Nanzala v Mulunda (Succession Appeal 1 of 2021)
[2023] KEHC 2829 (KLR) (24 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2829 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

SUCCESSION APPEAL 1 OF 2021

WM MUSYOKA, J

MARCH 24, 2023

BETWEEN

MARY NANZALA ..... APPELLANT

AND

JOSECK KITUI MULUNDA ..... RESPONDENT

(An appeal arising from the ruling of Hon. ZJ Nyakundi, Senior Principal Magistrate, in Butali SPMCSC No. 67 of 2019, of 28th January 2021)

JUDGMENT

1. The appeal herein arises from a decision of the trial court, in Butali SPMCSC No. 67 of 2019, of 28th January 2021. The grounds of appeal revolve around the objector's submission not being considered and the trial court not considering the objectors application for objection, hence arriving at a wrong decision. The appellant would like the impugned decision set aside or vacated; an order that the grant of letters of administration, issued on 9th September 2019, and confirmed on 21st September 2020, be revoked, and an new grant issued to the objector; an order that the subsequent registration of Kakamega/Masakha/447, in the name of the respondent, be cancelled, and the title reverted to the name of the deceased, Meshack Mulunda Sikunwa alias Meshack Mulunda; and that costs of the appeal, and at the trial court, be paid by the respondent.

2. The impugned ruling, of 28th January 2021, turned on a summons for revocation of grant, dated 26th October 2020, filed in court on even date, by the appellant. It had been argued that the grant had been obtained through defective and fraudulent proceedings, by way of making false statements and untrue allegations of fact. Her case was that she was a widow of the deceased, but was never informed of the cause, and no consent was ever sought from her, when the cause was being filed. She also raised issues with the confirmation process, that it was conducted without involving the other beneficiaries, and that she was not satisfied with a mode of distribution, which had left out 5 beneficiaries, and in respect of which they did not sign any consents.

3. In her affidavit, sworn on 26th October 2020, the appellant averred that the process of obtaining the grant left out other beneficiaries, and no consent was sought from them before the grant was obtained. She listed the survivors of the deceased as herself as widow, 6 sons, and 5 daughters. She averred that the proceedings to confirm the grant were also defective, as the daughters of the deceased were not included in the process of confirming the grant, arguing that only 3 beneficiaries signed the consent on distribution, and that the rest of the beneficiaries were not involved, and had not been informed of the process, and that 5 survivors and a purchaser were left out. She also complained that before the grant was confirmed, the respondent had already caused himself to be registered as proprietor of the subject property.

4. The reply to the summons for revocation of grant was by way of affidavit, sworn on 17th November 2020, by the respondent. He explained that the family had sat and agreed that administration be committed to him and the appellant, but the appellant refused to initiate the process, saying that she was not yet ready. When she failed completely to take action, he opted to approach the court by way of citation. After she was served with the citation, she did not bother to come to court, as she told the process server that she had already filed a succession cause at Kakamega High Court, whereupon the trial court allowed him to petition for representation, which he did. He averred that even for confirmation she was informed, but chose to stay away. He asserted that the appellant ought to have filed an objection before the making of the grant, and a protest at confirmation of grant, if she had any issues. He further asserted that the entire process was done in accordance with the law. He asserted that the share of the appellant included that of her daughters.

5. Directions were taken on 30th November 2020, that the application would be disposed of by way of written submissions. The only written submissions on record were those filed by the appellant, on 7th December 2020, of even date.

6. In the ruling of 28th January 2021, the trial court considered the submissions of the appellant and the trial record. it noted that the cause started by way of citation, which meant that the appellant was given a chance to initiate the succession proceedings, but she did not avail herself of the chance, hence the court allowed the respondent to petition. The trial court also noted that the appellant was listed in Form P&A5, the cause was properly gazette, and the appellant did not file objection, the appellant was allocated a share in the estate at confirmation of grant, and the other beneficiaries had not objected and that meant that they had no issues to raise. The court found that there was no fraud in the manner the grant was obtained, and proceeded to dismiss the summons for revocation of the grant, in a 2-page ruling.

7. Directions were given on 26th April 2022, for disposal of the appeal by way of written submissions. Both sides have filed submissions. From the written submissions by the appellant, it is clear that her main complaint is around the handling of the confirmation process. She submits that only the respondent attended court on the day the matter came up for confirmation, no other family member was in court to confirm whether or not they agreed with the proposals by the respondent. She submits that no affidavit of service was filed to demonstrate that the other family members were aware of the proceedings. It is submitted that being given leave to file a succession cause does not waive the rights of beneficiaries to participate, and once listed as such they must be given a chance to file consents or otherwise be provided for. It is submitted that only 3 family members had been signing the papers, and it is said that there was no evidence that the other family members were aware of the proceedings. It is submitted that the daughters of the deceased were entitled to a share in the estate, regardless of whether they were married or not. It is further submitted that the court had a duty to require their attendance to get their views. It is submitted that the court erred in confirming the grant without the consent of some of the beneficiaries. It is submitted that there was fraud in the registration of the respondent, as proprietor of

the sole estate asset, prior to confirmation of his grant. On the part of the respondent, it is submitted that the trial court had considered the submissions of the appellant, contrary to the assertion that it had not. It is submitted that the confirmation of the grant was not obtained fraudulently, as she was aware of the process.

8. I will start by stating that the memorandum of appeal is very badly drafted. There should always be certainty and precision in pleadings, so that the court is quite clear on the dispute that it is determining. The 2 grounds of appeal set out in the memorandum state:

> "(1) The learned trial magistrate erred in law for failing to consider the objectors submission.
>
> (2) The learned trial magistrate erred in law in failing to consider the objectors application for objection hence arriving at a wrong decision."

9. In this appeal, there are only 2 parties, the appellant and the respondent. In the pleadings, that is to say the memorandum of appeal, the parties ought only to refer to the parties who are before the appellate court. There is no objector to these appeal proceedings. I am then left to speculate that the objector being referred must have been a party to the proceedings before the trial court.

10. I have carefully perused through the filings in the court below. There never was an objector, for no objection proceedings were ever filed. Objection proceedings are provided for under sections 67, 68 and 69 of the *Law of Succession Act*, Cap 160, Laws of Kenya. They relate to the process of making of the grant, and they do not involve filing of interlocutory applications, by way of summonses, but pleadings by way of answer to the petition and a cross-petition. No such pleadings were filed in the court below, and, therefore, the trial court did not conduct objection proceedings, hence there was no objector before the trial court. The "the application for objection," pleaded in the memorandum of appeal, is not provided for in the *Law of Succession Act*, nor in the *Probate and Administration Rules*, and no such form of application exists. Significantly, none was filed at the trial court, and none was considered by the trial court.

11. The application that appears to be the subject of this appeal, and which was before the trial court, and which the trial court determined, is the summons for revocation, dated 26th October 2020. Applications for revocation of grant, provided for under section 76 of the *Law of Succession Act*, are not objection proceedings, for to refer to them as such would be to confuse them with the proceedings that are envisaged under sections 67, 68 and 69 of the *Law of Succession Act*. The 2 are different processes. Objection proceedings are founded on pleadings, that is an answer to petition, and a cross-petition; while the revocation proceedings are based on an interlocutory application, a summons for revocation of grant. The *Probate and Administration Rules*, at Rules 7, 17 and 44 prescribe the forms, being petition, answer to petition, cross-petition and summons, respectively. Secondly, the objection proceedings are mounted before a grant of representation is made; while the revocation proceedings come after a grant has been made, for the application seeks revocation of that grant. Thirdly, the provisions in section 76, relating to revocation of grants, do not even use the words "to object" or "objection." The user of the term "objector" should be limited to the person who has initiated objection proceedings under sections 67, 68 and 69; the person who files a summons for revocation of grant under section 76 is not an objector, but an applicant in that application.

12. For the sake of clarity, I hereby set out the relevant provisions in sections 67, 68, 69 and 76, which state as follows:

> "67. Notice of application for grant

(1) No grant of representation, other than a limited grant for collection and preservation of assets, shall be made until there has been published notice of the application for such grant, inviting objections thereto to be made known to the court within a specified period of not less than thirty days from the date of publication, and the period so specified has expired.

(2) A notice under subsection (1) shall be exhibited conspicuously in the court-house, and also published in such other manner as the court directs.

