In re Estate of Fredrick Pirori Lenyasunya (Deceased) (Succession Appeal E001 of 2024) [2025] KEHC 3852 (KLR) (25 March 2025) (Judgment)

Neutral citation: [2025] KEHC 3852 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MARALAL

SUCCESSION APPEAL E001 OF 2024

AK NDUNG'U, J

MARCH 25, 2025

IN THE MATTER OF THE ESTATE OF FREDRICK PIRORI LENYASUNYA (DECEASED)

BETWEEN

NANCY NASERIAN LENYASUNYA ..... 1ST APPELLANT

NAPUNYU CLARA LENYASUNYA ..... 2ND APPELLANT

KELLY SAYANUE LENYASUNYA ..... 3RD APPELLANT

AND

CLARA JEPKORIR ..... RESPONDENT

JUDGMENT

1. A grant of letters of administration intestate in this cause was made on 07/12/2021 to Nancy Naserian Lenyasunya and Napunyu Clara Lenyasunya. The grant was subsequently confirmed and a certificate of confirmation of grant dated 10/03/2022 issued. Under that certificate, the Appellants herein were listed as the beneficiaries of the deceased's estate.

2. Consequently, the Respondent herein filed summons for revocation of grant dated 09/03/2023 seeking that the grant to be revoked on account that the administrators misrepresented the true beneficiaries of the estate of the deceased by concealing the existence of the Respondent herein as one of the beneficiaries of the deceased. The Appellants in response filed a replying affidavit dated 18/04/2023 opposing the application.

3. Before summons for revocation could be heard, the Respondent filed an application dated 10/05/2023 for orders that the parties do submit to DNA test to determine paternity which was agreeable to the Appellants and the court allowed the application and parties were ordered to present themselves for DNA sampling on 24th-25th July, 2023 in Nairobi. On 17/08/2023 when the matter was coming up

to confirm the progress, counsel for the Respondent informed the court that DNA was not done for failure of the Appellants to avail themselves for the same. Counsel for the Respondent asked the court to revoke the grant. The court proceeded to order that the summons for revocation of grant be heard.

4. The application was heard and vide a ruling dated 18/01/2024, the trial court allowed the Respondent's application for revocation of grant. The court while allowing the application observed that;

> " There is no material evidence placed before the court to show that the objector/applicant was a biological daughter of the deceased and therefore her exclusion from the estate was fraudulent. Mere assertion alone as contained in paragraph 2 of her affidavit sworn on 09/03/2023 is not enough. On the other hand, the parties through their respective counsel, agreed to have DNA extracted from the applicant and some of the respondent for analysis to conclusively and scientifically determine whether Clara Jepkorir is in any way related to the Respondents by blood and to what extent. This unfortunately did not happen...the respondents have not explained to the court any challenges encountered in complying with the order for extraction of DNA as earlier agreed. They simply went mute on the matter. The conduct of the respondents in declining to submit for DNA extraction is a pointer or indicator that they were apprehensive of a possible outcome that favours the applicants. To sustain the grant as confirmed would, in the event that it is established the applicant is a sister to the respondents and a daughter of the deceased and therefore a beneficiary, disentitle her of rightful share in the estate. In the circumstance of this case and for the reason that the respondents have reneged on their undertaking to submit to DNA extraction and testing, there is a justifiable cause for revocation of the grant..."

5. Being aggrieved by the holding of the trial magistrate, the Appellants appealed to this court vide a memorandum of appeal dated 19/02/2024 raising the following grounds of appeal;

   i. The learned magistrate erred by making a determination based on apprehension of what would have been a miscarriage of justice instead of calling for evidence as proof paternity relationship between the deceased and the objector/Respondent.

   ii. The learned magistrate erred by revoking the regularly obtained grant on the basis of an assumption thereby seriously causing a miscarriage of justice.

   iii. That objector/Respondent was entitled to a share of the estate without actual proof.

   iv. The learned magistrate erred directing parties to appear for directions regarding appointment of administrators when the objector/Respondent failed to discharge her burden of proof as to her relationship with the deceased.

   v. The learned magistrate was directly biased giving the Objector/Respondent the benefit of doubt that she may be related to the deceased instead of strictly abiding by the rules of evidence causing serious miscarriage of evidence.

6. The appeal was canvassed by way of written submissions. Counsel for the Appellants argued that the burden of proof was upon the Respondent to lead evidence to court to the effect that she was the deceased's daughter and the trial court disregarded section 107 and 109 of the *Evidence Act*. The Respondent also failed to avail evidence such as birth certificate or National Identity Card to show the district, division and sub location for inference to the chief's letter that was produced. The court asserted in its ruling that Respondent had not placed any material evidence to prove her relationship with the deceased and that mere assertion was not enough but ended up revoking the grant issued

to the Appellants. Therefore, trial court made its decision based on assumption and not evidence. That having observed that there was no prove of relationship, the court should have struck out the Respondent's application. That the court instead, made a case for the Respondent and read mischief on the Appellant's side for inadvertently failing to present themselves for DNA test.

7. That the court had issued an order for DNA but when this did not happen, no summons were issued to the Appellants to show cause why they failed to comply with the orders of the court. That the order had directed both the Appellants and the Respondent to conduct a DNA test and no evidence was led to prove that the Respondent surrendered herself for the same but the court quickly blamed the Appellants. That at no point did the burden to prove the relationship between the Respondent and the deceased shifted to the Appellants and therefore, the trial court erred to conclude as it did.

8. That appropriate avenue for disobedience of a court order is that of contempt of court proceedings. That the matter came up on 17/08/2023 to confirm DNA sampling but the Appellants and their advocate were not in court and hence, they could not give reasons as to why they did not submit to having the DNA samples and the court directed that the application for revocation be heard abandoning the order of DNA and the Respondent failed to persuade the court to allow her submit DNA results or call other evidence.

9. In rejoinder, the Respondent's counsel submitted that the Appellants consented to undergo a DNA test and parties agreed on a date but on the agreed date, that is 24/07/2023, she and her counsel waited for the Appellants at Kenyatta hospital but they failed to turn up and at 2Pm, she received a call from land settlement officer, Eldoret that one of the Appellant had gone to his office demanding for title deed for land parcel no. Mvita Settlement Scheme No 259. That the fact that the Appellants failed or refused DNA sample testing after consenting to it left the court with no other reason but to infer that the Appellants had possible apprehension of the result outcome and had to do everything to frustrate it. Therefore, the trial court was justified in ruling in her favour. She relied on several cases that DNA testing is the final proof of paternity especially the case of PKM v SPM & another [2015] eKLR.

10. I have considered the memorandum of appeal, the rival submissions by the parties and I have read through the trial court record.

11. The trial court revoked the grant that was initially issued to the Appellants herein. The reasons given by the court for revocation as seen earlier was that the Appellants failed to submit themselves for DNA testing to determine paternity and as to the relationship between the Appellants and the Respondent so as to determine whether the Respondent was a beneficiary of the deceased's estate. The court went on to hold that their failure to submit for DNA testing was a pointer that they were apprehensive of a possible outcome which would have favored the Respondent. The court further held that to sustain the grant as confirmed, in the event it was established that the Respondent was deceased's daughter, would have disentitled her of rightful share in the estate.

12. As regards revocation of the grant, Section 76 (a) (b) of the *Law of Succession Act* stipulates-

> "76. 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;"

13. The court in re Estate of Prisca Ong'ayo Nande (Deceased) [2020] KEHC 6553 (KLR) expounded on the grounds for revocation of grant and held as follows;

> " Under section 76, a court may revoke a grant so long as the grounds listed above are disclosed, either on its own motion or on the application of a party. A grant of letters of administration may be revoked on three general grounds. The first is where the process of obtaining the grant was attended by problems. The first would be where the process was defective, either because some mandatory procedural step was omitted, or the persons applying for representation was not competent or suitable for appointment, or the deceased died testate having made a valid will and then a grant or letters of administration intestate was made instead of a grant of probate, or vice versa. It could also be that the process was marred by fraud and misrepresentation or concealment of matter, such as where some survivors are not disclosed or the applicant lies that he is a survivor when he is not, among other reasons...

14. In Albert Imbuga Kisigwa v Recho Kavai Kisigwa, Succession Cause No.158 OF 2000) the court view was that the power to revoke grant is discretionally and stated thus;

> " The power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the court to invoke section 76 and order for revocation or annulment of a grant. And when a court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased's estate and ensure that the action taken will be for the interest of justice."

15. Nondisclosure of a beneficiary is indeed a ground for revocation of grant. But the issue herein is that there was no proof that the Respondent herein was related to the deceased warranting revocation. The court even found in part that the Respondent had failed to prove that she was a beneficiary as there was no evidence that was tendered to that fact. It is therefore my view that the court fell into error revoking the grant where there was no evidence that the Respondent was indeed related to the deceased. For court to order revocation as seen in the case of Albert Imbuga case (supra), there must be evidence to warrant the court to invoke section 76 of the Succession Act.

16. It is my view that the trial magistrate fell into error as the establishment of the truth about the paternity was vital and in the best interest of the parties as the matter would have been settled with finality. The record reveals that the court was in a hurry as on the day when the matter was coming up for mention to confirm whether DNA was done, the Appellants and their counsel were not present.

17. In the South African case of Botha v Dreyer (now Moller) (4421/08) [2008] ZAGPHC 395, the Court held;

> " The Court is clothed inherently and constitutionally with jurisdiction to order parties to have blood tests where it finds that the competing rights and interests of the parties

require the truthful verification by specific methods. Truth is the primary value in the administration of justice and should be pursued, if not for its own sake then at least because it invariably is the best means of doing justice in most controversies."

18. I must hasten to add that our jurisprudence on matters succession points to a misapprehension of the law of succession that has gained notorious traction whereby parties have tended to overly treat claims in an estate as adversarial proceedings between them whereas the clear path to follow is for any person laying a claim to the estate to prove their claim thereto even in the absence of any opposition from any other interested party. Thus, in this matter the consent on DNA analysis ought to have been followed through to the end whereby the entitlements of the parties would have been finally determined within the ambit of Section 29 of the *law of succession Act*.

19. As it were, the trial court reached a finding on revocation of the grant without hearing the parties through persuing to the end the crucial evidence on DNA analysis that had been agreed upon by consent and/ or making a determination on the question of failure to appear for DNA analysis and the attendant sanctions that would follow such failure.

20. Upon re-evaluation of the evidence herein, the order that commends itself is to allow the appeal, set aside the ruling dated 18/01/2024 and in lieu thereof remit this case back to the trial court for retrial with a specific order that the Appellants and the Respondent are to avail themselves for DNA testing at the Government Chemist at a date to be set by the trial court with the court proceeding to determine the matter bearing in mind these directions.

21. The appeal is allowed to the extent aforesaid. This matter is remitted back for trial before any other magistrate of competent jurisdiction other than John Tamar (SPM).

DATED SIGNED AND DELIVERED VIRTUALLY THIS 25TH DAY OF MARCH 2025

A.K. NDUNG'U

JUDGE