



Matei Julius Mulili Ndeti & Nzioki Mulili Ndeti (Administrators of the Estate of Harrison Mulili Ndeti) & 4 others v Ndeti & another (Civil Appeal 64 of 2019) [2022] KECA 150 (KLR) (18 February 2022) (Judgment)

Neutral citation: [2022] KECA 150 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 64 OF 2019
K M'INOTI, F SICHALE & J MOHAMMED, JJA
FEBRUARY 18, 2022**

BETWEEN

**MATEI JULIUS MULILI NDETI & NZIOKI MULILI NDETI
(ADMINISTRATORS OF THE ESTATE OF HARRISON MULILI
NDETI) 1ST APPELLANT**

**SYOKWIA KIILU NDETI & VINCENT SOMBA NDETI (ADMINISTRATORS
OF THE ESTATE OF THE LATE JULIUS KIILU NDETI
(DECEASED) 2ND APPELLANT**

**GREGORY MUTHEKE NDETI (ADMINISTRATOR OF THE ESTATE OF THE
LATE MUTHEKE MUTUA NDETI (DECEASED) 3RD APPELLANT**

**URBANUS KIOKO NDETI & BONIFACE NTHIWA NDETI
(ADMINISTRATORS OF THE ESTATE OF THE LATE ALPHONSE NTHIWA
NDETI (DECEASED) 4TH APPELLANT**

**ALEX KIILU NDETI & ESTHER NGONDU NDETI WAQO
(ADMINISTRATORS OF THE ESTATE OF THE LATE PATRICK MUTHEKI
NDETI (DECEASED) 5TH APPELLANT**

AND

CECILIA SITUMAI NDETI 1ST RESPONDENT

MICHAEL KYENDE NDETI 2ND RESPONDENT

*(Being an appeal from the ruling of the High Court of Kenya at
Nairobi (Musyoka, J.) dated 14th July 2018 and delivered by Muigai
J. on 21st June 2018 in High Court Succession No 1578 of 2012)*



JUDGMENT

Background

1. This appeal has a long and chequered history pitting family members against each other over a period spanning over 40 years. Litigation has traversed between the High Court, the Environment and Land Court (ELC) and this Court.
2. A brief background is that Prof. Kivuto Ndeti, (the deceased) died intestate on 31st March, 2012. In a petition lodged on 15th October, 2012, representation was sought by Cecilia Situmai Ndeti and Michael Kyende Ndeti (the 1st & 2nd respondents) in their capacities as widow and son of the deceased respectively. In the Petition the deceased was indicated to have been survived by the widow and four (4) children, namely, Caroline Mwelu Ndeti, Michael Kyende Ndeti, Mkwama Kivuto Ndeti and Raphael Kyalo Ndeti. The deceased was said to have died possessed of the following assets: LR Nos. 209/7311, 7741/82, 37/175, 7149/9, 337/991, 133323/1, 337/849 and 337/923; Katelembo Plots Nos. 1685, 3001 and 3800, parcels of land at Lukenya being Mavoko Town Block 3/107, 1063, 1387, 2397, 2401 and 2446; money in accounts at Standard Chartered Bank Limited; and shares in Standard Chartered Bank Limited and Kenya Re-Insurance Corporation Limited. The deceased was said to have died without any liabilities.
3. An application for letters of administration intestate was made by the respondents on 24th January, 2013 and a grant was duly issued. The said grant (the Grant) was confirmed on 30th October, 2013 and a certificate of confirmation issued to the administrators. The estate was shared out between the widow (the 1st respondent) and her four (4) children. The certificate of confirmation of grant was subsequently rectified severally upon application by the administrators on diverse dates.
4. In an application dated 11th July, 2016 filed at the High Court, Matei Julius Mulili Ndeti & Nzioki Mulili Ndeti (Administrators of the Estate of Harrison Mulili Ndeti), Syokwia Kiilu Ndeti & Vincent Somba Ndeti (Administrators of the Estate of the Late Julius Kiilu Ndeti (Deceased), Gregory Mutheke Ndeti (Administrator of the Estate of the Late Mutheke Mutua Ndeti (Deceased), Urbanus Kioko Ndeti & Boniface Nthiwa Ndeti (Administrators of the Estate of the Late Alphonse Nthiwa Ndeti (Deceased), Alex Kiilu Ndeti & Esther Ngondu Ndeti Waqo (Administrators of the Estate of the Late Patrick Mutheki Ndeti (Deceased), the 1st, 2nd, 3rd, 4th & 5th appellants herein sought the nullification of the confirmed grant. The affidavit in support of the application was sworn by Harrison Mulili Ndeti (now deceased), a brother of the deceased and administrator of the respective estates of the deceased brothers of the deceased. The ground upon which the application for nullification of the confirmed grant was sought was that some of the properties presented by the respondents for distribution as forming the estate of the deceased did not belong to the deceased but belonged to the Ndeti family which comprised the deceased and all his brothers (the appellants herein); that the said properties are: LR. No. 209/7311, L.R No. 7741/82, L.R No. 37/175, L.R. No. 7149/9, L.R. No. 337/991, L.R No. 13323/1, L.R No. 337/847, L.R No. 337/923, Plot No. 1685, Plot No. 3001, Plot No. 3800, MAVOKO TOWN BLOCK 3/107, MAVOKO TOWN BLOCK 3/2401, MAVOKO TOWN BLOCK 3/1063 MAVOKO TOWN BLOCK 3/2446, MAVOKO TOWN BLOCK 3/2397, MAVOKO TOWN BLOCK 3/1387; that the deceased held the assets in trust for members of the Ndeti family; that the Ndeti family operated businesses in a partnership comprising the brothers known as P. N. Ndeti & Bros; that the suit properties were acquired through the partnership; that suits arose between the deceased and some of his brothers over some of the suit properties; that a suit was filed by third parties, ELC No. 1116 of 2015, seeking that the suit properties belonging to the



partnership be shared out amongst the partners (including the deceased); that the administrators of the estate of the deceased sought to distribute the suit properties as part of the estate of the deceased yet the suit properties were acquired through the partnership.

5. The appellants further contended that by listing the suit properties as the free property of the deceased, the administrators ignored the outcome of court decisions which expressly found that the suit properties listed in the confirmed grant belonged to the Ndeti family.
6. The respondents opposed the application and denied the assertions made by the appellants, and claimed that none of the suit properties belonged to the Ndeti family since the brothers, including the deceased, had carried out business in their individual capacities, and had accumulated property in their individual capacities. The respondents further denied that any of the suit properties had been subject of any litigation, and denied knowledge of any decision finding that the suit properties listed in the confirmed grant belonged to the Ndeti family, and that the partnership had been de-registered by the Registrar of Companies and its assets distributed by its shareholders. In the result, the respondents contended that all property listed in the grant belonged wholly to the deceased, and urged the court to dismiss the application.
7. In rendering the ruling, the trial court (Musyoka, J.) considered the issues raised by the parties and held as follows:

“ 8. As it is there is no proper case before me for revocation of the grant herein for the reasons advanced by the applicants. It is not alleged, nor demonstrated, that the process of obtaining the grant was attended by the problems envisaged under section 76(a) (b) and (c), or the administrators failed to do the things expected of them as set out in Section 76(d), or that the grant had become useless and inoperative as contemplated by 76(e).

9. The proper remedy for a person who is unhappy with the confirmation process or with the orders granted is to challenge the same on appeal or on review. Indeed, such a person ought to take advantage of the provisions of rule 40 of the Probate and Administration Rules, and raise protests to the proposed confirmation, which would then allow them to be heard as per the provisions of rule 41 of the said Rules. There was occasion for applicants to follow that process, it has not been demonstrated that they were unaware of the same. The material that they have placed before me ideally ought to have been placed before the court at confirmation of the grant.

10. For the reasons given above, I do not find basis upon which I should revoke the grant made herein. I shall accordingly dismiss the application dated 11th July 2016 with costs to the administrators.”

8. Aggrieved by that decision, the appellants filed the instant appeal. In their memorandum of appeal, the appellants set out seven (7) grounds of appeal. These grounds challenge the decision of the trial court contending inter alia: that the learned trial Judge erred in the manner in which he analyzed the evidence before him; that the ruling of the trial court had the effect of setting aside a judgment of this Court in Civil Appeal No. 56 of 2013 holding that L.R. 7149/9 registered as L.R 1872/2 did not belong to the deceased though registered in his name but belong to the Ndeti family; that the trial court failed to consider that the interested parties (the appellants herein) were unaware of the existence of ELC Cause No. 1116 of 2015 which sought for an order that the suit properties of the partnership be shared out among the partners in the partnership including the deceased.
9. The appellants made an application to this Court, seeking inter alia: that they be granted leave to file a supplementary record of appeal to incorporate documents left out in the appeal and to amend the



memorandum of appeal to include the question of the jurisdiction of the trial court when there is a dispute as to ownership of property. That application was allowed, and by an order of this Court dated 20th January, 2020, the appellants were granted leave to file a supplementary record of appeal together with an amended memorandum of appeal. We shall proceed on the grounds set out in the amended memorandum of appeal, grounds which we have set out in summary above.

Submissions by counsel

10. Mr. Muindi, learned counsel for the appellants filed written submissions which he orally highlighted before us. Mr. Muindi submitted that the appellants claimed an interest not as beneficiaries, but as owners of the suit properties listed in the confirmed grant. On this basis, counsel faulted the trial court for finding that the question of ownership could not be determined in the context of an application for revocation of the grant.
11. Mr. Muindi further submitted that the trial court erred in finding that the appellants had not laid a basis for revocation of the grant as the appellants had properly demonstrated that the respondents had concealed material facts prior to confirmation of the grant. Counsel submitted that one property described as L.R No. 7149/9 registered as L.R. No. 1872/2 had been the subject of litigation in H.C.C.C. No. 430 of 1981. Mr. Muindi submitted that in Civil Appeal No. 56 of 2013, this Court upheld the decision of the High Court which was to the effect that L.R. No. 7149/9 listed in the confirmed grant did not belong to the deceased.
12. It was counsel's further submission that the correct forum to determine a dispute with respect to title in land is the Environment and Land Court (ELC), and that this process was already taking place in ELC No. 1116 of 2015 where the court has been called upon to determine the question of ownership in respect of several properties, including the suit properties in the confirmed grant. In counsel's view, this Court should allow the instant appeal and set aside the confirmed grant to pave way for the hearing and determination of ELC No. 1116 of 2015.
13. Counsel further submitted that the confirmed grant had been obtained by the respondents fraudulently as they had made false statements and concealed material facts from the succession court; that there was no disclosure by the respondents to the court of the joint ownership of the suit properties; that the grant was obtained ex-parte and without the knowledge of the appellants including the 5th appellant who had entered appearance pursuant to Rule 60 of the Probate & Administration Rules under the Law of Succession Act; that the respondents were aware of the challenge to the issuance of the grant as they were parties to litigation challenging the said grant being HCCC 430 of 1981 and Civil Appeal No. 56 of 2013; that this Court upheld the High Court decision in HCCC 430 of 1981 that LR 7149 registered as LR 1872/2 did not belong to the deceased; and that the respondents knowingly withheld or concealed this information from the succession court and proceeded to apply for the impugned grant to be confirmed. Counsel was emphatic that there were sufficient grounds to warrant revocation of the grant and urged us to allow the appeal with costs.
14. Mr. Gitonga Murugara, learned counsel for the respondents relied on his written submissions which he briefly highlighted before us.
15. Counsel referred to Section 76 of the Law of Succession Act which grants courts power to revoke or annul grants. He submitted that this was not a proper case for the invocation of Section 76 of the Law of Succession Act as the impugned grant was confirmed many years ago, and the respondents had already proceeded to distribute the suit properties listed in the impugned confirmed grant.
16. With respect to the HCCC No 430 of 1981, counsel submitted that in terms of the order of the High Court, P. N. Ndeti and Bros Limited was dissolved and its assets distributed.



17. Counsel further submitted that this Court should not consider the grounds of appeal raised in the amended memorandum of appeal because consideration of those grounds will require the presentation of new evidence while leave to adduce that evidence before this Court was not sought or granted. Counsel urged us to uphold the decision of the High Court and dismiss the appeal with costs.

Determination

18. We have considered the record of appeal, the submissions by learned counsel, the authorities cited and the law. This being a first appeal, the duty of this court is as stated in the case of *Abok James Odera t/a. J. Odera & Associates vs. John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR*, where it was held in part that:

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

19. The main issue for determination in this appeal is whether the assets distributed as the estate of the deceased belonged to the deceased and were therefore available for distribution to his dependants; and whether the learned Judge erred in declining to revoke the grant issued to the respondents herein.
20. Section 76 of the Law of Succession Act provides for the instances in which the High Court can revoke a grant of representation of a deceased person’s estate. That section provides in part 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” [Emphasis supplied].

21. In *Matheka & Another vs. Matheka [2005] 2KLR 455* this Court construed Section 76 of the Law of Succession Act and laid down the following guiding principles:-

- i. A grant may be revoked either by the application by an interested party, or by the court on its own motion.
- ii. Even when revocation is by the court upon its own motion, there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by the making of a false statement or by concealment of something material to the case or that the grant was obtained by means of untrue allegation of facts essential in point of law or that the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the estate.” [Emphasis supplied].

22. In the instant appeal, the appellants’ claim is that the suit properties were held in trust for them by the deceased and they were therefore joint owners of those properties and not beneficiaries of the



deceased. It is their contention that they should have been involved in the succession process leading to the confirmation of the grant.

23. The appellants have a duty to prove any of the grounds set out in Section 76 of the Law of Succession Act before the grant issued is revoked. In the persuasive decision of the High Court, Mwita, J. in *Albert Imbuga Kisigwa vs. Recho Kawai Kisigwa, Succession Cause No. 158 of 2000* stated as follows:-

“ [13] Power to revoke a grant is a discretionary power that must be exercised judiciously and on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrongdoing for the court to invoke Section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased’s estate and ensure that the action taken will be for the interest of justice.”

24. Further, Rule 26 of *Probate and Administration Rules* states that letters of administration shall not be granted to any applicant without notice to every person entitled in the same degree as or in priority to the applicant. In *Re Estate of Wabome Mwenje Ngonoro (2016) eKLR* it was held: -

“ It is trite law that if a grant was obtained fraudulently by making of a false statement or by the concealment from the court of something material to the case; or that the grant was obtained by means of untrue allegation of fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently, such a grant can be revoked or annulled. The law permits the court to revoke a grant on its own motion or on application by an interested person.”

The evidently deliberate failure by the Respondent to involve the Applicants at the time of filing these proceedings, failing to list them among the beneficiaries or seek their consent or renunciation was in my view in bad faith and amounts to concealment of material facts. My conclusion is that the proceedings leading to the issuance of the grant are defective in substance and that material information was not disclosed to the court in that had the court been made aware that there were other beneficiaries who were interested in the Deceased's estate, the court would have hesitated to issue the grant.”

25. Statute law is clear that concealment of material facts from the court is a ground for the revocation of a grant which had been issued to a party in a succession matter. In the case of *Jamleck Maina Njoroge vs. Mary Wanjiru Mwangi [2015] eKLR*, in revoking a grant the High Court (Achode, J.) reiterated the grounds upon which a grant can be revoked and stated as follows:

“ The circumstances that can lead to the revocation of grant have been set out in Section 76 Law of Succession Act. For a grant to be revoked either on the application of an interested party or on the Court’s own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.”

26. In the circumstances of this appeal and for the reasons advanced above, we find that there was justifiable cause for the grant of letters of administration issued to the respondents and confirmed on 30th October, 2013 to be revoked. In the circumstances, the learned Judge therefore erred in declining to revoke the said grant.



27. In view of the fact that the gist of the appellants' case relates to ownership of the suit properties, we find that the right forum for this dispute is the ELC. The ELC is seized with the requisite jurisdiction to determine all the issues raised by the appellants herein as pertains to ownership of the suit properties and there is already a suit pending before that court on the issue. Once the ELC renders itself on the question of ownership, the High Court can be moved if there is any outstanding or unresolved question of succession.
28. Accordingly, this appeal has merit and is allowed in the following terms:-
- a) The ruling by Musyoka, J. dated 14th June, 2018 and delivered by Muigai, J. on 21st June, 2018 is hereby set aside.
 - b) The confirmed grant issued on 30th October, 2013 is hereby revoked.
 - c) Distribution of the contested properties is prohibited until the pending ELC Cause No. 1116 of 2015 is determined.
 - d) As the dispute involves family members, each party to bear their own costs in this Court and in the High Court.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF FEBRUARY, 2022

K. M'INOTI

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

