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Case Class:	Civil
Court:	High Court at Embu
Case Action:	Judgment
Judge:	Abigail Mshila
Citation:	Kithaka Kithiru & another v Anastasia Njagi Mwinukie [2021] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Embu
Docket Number:	-
History Docket Number:	-
Case Outcome:	Appeal partially allowed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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**IN REPUBLIC OF KENYA**

**THE HIGH COURT OF KENYA**

**AT EMBU**

**CIVIL APPEAL NO. 48 OF 2018**

**KITHAKA KITHIRU**

**DOMINIC NAMU.....APPELLANTS**

**VERSUS**

**ANASTASIA NJAGI MWINUKIE.....RESPONDENT**

**JUDGMENT**

1. This is an Appeal arising from the Ruling of Hon.Jackson O.Omwange (RM) delivered on 7/06/2018 in Siakago Succession Cause No.1 of 2017.

2. The Appellants had filed for revocation or annulment of the Grant in the succession cause and were aggrieved by the findings of the trial court in which it ruled that the distribution of the estate of Kiura Mutara as ordered in the certificate of the confirmed Grant was fair and reasonable;

3. The appellants being aggrieved by the decision instituted this Appeal and listed ten (10) grounds of appeal as summarized hereunder;

(i) The trial court erred in holding that the Appellant's application for Revocation of Grant did not satisfy the requirements for revocation of the confirmed Grant;

(ii) The trial court erred in failing to consider that the appellants and other beneficiaries of the Estate of Ngungi Mwinukie were entitled to their deceased fathers share out of the entire estate of late Kiura Mutara;

(iii) The trial court erred in holding that that the distribution of the estate of Kiura Mutara as ordered in the certificate of the confirmed Grant was fair and reasonable;

(iv) The trial court erred when it held that half share of land parcel **No. NTHAWA/RIANDU/308** be held in favour of the estate of Ngungi Mwinuke; and at the same time made an order for the further amendment of the confirmed Grant; and dismissing the Appellants Application despite the same being unopposed by the administrator/respondent;and holding that the entire Application was because the Appellants were dissatisfied with distribution of the estate;

(v) The trial court erred in directing that the parties proceed by way of written submissions despite earlier directing that they proceed by way of '*viva voce*' evidence;

(vi) The trial courts' decision was against the weight of the evidence presented to the trial court and erred in holding that the entire application by the appellants was a result of being dissatisfied with the distribution of the half share of the parcel of land. The decision was as against the weight of the evidence presented. The trial court proceeded with the matter that had proceeded before another magistrate without complying with the mandatory legal provisions for transfer of cases between magistrates;

(vii) The Appellants prayed that the appeal be allowed and the trial courts' decision be set aside.

4. The parties were directed to canvass the appeal by filing and exchanging written submissions; hereunder is a summary of the respective rival submissions;

#### **APPELLANTS' CASE**

5. The appellants submitted that they had filed an application for Revocation of the Grant as the Grant of Letters of Administration had the effect of administering two estates in the same cause and the Respondent had failed to disclose that the suit land was owned by two deceased persons in half shares and such failure to disclose this fact was clearly concealment of material facts. Therefore the application for Revocation of the Grant was merited and it was also unopposed yet it was dismissed by the lower court;

6. The beneficiaries of the estate of Ngunge Mwinukie ought to have filed a separate cause in respect of their fathers' estate; the trial court ought to have allowed the beneficiaries who include the appellants to file a separate cause in respect of their fathers estate;

7. The distribution of Kiura Mutara's estate was not fair or reasonable as the trial court failed to find that the Appellants were entitled to a share in Kiura Mutara's estate; the lower court ought to have indicated that their Respective mothers held their fathers share in trust for them as beneficiaries of Ngunge Mwinukie;

8. The trial court correctly found that it could not distribute the estate of Ngungi Mwinukie but turned around to hold that the half portion of Land Parcel No.Nthawa/Riandu/308 be held in favour of the estate of Ngungi Mwinukie. The court erred in failing to state who was to hold this share on behalf of the beneficiaries;

9. The trial court dismissed the appellants' application for revocation and at the same time ordered the amendment of the Grant;

10. In conclusion the Appellants humbly urged the court to allow the appeal with costs.

#### **RESPONDENT'S RESPONSE**

11. In response the Respondent submitted that she was not opposed to the Appeal in its entirety being allowed as it was in the best interest of justice as the trial court's decision had done more harm than good to the deceased's estate;

#### **ISSUES FOR DETERMINATION**

12. Upon reading the written submissions these are the issues this court has framed for determination;

- (i) Whether the application for the Revocation of the Grant was merited:-
- (ii) Whether the Amended Certificate of Confirmation was in order;
- (iii) Whether the widows of the late Ngungi Mwinukie should hold the property in trust for the other beneficiaries of the estate;
- (iv) Whether this court should interfere with the trial courts mode of distribution.

#### **ANALYSIS**

13. In considering the appeal, this court is guided by the Court of Appeal in the case of **Selle & Another vs Associated Motor Boat Co. Ltd & Another (1968) EA 123**; it held that "the duty of an appellate Court is to evaluate and re-examine the evidence on record in order to reach an independent conclusion; in addition, the Court will as an appellate court, not normally interfere with a lower court's judgment on a finding of fact unless the same is founded on wrong principles of fact and or law."

**Whether the application for the Revocation of the Grant was merited:**

14. In addressing this issue this court has perused the court record at length and notes that the Applicants are the children of Ngungi Mwinukie (deceased) and the grandchildren of the Kiura Mutara (deceased). The parcel of land Nthawa /Riandu/308 was co-owned by their father and their grandfather and that Letters of Administration were filed by the Respondent and Ngungi Mwinukie who were both appointed as administrators to the estate of Kiura Mutara. The Grant of letters of administration was confirmed on the 10/02/2004. On the 30/09/2009 one of the administrators passed on leaving the Respondent as the sole surviving administrator. That vide an application dated 12/03/2013 the Respondent herein sought orders that the estate be managed by herself as the sole administrator which order was duly granted; thereafter the trial court ordered that the share belonging to Ngungi Mwinukie (deceased) be transferred and be held by his widows being Necera Ndagara and Serena Mbaka respectively; The surviving administrator proceeded to distribute the shares of the deceased son to his two widows and a further portion was also distributed to the estate of Ngungi Mwinukie;

15. The appellants contend that the Grant issued was defective as it included the separate estate of Ngungi Muinukie and as this fact was not disclosed there was concealment of material facts when the cause was filed and thus sought a revocation or annulment of the Grant.

16. It is not disputed that the property in issue being Nthawa/Riandu/308 was jointly owned by the late Kiura Mutara (deceased) and his son Ngungi Muinukie (deceased). The record also reflects that the Respondent and Ngungi Muinukie before his demise were the joint administrators of the estate of Kiura Mutara with the consents and blessings of all the beneficiaries;

17. It is also noted that the properties were distributed before the demise of Ngungi Muinukie and his half share in Nthawa/Riandu/308 was duly distributed to him and that he also benefited from a share in Nthawa/Siakago/1244;

18. As was rightly noted by the trial court that there was no dispute regarding the distribution of the estate of Kiura Mutara; also as rightly pointed out by the trial court the appellants ***'seek the revocation of the grant on the basis that they are disgruntled or dissatisfied with the mode of distribution of the estate of Ngungi Muinukie to his widows'***;

19. The trial court went on to distinguish between revocation by procedure and revocation due to mal-administration as provided under Section 76 of the Law of Succession Act and arrived at its finding that the revocation fell within the latter category;

20. Indeed, in this instance, upon the demise of the co-administrator the Grant became useless and inoperative and thus fell into the second category of revocation due to mal- administration; This then means that upon the death of a co-administrator the surviving administrator cannot act on a Grant that still bore the name of the dead administrator and as expected the Grant had to be revoked and a fresh one issued and in this instance it was issued to the sole surviving co-administrator being the Respondent herein;

21. From the proceedings in the court record this court is satisfied that the succession proceedings done during the lifetime of Ngungi Mwinukie were not defective in form or in substance; upon his demise the Grant issued to the respondent was also not defective in form and substance; and this court finds no good reason to interfere with the trial courts finding ***'that the present application does not satisfy the requirements for the revocation of the Confirmed Grant'***;

22. This ground of appeal has no merit and is hereby disallowed.

**Whether the Amended Certificate of Confirmation was in order; whether the widows of the late Ngungi Mwinuke should hold the property in trust for the other beneficiaries of the estate; whether this court should interfere with the trial courts mode of distribution.**

23. The initial Certificate of Confirmation is dated 10/02/2004 and bears the names of the respondent and Ngungi Mwinukie as the joint administrators. Upon the demise of the co-administrator and upon an application the court was moved to allow the respondent to act as a sole administrator and the application was granted and the Certificate of Confirmation was then amended to bear the sole name of the Respondent. In the circumstances the amended Certificate of Confirmation bearing the respondents sole name is found to be in order and there is no good reason found by this court that warrants it to interfere with the trial courts finding ***'that the application does not meet the requirements for revocation of the confirmed grant.'***

24. The Certificate of Confirmation also sets out the mode of distribution for the estate of Kiura Mutara and the distributed portions are set down therein for all the properties; there is no dispute as to the portions of the deceased estate that had been distributed and

devolved to Ngungi Mwinuke. Problems arose after the demise of Ngungi Muinukie and as rightly noted by the trial court the Appellants have an issue with their two respective mothers being given their deceased fathers share and their application hinges on their dissatisfaction in that there ***'was no indication that the two widows were to hold the properties in trust for the beneficiaries.'***

25. Ideally the distribution ought to have awaited the taking out of a Grant Letters of Administration over Ngungi's estate. The situation that obtains here is that it was wrong for the trial court to have distributed the estate to the widows without an Administrator being first appointed;

26. The contentious issue, therefore is, the procedure adopted by the trial court in vesting Ngungi Muinukies portion parcel No.Nthawa/Riandu/308 in his widows in equal shares and in purporting to have applied the mode of distribution as provided in Section 40 of the Act proceeded to amend the Certificate of Confirmation and replaced Ngungi Muinukie's name with his two widows and the court record reads;

***'The deceased had two houses. The two wives of the deceased and all their children are therefore entitled to a share of his net intestate equally as set out in Section 40.....'***

27. It is this courts considered opinion that the correct position adopted by the trial court is the one made in its ruling when analyzing the distribution of Land Parcel No.Nthawa/Riandu/5314 was; it reads as follows;

***'The court cannot distribute land parcel No.Nthawa/Riandu/5314 which comprises the intestate estate. His widow and the sons can independently file for a petition for a grant of letters of administration in favour of the estate of the late Ngungi Mwinukie. Therefore this court under the powers stipulated under Section 48 of the Law of Succession Act deems it fair and just to order for the review of the amended grant issued on 17/02/2015 in respect of the half share of parcel of land no.Nthawa/Riandu/308 to be held in favour of the estate of Ngungi Muinukie instead of his widows Serena Mbaka Ngungi and Necera Ndagara Ngungi.'***

28. This court finds that the trial court ought to have adopted this position for all the properties as the widows are indeed not the administrators of the estate of Ngungi Muinukie. To date no attempts have been made by any of his widows and or beneficiaries to petition for limited or full letters of administration for this estate; it then follows that his estate has no administrator to distribute of the same;

29. For those reasons this court finds good reason to warrant interfering with the trial courts finding on the amendment and mode of distribution of the Certificate of Confirmation to the two (2) widows. This courthereby directs that the Certificate of Confirmation be rectified to read that ***'the two widows hold the properties in trust for all the beneficiaries of the deceased Ngungi Muinukie'***;

30. The widows are also directed to petition for a Grant of Letters of Administration within 45 days from the date hereof, in default the portions of the estate of Ngungi Mwiunkie vested in the two widows do revert back to the estate of Kiura Mutara pending the appointment of an administrator to the estate of Ngungi Mwiunkie;

31. This ground of appeal is found to be partially meritorious and it is hereby allowed.

## **FINDINGS & DETERMINATION**

32. From the foregoing reasons this court makes the following findings and determinations;

(i) The appeal is found to be partially meritorious.

(ii) There are good reasons found to interfere with the trial court's ruling on the amendment of the mode of distribution; the portion of the Ruling is hereby set aside and substituted with an amendment to the Certificate of Confirmation be rectified to read that ***'the two widows hold the properties in trust for all the beneficiaries of the deceased Ngungi Muinukie'***;

(iii) The widows are hereby directed to petition for a Grant of Letters of Administration within 45 days from the date hereof; in default the portions of the estate of Ngungi Mwiunkie vested in the two widows do revert back to the estate of Kiura Mutara pending the appointment of an administrator to the estate of Ngungi Mwiunkie;

(iv) The Grant be confirmed accordingly;

(v) Each party shall bear their own costs of the appeal.

Orders Accordingly.

**Dated, Signed and Delivered Electronically at Nyeri this 13<sup>TH</sup> day of September 2021.**

**HON.A.MSHILA**

**JUDGE**



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