



**Muthoni v M’Njara & another (Civil Appeal E018 of 2021)
[2024] KEHC 1770 (KLR) (23 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1770 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CIVIL APPEAL E018 OF 2021
LW GITARI, J
FEBRUARY 23, 2024**

BETWEEN

HARRIET MUTHONI APPELLANT

AND

PAUL MURIUKI M’NJARA 1ST RESPONDENT

POLLY NKIROTE 2ND RESPONDENT

JUDGMENT

1. The Appellant filed this appeal vide the Memorandum of Appeal dated 29th September, 2022. The appeal is against the ruling of the Chuka Principal Magistrate’s Court that was delivered on 7th September, 2021 in Succession Cause No 257 of 2012.
2. The appeal raises the following grounds:
 - a. That the learned trial magistrate erred in law and fact in not appreciating sufficiently or at all the evidence adduced by the Petitioner/Respondent therein (the Appellant herein).
 - b. That the learned trial magistrate erred in law and in fact in not appreciating sufficiently or at all the submissions of the Counsel for the Appellant herein on the issues for determination.
 - c. That the learned trial magistrate erred in law in failing to appreciate the oral testimonies rendered in Court by the Appellant.
 - d. That the learned trial magistrate erred in failing to address and make a proper finding on the issues raised by the Appellant in the pleadings and submissions.
 - e. That the ruling has inconsistencies and thus has not fully canvassed the issues raised by the parties therein.



- f. That the learned trial magistrate erred in applying his conscience rather than the law in evaluating the evidence as presented before the Court hence the findings are totally unsupported in law.
 - g. That the learned trial magistrate erred in considering extraneous issues which vitiated his judgment thus arriving at an erroneous finding.
3. Based on the grounds, the Appellant urges this Court to allow the present appeal by setting aside the impugned ruling.
 4. The undisputed facts of this case would suffice at this point. The succession cause which forms the basis of the impugned ruling and the proceedings relates to the estate of the late Ithiira Kibaara (the deceased) who died intestate on 10th August, 1972. The deceased had two wives. The first wife was the late Kaburirere Mbooro wa Kaarigu while the Appellant herein was the second widow of the deceased.
 5. A grant of letters of administration was issued to the Appellant and the same was confirmed on 17th July, 2013. In the said grant, six (6) beneficiaries, who were introduced by the letter of the chief as the deceased's widow and his children, were granted various shares in the land parcel number Nkuene/Kithunguri/216.
 6. Vide an application dated 29th January, 2021, the Respondents sought for the revocation of the said grant and inhibition of any further dealings in the parcels No 2148, 2149, 2150, 2151, 2152, 2167, 2168, and 2169 which resulted from the subdivision of the main land No Nkuene/Kithunguri/216. The application for the revocation of the grant was based on the grounds that the said grant was obtained fraudulently and without full material disclosure of the actual beneficiaries. The Respondents contended that they are the children of the late Paskwale M'Njara M'Itirai who was a son of the deceased.
 7. The Appellant opposed the said application and contended that the Respondents are strangers to the family and should not be included in the distribution of the subject estate.

The learned trial magistrate held that;

“In as much as the clan cannot prove paternity, denying the applicants as children of Paskwale orally also cannot suffice. The birth certificate obtained in 2021 is disregarded for purposes of this case. It actually behoves this court to examine why land situated in Meru yet case filed in Chuka. What was being sought to be hidden. Furthermore it also behoves this court to establish why the applicant would claim a share if they are not related to the deceased. This court is at cross-roads. It appears there is a lot that need airing before a grant is issued in this case.”

8. In the end, the learned trial magistrate found that the Respondents had proved their case for the revocation of the grant and went ahead and revoked the said grant.
9. Aggrieved by the said ruling, the Appellant instituted this appeal based on the grounds I have cited above. The appeal was canvassed by way of written submissions which I have summarized here below.

The Appellant's Submissions

10. The Appellant filed her written submissions on 8th February, 2023. It is the Appellant's submission that the trial magistrate erred in failing to address and make a proper finding on the issues raised by her in the pleadings and submissions. That while the trial court failed to appreciate that the effect of



expunging the birth certificates produced by the Respondents was that there was no further evidence to buttress the Respondent's claim that they were children of the deceased.

11. It is further the Appellant's submission that the trial court erred in heavily relying on Section 29 of the Law Succession Act which relates to dependency yet the Respondents had not proved their dependency to the late Paskwale who is long dead. That the issue as to whether the Respondents were the children of the late Paskwale is an issue to be determined by proof of paternity. That the main objective of proving paternity is settling the issue in finality. She relied on the case of *NEO v HWK* [2018] eKLR and in *In the Estate of PWM (Deceased)* [2016] eKLR in which exhumation was ordered and a DNA subsequently done to prove paternity. The Appellant thus submitted that on a balance of probability, the decision of the Trial Magistrate ought to be reversed and the appeal herein upheld.

The Respondent's Submissions

12. On their part, the Respondents maintained that they were children of the late Paskware M'Njara M'Itirai who was the first born son of the deceased born of the first wife of the deceased, Kabururiere Mbooro wa Karigu. That the Appellant secretly applied for the letters of administration of the subject estate, distributed the same to her children, and hence completely disinherited the Respondents.
13. Further, the Respondents submitted that the Appellant transferred a portion of the estate to one Anastasia Nzisa Musa, who they claim is a stranger to the estate although she is named in the chief's introductory letter. It was their case that the Appellant secretly procured the said grant by institution of the succession proceedings at Chuka Law Courts yet the deceased's estate to wit LR No Nkuene/Kithunguri/216 is situated in Meru County a few kilometers from Nkubu Law Courts.
14. The Respondents relied on the following cases to buttress their submissions:
 - a. Kakamega High Court Succession Cause No 515 of 2005 *In re Estate of Monica Wanjiru Musasia (Deceased)* [2022] KEHC 16901 (KLR);
 - b. *In re Estate of Murei Manyambe (Deceased)* [2021] eKLR;
 - c. *RNC & 2 others v SMG* [2017] eKLR.
15. For the above reasons, it was the Respondents' submission that the trial court correctly found the grant issued to the Appellant was ripe for revocation. They thus urged this court to dismiss this appeal with costs.

Issues for Determination

16. The main issue for determination is whether the Respondents met the threshold for revocation of the grant issued to the Appellant on 15/10/2012 and confirmed on 17th July, 2013, and rectified on 30/7/2014 and 13/7/2016.

Analysis

17. I have considered the record, the grounds of appeal, and the respective submissions made on behalf of the parties. This being a first appeal, the duty of this Court as a first appellate court is now well settled.



In the case of *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR stated as follows in regards to this court's duty as a first appellate court:

See also the decision in *Selle & another v Associated Motor Boat Co. Ltd & another* (1968) E.A 123.

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

18. The deceased in this case is the late Ithira Kibaara. He died intestate on 10th August, 1972. The Appellant herein, Harriet Muthoni, sought for and was issued with a grant of letters of administration in respect of the deceased's estate in her capacity as the widow of the deceased.
19. As per the introductory letter by the Assistant Chief of Kithinguri sub-location dated 29th April, 2010, the deceased left behind LR No Nkuene/Kithunguri/216 and was survived by the following beneficiaries:
 - a. Harriet Muthoni – Wife
 - b. Fredrick Kirimi – Son
 - c. Julius Makandi – Son
 - d. Charles Gikunda – Son
 - e. Anastatia Nzisa Musau – Daughter
 - f. Rose Gaceri 'M' Itirai – Daughter
20. The said grant was issued on 20/4/2016 (after rectification) and the estate was ordered to be distributed as follows:-
 - a. LR No Nkuene/Kithunguri/216
 - i. Fredrick Kirimi Lawrence– 0.85 Acres
 - ii. Julius Makandi Lawrence – 0.40 Acres
 - iii. Charles Gikunda – 0.35 Acres
 - iv. Anastatia Nzisa Musau – 0.35 Acres
 - v. Rose Gaceri M'Itirai – 0.40 Acres
 - vi. Harriet Muthoni M'Itirai – 0.54 Acres
21. Following the confirmation of the grant, the estate was sub-divided and the beneficiaries named in the confirmed grant were each given their respective shares.
22. The Respondents herein consequently sought for the revocation of the said grant on grounds that the same was obtained fraudulently without full disclosure of the actual beneficiaries and concealment of material facts from the court. They also contended that the estate was distributed to strangers. They also contend that the petitioner disposed off the resultant parcel in efforts to ensure that they defraud them of their entitlement. The Respondents contended that they were children of the late Paskwale M'Njara M'Itirai, who was the son of the deceased to whom this succession cause relates.



