



IN THE COURT OF APPEAL

AT NYERI

(CORAM: G.B.M. KARIUKI, F. SICHALE & S. Ole KANTAI, JJA)

CIVIL APPEAL NO. 32 OF 2016

BETWEEN

FRANCIS MURIITHI MIIRI.....1ST APPELLANT

SHEM N. MIIRI.....2ND APPELLANT

WILLIAM KINYUA MUCHIRA.....3RD APPELLANT

AND

SUSAN WAMBURA MIIRI..... 1ST RESPONDENT

AGNES WANJIKU MIIRI,2ND RESPONDENT

ESTHER WANJIRU MIIRI3RD RESPONDENT

FRANCISCA KUTHII MIIRI.....4TH RESPONDENT

(An Appeal from the Ruling and Order of the High Court of Kenya at Kerugoya (Limo, J.) dated 28th October, 2015 in Succession Cause No. 853 of 2013)

JUDGMENT OF THE COURT

This is an appeal by Messrs **Francis Muriithi Miiri**, **Shem N. Miiri** and **William Kinyua Muchira** that impugns the decision of the High Court of Kenya at Kerugoya (**R. K. Limo, J.**) contained in the Ruling delivered in the High Court Succession Cause No. 853 of 2013 at Kerugoya on 28th October 2015. In the ruling, the learned Judge revoked and annulled the grant of Letters of Administration in the estate of **MIIRI NDERI KARIRI** alias **KIURA NDERI** (deceased) issued on 21st March, 2001 in Embu High Court Succession Cause No. 76 of 2002 and confirmed on 7th March 2002 in the said cause.

The record shows that the deceased was survived by his wife, Peris Kathangu, now deceased, and the following sons and daughters; Mary Wawira, Francis Muriithi, Francisca Kuthii, Shem Ndwiga, Esther Wanjiru, Agnes Wanjiku, Irene Kathugu Miiri and Susan Wambura. Mary Wawira passed away after the death of the deceased and was survived by William Kinyua Muchira who is entitled to step into the shoes of his mother and succeed to her share of the estate. The record shows that all the siblings of the deceased

supported Shem N. Miiri to be the administrator of the estate.

Messrs **Susan Wambura Miiri, Agnes Wanjiku Miiri, Esther Wanjiru Miiri** and **Francisca Kuthii Miiri** took out a summons in March 2013 in Kerugoya High Court Succession Cause No. 853 of 2013 seeking annulment and revocation of the Grant issued to Shem N. Miiri and confirmed on 7th March 2002 as aforesaid. The impugned ruling ensued from the summons giving rise to this appeal.

In the memorandum of appeal, the appellants put forward the following 4 grounds of appeal:-

“1)The learned trial Judge erred in law and fact in that while framing only one issue for determination as to whether the grant issued and confirmed in Embu o 7th March, 2002 should be revoked and/or annulled pursuant to Section 76 of the Law of Succession Act, and while making a finding that there were no facts supporting any of the grounds alluded in the face of the summons for revocation of grant, proceeded to order that the grant be revoked and/or annulled.

2) The learned trial Judge erred in law and fact in making a finding that there was one Irene who was a dependant of the deceased and was not provided for, and used this as a ground for annulling the grant, yet the said Irene was not a party or a witness in the proceedings.

3) The learned trial Judge erred in law and fact in making a finding that one of the beneficiaries by name Peris Kathungu Miiri died before the transmission of her share was completed and therefore has become inoperative yet there are several provisions in the Law of Succession Act Cap 160 Laws of Kenya to deal with the share of a deceased beneficiary.

4) The learned trial Judge erred in law and fact in dealing with extraneous issues which were not part of the pleadings or relevant to Section 76 of the Law of Succession Act and relying on those issues as grounds for revocation and/or annulment of grant.

In determining the summons, the learned Judge found in the impugned ruling that the grant was obtained by means of “untrue allegation of fact even though the allegation could have been made by genuine mistake or ignorance.” The learned Judge observed that the petitioner, Shem Miiri, stated that the late Mary Wawira Miiri was survived by only one child, namely, William Kinyua Muchira and that there was no mention of Irene. The learned Judge observed that at the hearing, Francis Muriithi Miiri who was a respondent admitted that Irene was brought up by their late mother and the deceased. It is for that reason and on that basis that the learned Judge made his finding.

In addition, the learned Judge found that the share assigned to Peris Katugu Miiri, deceased, is inoperative “due to her demise before the administration of the estate and transmission of her share was completed.” The learned Judge was alive to the fact that the applicants in the summons for the revocation of the grant had not invoked or relied on the facts which came to his attention, and being satisfied that they constituted in law grounds for revocation of the Grant under Section 76 of the Law of Succession Act, Cap 160, of his own motion, (*suo moto*) revoked the grant. The learned Judge delivered himself as follows:-

“In sum though this court is not satisfied with some of the reasons given as indicated above, I am persuaded by the two grounds I have highlighted above. I do find that it is in the interest of justice to proceed suo moto and allow this application. I am not persuaded by the respondents that the summons for revocation of grant is defective for seeking to revoke a grant issued on 7th March, 2002. The summons sought to revoke the grant that was confirmed on 7th March, 2002. The wording may not be perfect but excusable given that they acted in person and drew the application themselves. Substantively, the application has met the threshold. Consequently the grant issued on 21st March, 2001 and confirmed on 7th March, 2002 is hereby revoked and/or annulled.

The petitioner is directed to sit down with all the beneficiaries and list down all the assets

remaining in the estate and agree on the mode of distribution. In default of agreement any of the parties can move the court. In this regard, a fresh grant is hereby issued to him and one of the applicants herein to be picked by the sisters. In view of the relationship of the parties in this cause and in order to promote reconciliation, I shall make no orders as to costs. Each party to pay own costs. It so ordered.”

The grounds on which a grant may be annulled or revoked are set out in Section 76 of the Law of Succession. It is discernible from the evidence in the record of appeal that the grant should have been revoked on the ground that it was obtained fraudulently through concealment of material facts. Ostensibly, the learned Judge revoked the grant for the wrong reasons. In effect, the learned Judge's decision to revoke the grant was correct but was buttressed by the wrong grounds.

In the circumstances of this appeal, we think the appeal must fail as the decision to revoke the grant was correct. We uphold that decision but otherwise substitute the reasons given for revocation with concealment of material facts.

Further, we uphold the decision for issuance of a fresh grant to the petitioner, Shem N. Miiri, and one other person to be nominated by the daughters of the deceased from among the respondents i.e. **Susan Wambura Miiri, Agnes Wanjiku Miiri, Esther Wanjiru Miiri and Francisca Kuthii Miiri.**

The estate of the deceased shall be distributed by the superior court after hearing the parties and ensuring that the entire estate is collected and brought into hotch-potch. As this is a family matter, we make no orders as to costs.

Dated and delivered at Nyeri this 27th day of July, 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