IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KARANJA, MWILU & MUSINGA, JJ.A.

CIVIL APPEAL NO. 279 OF 2003

BETWEEN

JOSEPHINE WAMBUI WANYOIKE…….……..…APPELLANT

AND

MARGARET WANJIRA KAMAU……...……..….1ST RESPONDENT

MERCY NJERI WANYOIKE…….....……...……2ND RESPONDENT

(Appeal from the Order of the High Court of Kenya at Nairobi (Aganyanya, J) dated 3rd June, 2002

in

HCCC NO. 345 OF 2000)

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JUDGMENT OF THE COURT

A Grant of Letters of Administration Intestate in respect of the Estate of the late **Wainaina Wanyoike** was issued to **Josephine Wambui Wanyoike, Margaret Wanjira Kamau** and **Mercy Njeri Wanyoike** jointly by the Resident Magistrate's court Thika after a full trial.

By a Certificate of Confirmation of the said Grant dated 27th January 1994, the deceased's two parcels of land were to be shared equally amongst the three administratrices. Apparently, nothing seems to have happened until sometime in March 1997 when according to the appellant, some surveyors went to the properties and started sub-dividing them. This prompted her to go back to Thika Magistrates' court where her advocates, *Kiania Njau & Co. Advocates* filed the application dated 20th August 1997, seeking to set aside the order confirming the grant and also asking that any acts done pursuant to the said order be vacated to enable the application for distribution to be heard inter-partes. That application was predicated on **Order 1XA Rules 10** and **11** of the **Civil Procedure Rules**. It was heard by M.J.W. Mugo, learned Chief Magistrate who dismissed it for the reason that the order sought was tantamount to seeking annulment or revocation of the confirmed Grant and she had no jurisdiction to do so.

Being aggrieved by that dismissal, learned counsel for the appellant filed an appeal before the High Court citing the following grounds:-

1. ***"The learned Chief Magistrate erred in equating the application before her to an application for annulment or revocation of the grant.***

2. ***The learned Chief Magistrate erred in failing to appreciate that what she was being asked to do was to give the applicant a chance to participate in deciding the shares of the parties and mode of subdividing the immovable property to avoid causing her inconvenience and not revoking or annulling the grant."***

The Appeal file together with the subordinate court file was placed before Aganyanya, J (as he then was) for certification under **Section 79(B)** of the **Civil Procedure Act.** The learned Judge upon perusal of the file found no sufficient ground for interfering with the decree appealed against or any part thereof. He therefore, summarily rejected the appeal.

It is against that summary rejection of the appeal that the appellant now appeals to this Court citing the following grounds:-

1. ***"The Learned Judge erred in law in that he did not appreciate that whereas a subordinate court may have no jurisdiction to annul or revoke the grant it has power and jurisdiction to lift its order for distribution of property where a party was not heard on distribution of the same.***

2. ***The learned Judge erred in erroneously equating the application for setting aside order made during the confirmation proceedings with an application for annulment or revocation of the grant."***

This being an appeal against the summary rejection of the appeal by the learned Judge of the High Court, it becomes incumbent on us to consider the grounds of appeal advanced in that court to see whether the learned Judge properly rejected the appeal. We wish to point out that indeed, though differently worded, those are the same grounds of appeal that have been proffered in this appeal. The gist of these grounds is that the learned magistrate erred in law in equating an application for setting aside a confirmed Grant to one for annulling or revoking the Grant.

By rejecting the appeal summarily, the learned Judge of the High Court agreed with the findings of the learned magistrate and therefore, found no need to have the matter heard. In other words, the learned Judge found no merits whatsoever in the said appeal.

Can the learned Judge be faulted?

The challenge in this appeal is directed at the exercise of the learned Judge's discretion to either admit or reject the appeal summarily. It is in that perspective that we should consider this appeal. In order for this Court to interfere with the learned Judge's exercise of discretion as to whether to admit the said appeal or not, the following principles must be satisfied:-

1. ***"The court must be satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result, has arrived at a wrong decision;***

2. ***That the Judge took into account matters or issues he should not have taken into account;***

3. ***That the learned Judge did not take into account matters/issues he should have taken into account and therefore reached a decision that was plainly wrong (See Shah vs Mbogo [1968] E.A 93.")***

It is learned counsel's submission that the Judge failed to appreciate the law as to whether the learned magistrate had jurisdiction to set aside the confirmed Grant. He submitted that both the magistrate and the Judge erred in concluding that setting aside the grant was equivalent to revoking it.

We have considered the law applicable in this area. We are satisfied that the learned magistrate arrived at

the correct decision.

First and foremost, **Order1XB** of the repealed **Civil Procedure Rules** is not one of the Rules of Civil Procedure which have been imported into the Law of Succession Act vide **Rule 63(1)** of the Probate and Administration Rules.

We hasten to add that the **Law of Succession Act** is a self sufficient Act of Parliament with its own substantive law and rules of procedure. In the few instances where need to supplement the same has been identified, some specific rules have been directly imported into the Act through It's Rule 63(1**).**

There must have been a good reason for that. If a magistrate had power to set aside Grants that are already confirmed, that would be tantamount to usurping the powers of the High Court exercised under **Section 76** of the **Law of Succession Act**, and fly in the face of **Section 48(1)** of the same Act which defines the jurisdiction of a magistrate in respect of Succession matters.

It is our view that once a magistrate confirms a Grant of Letters of Administration; he/she is divested of jurisdiction to reopen that matter. The only recourse a dissatisfied party has is to move to the High Court for orders of revocation of the Grant.

The learned Judge clearly appreciated that position in law and hence found no need for the matter to be admitted for appeal. In so doing ,we find that he did not err either in law or in fact and exercised his discretion judicially.

We find no fault with his decision to summarily reject the appeal before him. Our finding in this matter is that, this appeal lacks merit. The same is hereby dismissed with no order as to costs as the respondents did not defend the appeal.

Dated and delivered at Nairobi this 26th day of July, 2013.

W. KARANJA

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR