



**In re Estate of JGM (Deceased) (Probate & Administration Appeal E012 of 2022) [2024] KEHC 7740 (KLR) (28 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7740 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MURANG'A  
PROBATE & ADMINISTRATION APPEAL E012 OF 2022  
CW GITHUA, J  
JUNE 28, 2024  
IN THE MATTER OF THE ESTATE OF JGM (DECEASED)**

**BETWEEN**

**LNG ..... APPELLANT**

**AND**

**IN ..... RESPONDENT**

*(Being an appeal against the ruling of Hon. E.M Nyagah (S.P.M) delivered in the Murang'a Chief Magistrate's court Succession Cause No. 182 of 2019 dated 30th August 2022)*

**JUDGMENT**

1. This appeal emanates from the ruling of the trial court in Murang'a Succession cause No. 182 of 2019 in which the lower court re-distributed the deceased's estate and ordered that half of the monies held in three bank accounts at Equity bank and Family bank be inherited by the respondent while the remaining half would be shared by the deceased's other beneficiaries.
2. The brief background to this appeal is that the deceased, JGM died intestate on 21<sup>st</sup> of June 2018. The respondent, Ms. IN who claimed to be his widow proceeded to petition for grant of letters of administration to his Estate which grant was issued to her on 19<sup>th</sup> of August 2019. Interestingly, the grant was confirmed about a month later on 23<sup>rd</sup> of August 2019. The certificate of confirmation of grant shows that the deceased's Estate comprising of three bank accounts held at Equity Bank, Kiriaini branch and Family Bank, Murang'a branch was distributed solely to the respondent.
3. Thereafter, the appellant filed summons for revocation of grant under Section 76 of the *Law of Succession Act* and Rule 44 of the *Probate and Administration Rules* seeking that the confirmed grant be revoked on grounds that the proceedings to obtain the same were defective in substance; that the grant was obtained fraudulently by making of false statements and concealment of material facts.



4. The applicant contended that the respondent was not the deceased's wife and that she was a stranger to the Estate; that when petitioning for the grant and when seeking its confirmation, the respondent failed to disclose that the deceased was survived by the applicant and her five children namely CWG; PMG; DKG; PWG and PWG who were all beneficiaries of the estate but were left out during its distribution.
5. The respondent opposed the summons through a replying affidavit sworn on 21<sup>st</sup> February 2020 in which she deposed that she was the deceased's only wife and that she had no reason to involve the applicant when petitioning for the grant since the applicant was not the deceased's wife; that in fact, the applicant was a stranger to the estate and the deceased was not the father of her children; that therefore, no good reason existed to warrant revocation of the grant.
6. After hearing the summons which was prosecuted by way of oral evidence, the learned trial magistrate delivered the impugned ruling.
7. The appellant was aggrieved by the trial court's decision hence this appeal. In her memorandum of appeal dated 14<sup>th</sup> September 2022, the appellant advanced a total of seven grounds of appeal in which she principally complained that the learned trial magistrate erred in law and fact by failing to uphold the summons despite availability of overwhelming evidence in its support; that the trial court erred by distributing the deceased's property when there was no application for confirmation of grant before it and by distributing half of the estate to the respondent in the absence of evidence that she was the deceased's widow or that she had made any contribution to the funds held therein.
8. On the basis of the above grounds, the appellant implored this court to allow the appeal, set aside the orders made by the trial court and substitute them with an order allowing the summons for revocation of grant dated 17<sup>th</sup> September 2019.
9. The appeal was prosecuted by way of written submissions. The appellant filed her submissions on 8<sup>th</sup> July 2023 while those of the respondent were filed on 31<sup>st</sup> July 2023. The submissions were highlighted before me on 18<sup>th</sup> March 2024 by Ms Kimani instructed by Ms R.M Kimani & Company Advocates for the appellant and learned counsel Ms Wangui Wangai instructed by J.N Mbuthia & Company Advocates for the respondent.
10. This is a first appeal to the High court. As such, it is an appeal on both facts and the law. I am well aware of the duty of the first appellate court which as succinctly stated by the Court of Appeal in *Abok James Odera T/A A J Odera & Associates v John Patrick Machira T/A Machira & Co Advocates* [2013] eKLR is to:

“ to re-evaluate, re –assess and re-analyse the extracts on the record and to determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.....’
11. Having carefully considered the grounds of appeal alongside the evidence on record together with the rival written and oral submissions made on behalf of both parties as well as the authorities cited, I find that only two key issues arise for my determination which are;
  - i. Whether the learned trial magistrate erred by failing to allow the summons for revocation of grant as sought and by re -distributing the deceased's estate.
  - ii. If the answer to issue No 1 is in the affirmative, what orders should be made by this court?.



12. Turning to the first issue, the law governing revocation of grants is set out in 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 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.

13. A reading of the impugned ruling shows that whereas the learned trial magistrate fully appreciated the import of Section 76 of the [Law of Succession Act](#) which he reproduced, he failed to properly interrogate the evidence presented before him to establish whether or not the appellant had proved her claim that the proceedings to obtain the grant were defective in substance and that the grant had been obtained and confirmed fraudulently through the making of false statements as well as concealment of material facts.

Instead, the learned trial magistrate delved straight into a consideration of whether the respondent’s long cohabitation with the deceased amounted to a marriage under the common law principle of presumption of marriage which he found in the affirmative and then proceeded to immediately redistribute the deceased’s estate. He did not make any finding on the application for revocation of grant which is what was pending his determination.

14. The above was a serious misdirection on the trial magistrate’s part and amounted to an error of law. The learned trial magistrate ought to have addressed his mind to the issues raised in the application and made an express finding or determination whether or not the applicant had demonstrated sufficient grounds to warrant revocation of the grant issued to the respondent. Depending on whether he found merit in the summons or not, he ought to have either expressly allowed or dismissed the application.

15. Further, the learned trial magistrate erred when he proceeded to redistribute the deceased’s Estate without having first revoked the confirmed grant. Since the entire estate had already been distributed



vide the confirmed grant which the court did not revoke, nothing was available for a second or further distribution. The learned trial magistrate purported redistribution of the Estate was in my view an exercise in futility.

16. As the trial court failed to determine the application filed by the appellant, it behooves me as the first appellate court to step into its shoes and decide the application on the basis of the evidence on record.
17. As stated earlier, the summons was heard by way of oral evidence. The record shows that the applicant testified in support of her case and called two additional witnesses. The respondent also testified and called one other witness.
18. In her evidence, the appellant maintained that she was the deceased's wife but they separated in 1998 after some disagreement; that before he died, the deceased had given her two acres of land which she sold. She also admitted that PWG was the deceased's daughter; that her mother was one Lydia Wangari not the respondent; that prior to his death, the deceased sold parcels of land and deposited the sale proceeds in a bank account.
19. Her witnesses PW2 and PW3 adopted their witness statements in which they supported the appellant's evidence that she was the deceased's widow and that their union had been blessed with four children.
20. On her part, the respondent testified that although no customary rights were conducted to formalise her marriage to the deceased, she lived with him as husband and wife for 28 years and they held themselves out as such to members of the public; that their union was blessed with one child namely PW and that since she used to attend many social functions together with the deceased, members of the public knew the deceased as her husband.
21. The Respondent also admitted that prior to his death, the deceased told her that he used to be married to the appellant but he had allegedly divorced her. During cross-examination, the respondent testified that she got to know the appellant during the deceased's funeral where she was presented as the deceased's wife but similar recognition was not extended to her. She also admitted that she knew that the deceased had other children and she saw one of them, one Mwangi, during the funeral.
22. Her witnesses, DW2 her Aunt and DW3 her daughter confirmed that the respondent was living with the deceased as man and wife from 1990 till the date of his demise.  
  
DW3 in addition stated that she was not aware of the succession proceedings and she never executed any consent in relation to the succession proceedings.
23. Having independently analysed the evidence on record, I find that the respondent's admission that she was aware that the appellant had been married to the deceased although they had separated at the time of his demise and that she was aware that the deceased had other children is in my view evidence that when petitioning for a grant of administration to the deceased's Estate and when seeking its confirmation, the respondent made false statements and concealed material facts when she indicated that the deceased was survived by only herself and her daughter (DW3). She did not disclose to the court that the deceased was also survived by the appellant and her children.
24. It is also worth noting that although the documents filed in support of the respondent's petition for a grant and summons for confirmation of grant indicated that DW3 participated in the process of obtaining both grants by executing consents at each stage, DW3 in her evidence denied such participation and specifically denied having executed any consent. She disowned the signatures attributed to her in the consents filed in support of the petition for a grant and summons seeking its confirmation. Since this evidence by DW3 was not challenged by the respondent during re-



examination, it remained uncontroverted and leads to an inevitable conclusion that the aforesaid consents were forgeries.

25. For all the above reasons, it is my finding that the process of obtaining both grants by the respondent was defective in substance as it was marred by fraud and concealment of material facts.

In the premises, I find merit in this appeal and it is hereby allowed. Consequently, the grant of letters of administration issued to the respondent on 19<sup>th</sup> August 2019 which was confirmed on 23<sup>rd</sup> August 2019 is hereby revoked. The certificate of confirmation of grant issued on the same date is also annulled. In addition, the orders made by the trial court on 30<sup>th</sup> August 2022 are set aside.

26. Having revoked the grant issued to the respondent, what then happens to administration of the deceased's Estate?

To answer this question, I will invoke my inherent powers under Section 47 of the *Law of Succession Act* and Rule 73 of the Probate and Administration Rules and proceed to determine how the deceased's Estate will be administered and distributed in order to conclusively and expeditiously resolve the dispute between the parties instead of remitting the matter back to the trial court for that purpose.

27. I will start by observing that from the evidence on record, it is not disputed that the appellant used to be the deceased's wife but they had separated at the time of his death.

Under Section 3 of the *Law of Succession Act*, the term wife is defined as follows;

“Wife includes a wife who is separated from her husband and the term “ husband” and “ Spouse”, “widow” and “ widower” shall have a corresponding meaning” .

Given the above definition, I have no doubt in my mind that the appellant was the deceased's wife who became his widow upon his death.

28. With regard to the respondent, there is undisputed evidence that after separating with the appellant, the deceased started cohabiting with her as husband and wife until he passed on. Their period of cohabitation spanned a period of 28 years and they were blessed with one child ( DW3).

29. Given the above evidence, I wholly concur with the learned trial magistrate's finding that this long and open cohabitation between the deceased and the respondent led to the common law presumption of marriage by cohabitation and since this presumption was not rebutted by any evidence to the contrary, I find that the respondent also qualified to be the deceased's second wife and widow. This in effect means that the deceased was in his lifetime a polygamous man and his two wives are entitled to be administrators of his Estate.

30. Consequently, I hereby appoint both the appellant and the respondent as joint administratrix of the deceased's Estate. There is evidence that the Estate comprises of only funds in three bank accounts whose amount has not been disclosed. Although the respondent claimed that she had contributed some monies which were deposited in the bank accounts, she did not substantiate this claim with any evidence. There is undisputed evidence that prior to his death, the deceased sold his parcels of land and deposited the sale proceeds in the three bank accounts.

31. It is noteworthy that the appellant admitted in her evidence that she was given a gift of two acres of land during the deceased's lifetime which she sold. It is not clear whether the gift was given to her as an individual or on behalf of her household. What is clear, however, is that she did not say that she shared proceeds of the sale with her children or the respondent. Section 42 of the *Law of Succession Act* provides that gifts given by a deceased person in his lifetime to a child, grandchild or a house shall be



taken into account during distribution. In the circumstances, I find that it is only just and fair that the appellant be excluded from having any share of the funds subject of distribution in this case.

32. Since as demonstrated above the deceased had two wives each representing a house, his estate should be distributed in the manner provided for in Section 40 of the Law of Succession Act which provides as follows;

40.

- (1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.
- (2) The distribution of the personal and household effects and the residue of the net intestate within each house shall then be in accordance with the rules set out in sections 35 to 38.

33. Taking into account the above provision and the findings made hereinabove, the grant issued herein is confirmed on the following terms;

- i. The funds in each of the three bank accounts namely Account No. 0050xxxxxxx and Account no. 0050xxxxxxx held at Equity Bank, Kiriani Branch and Account No. 006xxxxxxx held at Family Bank, Muranga Branch shall be shared according to the number of children in each house with the respondent being added as an additional unit to her house. The appellant's house shall therefore have a share of five units while the respondent's house shall have a share representing two units. A certificate of confirmation of grant to issue accordingly.

34. On costs, it is trite that costs follow the event and are at the discretion of the court. Since the appeal was necessitated by the errors made by the trial court in handling the appellant's application, each party shall bear its own costs of the appeal but the respondent will bear the appellant's costs in the lower court.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MURANG'A THIS 28<sup>TH</sup> DAY OF JUNE, 2024.**

**C.W. GITHUA**

**JUDGE**

In the presence of:

Miss Kimani for the appellant

Miss Wangui Wangai for the Respondent

Ms Susan Waiganjo – Court Assistant

