, the other beneficiaries that had been listed were not present, and the record does not show whether they gave consent for the confirmation of the grant.

21. In addition, the respondent claimed that her sons were entitled to a share of the estate, but there is no indication whether or not this was taken into consideration by the trial court. It seems therefore, that the respondent's concerns were valid, and with this in mind, the court had no option but to invoke its power under section 76 of the Law of Succession Act and to grant the orders as prayed, with the result that the application for confirmation of the grant will be heard afresh and the issues raised by the respondent will be put to rest.

22. In the circumstances, we are satisfied therefore that the decision of the trial court was proper, and the orders made, revoking the grant of representation to the appellant and requiring the summons for confirmation of the grant be heard *de novo* were the most appropriate in the circumstances. This appeal therefore fails in its entirety and it is hereby dismissed. This being a family matter, each party shall bear its own costs.

Dated and Delivered at Eldoret this 25th day of July, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH 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.