



IN THE COURT OF APPEAL

AT NYERI

(CORAM: G. B. M. KARIUKI, SICHALE & KANTAI, JJ.A)

CIVIL APPEAL NO. 49 OF 2015

BETWEEN

MERIOTH KEGA WAMUGUNDA APPELLANT

AND

SALOME MUTHIGIO WAMUGUNDA RESPONDENT

(Being an application to strike out record of appeal from the judgment of (Wakiaga, J) dated 16th May, 2013 in SUCCESSION CAUSE NO. 358 OF 2013)

JUDGMENT OF THE COURT

This is an appeal against the judgment of **Wakiaga, J.**, delivered on 10th May, 2013. The background to this appeal is that the appellant, **MERIOTH KEGA WAMUGUNDA**, the then applicant filed a Chamber Summons dated 27th September, 2010 under Rules 58, 59 & 73 of the Probate and Administration Rules. **SALOME MUTHIGIO WAMUGUNDA**, the respondent herein was the respondent therein. The appellant sought *inter alia*, the following orders:-

“1. That this Honourable Court be pleased to authorize the bank manager Barclays bank to sign and or execute the discharge of charge in respect of land title Reg. No. TETU/IHURURU/69 for the estate of GILBERT WAMUGUNDA THUITA ALIAS WAMUGUNDA THUITA – deceased in favour of the joint petitioner MERIOTH KEGA WAMUGUNDA and SALOME MUTHIGIO WAMUGUNDA to effectuate the subdivision and transfer of the land pursuant to certificate of confirmed grant issued by this honourable court on (sic) dated 21st day of November, 2008.

2. That the 2nd petitioner Salome Muthigio Wamugunda who has refused to comply with the court order be compelled to surrender the land title Nos. TETU/IHURURU/69 and NYANDARUA/PESI/112 to the Land Registrar’s Nyeri and Nyandarua respectfully and/or in the alternative production of titles be dispensed with and same be cancelled in order to effectuate the subdivisions and transfer of the said lands and new titles be issued.”

In the supporting affidavit, the appellant deponed that on 21st November, 2008 she together with the respondent were issued with a certificate of confirmed grant in respect of the estate of the late **GILBERT WAMUGUNDA THUITA** alias **WAMUGUNDA THUITA**; that the appellant and the respondent were

to share equally two parcels of land namely **NYANDARUA/PESI/112** and **TETU/IHURURU/69**; that the deceased had charged title registration No. **TETU/IHURURU/69** to Barclays Bank of Kenya Limited for a sum of Ksh.30,000/- which sum had been fully repaid and finally that the respondent who had custody of title documents for parcels No. **TETU/IHURURU/60** and **NYANDARUA/PESI/112** had refused to surrender them for purposes of cancellation and issuance of new titles.

In response to the motion, **DAVID MWANGI WAMUGUNDA**, the respondent's son swore an affidavit under protest dated 24th November, 2011. He denied having consented to the filing of the petition and/or Confirmation of the Grant issued on 21st November 2008; that title No. **NYANDARUA/PESI/112** was to be shared by the deceased's children whilst **TETU/IHURURU/69** was to be shared by the applicant and the respondent.

Wakiaga, J. considered the above conflicting positions and after hearing respective counsel directed that **NYANDARUA/PESI/112** be shared among the children of the deceased and ordered that the grant be rectified to that extent. He further directed that “... **the Manager Barclays Bank execute the discharge of charge documents to enable the petitioners transfer the same**”.

The appellant was dissatisfied with the judgment of Wakiaga J. and filed a memorandum of appeal on 27th October, 2005 and listed 6 grounds of appeal. The appellant faulted the learned judge for distributing **NYANDARUA/PESI/112** according to the “**wishes**” of the deceased which wishes did not qualify to be a will; that the judgment had the potential of disinheriting 5 children of the deceased; that the distribution ordered by the Judge was in stark contravention with the laws governing intestate estates; and finally that the learned Judge interfered with a confirmed grant *suo motu*.

On 10th May, 2017 the appeal came before us for plenary hearing. **Mr. Muchiri**, learned counsel for the appellant urged us to find that the learned Judge erroneously rectified the grant in the absence of an application for rectification; that rectification is not meant to change the mode of distribution but to correct errors in names, land parcels etc. Secondly, counsel argued that although the trial judge in changing the mode of distribution referred to the “**wishes**” of the deceased, the deceased died intestate and the grant was for an intestate estate.

In opposing the appeal **Mr. Mindo** for the respondent urged us to find that on 13th July, 2012 the parties appeared before Sergon, J, who by consent recorded the following:-

“LR NO. TETU/IHURURU/69 be shared equally between the petitioners.

The sharing of NYANDARUA/PESI/112 to be discussed further.”

Mr. Mindo contended that it was in pursuance of the orders made by Sergon J. that on 5th October 2012, Wakiaga J. directed “the parties to file their submissions on the remaining property within two weeks” following which he rendered the impugned judgment of 16th May 2013.

In a brief rejoinder, Mr. Muchiri contended that the grant having been confirmed the same could not be varied but that it could only be revoked under **Section 76** of the **Law of Succession Act**.

We have considered the record, the rival submissions, the authorities cited and the law. This being a first appeal, we are obligated to re-assess and re-analyze the evidence tendered in the lower court in line with the principles as set out in the case of **SELLE VS. ASSOCIATED MOTOR BOAT COMPANY [1968] EA 123**. In our view, the facts of this appeal are fairly straightforward. The appellant and the respondent are wives of the late **GILBERT WAMUGUNDA THUITA** alias **WAMUGUNDA THUITA** who died on 26th January, 2006. Following a petition for letters of administration by the two widows, the court issued a Certificate of Confirmation of Grant dated 21st November, 2008. In the confirmed grant **NYANDARUA/PESI/112** and **NO. TETU/IHURURU/69** were to be shared equally by the applicant and the respondent. It would appear that the distribution of these two parcels could not be effected as the respondent had the custody of the title documents thus necessitating the filing of the

Chamber Summons dated 27th September, 2010 by the appellant.

After hearing counsel for the appellant and the respondent “... **and upon considering the application dated 27th September 2010 as well as the affidavit of protest dated 24th November, 2011 by David Mwangi Wamugunda....**” the Court ordered as follows:

“1. THAT the grant herein be and is hereby rectified as regards NYANDARUA/PESI/112 only to be shared as per the wishes of the deceased and direct the Respondent to execute documents in respect of transmission thereof within 21 days from the date of presentation.

2. That the Manager Barclays Bank execute the discharge of Charge documents herein to enable the petitioners transmit the same.

3. That each party shall bear their cost.”

The appellant was aggrieved by the outcome of the motion filed by her as she did not seek an order for the revocation of the grant issued to her and the respondent.

S. 76 of the Law of Succession Act makes provision for revocation or annulment of grant. It provides:-

“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;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either:-

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow;

or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.

On the other hand, S.74 of the Law of Succession Act makes provision for rectification of errors. It provides:-

”74. Errors may be rectified by court

Errors in names and descriptions, or in setting fourth the time and place of the deceased’s

death, or the purpose in a limited grant, may be rectified by the court, and the grant of representation, whether before or after confirmation, may be altered and amended accordingly.”

In the appeal before us the learned trial judge purported to rectify the grant yet there were no errors in names and descriptions, or in setting out the time and place of the deceased’s death or the purpose in a limited grant as provided for in **Section 74** of the **Law of Succession Act**. With all due respect to the Judge, he proceeded to modify the grant without any such application before him and without due regard to the fact that the Law of Succession Act permitted revocation of a grant (**S.76**) and/or rectification of a grant (**S.74**) but not modification, more so in an application seeking orders to give effect to the grant. In the modification, the learned Judge purported to give effect to the wishes of the deceased and yet the deceased died without leaving a will. Further, there was no such application seeking orders of modification. This was clearly wrong and we have no hesitation in setting aside the learned Judge’s orders of 16th May 2013.

The outcome of the above is that this appeal is allowed. Accordingly, the judgment delivered on 16th May 2013 by Wakiaga, J. is hereby set aside and the appellant's prayers (a) and (b) in the Notice of Motion dated 27th October 2016 are allowed. This being a family matter, we direct each party to bear his/her own costs.

Dated and delivered at Nyeri this 28th day of June, 2017.

G. B. M. KARIUKI SC

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR