Odhiambo v Wabwaya (Family Appeal E004 of 2022)
[2024] KEHC 6248 (KLR) (27 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6248 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

FAMILY APPEAL E004 OF 2022

RE ABURILI, J

MAY 27, 2024

BETWEEN

JAMARY NICHOLAS ODHIAMBO ..... APPELLANT

AND

MAGDALINA ANYANGO WABWAYA ..... RESPONDENT

(Being an appeal from the Ruling of the Honourable S.O. Temu delivered on the 14th April 2022 in the Senior Principal Magistrates Court at Nyando in Succession Cause No. 301 of 2019)

JUDGMENT

1. The respondent Magdalina Anyango Wabwaya filed a petition for letters of administration intestate to administer the estate of the deceased Samba Bange Ogeng' alias Samba Bange but before confirmation, several persons including the appellant herein filed objections to the said petition.

2. The parties therein gave viva voce evidence with the respondent being allowed to call the chief who had written for her a letter to confirm that she was entitled to take out letters of administration.

3. The trial magistrate after hearing all the parties found in favour of the respondent stating that she was the nearest in consanguinity to take out letters of administration in respect of the estate of the deceased. The trial magistrate dismissed the appellant's claim and noted that him and some of the objectors were clansmen of the deceased and further stated that the objectors whose claims were based on purchase could have their rights addressed in civil proceedings for the transfer of the lawfully acquired land based on evidence and documentation as against the respondent.

4. Dissatisfied by the trial court's findings, the appellant lodged his appeal vide a memorandum of appeal dated 13th May 2022 and filed on the even date in which he raised twelve grounds of appeal that are summarised herein below;

   i. That the learned magistrate erred in law and in fact by making a finding that the petitioner belonged to category of persons in section 39 (e) of the succession Act laws of Kenya.

   ii. That the learned magistrate erred in law and in fact by making a finding that the petitioner was the sole surviving and the nearest in consanguinity to take out letters of administration to the deceased estate.

   iii. That the learned magistrate erred in law and in fact by making a finding that the claim of the 1st, 3rd, 4th and 8th objectors were those of a clansman without any legal right on the estate of the deceased herein.

   iv. That the learned magistrate erred in law and in fact by making a finding that the 5th objector being on the land amounts to meandering with the deceased property and should vacate as he has no basis being there.

   v. That the learned magistrate erred in law and in fact by failing to take notice of the contradictions in the evidence tendered by the area chief and the petitioner.

   vi. That the learned magistrate erred in law and in fact by being biased in taking down of proceedings that is by selecting facts which are favourable to the petitioners and omitting material facts to meet the end of justice.

   vii. That the learned magistrate erred in law and fact by ignoring the fact that the petitioner deliberately used false information when completing several forms which constitute the application for grant of letters of administration intestate.

   viii. That the learned magistrate erred in law and in fact by choosing to down-play the fact that the documents in question were affidavits which essentially means that the petitioner swore false affidavits.

   ix. That the learned magistrate erred in law and in fact by failing to take notice of the fact that the petitioner denied ever having signed the said forms/affidavit and even denied ever knowing the persons whose signatures were appended on the said document.

   x. That the learned magistrate erred in law and in fact by failing to take notice that the affidavits were in perjury as the statements were made under oath, hence intended to subvert the cause of justice.

   xi. That the learned magistrate erred in law and in fact by deliberately choosing to overlook the fact that the petitioner, by knowingly and willfully making false statements rendered her application for grant of letters of administration defective in form and substance, thereby constituting grounds for denying the petitioner the grant as the petitioner's actions are tainted with fraud and non-disclosure of material facts.

xii. That the learned magistrate therefore erred in law and in fact by failing by dismissing lack of execution and denial of petitioners' signature as mere technicalities.

5. The parties filed submissions to canvass the appeal.

The Appellant's Submissions

6. It was submitted that having established that the petition for grant of letters and the affidavit in support of the same were not signed by the petitioner, the petition for grant of letters of administration to the deceased's estate was fatally defective and incompetent. Reliance was placed on the Supreme Court Case of Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & Another.

7. The appellant submitted that as an in-law of the deceased, the petitioner had no right to take out letters of administration to the deceased's estate unless she does so claim a share of her spouse in the estate of the husband otherwise such actions amount to interference with the deceased's estate.

8. The appellant submitted that the objectors were beneficiaries of the deceased's estate as some of them had purchased portions of it and had sale agreements to that end and further that some were close relatives and have possession of land forming part of the deceased's estate for well over 12 years.

9. It was submitted that a lot went on before the trial court including open disrespect to his counsel and interferences which were unfortunately deliberately not recorded as is evident from the ambiguity in the proceedings. The appellant submitted that the trial court deliberately failed to record vital information.

10. It was the appellant's argument that the trial court's bias as detailed above was a ground upon which the instant appeal ought to be allowed as was held in the case of Kimani v Kimani [1995 – 1998] VOL1 EALR page 134.

The Respondent's Submission

11. It was submitted that Section 39 of the *Law of Succession Act* outlines clearly to whom the estate of a deceased person shall devolve where the deceased dies intestate and that the succession process is merely administrative in nature thus the honourable court only needs to confirm that the petitioner falls within the four corners of section 39 of the *Law of Succession Act*.

12. The respondent submitted that there was a single application for revocation of grant dated 24th February 2020 by the appellant herein and series of witness statements by persons who erroneously and or mistakenly referred to themselves as objectors.

13. It was submitted that the application for revocation was defective and without footing as despite bringing the application pursuant to section 76 of the *law of succession Act*, the appellant did not pray for orders to revoke and or annul the grant and further the appellant herein failed to disclose capacity to raise the subject as he did not establish his relationship to the deceased but rather simply stated that the petitioner failed to disclose that the deceased left behind more than one heir. The appellant submitted that parties are bound by their pleadings and thus a party cannot testify in the dock and proceed to give evidence that was not introduced in his pleadings.

14. The respondent submitted that assuming that the objector disclosed capacity, he does not fall within the corners of section 39 of the *Law of succession Act*.

15. It was further submitted that the objector in his application introduced other parties as purchasers and or beneficiaries who were not objectors but witnesses and thus no orders can be issued for or against parties not joined to a suit. It was further submitted that the sale agreements purportedly annexed to the application cannot stand as they do not relate to the objectors but third parties not joined to the cause.

16. The respondent submitted that assuming the purchasers were properly joined in to the cause for whatever reason, she would rely on the case of Re Estate of Stone Kithuli Muinde(deceased) [2016] eKLR where the court stated inter alia that it does not have jurisdiction to entertain claims to ownership of land.

17. As regards the issue of signatures, it was submitted that the same arose when the counsel for the objectors put a question to the petitioners with regards to the signatures of the guarantors and the same was clarified during re-examination where the respondent stated that she is the one who filed the succession and that the guarantors were only witnesses.

18. It was further submitted that assuming that the signatures were at variance as alluded to by counsel for the objector, the issue was not substantively placed before court and there was no application to strike out the petition on account of the variance in the signatures, further that the respondent was cross examined on the correctness of her petition and in the process, she supported and defended her petition. The respondent submitted that the appellant was allowed to test the Petitioner's case and the honourable court arrived at a just determination after according each party a right to be heard.

19. The respondent submitted that the issues raised by the objectors herein do not breathe new life to the dismissed suit but instead serve a similar role as the numerous objector proceedings in the lower court; to defeat/delay justice and as such the instant appeal should be found to lack merit and be dismissed with costs to the respondent.

Analysis and Determination

20. I have considered the issues raised before this court in this appeal, the submissions of the parties and the authorities relied. As stated herein earlier, the respondent herein filed a petition for the estate of the deceased Samba Bange Ogeng alias Samba Bange but before confirmation, the appellant filed an application dated 24th February objecting to the respondent's application and further seeking to have the grant issued to the respondent revoked.

21. The appellant herein was the only objector although in support of his case, the appellant procured the witness statements of nine other individuals who referred to themselves as objectors. The said individuals were never enjoined as objectors and as such, they remained the appellant's witnesses.

22. The crux of the appellant's objection was that a grant sought to be confirmed was obtained fraudulently and that the respondent failed to disclose that the deceased left behind more than one heir who stood to suffer irreparable loss if the grant was confirmed as they had bought property from the deceased prior to his death.

23. In support of his case, the appellant testified that he was the son of the deceased's step-brother. He admitted that the respondent was an in-law to the deceased who died without marrying and without any children. It was his testimony that since he lived on the land, he should be allowed to divide it amongst other clan members. He testified that there was fraud in the taking out of letters of administration as the village did not sit and agree on the distribution of the deceased's estate.

24. It was the testimony of other appellant's witnesses that they were claiming a share of the deceased's estate on account of sharing a grandfather with the deceased while other witnesses alleged to have bought parcels of land from the deceased prior to his death, which parcels comprised parts of the deceased's estate.

25. On her part, the respondent testified that the deceased was her brother in law as he was a brother to her husband who had since also passed on. She reiterated that the deceased was not married and that she had notified her children prior to filing her petition.

26. The trial court suo motto summoned the Chief of Awasi area who had written the letter for the petitioner and he testified that the petitioner was the only surviving relative of the deceased. He further stated that the appellant was not from the deceased's family and he confirmed writing the letter dated 27.11.2019.

27. Examining the evidence of both the appellant and his witnesses vis a vis the respondent, the respondent's evidence appears to me to be more, plausible, consistent and credible. However, the question of kindred relation must be examined as set out in the law regarding who has the capacity to take out letters of administration as a dependent, relative or beneficiary of the deceased intestate. My conclusion is that the respondent being a sister in law to the deceased is not in the nearest degree of consanguinity to the deceased compared to the appellant who seems to be a clan member. The deceased having died intestate and not survived by a souse, child or parent, his estate would only devolve upon the persons of the nearest degree of consanguinity. The question is whether the appellant or respondent meet that test of consanguinity.

28. Section 66(a)-(d) provides for preference be given to certain persons to administer a deceased person's estate where the deceased died intestate: -

> " 66. 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"

29. Part VII, dealing with making of grants under Rule 26(1) and (2) of the Probate and Administration Rules provides that:

> " 26.
>
> (1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.
>
> (2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written

consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require."

30. Under Part V referred under Section 66(b), the persons given priority over an intestate are the surviving spouse and children. Thus, where the intestate has unfortunately left no surviving spouse and children, the provisions of Section 39 of the *Law of Succession Act* comes in conveniently, stipulating that the net intestate shall devolve up to the kindred of the intestate in manner of order of priority. Section 39(1) and (2) provides that:

> " 39.
>
> (1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority-
>
> (a) father; or if dead
>
> (b) mother; or if dead
>
> (c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none
>
> (d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none
>
> (e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.
>
> (2) Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1), the net intestate estate shall devolve upon the State, and be paid into the Consolidated Fund."

31. Black's Law Dictionary, Eight Edition defines consanguinity as the relationship of persons of the same blood or origin.

32. The same dictionary defines affinity as the relation that one spouse has to the blood relatives of the other spouse; relationship by marriage or any familial relation relating from marriage.

33. No doubt, the respondent is related to the deceased as an in low hence by affinity not consanguinity. However, her children who are alive and whom she claimed gave her consent to petition for the grant are related to the deceased by way of consanguinity as they are children of the deceased's brother hence they are his nephews. This does not mean that the said nephews are being touted by this court to petition but that from the material placed before me, they are in the nearest degree of consanguinity.

34. The appellant on the other hand did not adduce any evidence to prove how he is closely related to the deceased by blood. He is a member of the clan yes but clan members that do not fit into the class of persons set out under section 39 of the *Law of Succession Act* and in the degree of Consanguinity as per the Consanguinity and Affinity Table provided for at the end of the Probate and Administration Rules pursuant to Rule 7(1) (e) (iii) means nothing.

35. The law requires that generations be counted from the intestate beginning with the parent up to the common ancestor and then down to the particular relation.

36. It is a mistake, therefore, to assume that all next of kin will be related to the same level of common ancestor. Therefore, if a person is claiming to be a next-of-kin situation, he/she must account for all the reasonable possibilities of relationship in equal degrees derived from each different level of common ancestors (see Daniel F. Carmack, Common Problem in Administration of Decedents' Estates, 14 Clev.-Marshall L. Rev. 179 (1965).

37. Thus, the term "next of kin," for intestate succession purposes only, is understood in the primary sense of those nearest to the intestate by blood. See Immaculate Wangari Munyaga v Zachary Waweru Ireri [2016] eKLR (HC SUCC Cause No. 4 of 2015 –Nairobi).

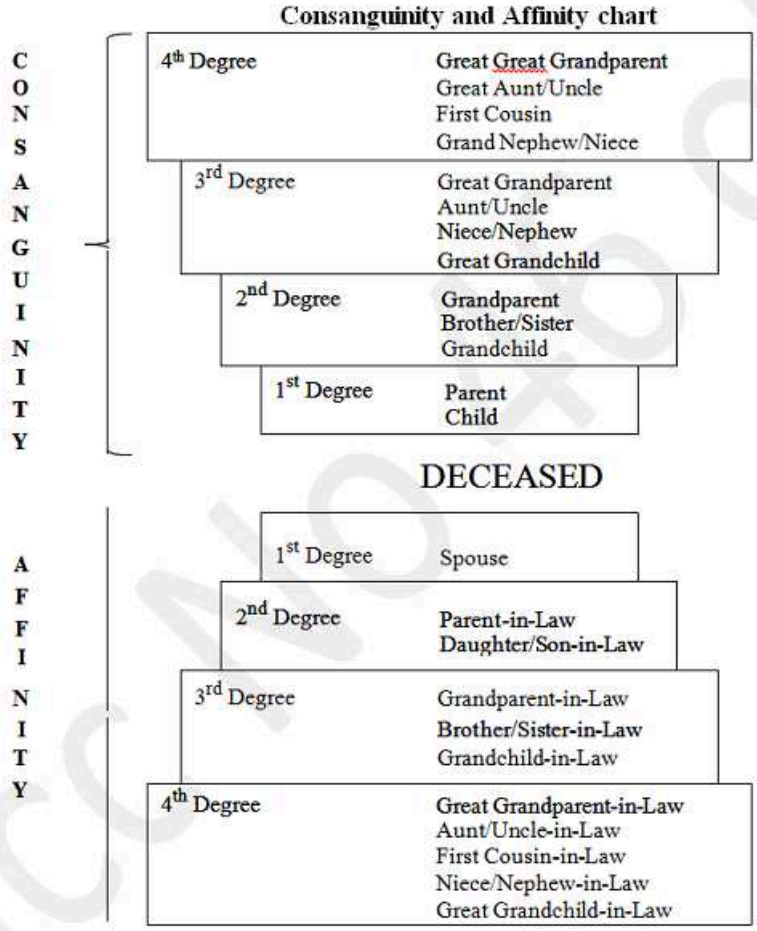
38. Thus, the dispute between the appellant and the respondent can be resolved by examining the degree of consanguinity and affinity so as to determine who between the disputants herein is nearest by blood to the deceased.

39. An examination of the consanguinity and affinity Table below is a good guide.

40. Accordingly, I find and hold that neither the appellant nor the respondent are in the nearest degree of consanguinity with the deceased. However, the children of the respondent are and in the absence of any evidence that they gave authority to the respondent to petition for grant, I find that the respondent had no legal authority to petition for the grant for her own benefit.

41. Nephews are legally entitled to petition for grant and even benefit from the estate of the deceased but only after settling all eligible debts left behind bey the deceased and estate Duty if any is payable by the estate of the deceased.

42. . The appellant alleged and pleaded in his grounds of appeal that there were contradictions in the testimony of the respondent and the Chief who wrote the letter to enable her petition for grant. I have had the advantage of going through the record and note that contrary to the appellant's assertions, the Chief's testimony corroborated the respondent's testimony, though, just like the respondent herself, were in ignorance of the law as established. Furthermore, the chief clarified that the appellant was not a relative of the deceased. I find that this ground lacks merit.



43. The appellant had sought to have the grant issued to the respondent revoked. It was his case that the respondent obtained the said grant fraudulently.

44. The law providing for revocation grants is Section 76 of the *Law of Succession Act*, Cap 160 of the Laws of Kenya. It provides as follows: -

> 76. Revocation or annulment of grant
> 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.

45. The appellant herein failed to demonstrate before the trial court that he was best suited to take out letters of administration or that he needed to be informed of the process, and neither are his so-called witnesses who appeared as objectors are persons of interest as far as the law of succession is concerned. They claimed that they purchased land from the deceased. Their interest should be how to get their entitlement from an administrator upon proof of such purchase and there are many avenues in law for purchasers to lodge claims including filing suit against the administrator before the Environment and Land Court for title to be transferred in their names, or claiming as liabilities of the estate.

46. As regards the issue of signatures, I have perused the documents filed in support of the petition for grant on 19th December, 2019. I observe that most of the documents which are necessary forms were not signed including P&A 11, P&A 57, P&A 80 the latter was never witnessed though initialed as if signed by the petitioner but which signature is highly doubtful even in the absence of a handwriting expert as one can easily see that someone just initialed the name of the respondent. Initialing can be done by anyone. In my view, the failure to sign the forms that accompany the petition is a serious defect as it borders on authenticity of the said forms. That alone is a good ground for revocation of a grant.

47. The appellant has pleaded and made serious allegations regarding the trial magistrate's independence. It was the appellant's pleading in this appeal that the trial magistrate was biased against him and the objectors in that his taking down of proceedings was selective in favour of the petitioner and further that he omitted material facts to meet the ends of justice.

48. Bias is prima facie a factor that may lead to a judge/magistrate recusing himself from a matter. Such an action is meant to safeguard the sanctity of the judicial process in tandem with the principle of natural justice that no man should be a judge in his own case and that one should be tried and/or have his dispute determined by an impartial tribunal. This is what is provided for in Article 50(1) of *the Constitution* thus:

> " Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body".

49. What is bias? The Oxford English Dictionary defines bias as "an inclination or prejudice for or against one thing or person". The Blacks' Law Dictionary 9th edition defines the word bias as "Inclination; prejudice; predilection". One of the fundamental tenets of the Rule of Law is impartiality of the judiciary and in circumstances where bias is alleged and proved, then the pragmatic practice is that the particular judge or magistrate will as a matter of course recuse/remove himself from the hearing and determination of the matter.

50. When interrogating a case of bias, the test is that of a reasonable person and not the mindset of the judge. That is why in Tumaini v Republic [1972] EA LR 441 Mwakasendo J held that:

> " in considering the possibility of bias, it is not the mind of the Judge which is considered but the impression given to reasonable people.

51. Further in Nathan Obwana v Robert Bisakaya Wanyera & 2 others [2013] eKLR, Chitembwe J outlined the local jurisprudence on seeking recusal of a judge thus:

> " In Kenya the Court of Appeal in the case of Republic v Mwalulu & 8 Others: [2005] 1 KLR the court did set up the principles on which a judge would disqualify himself from a matter and stated as follows:
>
> 1. When the courts are faced with such proceedings for the disqualification of a judge, it is necessary to consider whether there is a reasonable ground for assuming the possibility of a bias and whether it is likely to produce in the minds of the public at large a reasonable doubt about the fairness of the administration of justice. The test is objective and the facts constituting bias must be specifically alleged and established.
>
> 2. In such cases the Court must carefully scrutinize the affidavits on either side, remembering that when some litigants lose their case they are unable or unwilling to see the correctness of the verdict and are apt to attribute that verdict to a bias in the mind of the Judge, Magistrate or Tribunal.
>
> 3. The Court dealing with the issue of disqualification is not, indeed it cannot, go into the question of whether the officer is or will be actually biased. All the Court can do is to carefully examine the facts which are alleged to show bias and from those facts draw an interference, as any reasonable and fair-minded person would do, that the judge is biased or is likely to be biased.
>
> 4. The single fact that a judge has sat on many cases involving one party cannot be sufficient reason for that judge to disqualify himself. The fact that Tunoi, JA had sat on many cases involving the Goldenberg Affair, without anything more, was absolutely no good reason for him to disqualify himself."

52. The learned Judge in the above case held further that more apprehension of bias cannot be a ground for recusal. That the allegations of bias must be factual and proved. In that context, he stated thus:

> " I do find that there has been no proof of bias. The apprehension by the applicant that he will not get justice in this court is a normal apprehension whereby each party who has a matter in court is apprehensive as to the decision the court would make. The court may find in his or her favour and that uncertainty makes parties to be apprehensive. If a party interprets his apprehension and conclude that the court would be biased then that is taking the wrong dimension unless allegations of bias are proved by facts. The aspect of judging encompasses the unpredictability of the decision. If that aspect is missing then parties will be able to make their own predictions and make conclusion as to how the court is likely to decide a matter."

53. I fully agree with the foregoing reasoning as regards allegations of bias on the part of a judge or magistrate and it is my finding that based on the record before the Court, there is no evidence presented to warrant a finding of bias being made on the part of the presiding magistrate.

54. Taking all the above into consideration, I find that the appellant failed to prove his case before the trial court. His relation with the deceased Samba Bange Ogeng' alias Samba Bange is not verifiable and therefore he had no such right to petition or even grant permission to the respondent to petition on his behalf. On the other hand, the respondent being a sister in low to the deceased, could not petition for grant as the deceased was survived by other blood relatives including her sons who are nephews of the deceased. The idea contained in the chief's letter that she is the only surviving relative is far fetched and supported in law.

55. As I conclude, I must clarify that there were no such persons as objectors, other than the appellant. The persons who swore affidavits in support of his summons for revocation of grant were simply his witnesses not objectors as they were never enjoined to the succession cause as interested parties.

56. On the basis of the above analysis, I make the following orders:

    1. The appeal is allowed only to the extent that the grant of letters of administration intestate issued to the respondent Magdalina Anyango Wabwaya on 14th April, 2022 to administer the estate of Samba Bange Ogeng' alias Samba Bange is hereby revoked and annulled.

    2. Only persons who are related to the deceased Samba Bange by blood and in the degree of consanguinity as stipulated in section 39 of the *Law of Succession Act* or any other person authorized by the court as stipulated in section 66 of the *Law of Succession Act* have the authority to petition for a grant to administer the estate of the deceased and pay off his liabilities if any, from the estate property.

    3. Each party to bear their own costs of this appeal.

57. This file is closed.

Dated, Signed and Delivered at Kisumu this 27th day of May, 2024

R.E. ABURILI

JUDGE