REPUBLIC OF KENYA

Court of Appeal at Nyeri

Civil Appeal 201 of 2007

JOYCE NGIMA NJERU……..1ST APPELLANT

DANIEL NJUE NJERU ……...…….....2ND APPELLANT

AND

ANN WAMBETI NJUE……..……RESPONDENT

(Being an Appeal from the Proceedings and Judgment in the High Court at Embu (Justice J.N. Kaminwa J) dated 10th May, 2007

in

Succession Case NO. 40 of 2001)

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JUDGMENT OF THE COURT

This appeal has its roots in Embu PMCC Succession cause No.177 of 1993 presented by **Obadiah Muriuki Njeru and David Njue Njeru**. It is common ground that the first Grant was issued to the afore named applicants on the 25th day of March, 1994 (**Obadiah Muriuki Njeru and Daniel Njue Njeru)** The respondent **Ann Wambeti** filed objection to the confirmation of that grant. The objection proceedings were heard on their merits and in a ruling delivered on 24/8/1994, the learned trial Magistrate **Mr. F.M. Mutahi** found for the respondent by holding that land parcel number Ngandori/Kiriari/2295 be shared equally between **Ann Wambeti Njue** who was to get 5 Ha. and **Joyce Ngima** who was also to get 5 Ha. A confirmation certificate was thereafter issued to that effect. The confirmation order was executed and land parcel number Ngandori/Kiriari/2295 was subdivided into two giving rise to land parcel number Ngandori/Kiriari/3721 which was registered in the name of **Ann Wambeti** on the 10th February,1998 and land parcel number Ngandori/Kiriari/3722 which was registered in the name of Njeru M' Itawa on the 7th January,1998.

On 10th May, 2001 the appellants **Joyce Ngina Njeru** and **Daniel Njue Njeru** presented an application in High Court Embu Misc Application No. 40/2001 seeking for revocation or annulment of the confirmed Grant under section 76 of the law of succession Act cap 160 laws of Kenya and rule 44(1) of the Probate and Administration Rules citing the statutory grounds in their support. The application was supported by an affidavit deponed by **Daniel Njue Njeru** and opposed by the contents of a replying affidavit deponed and filed by the respondent **Anne Wambeti**. Khaminwa J heard the application by way of viva voce evidence resulting in a ruling handed down by **the learned Judge** on the 10th day of May, 2007 in which

the application for revocation and or annulment of the Grant was dismissed.

The appellants were aggrieved by the said ruling and appealed to this Court vide a memo of appeal dated the 9th day of August, 2007. Seven grounds of appeal were put forward namely:-

(1) **The learned Judge erred in law and fact in concluding that any irregularities in the ruling on confirmation of the grant should have been challenged in an appeal.**

(2) **When she failed to consider that the appellants might have been denied the chance to adduce more evidence in an appeal.**

(3) **In holding that the confirmation order was that land be shared between the petitioners Daniel and Obadia Muriuki and their mother Joyce Ngina Njeru (widow of the deceased) and Ann Wambeti.**

(4) **in disregarding the mandatory provisions of the law of substitution in that:-**

(a) **She failed to make a finding that no letters of Administration were ever taken by the Respondent Ann Wambeti Njue to enable her claim a share of the deceased's' estate on behalf of the deceased who had also passed away.**

(b) **She failed to make a finding that the said Ann Wambeti Njue could therefore not be a beneficiary of the estate of the deceased.**

(5) **The learned Judge erred in law and fact in failing to take into consideration that Ruriga M' Itewa the deceased husband of Ann Wambeti Njue had his own parcel of land No. Ngandori/Kirigi/1034 in respect of which she had never attempted to institute succession proceedings.**

(6) **The learned Judge erred in not properly recording the evidence adduced by the Appellants and failing completely to record the evidence of the Respondent.**

(7) **The learned Judge erred and prejudiced herself by failing to give proper weight to the evidence adduced by the appellants."**

On the day fixed for hearing of the appeal learned Counsel **Mr. A.P. Karithi** appeared for the appellants, while learned counsel M**.C. Kamwenji** appeared for the respondent. **Mr. A.P. Karithi** urged us to allow the appeal on the ground that the respondents had no locus standi to claim the share entitlement of her deceased husband in the absence of her first obtaining letters of administration to the said deceased husbands estate; she should have pursued interests in her deceased husband other lands and, lastly, that she was not a direct beneficiary of the estate of the deceased who is the subject of these proceedings, (deceased)

In response, **Mr. M.C. Kamwenji** urged us to dismiss the appeal on the grounds that the respondent did not need letters of administration to her deceased husband's estate before seeking entitlement because she was pursuing the claim in her own rights; that existence of other alternative lands the respondent could benefit from was not proved and, lastly, that, it had not been disputed that the respondent had resided on the subject land in her capacity as a family member for a long time.

This being a first appeal, we are reminded of our role as a first appellate court which is to re-evaluate and re assess the evidence on record and the conclusions reached by the High Court and determine whether those conclusions are to stand or not and give reasons either way with the only caveat placed on the exercise of that power being that we should be slow to interfere with the learned trial Judge's findings of facts and the demeanor of witnesses as unlike that court we did not have the benefit of seeing and hearing them. See the case of **Kamau versus Mungai and another (2008) 1KLR G&F 1103**

Having done so it is our view that complaints raised by the appellants in their grounds of appeal can be clustered into the following issues for purposes of assessment namely:-

(1) Whether in the circumstances of this case the appellant should have moved the High Court by way of an application for revocation of Grant or by way of an appeal?

(2) Whether the respondent needed letters of representation to the estate of her deceased husband before moving to seek a share of the estate of the deceased. In other words whether the respondent had locus standi to pursue her inheritance rights in these proceedings?

(3) Whether there were two (2) other alternative parcels of land which the respondent should have pursued to inherit in lieu of her right to pursue her rights in respect to the parcel of land subject of these proceedings?

(4) Whether the decision of the learned Judge of the High Court is wrong and cannot be supported?

(5) Whether allowing this appeal will serve the best interests of the parties to it?

Section 76 of the law of succession Act Cap 160 Laws of Kenya provides the parameters upon which a court of law can either grant or reject a plea for a relief of revocation of a Grant. It provides:-

"**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 substantive,**

(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 un true allegation of a fact essential in point of law to justify the grant not withstanding that the allegation was made in ignorance or in advertently,**

(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 has ordered or allowed; 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 particulars; or**

(e) **That the grant has become useless and in operative through subsequent circumstances"**

We are also aware that this provision has been construed and the law on this aspect crystallized by the decision of this court in the case of **Matheka and another versus Matheka (2005) KLR 455** wherein it was held inter alia that:-

(1) **A grant may be revoked either by application by an interested party or on the courts own motion.**

(2) **Even when revocation is by the court upon its own motion, there must be evidence that the proceedings to obtain the grant were defective in substance; or that the grant was obtained**

fraudulently by the making of a false statement or by concealment of something material to the case, or that the grant was obtained by means of untrue allegation of facts essential in point of law or that the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the estate.

(3) **…."**

We have revisited the rival evidence that was adduced before the learned Judge on this aspect and applied the principles set out above on to those facts. In our considered view, the learned trial Judge was entitled to dismiss the application for the reasons that although the appellants as beneficiaries of the estate of the deceased can be taken to be interested parties to the said estate and therefore eligible parties to seek revocation of a grant and they had in fact cited the ingredients required to be established before one can earn the relief of revocation of grant, the evidence adduced before the learned Judge did not establish the existence of those ingredients.

A revisit to the evidence adduced reveals that the second appellant **Daniel Njue Njeru** gave evidence as DW1, the 1st appellant **Joyce Ngina Njeru** as PW2 and **Levi Mugo,** the area Chief, as DW3. The respondent does not appear to have tendered any evidence during the revocation proceedings.

In the evidence, the appellants admitted that the land subject of these proceedings belonged to one **M'Itawa** who was a late father to the husband of the respondent, and husband of the first appellant who was also the father to the 2nd appellant; the elders had ruled in earlier proceedings that the late husband of the respondent was entitled to a share of the disputed land which was 10 acres, meaning that the respondent's deceased husband was entitled to get 5 acres.

On that evidence, the learned Judge made observation that the respondent had objected to the confirmation of the grant which was heard on merit and a ruling made on 24/8/1994 whereby the deceaseds' plot No. Ngandori/Kiriari/2295 was to be shared equally between the applicants/petitioners and the objector, that land parcel number Ngandori/Kiriari/2295 was subdivided into two portions namely Ngandori/Kiriari/372 for **Ann Wambeti** protestor and parcel number 3722 for **Njeru M'Itawa;** that since the protest on confirmation of Grant was decided upon by the court any irregularities arising from that decision should have been challenged on appeal.

We have revisited the said learned Judges concluding remarks and we are satisfied that it is a correct appreciation of the law as applied to the facts before her, because the central core of the ingredients required to be established under section 76 of the L.S.A. is that it is meant to be used as a vehicle to attack and fault the process of either obtaining the Grant or in active use of the Grant after being lawfully obtained in circumstances where it has become useless. It is not meant to fault the decision on the merits. In the premises, we are satisfied that the learned Judge was right in finding that the appellants evidence was not aimed at faulting the proceedings leading to the issuance of the grant, but at faulting the merits of the decision where by the respondent had been adjudged as a share holder of the share of entitlement which was due to her deceased husband's interest. For this reason we agree that the proper forum to reconsider that finding should have been an appeal court and not the High Court through an application for revocation of Grant.

(2) With regard to the issue of locus standi, on the part of the respondent to claim a share of the deceaseds' estate, we are in agreement that since the land in contest had never been registered in the name of the deceased husband of the respondent, it was not necessary for the respondent to obtain a grant of representation to her deceased husbands' estate, claim that land, have it registered in the deceased husbands' name first before transferring it to herself. It was more prudent for her to claim as a direct beneficiary since she was the only claimant to her deceased husbands' property.

(3) With regard to allegations of existence of two other properties allegedly belonging to the deceased husband of the respondent, their existence was not proved nor would their existenceoperate to oust the respondent's direct claim of entitlement to her deceased husbands' share of an admitted ancestral/clan land.

(4) With regard to the issue as to whether the decision of the learned trial Judge was against the weight of the evidence, we find that it was not, because she correctly found that the appellants had not established the ingredients required to be established before one can earn a relief of revocation of a Grant. What they had established to exist was a right to attack the decision to give the respondent direct inheritance of her deceased husband's share of the clan land. This was a proper matter for adjudication by an appellate court as we have stated above.

(5) With regard to the issue as to whether allowing the appeal will serve the best interests of justice to the parties, we are satisfied that an appropriate response should be in the negative because, firstly, the appellants waited for long before lodging a complaint against the learned Magistrates' decision, an admitted seven years long wait. Secondly, the land was subdivided as per the confirmation order which had been arrived at after a merit hearing by way of viva voce evidence and there has been no allegation that the learned trial magistrate had not exercised his judicial discretion judiciously and with a reason and that for this reason if an appeal had been preferred or is likely to be preferred there is a chance to succeed.

For the foregoing reasons we are inclined to dismiss this appeal which we hereby do. Being a succession matter we order that each party to bear own costs.

Dated and delivered at Nyeri this 1st day of November, 2012.

E.M.GITHINJI

JUDGE OF APPEAL

R.N. NAMBUYE

JUDGE OF APPEAL

D.K. MARAGA

JUDGE OF APPEAL

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

DEPUTY REGISTRAR