23. To this end, the Appellant conceded that the late Paskwale M’Njara M’Itirai was the son of the deceased. She however contended that the late Paskwale M’Njara M’Itirai died without any surviving spouse or children.

24. The circumstances that can lead to the revocation or annulment of a grant, whether confirmed or not, are set out under Section 76 of the *Law of Succession Act* which provides as follows

“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;
- (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 particular; or
- (e) that the grant has become useless and inoperative through subsequent circumstances.”

25. As stated above, the Appellant conceded that the late Paskwale M’Njara M’Itirai was the son of the deceased and her step-son. From the evidence on record, the late Paskwale M’Njara M’Itirai died on 25th December, 2000 while the deceased herein died on 10th August, 1972. It follows that the late Paskwale M’Njara M’Itirai was among the beneficiaries who survived the deceased. However, the Appellant at the time of filing the petition to obtain the grant of letter of administration did not disclose the fact that late Paskwale M’Njara M’Itirai survived the deceased yet she was aware of this fact. For this sole reason, I am convinced that the Appellant did conceal material facts in obtaining the grant which is a ground for revocation of the said grant

26. On the issue of whether the Respondents were children of the late Paskwale M’Njara M’Itirai, it was the evidence of Julius Mutugi Kiogora (PW2), who is the assistant chief in Kithunguni village Mitunguu, that he consulted the clan leaders who confirmed that the Respondents were children of late Paskwale M’Njara M’Itirai. This evidence was corroborated by the testimony of Angelo Mwiti Chabari (PW3), who is a neighbour to the Appellant. I however note that the evidence of the chief (PW2) is of no probative value as he did not give the appellant a chance to be heard. Indeed the learned trial magistrate found that the clan cannot prove paternity. The Respondents’ birth certificates were produced in



evidence to buttress their claim but the same was expunged from the record for having been obtained late in the day. On the other hand, the appellant called his son as a witness and who he testified that the late Paskwale did not have a spouse or any children as he never married. The trial court considered the evidence tendered by the parties and noted that the evidence of the Appellant did not openly deny that the Respondents lived with the deceased. The learned trial magistrate held the view that “... as much as the clans cannot prove paternity, denying the [Respondents] as children of Paskwale also cannot suffice.” In this regard, I am not inclined to agree with the finding of the trial court. Having found that paternity could not be proved by the clan and having rejected the authenticity of the birth certificates produced by the respondents she had nothing to cling onto and find in favour of the respondents.

Under the *Law of Succession Act* (Cap 160 Laws of Kenya) the court is supposed to identify the person(s) beneficiary entitled to the estate of the deceased, the property forming the estate of the deceased and the mode of distribution. The proviso to Section 71 of the Act which deals with confirmation of grants is provided:-

“Provided that in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all person beneficiary entitled and when confirmed the grant shall specify all such persons and their respective shares.”

In this regard, a claim for dependency ought to be determined before the confirmation of grant. The respondents were grandchildren who under Section 29(b) of the Act are not first line beneficiaries are required to prove that they were being maintained by the deceased immediately prior to his death. The respondents did not prove that they were being maintained by the deceased, that is their alleged grandfather prior to his death. The court has discretion to make provision for such dependant as provided under Section 26 of the Act, Despite his discretion, Section 30 of the Act provides as follows:-

“No application under this part shall be brought after a grant of representation in respect of the estate to which the application refers has been confirmed as provided by Section 71.”

The respondents were not dependants in the estate of the deceased as their claim hinged on the dependency of their father to the estate of the deceased. It follows that once the grant was confirmed, their claim for dependency was time barred by operation of the law. In the case of *Re-Estate of Abdulkarim Chatur Popat (Deceased)* (2018) eKLR it was stated that;

“The wording of Section 30 is plain and simple. No application under part III of the Act shall be brought after a grant of representation in respect of the estate to which the application refers has been confirmed as provided by Section 71 of the Act. Where an application is so brought after confirmation of a grant the court would be devoid jurisdiction to entertain the same.

Further, the court cannot create or expand jurisdiction it lacks through judicial craft or innovation.”

It is trite law that a court’s jurisdiction flows from either the *Constitution* or legislation or both.

Thus a court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. See Supreme Court decision in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* (2012) eKLR

In Re Estate of James Gathigi Githua (deceased) (2009) eKLR



The court stated:-

“To the extent that the objection raised relates to the jurisdiction of this court to entertain this application after the confirmation of the grant it relates to a point of law. However Section 30 of the Law of Succession Act provides that no application under Sections 26, 27 & 28 & 29 & 30 of the Law of Succession Act can be brought after the grant has been confirmed.”

I associate myself with the above decision and find that the Act prohibits filing a claim for dependency under Part III after the confirmation of the grant of representation. The learned trial magistrate based her finding under Section 29 of the Act. In this matter, the initial grant was confirmed on 17/7/2013. It was rectified and final confirmed grant issued on 20/4/2016. The summons for revocation of grant was filed in 2021. The respondents were grandchildren who were claiming entitlement to their father's claim in the deceased herein. Such a claim could not be brought by the respondents after the confirmation of the grant. The trial magistrate lacked the requisite jurisdiction to entertain the claim and erred by holding that the respondents were dependants. Any action undertaken by a court without jurisdiction is null and void. It follows that the ruling by the learned trial magistrate is null and void for want of jurisdiction to entertain the claim after the grant was confirmed.

27. It is my view that the claim by grandchildren for a share of their grandparents estate cannot be sustained unless it is shown that the grandchildren depended on the property belonging to the deceased at the time of his demise independent of their parents [See the decision of this Court in Murungi Kanampiu v Carmen Ithiru Njagi & another [2016] eKLR]. In the present case, the Respondents were born after the demise of the deceased. There is therefore no evidence that they depended on the deceased's estate independent of their father. As such, the Respondents who were not dependants of the deceased and ought not to have claimed a share of subject estate directly but through their parents. This means that they should have first taken out a grant of representation in the estate of their father before claiming from the estate of the deceased herein. This they did not do and they were therefore not property before the court. The learned trial magistrate did not establish that the respondents were children of Paskwale. Paternity is proved to determine dependency conclusively. The evidence which was adduced before the trial court was not sufficient to prove paternity. The respondent had the burden to prove that they were children of Paskwale who survived him and therefore entitled to his share from estate of the deceased. This was not to be done. Section 107 of the Evidence Act provides:-

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

I have considered the submission by the respondents on none compliance by the applicant with Section 51 (2) of the Act. The respondents are not administrators of the estate of the deceased Paskwale. They lack capacity to challenge the grant by dint of Section 82(a) of the Act.

Conclusion

For the reasons stated in this Judgment, I find that the ruling by the learned trial magistrate was made without jurisdiction and the respondents lacked the necessary authority to file the summons for revocation of grant. I therefore find that :-

1. The appeal has merits.
2. I allow the appeal and order that the Ruling of the learned trial magistrate and all the consequential orders is set aside.



3. Each party to bear its own costs.

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

L.W. GITARI

JUDGE

23/4/2024

Mr. Kanyomo for mr Muchomba for Respondent

Mr. Karanga for Appellant - online

The Judgment has been read out in open court.

L.W. GITARI

JUDGE

23/2/2024

