



REPUBLIC OF KENYA



Margaret v Njega (Civil Appeal 4 of 2023) [2024] KEHC 4218 (KLR) (24 April 2024) (Judgment)

Neutral citation: [2024] KEHC 4218 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL 4 OF 2023
LM NJUGUNA, J
APRIL 24, 2024**

BETWEEN

STELLA KINYA MARGARET APPELLANT

AND

THOMAS NJEGA RESPONDENT

(An appeal from the Ruling of Hon. J.W. Gichimu, SPM in SPM's Succession Cause No. 21 of 2014 delivered on 10th January, 2023)

JUDGMENT

1. The appellant filed a memorandum of appeal dated 30th January 2023, seeking the following orders:
 1. That the impugned ruling be set aside;
 2. That the grant issued to the respondent's deceased brother Lucas Ndwiga Njega on 04th May 2015 and confirmed on 10th March 2016 be revoked or annulled;
 3. That the appellant be appointed as administrator of the estate of the deceased; and
 4. Costs of the appeal be provided for.
2. The appeal is premised on the grounds that the learned Senior Principal Magistrate erred in both facts and law:
 1. When he misconstrued the evidence of the appellant by holding that the appellant was a child of the deceased by virtue of her mother being married to the deceased;
 2. In holding that failure by the appellant to call her mother to testify left gaps in her evidence;
 3. In disregarding evidence by several independent witnesses that the appellant and her brother were children of the deceased and that they lived with the deceased together with their mother;



4. In failing to consider that while the appellant obtained her birth certificate on 04th October 2018 which was 6 years after death of the deceased, the details on the said birth certificate were registered on 28th September 1987 which was about 25 years prior to the death of the deceased;
 5. In discounting the evidence of the appellant's health card which clearly stated that the deceased was her father;
 6. In disbelieving the appellant's evidence on the ground that she had her mother's surname on her national identification card;
 7. In holding that the appellant's mother should have come to court to confirm that she was the one appearing on the photographs produced yet the respondent had confirmed that it was the appellant's mother appearing on the said photographs;
 8. When he exhibited bias against the appellant in his judgment;
 9. When he gave more credibility to the evidence of the respondent, which consisted of more denials and unproved allegations;
 10. When he failed to consider that the grant issued to Lucas Ndwiga Njega (deceased) on 04th May 2015 and confirmed on 10th March 2016 has become useless and inoperative through the subsequent death of the said administrator; and
 11. When he denied the appellant her right to inherit her late father's estate.
3. A grant of letters of administration in the estate of the deceased was issued on 04th May 2015 to Lucas Ndwiga Njega. The said grant was confirmed and a certificate of confirmation of grant was issued on 10th March 2016 indicating 6 beneficiaries to the estate of the deceased which comprises of land parcel number Kyeni/Mufu/2628, to be distributed in equal shares. The applicant herein filed summons dated 25th January 2018 seeking orders that the certificate of confirmation of grant issued on 10th March 2016 was obtained by untrue allegation of facts, false statement and concealment of facts material to the case.
 4. The application was premised on the grounds that the administrator failed to disclose to the court that the applicant was an heir of the estate and that the certificate of confirmation was issued in error because the estate was only bequeathed to the siblings of the deceased. That the distribution indicated on the certificate of confirmation is selfish and a ploy by the beneficiaries to disinherit the appellant and her brother. In the affidavit in support of the summons for revocation, the appellant deposed that the grant of letters of administration was obtained without involving her and her family.
 5. That the deceased had 2 children being the appellant and her brother yet the estate was distributed to the deceased's siblings who are not proven dependants of the deceased. That the appellant and her brother Alex Gitonga Ireri were not included in the P&A Form 38 and the petitioner for the grant did not produce a Chief's introductory letter to the proceedings as the case should be. She deposed that even though the estate of the deceased is in the process of being distributed, the court had the ability to revoke the grant under section 76 of the *Law of Succession Act* and stop the distribution of the estate.
 6. The court took viva voce evidence in the matter. PW1 was the appellant who stated that the deceased is her father and she lives on his land parcel number Kyeni/Mufu/2628 on which she was also born. That her mother's name is Margaret Kina Kiura whose first name she took as her surname. That the deceased was the youngest in his family and he was living on the suit land with her mother prior to his death. That at the time of death of the deceased, she was working in Embu and was informed by a neighbor that the deceased was ill and had been taken to hospital by his brother. That the deceased



- was admitted in hospital and she went to see him. That later on, she was informed that he had died and she attended the funeral with her mother and brother.
7. That after the funeral, the deceased's brothers, including the respondent demolished her mother's house and evicted her, taking away all the livestock and household belongings. That they cut down all the fruit trees and the respondent moved into the land and settled on it. That her mother was taken in by one Njungu and later she moved to the house her brother built for her. She testified that her mother has been very stressed about the issue and she is an alcoholic which is why she couldn't file the suit herself. She denied being the daughter of one Mwaniki Ndungu and that she did not know him.
 8. She produced documentary evidence including birth registration documents for her and her brother, health records showing the name of the deceased as the father and photographs of her family with the deceased, in support of her case. On cross-examination, she stated that she got her birth certificate in 2017 because her uncles had started alleging that she was not a daughter of the deceased. That prior to the death of the deceased, he was living with her mother and that her uncles did not like her mother.
 9. PW2, Charity Runji Njagi, a neighbor of the deceased, stated that she knew the deceased and his father and she sometimes worked for his father. That the deceased was given the suit land by his father and he planted various fruit and nut trees on it. That he lived on the land with his wife Margaret Kina and they had 2 children namely the appellant and her brother Gitonga and she visited them often. That 2 weeks after the death of the deceased, she heard commotion from the home of the deceased and she went to find out what was happening. That 3 of the deceased's brothers went to the land, cut down all the fruit trees and split timber out of them, destroyed the crops, demolished the houses and evicted the appellant's mother from the land.
 10. She stated that the respondent took possession of the land while the appellant's mother was taken in by a neighbour called Njungu. She produced photographs showing the deceased with the appellant, her mother and her brother and she was also in some of the photographs. On cross-examination, she stated that the deceased married the appellant's mother under Ki-Embu Customary Law in a ceremony that she did not attend and she did not recall the date. That she attended a ceremony to celebrate the appellant's brother and there were photographs to show for it. That she saw the respondent and his brothers demolishing the appellant's mother's house.
 11. PW3, Zeverio Ndwiga, assistant chief of Kaagari Location since 2011 stated that he knew the deceased and he knows his brothers. That the deceased lived on the suit land with his wife Kina and his daughter and son Gitonga. That after his death, the wife and children of the deceased were chased from the land by the brothers of the deceased and their home was destroyed. That his office did not issue an introductory letter for purposes of succession proceedings. On cross-examination, he confirmed his testimony and added that when the appellant's mother was chased from the land, she did not complain to the authorities.
 12. PW4, Gerishon Njeru stated that he was an immediate neighbor of the deceased and a brother to Margaret Kina, the deceased's wife. He stated that the deceased was the owner of parcel number Kyeni/Mufu/2628 where he lived with his wife and 2 children and he was buried thereon. That after the death of the deceased, the brothers of the deceased chased her sister from the land he gave her a place to stay. That the brothers of the deceased denied that the appellant and her brother were children of the deceased. That he was forced to place a caution on the deceased's land, which action caused him and the deceased's brothers to be summoned by the Land Registrar but they did not resolve the dispute. That the appellant's mother was married before to one Mwaniki but she was widowed. On cross-examination, he stated that when the deceased married his sister, there was a dowry ceremony



- and he attended it but the deceased's brothers did not attend. That the appellant's mother had other children from her first marriage but the deceased took care of all of them and raised them.
13. PW5, Joel Njagi stated that his land bordered the deceased's land and they knew each other and they interacted a lot. That the deceased lived on his land with his wife Margaret, his daughter the appellant and his son called Alex Gitonga. That the deceased was a farmer and was assisted by his wife in his farming activities from which they drew a livelihood. That when the deceased died, he attended the funeral and his wife and 2 children were present and he was buried on the said land. That soon after the burial of the deceased, the brothers of the deceased chased the appellant's mother from the land, destroyed her home and cut down the fruit trees growing on the land. That the respondent took over the land and settled on it. On cross-examination, he stated that the deceased married the appellant's mother around 1985 or 1986 thereabouts but there was no marriage ceremony that he can recall. That after the death of the deceased and eviction of his widow, he is the one who gave out the parcel number to PW4 so that he can register a caution on it. That the appellant's mother lives with PW4.
 14. PW6, Jackson Njagi Duncan stated that the deceased was well known to him and that his land bordered his. That he lived on his land with his wife Margaret and their 2 children being the appellant and her brother Gitonga. That he saw the appellant and her mother and brother at the burial of the deceased. That the appellant's mother was evicted 3 weeks after the burial and her house was destroyed by the deceased's brothers. That they also destroyed about 300 fruit trees and crops, took away all the livestock the respondent took over the land. On cross-examination, he stated that there was no marriage ceremony when the deceased married the appellant's mother. That after the deceased's property had been destroyed, the sub-area chief visited the scene.
 15. DW1 was the respondent. He stated that the deceased, his brother lived as bachelor all his life and he did not have a wife or children. That when he fell ill, he nursed him until when he died in 2012. That following the death of the deceased, him and his brothers proceeded to petition for a grant of letters of administration. That the appellant is a daughter of the Margaret and one Mwaniki and that she was never introduced as a child of the deceased. On cross-examination, he stated that the deceased died at 45 years and he lived on the said piece of land which he inherited from their father. When was shown the photographs, he denied knowledge of the people in the photographs or the environment in which they were taken.
 16. DW2, Julius Mwaniki Njega, brother to the deceased stated that the appellant and her mother lived on the land that is next to their late father's land and she was raised at her late grandfather's place. That the appellant's mother was never introduced to the family as a wife of the deceased. That the appellant's mother was married to one Mwaniki and had 6 children with whom she returned after she separated from her husband. On cross-examination, he stated that he did not know who chased the applicant from the land but the respondent is the one who lives on it.
 17. DW3 Isaiah Njiru Kimwaro stated that him and his family were friendly with the deceased's father and family and that he would have known if the deceased was married. That the appellant's mother was only a neighbor to the deceased and she was married to a man called Mwaniki Ndungu, with whom she had 6 children. That when her marriage with Mwaniki ended, the appellant's mother, who is an alcoholic, moved back to her father's land where her kin helped to raise her 6 children. That DNA evidence would show that the appellant is not a child of the deceased but if she is found to be so, then the family would take up responsibility for her. On cross-examination, he stated that the appellant's grandfather is a neighbor of the deceased and that the applicant is not entitled to the deceased's land.
 18. DW4, David Gitonga, brother of the deceased and head of the clan, stated that he knew the deceased for more than 35 years and would have known if he was married. That the appellant's mother was a



- neighbor of the deceased and that she was not present at the burial of the deceased, neither were her children. That the brothers of the deceased petitioner applied for a grant of letters of administration because there was no immediate member of the family to do so. That the deceased did not have any wife or children. On cross-examination, he stated that he did not know the appellant or her mother.
19. At the trial court, the magistrate directed the parties to file written submissions which he also considered beside the pleadings and the evidence adduced. He found that the appellant had failed to prove that she was a daughter to the deceased especially because of her names on her identity card, the details on her birth certificate and the time when the same was taken out. He held that the appellant's mother was not a proven wife of the deceased and therefore she could not be ranked higher in priority to the brothers of the deceased when it came to the estate of the deceased. He held that there was no reason to revoke the grant.
 20. The appeal herein was canvassed by way of written submissions. Only the appellant filed her submissions.
 21. The appellant submitted that PW1-PW6 confirmed that the deceased had a wife and 2 children and they lived with him on the parcel of land known as Kyeni/Mufu/2628 and that the said family was chased away upon his death. That PW3, the area chief also stated the same as the authority in charge of the area. That according to the appellant's birth certificate, the birth was registered about 15 years before death of the deceased and that the deceased was named as the father of the appellant. That all the other documentary and photographic evidence produced showed that the deceased was the father of the appellant and her brother Alex Gitonga.
 22. It was her argument that the trial magistrate erred in stating that the appellant's mother should have been brought to testify in court yet the evidence on record was sufficient to make the case for her mother. She relied on the cases of *Re Estate of Obedi Ndwiga Rubarita (deceased) (2021) eKLR* and *Embu High Court Succession Cause No. 508 of 2002 in the estate of Njagi M'Ngungi delivered on 13th October 2022*. That since the administrator of the estate of the deceased is also dead and was substituted by the respondent in the revocation proceedings, that the court should finalize the matter and revoke the grant under section 76 of the *Law of Succession Act*.
 23. The issues for determination herein are as follows:
 1. Whether the appellant is a child of the deceased; and
 2. Whether the grant issued to Lucas Ndwiga Njega (deceased) on 04th May 2015 and confirmed on 10th March 2016 should be revoked.
 24. 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...”
 25. The appellant stated that she is a daughter of the deceased and she produced documentary and photographic evidence to show for this. She produced a copy of a birth notification serial number



881116 issued on 27th August 1987 for one Joan Stella Kinya Ileri showing her mother's name as Margaret Kina Kiura. She also produced birth certificate serial number 7858469 issued on 04th January 2018 for the appellant showing that the birth was registered on 28th September 1987. Part of her evidence was also corresponding medical records for child welfare clinics.

26. She called witnesses in support of her case and PW2, PW4, PW5 and PW6 all stated that they were neighbours of the deceased, who lived on his land with the appellant, her mother and her brother. These witnesses identified the appellant's mother from the photographs. PW2 stated that she visited the deceased and his family often and that she also knew the father of the deceased for whom she worked sometimes. She stated that when the deceased died, she heard commotion from the deceased's home and when she went to check, she found the respondent's brothers destroying the home of the appellant's mother.
27. PW4 is the appellant's maternal uncle who stated that he is the one who placed a caution on the deceased's property when her sister, the appellant's mother was chased from the deceased's land. That he settled her sister on his land and he stated that when his sister married the deceased, there was a dowry ceremony but the brothers of the deceased did not attend. That it is true that the appellant's mother was married before but she was widowed and the deceased took care of all her children, including those from the first marriage.
28. PW5 stated that the deceased married the appellant's mother around 1985 or 1986 thereabouts and there was no marriage ceremony. That the appellant's mother was present at the burial of the deceased together with her 2 children and she was chased from the deceased's land soon after the burial. That he is the one who gave PW4 the deceased's title number for him to place a caution. PW6 stated that there was no marriage ceremony between the appellant's mother and the deceased but they lived on the deceased's land with the appellant and her brother.
29. PW3 the area sub-chief stated that the brothers of the deceased did not obtain an introductory letter from his office before initiating succession proceedings in the estate of the deceased. That the deceased lived on his land with the appellant, her mother and her brother. On the other hand, DW1, DW2 and DW4 stated that the deceased never married and he died as a bachelor. That the appellant's mother was a neighbor and was never introduced to them as the deceased's wife. DW3, a friend of the family stated that he related closely with the deceased's father and would have known if the deceased had a wife. That the appellant's mother was another man's wife and that DNA evidence would show that she is not a child of the deceased but if she is a child of the deceased, she would be placed in the care of the respondent.
30. Sections 109 and 112 of the [Evidence Act](#), provide as follows:
 - “ 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.
 112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.”



31. The standard of proof in this case is on a balance of probabilities. According to the 9th Edition Black's Law Dictionary, balance of probabilities also means preponderance of the evidence, which is defined thus;

“The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.”

32. The testimony of the appellant's mother was not brought to court. Even though the trial magistrate took issue with that, I think that there is plenty of evidence to consider in determining the main issue before the court and the same is to be subjected to the standard of proof. In any event, none of the respondent's witnesses disputed the fact that Margaret Kina exists. In fact, they all stated that they knew her but not as their brother's wife but rather, as a neighbor. Therefore, in my view, it is immaterial that she did not testify. The testimonies of DW1-DW4 show that the appellant's mother was a neighbor of the deceased but PW1-PW6 stated that they lived together with the deceased. From the available evidence, on a balance of probabilities, it is my view that the appellant indeed lived with her mother and her brother and the deceased on his land.

33. Section 3(2) and (3) of the [Law of Succession Act](#) provide:

“

“(2) References in this Act to "child" or "children" shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any child born to her out of wedlock, and, in relation to a male person, any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.

(3) A child born to a female person out of wedlock, and a child as defined by subsection (2) as the child of a male person, shall have relationship to other persons through her or him as though the child had been born to her or him in wedlock.”

34. In light of the above-cited provisions, the evidence shows that the deceased lived with the appellant and her brother as his children. I deem the appellant to be the daughter of the deceased. That being the case, the hierarchy of beneficiaries comes into play as provided under section 66 of the [Law of Succession Act](#) as follows:

“When a deceased has died intestate, the court shall, save as otherwise

expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference:-

- (a) surviving spouse or spouses, with or without association of other beneficiaries;
- (b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;



- (c) the Public Trustee; and
- (d) creditors.

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.”

35. With reference to the above-cited provision and the second issue for determination, a grant was issued to the brother of the deceased named Lucas Ndwiga Njega (deceased) on 04th May 2015 and the same was confirmed on 10th March 2016. A brother of the deceased is not the highest-ranking person to petition for letters of administration where the deceased was survived by a spouse. Section 66 of the [Law of Succession Act](#) also provided that the court may also exercise discretion in granting the letters of administration in an intestate estate. Further, the second schedule of the Probate & Administration Rules provides for the various degrees of consanguinity and guides on the relatives who may petition for letters of administration by priority. According to the said order of consanguinity, where the deceased was survived by children, the brothers of the deceased rank at the second degree of consanguinity while the children of the deceased rank as the first degree of consanguinity to the deceased.
36. Therefore, in addition to my finding that the appellant is a child of the deceased, she is also entitled to a grant of letters of administration in the estate of the deceased. The issue of whether the grant that was issued to the deceased administrator should be revoked is anchored on section 76 of the [Law of Succession Act](#) which provides for circumstances under which a grant may be revoked. It states:
- “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 order or allow; 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.”



37. The deceased administrator, Lucas Njiru, petitioned for a grant in the estate of the deceased and the same was granted. He then filed summons for confirmation of grant dated 25th November 2015 supported by an affidavit wherein he named 6 beneficiaries to the estate but none of them was the appellant or her brother. The court relied on the averments on the summons for confirmation and the affidavit and issued a certificate of confirmation of grant dividing the estate equally amongst them. At the point of petitioning for letters of administration, the petitioner indicated himself as the only survivor of the deceased in form P&A 5. There is no mention of the appellant, her brother or her mother.
38. In her summons for revocation, the appellant challenged the grant itself and the certificate of confirmation of grant on grounds that the petitioner failed to inform the court that the deceased was survived by the appellant, her brother and her mother, thereby disinheriting them. From my foregoing discussion, the seclusion of the appellant and her mother and brothers from the succession proceedings is enough to displace the grant. The appellant argued that the petitioner of the grant failed to present to the court an introductory letter from the chief. PW3, the sub-chief stated that the letter was not procured, neither did he issue it.
39. The chief's introductory letter has no legal significance in a succession cause but it plays an important role in identifying the beneficiaries of the estate of the deceased on behalf of the courts. This was elaborated in the case of *In re Estate of Mukhobi Namonya (Deceased)* [2020] eKLR where it was held:
- “...it is critical that I deal with the importance of the letter from the Chief. It is not a requirement of the law, for it is not provided for in the *Law of Succession Act*, Cap 160, Laws of Kenya, nor in the Probate and Administration Rules. It was a device resorted to by the court to assist it identify the persons who survived the deceased, for the court has no mechanism of ascertaining the persons by whom the deceased was survived save by relying on officers of the former provincial administration, who represent the national government at the grassroots and are in contact with the people, and therefore, the best suited to assist the court identify the genuine survivors of the deceased.”
40. However, in this case, this letter would have enabled the court to know the survivors of the estate of the deceased and the appellant would, probably, have had a chance to object to the proceedings. The absence of the chief's letter is not a ground for the grant to be revoked but this court has taken note of the fact that the letter would have guided the court if it was obtained in good time and as the procedure demands.
41. Having regard to the foregoing, I find that the appeal has merit and the same is hereby allowed. The following orders shall issue:
1. The ruling and order of the trial court issued on 10th January 2023 in Runyenjes SPM's Court Succession Cause No. 21 of 2014, is hereby set aside;
 2. That the grant issued to the respondent's deceased brother Lucas Ndwiga Njega on 04th May 2015 is hereby revoked;
 3. The certificate of confirmation of grant issued on 10th March 2016 is hereby set aside;
 4. A grant of letters of administration to be issued to the appellant immediately following this judgment;
 5. Summons for confirmation to be filed within 30 days; and



6. Each party shall bear their own costs of the appeal.

42. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 24TH DAY OF APRIL, 2024.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent

