



REPUBLIC OF KENYA



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In re Estate of Nthinwa Njakwenda alias Nthiwa Njakwenda (Deceased) (Civil Appeal E048 of 2022) [2024] KEHC 1690 (KLR) (23 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1690 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E048 OF 2022
LM NJUGUNA, J
FEBRUARY 23, 2024**

**IN THE MATTER OF THE ESTATE OF NTHINWA
NJAKWENDA ALIAS NTHIWA NJAKWENDA (DECEASED)**

(Appeal from the Ruling of Hon. E. Wasike PM delivered in Senior Principal Magistrate's Court at Siakago in Succession Cause No. 79 of 2018 on 28th July 2018)

JUDGMENT

1. By a memorandum of appeal dated 24th August 2022, the appellant seeks orders that the ruling of the trial court be set aside, parcel number Nthawa/Siakago/1144 be shared equally between the appellant and the respondent and costs of the appeal be provided for. The appeal is premised on the grounds that the learned magistrate erred in law and fact:
 - a. When he distributed parcel number Nthawa/Siakago/1144 contrary to section 40 of the [Law of Succession Act](#);
 - b. By giving a ruling that contradicted his earlier ruling of 23rd September 2021 and his orders of 31st March 2022;
 - c. When he held the appellant was not entitled to a share of parcel number Nthawa/Siakago/1144;
 - d. When he exhibited bias against the appellant in his judgment;
 - e. Failing to give the necessary weight to the appellant's evidence; and
 - f. The judgment was against the weight of the evidence adduced.
2. The appellant and respondent are both daughters-in-law of the deceased, who was the father of their husband. The deceased was the registered owner of property parcel number Nthawa/Siakago/1144. The appellant petitioned for and a grant of letters of administration was issued in her name on 15th July 2019. She filed summons for confirmation of the grant proposing that parcel number Nthawa/Siakago/1144 be distributed equally between herself and the respondent. The respondent filed an



affidavit of protest stating that the estate of the deceased has 4 beneficiaries namely the appellant, the respondent, Beatrice Kanini Nyaga and Mary Muthoni Njiru, the last 2 being daughters of the deceased.

3. That prior to his death, the deceased had said that parcel number Nthawa/Siakago/1144 measuring 0.35 Hectares should be inherited by the respondent and her children. That she has been living on the property for 33 years and the appellant never lived there. The respondent thus claimed the property in whole, for herself. The appellant filed a replying affidavit to the protest, stating that the deceased did not give the land to the respondent and her children. That such an averment is a matter of fact and the respondent had failed to demonstrate that indeed the deceased gave her the land.
4. At the hearing of the protest, the petitioner herein stated that she had approached the respondent to participate in the succession proceedings but she refused. That she and the respondent are co-wives of the deceased but she is the one who petitioned for letters of administration and confirmation of the same. She urged the court to dismiss the protest and confirm the grant. On her part, the respondent stated that the appellant did not invite her and the other beneficiaries to participate in the succession proceedings for the estate of the deceased. That the land is registered in the name of her father in-law. Beatrice Kanini and Mary Muthoni stated that they supported the respondent's case.
5. The trial court considered the evidence placed before it and struck out the summons for confirmation of grant. The parties were given 60 days to come up with a mode of distribution, failing which the court would distribute the property. The case was mentioned severally for compliance but the parties did not agree on a mode of distribution. The trial magistrate stated that he was persuaded by the protestor's claim and gave her the whole of parcel number Nthawa/Siakago/1144. A certificate of confirmation of grant was issued to that effect.
6. The court directed the parties herein to file their written submissions but only the appellant complied.
7. The appellant submitted that she and the respondent are daughters-in-law of the deceased, who was the father of their deceased husband Tarasisio Njue Samuel. That Beatrice Kanini Nyaga and Mary Muthoni Njiru are daughters of the deceased. That the trial magistrate erred in issuing a certificate of confirmation of grant to the respondent yet she was not an administrator in the estate and the same contravened section 71(1) of the *Law of Succession Act*. That the summons for confirmation of grant was struck out but the appellant as the administrator was not given a chance to file fresh summons.
8. It was her argument that in the ruling dated 28th July 2022 the trial magistrate stated that there was insufficient evidence to prove that the respondent was entitled to the land. However, in the ruling dated 23rd September 2021, he stated that he was persuaded that the respondent was entitled to the property, thereby contradicting himself. It was her submission that if her husband was alive, he would have been the one to inherit the parcel of land and therefore the same should have been distributed equally between the 2 widows of the deceased beneficiaries. She urged the court to apply its wide discretion in the issues, in the interest of justice.
9. Having perused the memorandum and record of appeal together with the submissions herein, I find the issues for determination are:
 - a. Whether the amended grant of letters of administration issued on 29th July 2022 to the respondent is valid;
 - b. Whether the estate of the deceased has been equitably distributed.



10. The role of an appellate court is to re-examine the evidence at trial and come up with its own conclusions while keeping in mind the findings of the trial court. In the case of *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

11. The deceased herein is the father of Beatrice Kanini Nyaga, Mary Muthoni Njiru and the late Tarasisio Njue Samuel who was the husband of the appellant and respondent herein. The deceased was the registered owner of parcel number Nthawa/Siakago/1144. A grant of letters of administration was issued to the appellant on 15th July 2019 and she filed summons for confirmation of the same, proposing that the property be distributed equally between the appellant and the respondent. The respondent filed an affidavit of protest seeking to inherit all the said land by herself. Her evidence was supported by Beatrice Kanini Nyaga and Mary Muthoni Njiru, daughters of the deceased.
12. The trial magistrate struck out the summons for confirmation of grant and when the parties failed to agree on a mode of distribution, he went ahead and gave the property to the respondent, in alienation of everyone else. As a result of his ruling, an amended grant of letters of administration and a certificate of confirmation of grant were issued to the respondent on 29th July 2022. I do note that the initial grant issued to the appellant is still valid and at no point was it revoked. In essence, there are 2 grants of letters of administration in the estate of the deceased and this is irregular. According to section 71 of the [Law of Succession Act](#), the holder of a grant of representation is required to apply for confirmation and any certificate of confirmation of the grant thereof is usually granted to such person.
13. The subsequent grant issued to the respondent is marked as an amended grant of letters of administration, meaning that the initial grant was subjected to rectification. Section 74 of the [Law of Succession Act](#) and Rule 43 of the Probate and administration Rules provide the scope for rectification of a grant and the same is limited to errors in names or descriptions. The provisions state thus:

“Rectification of grant;

Section 74 of the [Law of Succession Act](#) provides:

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, may be rectified by the court.

Rule 43(1) of the Probate and Administration Rules provides:

Where the holder of a grant seeks pursuant to the provisions of section 74 of the Act rectification of an error in the grant as to the names or descriptions of any person or thing or as to the time or place of the death of the deceased, or in the case of a limited grant, the purpose for which the grant was made, he shall apply by summons.”

14. It is in fact the role of the holder of the grant to seek for rectification of a minor error on the face of the grant. However, this section does not include replacement of the name of an administrator altogether. Replacement of an administrator with another one is a substantive issue that must be raised through



the relevant summons which will be heard and determined by the court. In the case of In the matter of the estate of Geoffrey Kinuthia Nyamwinga (deceased) [2013] eKLR, the court stated;

“The law on rectification or alteration of grants is Section 74 of the [Law of Succession Act](#) and Rule 43 of the Probate and Administration Rules..... What these provisions mean is that errors may be rectified by the court where they relate to names or descriptions, or setting out of the time or place of the deceased’s death. The effect is that the power to order rectification is limited to those situations, and therefore the power given to the court by these provisions is not general...”

15. Further, in the case of the Estate of Hasalon Mwangi Kahero [2013] eKLR the court stated thus, when dealing with an application for rectification of grant to add a full name of person who was omitted:

“An error is essentially a mistake. For the purposes of Section 74 and Rule 43, it must relate to a name or description or time and place of the deceased death, or the purpose of a limited grant. Is an omission of a name or in the description of a thing an error” It would be an error if say a word in the full name of a person is omitted or a word or number or figure in a description is omitted. But where the full name of a person or a full description of a thing or property is omitted, it would be stretching the meaning of the word “error” too far to say that that would amount to the error or mistake envisaged in Section 74 and Rule 43.”

16. It is my considered view that the amended grant of letters of administration issued to the respondent on 29th July 2022 was improperly issued. The grant issued to the appellant on 15th July 2019 came first in time and has not been revoked. I consider the same to be the properly issued grant.

17. On the second issue for determination, which is closely related to the first issue, the trial court gave the whole of the estate to the respondent, who is a co-wife of the appellant and both being the daughters-in-law of the deceased. From the available evidence, it is not known whether the wife of the deceased is alive but the children of the deceased are known. Section 38 of the [Law of Succession Act](#) provides as follows:

“Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.”

18. The appellant stated that the trial magistrate erred by failing to subject the estate of the deceased to section 40 of the [Law of Succession Act](#) which provides for the circumstances where the intestate was polygamous. The provision is not applicable because the deceased is not said to have been polygamous. Further, neither the appellant nor the respondent was a spouse of the deceased.

19. Therefore, the applicable section herein is section 38 of the [Law of Succession Act](#) which provides that the estate of the deceased should be divided equally amongst the surviving children. In this case, the children of the deceased are Beatrice Kanini Nyaga, Mary Muthoni Njiru and the late Tarasisio Njue Samuel who was the husband of the appellant and respondent herein. Ideally, the portion due to the late Tarasisio Njue Samuel ought to bequeath to his 2 wives but the surviving children of the deceased namely Beatrice Kanini Nyaga and Mary Muthoni Njiru are not claiming any interest in the estate. Therefore, the two wives of the late Tarasisio Njue Samuel, who are the appellant and the respondent, should share the land equally as no concrete evidence was placed before the court to prove that the appellant was given another parcel of land by the deceased.

20. Therefore, the appeal succeeds and the following orders shall issue:



- a. The rulings dated 23rd September 2021 and 28th July 2022 in Siakago Principal Magistrate's Court Succession Cause No. 79 of 2018 are hereby set aside;
- b. The grant of letters of administration issued on 15th July 2019 is hereby confirmed and a certificate of confirmation of grant to issue, stating that Parcel number Nthawa/Siakago/1144 to be subdivided into 2 equal portions and be distributed between the appellant and the respondent.
- c. There shall be no order as to costs.

21. It is so ordered

DELIVERED, DATED AND SIGNED AT EMBU THIS 23RD DAY OF FEBRUARY, 2024.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent

