



REPUBLIC OF KENYA



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**Isiaho v Museve (Family Appeal 9 of 2021)
[2023] KEHC 26796 (KLR) (19 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 26796 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
FAMILY APPEAL 9 OF 2021
SC CHIRCHIR, J
DECEMBER 19, 2023**

BETWEEN

FIBRONA ISIAHO APPELLANT

AND

RICHARD MUSEVE RESPONDENT

*(Appeal from the ruling of the Hon. ERICK MALESI PM in Kakamega
MC Succession cause no 8 of 2016 delivered on 29th June 2021)*

JUDGMENT

1. This appeal is against the Ruling of the magistrate's court at kakamega in Kakamega MC Succession cause no 8 of 2016 delivered on 29th June 2021 wherein the trial court dismissed summons for revocation of grant, brought by the Appellant herein.

Background

2. On 27th January 2017, the public Trustee was granted letters of Administration intestate in respect of the Estate of Teresa Mukunda . The Grant was confirmed on 30th January 2019 and a portion of land parcel No. Idakho/ Shiseso/903 measuring 0.38 ha (suit property) devolved upon the Respondent herein.
3. On 14th February 2019 the Appellant herein filed for revocation of grant on grounds that the beneficiaries of the estate were left out and that the respondent herein ought not to have benefitted from the estate ,as he was not a heir of the deceased.
4. The Trial court heard the Application by way of viva voce evidence and dismissed the Application.



The Appeal

5. The Appellant was aggrieved by the outcome and proffered this Appeal.

Grounds of Appeal

- a). That the learned trial magistrate erred in law and in fact in holding that the administration and the distribution of the estate herein was completed without any irregularity
- b). That the learned magistrate erred in law and in fact in holding that the respondent who alleges to have purchased a portion of the estate from one of the sons of the deceased herein was a bona fide purchaser hence beneficiary contrary to the provisions of the *law of succession Act* and the evidence on record
- c). That the learned trial magistrate erred in law and in fact in failing to find that the respondent was not a beneficiary of the estate herein.
- d). That the learned trial magistrate erred in law and in fact in finding that it was the beneficiary who ought to have approached the land court in respect of the distribution of the estate herein.
- e). That the learned trial magistrate erred in law and in failing to find that the public trustee was only enjoined to ensure that the estate herein is administered in accordance with the law of succession and that the citation cause instituted by the respondent did not confer any rights to the respondent over the estate.
- f). That the learned trial magistrate erred in law and in fact in failing to find that it was only the estate of one of the joint owners that was administered and distributed.
- g). That the decision not to revoke and/or annul the grant and confirmation made in favour of the respondent not only contravenes but also circumvents the *land control Act*.
- h). That the learned trial magistrate erred in law and in fact in failing to find that the sale of land agreement entered into between the respondent before the administration of the estate herein was illegal hence null and void under the *law of succession act*.

6. The Appeal proceeded by way of written submissions.

Appellant's submissions

7. The Appellant traces the genesis of the current dispute to the Ruling of Justice Mrima made on 23.3.2015 which appointed the Public Trustee as an Administrator of the deceased's Estate.
8. The appellant faults the mode of distribution by the public trustee claiming that the beneficiaries were absent during the distribution; that the whole of the suit property was distributed, yet the land was jointly owned by the deceased and one Galara Muleli; that in effect the Estate of Galara Muleli was distributed without any succession proceedings.
9. The Appellant further faulted the public trustee for including the Respondent as a liability to the Estate. The Appellant contends that having not purchased any property from the deceased the Respondent was simply intermeddling with the deceased's property. In this regard the Appellant has relied on section 45(1) of the *law of succession Act* and the decision in the case of Virginia Mware Thurania vs. Purity Nkirote Thurania (2017) eKLR and Re-estate Paul M'Maria (2017) eKLR to buttress her submissions.



10. The Appellant further submits that there was no Application filed in the prescribed form to facilitate the confirmation of the Grant, contrary to the provisions of Rules 40 and 41 of the probate and Administration Rules.

Respondent's submissions.

11. It is the Respondent's submission that, the Appellant is not a beneficiary of the Estate of the deceased; that she has not demonstrated any prejudice she has suffered upon the respondent being given his 0.38 ha share of the land and that the said allocation does not result in disinheriting of the deceased's heirs in any way.
12. The Respondent further submits that the Appellant has never sought to revoke the grant issued to the public Trustee; that indeed the public Trustee was never made a respondent in the Application to revoke the Grant, yet the alleged misdeeds were undertaken by the public Trustee.
13. It is the Respondent's further submissions that the certificate of official search shows that the deceased and Galara Muleli each owned a half share of the suit property and there is no evidence that has been brought forward showing that the Respondent inherited his share from Galara's share of the land.
14. The respondent urges the court to uphold the findings of the trial court.

Evidence in brief

15. Pw1, was the Appellant herein. She adopted her Affidavit sworn on 14/2/2019 as her Evidence – in-chief. In the said Affidavit, she stated that the deceased was her mother-in-law; that her father-in-law had two wives, being the deceased herein and Calara Muleli; that the suit property was jointly registered in the name of the deceased and the said Calara Muleli; that her husband was peter Isiaho (now deceased) who was the son of Calara.
16. She further testified that Christopher Mateka from whom the Respondent purchased a portion of land from, was the son of the deceased and the said Christopher passed on leaving no children.; that she never knew about the succession cause and only came to know about it after the confirmation of the Grant had been done.
17. On cross Examination, she stated that she could not remember when the respondent entered the land. she admitted that the land had been sub- divided into two portions and that she occupies the portion belonging to Calara.
18. On re- examination she stated that the respondent does not occupy the land in question.
19. Pw2 was one Felix Khashindu. He adopted his statement dated 4/2/2021 as his evidence – in – chief. He stated that he was the son of John Inzeku, the son of protus Butichi , the son of the deceased. In other words, the deceased was his great grand- mother. He further stated that he was aware that the suit property was owned jointly by the deceased and one Kalara Muleli and finally that the Respondent is not an heir to the Estate and therefore has no right of inheritance.
20. On cross examination, he stated that Christopher was a grandfather to him as he was his grandfather's brother; that Christopher had no children of his own.; he did not know if Christopher had sold land to the respondent and he is not aware if the respondent is using his portion. Further on, he stated that the disputed portion is not being utilised.
21. On re- examination, he stated that the respondent is not in occupation of the land; that Kalara and the deceased had different husbands.



22. DW1, was the Respondent. For his evidence in chief he adopted his affidavit sworn on 14.3.2019. In the said Affidavit he stated that he purchased his portion from the estate of the deceased through her now deceased son, one Christopher Matekwa. He denied that the succession proceedings were not done in secret. He denied that he was in meddling on Kalara's property as he was not occupying her portion; that there is a clear demarcation of the two portions on the ground. That he cited PW2 in this cause but he failed to show up. He refuted the allegation that the deceased and Kalara shared a husband and stated that the deceased's husband was one khashindi while kalara's was inzeki; that the two men were brothers. He further stated that he was using his portion of land until 2014 when the Appellant herein started causing problems
23. On cross examination, he told the court that he purchased the land from Christopher in the year 2005 and that Christopher died around the year 2020. He admitted that he never conducted the search of the property and only came to know later that the land was registered in the name of the deceased; that he never obtained a consent from the land control Board and that he was aware that the suit property was jointly owned by the deceased and Kalara. He further testified that he knew the Appellant as belonging to the family of kalara; that he involved family members during the purchase, including the Appellant ; that the purchase documents are authentic and the transaction was legal
24. DW2 adopted his statement dated 21/1/2021 as his evidence in chief. On cross examination, stated that the respondent bought the portion of land 903 from Teresa's son and that he was the secretary of the agreements and that the agreement dated 15/6/2004.

Determination

25. I have considered the memorandum of Appeal, the lower court record and the parties submissions. In my view the following issues lend themselves for determination:
 - (i). Whether the Grant should be revoked
 - (ii). What appropriate orders should this court make.
26. In a nutshell, the Appellant's case is that the beneficiaries were left out of the succession proceedings ; that the Respondent was not a beneficiary to the Estate; that the suit property was distributed as though it solely belonged to the deceased , and finally that in effect the portion of land belonging to one Kalara/ Galara / Calara was distributed as tough without any succession proceedings having been done
27. The grounds upon which a Grant may be revoked are set out under section 76 of the [law of succession Act](#). The section 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.

28. It is now trite law that failure to disclose beneficiaries of a deceased Estate constitutes concealment of material facts. In the case of Wahome Mwenje Ngonoro(Deceased) (2016)e KLR the court held : “ It is trite Law that if a grant was obtained fraudulently by making of a false statement or by concealment from the court something material to the case Such a Grant can be revoked or annulled.....The evidently deliberate failure by the Respondent to involve the Applicant at the time of filing these proceedings , failing to list them among the beneficiaries or seek their consent or renunciation amounts to concealment of material facts.”
29. The Grant in this cause was issued to the Public Trustee. This was pursuant to an order issued by Justice Mrima on 23rd march 2015 in Kakamega High court succession cause No. 922 of 2014. The Citation had been filed by the Respondent herein against the heirs of the deceased. The heirs did not file any response to the citation, but the Judge on noticing that the Respondent herein was claiming only a portion of the whole of that parcel of land known as Idakho/Shiseso/903 made an order as follows: “ I have noted the citor’s claim is on part of the land known as Idakho/ Shiseso/ 903 and in order to protect the heir to the property, I order the public Trustee do take over the Administration of the Estate in the matter”
30. The Administrator of the Deceased’s Estate is therefore the public trustee not the Respondent herein. The orders for revocation therefore should have been sought as against the public Trustee not the Respondent herein. In effect the person who is being accused for failure to disclose material facts has not been sued. The Application was ill- advised as no cause of action has been established against the Respondent in this regard. Therefore, no valid grounds have been advanced for revocation of the Grant this prayer is dismissed.

What appropriate orders should the court make.

31. From the Appellant’s Affidavit and her testimony in court it clearly emerges that she has an issue with the distribution of the property of the deceased’s Estate and not the Administration of the Estate by the public trustee.
32. Something else which has been brought out in this Appeal and which either escaped the attention of the trial court or was not brought to its attention, is that whereas the proceedings herein relate to the Estate of Teresa Mukunda, the only property of the Estate which was placed before court was jointly owned by the deceased and one Galara Muleli Inzeku alias Kalahari mulili alias Carala Muleli,(hereafter only referred to as Galara) who is also reportedly deceased. This is evident from paragraph 4 of the Appellant’s supporting Affidavit and the search certificate dated (see ground (a) of the Appellant’s ground in support of the Application)



33. According to the Appellant, Galara and Teresa were co- wives but according to her witness PW2 and the Respondent the two women were married to different men. However, for purposes of these proceedings their marriage set up is immaterial. What is material is that the two persons jointly owned the suit property.
34. The Appellant has submitted that based on the survivorship principle on joint tenancy the property ought to have gone to Galara upon the death of Teresa. The Appellant hastened to expressly state that her claim is not based on the survivorship principle. However, I think it is important to address the principle, because it answers the question as to whether as at the time of the deceased's death, her interest in the property had ceased or not. This will in turn seek to answer the question of and whether or not there ought to have been an appointment of an Administrator for the Estate herein.
35. The certificate of official search issued on 22.8.2017 shows that the suit property was owned by the Teresa mulunda and Kalara Mulili. Contrary to the Appellant's assertion in her submissions there is no indication on whether the ownership was on the basis of joint tenancy or tenancy in common. No transfer document was produced in evidence. Such a document would perhaps had given an indication on what kind of tenancy was in place. The presumption then is that the ownership was tenancy-in- common; that the owners owned a distinct portion and each portion ought to be subjected to separate succession proceedings. Nevertheless, the Appellant made it clear that her claim is not based on survivorship principle.
36. The error therefore occurred in the distribution of the suit property. What was available for distribution amongst the beneficiaries of Teresa Mulunda was half portion of said parcel. The other half belongs to the Estate of Garala Muleli
37. Back to the Appellant's claim of having been excluded from benefiting from the estate, she testified that she was the daughter in law of Garala having been married to Garala's deceased son, one peter Isiaho Inzeku Her claim therefore is against Clara's Estate and not the Estate of the deceased herein.
38. what the Appellant and other beneficiaries of Galara should be doing is to commence proceedings for her Estate and seek to claim the half share of parcel No, Ishiako/ Shiseso/903, on behalf of Galara's Estate.
39. I agree with the Appellant that the Estate of Garala was distributed without succession proceedings . Put differently, while distributing the Estate, the court ended up distributing property that did not belong to the deceased herein. What belonged to the deceased was not properly ascertained before distribution was done.
40. To conclude on this issue, the problem in my view is not the Administration but the distribution of the property. There is no reason therefore to revoke the grant as aforesaid.
41. However, there was a problem in the distribution as another person's property was erroneously included in distribution. For this reason, the confirmation orders ought to be set aside. This will give another chance to the public trustee to go back to the drawing board, ascertain the assets and beneficiaries of the deceased and re- apply for confirmation of Grant.
42. In conclusion, to serve the interest of justice, I will proceed to make the following orders:
 - a). The Appeal fails to the extent that the prayer for revocation of Grant is rejected.
 - b) . The orders of confirmation of Grant dated 15.1.2019 are hereby set aside and the certificate of confirmation of grant issued on 30.1.2019 is hereby cancelled.



c). The public Trustee to take out fresh summons for confirmation for Grant within 45 days from today's date.

e). This order to be extracted and served on the public Trustee.

f). This matter shall be mentioned on a date to be given during the delivery of this Ruling to confirm compliance.

43. Each party to meet their own costs in this Appeal.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 19TH DAY OF DECEMBER, 2023.

S. Chirchir

Judge.

In the presence of :

E. Zalo- Court Assistant.

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