68. Objections to application

(1) Notice of any objection to an application for a grant of representation shall be lodged with the court, in such form as may be prescribed, within the period specified by such notice as aforesaid, or such longer period as the court may allow.

(2) Where notice of objection has been lodged under sub-section (1), the court shall give notice to the objector to file an answer to the application and a cross-application within a specified period.

69. Procedure after notice and objections

(1) Where a notice of objection has been lodged under subsection (1) of section 68, but no answer but no cross-application has been filed as required under subsection (2) of that section, a grant may be made in accordance with the original application.

(2) Where an answer and a cross-application have been filed under subsection (2) of section 68, the court shall proceed to determine the dispute.

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..."

13. So, from the above, it would be clear that the memorandum of appeal sets out parties who were not before the trial court, and refers to proceedings that were not mounted and conducted before that court. That should be adequate basis for me to dismiss the appeal, for being vague and incoherent. However, for the sake of doing substantial justice, and being alive to Article 159 of the *constitution*, I shall go ahead to determine the appeal on its merits, based on what I understand the appellant to be raising.

14. The succession proceedings before the trial court were initiated by way of a citation issued to the appellant, at the instance of the respondent. The appellant is the widow of the deceased, and the mother of the respondent. The appellant did not act on the prompting of the citation, and file succession to the estate herein, hence the court allowed the respondent to apply. To that extent, the appellant would not have basis to say that the respondent did not involve her, for he made efforts to have her move the court appropriately, but she failed to, and the court then allowed him to move.

15. The question that follows, is whether, upon being granted leave by the court to apply, the respondent was obliged to comply with the requirements of the *Law of Succession Act* and the *Probate and Administration Rules*, governing applications for representation. The answer to that is in the positive. The grant of leave to apply for representation, upon issuance of a citation, does not override the law on the process to be followed in applying for representation to an estate. The citor, upon being granted that leave, has to comply with the requirements of section 51 of the *Law of Succession Act* and the rules in the *Probate and Administration Rules* relevant to petitions for representation. One such Rule is 7(7), and the other is Rule 26. Section 51 of *the Act* sets out the particulars that ought to be fed to the petition, and I am persuaded that the respondent complied fully with what was required of him under that provision. Rule 7(7) covers a petitioner without prior right of administration. The respondent was such a petitioner, for his entitlement to administration was lesser to that of the appellant. Under Rule 7(7), such a petitioner is required to either obtain a renunciation of right by the person with prior right, or a consent in writing by such a person to him to petition, or obtain a citation addressed to that person requiring him to take out grant or otherwise renounce his right to apply. In this case, I am satisfied that the respondent caused a citation to issue to the appellant to take out a grant, but she failed to, hence the court gave him the go-ahead.

16. For avoidance of doubt, Rule 7(7) says:

> " Where a person who is not a person in the order of preference set out in section 66 of *the Act* seeks a grant of administration intestate he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise its discretion under that section and shall also satisfy the court that every person having a prior preference to a grant by virtue of that section has—
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> (a) renounced his right generally to apply for a grant; or
>
> (b) consented in writing to the making of the grant to the applicant; or
>
> (c) been issued with a citation calling upon him either to renounce such right or to apply for a grant."

17. Rule 26, like Rule 7(7), applies to cases where the petitioner is a person who has a lesser or equal right with other persons who are not applying for the grant. Rule 26(1) states the position that no grant is to be made to any person without notice to any other person entitled in the same degree as or in priority to the petitioner. What this means is that a petitioner for representation must notify all the persons who are entitled to representation at a degree of priority higher or equal to his. Rule 26(1) boosts Rule 7(7), and goes beyond it. It requires that at the point of petitioning, the petitioner must notify any other person who has a higher right or equal right or entitlement to administration to his, by way of the consents in Forms 38 or 39. That would include getting such consent signed by a citee, who had been served with the citation envisaged in Rule 7(7). Rule 26(2) is about what should happen where the consents and renunciations envisaged in Rule 7(7) are not forthcoming, either because those who ought to renounce or consent are unavailable or have refused to cooperate. The petitioner is required to file an affidavit to explain the circumstances under which he applies for grant without the requisite renunciations and consents.

18. Rule 26 states:

> " Grants of letters of administration

(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.

(3) Unless the court otherwise directs for reasons to be recorded, administration shall be granted to a living person in his own right in preference to the personal representative of a deceased person who would, if living, have been entitled in the same degree, and to a person not under disability in preference to an infant entitled in the same degree."

19. Did the respondent comply with Rule 26? The deceased was survived by 12 individuals, being a widow, sons and daughters. Of the 12, the widow had prior right to administration, over the sons and daughters; and the sons and daughters had equal entitlement to administration amongst themselves. The names of the 12 survivors were set out in a Chief's letter, dated 14th September 2018; and the names of the 12 were also set out in the petition, filed in the cause at the lower court, on 5th July 2018. The letter from the Chief also listed a buyer, who I shall, for the purposes of these proceedings, treat as a creditor. A creditor does not have a prior right to administration over the widow and children. The respondent had a lesser right to that of the widow, as stated above, and he was required to comply with Rule 26. He complied with Rule 7(7), by causing citations to issue to the widow, as required by that Rule. However, he did not comply with Rule 26. Rule 7(7) applies before the petition is lodged in court. Indeed, a person riding on a citation, ought not file the petition before the court gives him leave. Rule 26 applies at the time of lodging the petition, and it would include cases where leave has been granted. The petitioner with leave, following citation, would still have to notify the citee, that he has or is petitioning for representation, for the citee may not have notice of the leave and of the filing of the petition. The record before me indicates that leave was granted to the respondent, on a citation, to pass over the appellant, and apply for grant, and, therefore, he did comply with Rule 7(7), to the extent of the citation, but he did not provide proof that he had notified her that he was petitioning for representation, as required of him by Rule 26. This was a defect in the process. The person with prior right to administration was not notified of the process at the time of petitioning, and Rule 26 was not complied with.

20. I note that the trial court restricted itself to the case of the appellant, and did not consider whether the law and the rules governing the process of obtaining the grant were complied with, with respect to the other persons who were entitled to administration equally with the respondent. The deceased had 11 children, being 5 sons and 6 daughters, going by the Chief's letter. All the 11 had a right to administer the estate of their late father. That would mean that if only 1 of them sought representation, he had to comply with Rule 26, by notifying the other 10 of his petition, and providing evidence of the same, by way of renunciation, consent or affidavit. I have very closely scoured and perused through the file of papers from the trial court, and I have not come across any renunciation of right to apply for representation by the other 10 children, nor consents by them, allowing the petitioner to go ahead despite them also being entitled to petition. I have also not seen an affidavit, in compliance with Rule 26(2), explaining the absence of the renunciations or consents under Form 38 or 39, by the other 10 children of the deceased. Rule 26 is in mandatory terms. The failure to comply with it is a defect in the process. Compliance would have obviated the sort of challenges that the appellant is now mounting against the process. The impression created is that the respondent proceeded to obtain representation

to the estate, alone, without notifying and involving the other 11 children of the deceased, contrary to the law, which envisages an all-inclusive process.

21. From what I have stated above, it should be clear that there was a case for the trial court to find that the process of obtaining the grant was defective, for it did not fully comply with the set law. The trial court fell into error when it only looked at the matter from the perspective that it was a dispute between the appellant and the respondent. Where revocation of grant is raised, particularly around how the grant was obtained, the trial court is bound to look beyond the parties, and consider all the facts. It is about the law and the process, and not about the individuals before the court. It is about assessing whether the petitioner did the right thing, so that if there were lapses, then a finding ought to have been made that the grant was obtained in a defective process. There is no proof that there was fraud, but the process had defects. Whether the grant ought to have been revoked is a different thing, for there is discretion, on the part of the court, to decide whether to revoke the grant, or to allow it to stand despite the defects in the process of obtaining it. Other than what the parties raise in the revocation application, the court ought to also consider other matters beyond what is raised. The court ought not limit itself to what the applicant flags, for section 76 gives the court power to revoke grants on its own motion, where it comes across any defects in the process of obtaining the grant, or even discerns fraud from the documentation. That power also emerges in section 71, at confirmation. Under section 71(2)(a), the court ought to consider whether the grant was properly obtained, and where it finds that it was not, decline to confirm it, and at that point exercise the power under section 76, to revoke it on its own motion, and under section 71(2)(b) to issue the grant to someone else. The trial court in this case was apparently blind to these broad powers of the court, and limited itself, unfortunately, to the 2 parties, who were before it, and did not consider the matter in light of the rights of the other 10 who were not before the court.

22. Section 71(2)(a)(b) provides:

> " Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may-
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> (a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or
>
> (b) if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 inclusive, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be unadministered..."

23. One of the other issues raised relate to confirmation of the grant. The appellant has issues with the manner the estate was distributed, and the fact that, at confirmation, only the respondent attended court, the other 11 survivors of the deceased, and the 1 creditor listed in the Chief's letter, were absent. Usually, what transpires at confirmation of grant is not a ground for revocation of a grant under section 76. See *Mburu Njoroge vs. Frederick Mburu Njoroge* [2014] eKLR (Ngaah, J) and *In re Estate of Prisca Ong'ayo Nande (Deceased)* [2020] eKLR (Musyoka, J). I say so because section 76 mentions confirmation of grants to the limited extent of making it a ground for revocation of grant where the administrator fails to apply for it within the timelines set out in the law. That is the purport of section 76(d)(i). Therefore, unless one is saying that the administrator has failed to apply for confirmation of his grant within the timelines set out in the law, there may be no reason to make the confirmation process an issue at revocation, for revocation is sought where confirmation has not been sought, so

that where it is sought and grant is confirmed, there would be no ground for moving the court under section 76(d)(i).

24. Section 76(d)(i) says:

> "(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..."

25. One of the other grounds for revocation of grant, under section 76(d)(ii), is lack of diligence in administration of the estate. The provision is not explicit on what that entails. The courts have interpreted that to mean failure to get in assets. Generally, it should relate to failure to carry out the duties concomitant with administration: to ascertain assets, ascertain survivors and beneficiaries, ascertain debtors and creditors, collect debts and assets, settle debts and liabilities, apply for confirmation of grant, distribute the estate after confirmation, render accounts of the administration, among others. Where there is an egregious failure to discharge duties relating to administration, what is broadly referred to as failure of administration, the court ought to exercise discretion to revoke the grant. Equally, where there is maladministration, by way of fraudulent use or wastage of the assets of the estate, a grant ought to be revoked. It would appear that where an estate is distributed, or proposed for distribution, in a manner that excludes some of the beneficiaries, whether they are survivors or creditors, could fall under maladministration, and, if the application for revocation of grant is properly framed, could provide a ground upon which the court may revoke the grant. Of course, where the court properly handles the confirmation proceedings in accordance with the law, by ensuring that all the assets of the estate and all the persons beneficially entitled have been properly ascertained, by ensuring that all those ascertained as beneficially entitled have been provided for and allocated shares, and by ensuring that all the relevant processes have been complied with, among others, there would be no basis to entertain an application for revocation, by a person who participated in the confirmation proceedings, where he should have articulated the issues raised in his revocation application. See *Mburu Njoroge vs. Frederick Mburu Njoroge* [2014] eKLR (Ngaah, J).

26. Section 76(2)(d)(ii) states:

> "(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—
>
> (i) ...
>
> (ii) to proceed diligently with the administration of the estate..."

27. I am usually shy about revisiting confirmation proceedings, while determining a revocation application, but in view of what I have stated in the foregoing paragraph, I shall consider the confirmation proceedings in this case, to assess whether or not what happened displayed lack of diligence in administration, by way of maladministration. The matter does not fall under what was stated in *Mburu Njoroge vs. Frederick Mburu Njoroge* [2014] eKLR (Ngaah, J), for the appellant was not involved in the confirmation process. She did not sign the consent to confirmation of grant dated 13th March 2020, and filed in court on 15th March 2020. She did not attend court on 21st September 2020, when the grant was confirmed. There is nothing in the record of the trial court to demonstrate that the application was brought to her notice. Rule 40(6) of the *Probate and Administration Rules* envisages the filing of an affidavit of protest, by those not supporting the proposals in the confirmation

application. An affidavit of protest can only be filed by persons who have notice of the proposals. That would require the filing of an affidavit of service, as proof that all beneficially entitled had been notified of the application, and had chosen not to file affidavits of protest.

28. Rule 40(6) states follows:

> "Any person wishing to object to the proposed confirmation of a grant shall file in the cause in duplicate at the principal registry an affidavit of protest in Form 10 against such confirmation stating the grounds of his objection."

29. Rule 40(8) allows the court to confirm a grant where there is no affidavit of protest, and where there is evidence, by way of a consent in Form 37, that all those beneficially entitled have no objection to the proposals. The court can only exercise power under Rule 40(8) where there the consent under Form 37 is signed by all those beneficially entitled. Where the consent on record is signed by only a section of the beneficiaries, then the court should refrain from acting under Rule 40(8) until it is satisfied that all entitled are aware of the application. That can only be done by way of an affidavit of service. None was filed, and, the court could not properly act under Rule 40(8) as it purported to in this case.

30. Rule 40(8) provides:

> "Where no affidavit of protest has been filed the summons and affidavit shall without delay be placed by the registrar before the court by which the grant was issued which may, on receipt of the consent in writing in Form 37 of all dependants or other persons who may be beneficially entitled, allow the application without the attendance of any person; but where an affidavit of protest has been filed or any of the persons beneficially entitled has not consented in writing the court shall order that the matter be set down as soon as may be for directions in chambers on notice in Form 74 to the applicant, the protester and to such other persons as the court thinks fit."

31. Rule 41(1) is also relevant. It sets out what ought to happen at the hearing of the application for confirmation of grant. It envisages that the hearing happens in the presence of all persons beneficially entitled, for it requires the court to read the application to the parties in a language they understand, and to hear any person who has filed a protest affidavit and any other person beneficially entitled. That envisage that all persons with an interest in the estate ought to be made aware of the application and ought to be invited to the hearing, so that the court can act in accordance with Rule 41(1). There is no evidence that any of the persons beneficially entitled had been notified of the hearing that happened on 21st September 2020, for there is no affidavit of service to demonstrate if anyone had been served, and it would appear, from the record, that only the respondent was in attendance. It would appear, contrary to Rule 41(1), the court only heard from the respondent. Yet, under Rule 40(8), the court could only properly proceed in the matter in the absence of all the persons beneficially entitled where all those beneficially entitled had executed the consent in Form 37. The deceased had 11 children, only 3 of them signed the form on record. The other 6, excluding the respondent, had not. The Chief's letter mentions a creditor, he did not sign a consent form, nor attend court, and there is no evidence that he was notified, yet his name featured in the court record. The trial court could not proceed under either Rule 40(8) and Rule 41(1) in the face of that. The court ought to have postponed the matter, under section 71(2)(d) of *the Act*, to allow attendance by the persons beneficially entitled, or otherwise to have them sign the consent form or file an affidavit of protest under Rule 40(6).

32. Rule 41(1) states:

> "At the hearing of the application for confirmation the court shall first read out in the language or respective languages in which they appear the application, the grant, the affidavits and any written protests which have been filed and shall then hear the applicant and each protester and any other person interested, whether such persons appear personally or by advocate or by a representative."

33. The proviso to section 71(2) and Rule 40(4) impose a duty on the administrator to ascertain the persons who are beneficially entitled to a share in the estate, and their shares in the property proposed for distribution. That would entail disclosing to the court the persons by whom the deceased was survived, that is to say the surviving spouse, if any, and the children. He should also disclose any persons who have a legitimate claim against the estate. After doing so, he should propose distribution. If the distribution omits any of the children of the deceased, he should explain why those persons have not been allotted shares. If they have consented to exclusion, he should attach a copy of the consent. If they renounced their share, then he should attach copies of the renunciation.

34. The proviso to section 71(2) and Rule 40(4) state as follows:

> "Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares"
>
> "Where the deceased has died wholly or partially intestate the applicant shall satisfy the court that the identification and shares of all persons beneficially entitled to the estate have been ascertained and determined."

35. Was that done in this case? No. The respondent filed a letter from the Chief of Chegulo Location. That letter said that the deceased had been survived by a widow, the appellant herein, and 11 children, 5 sons and 6 daughters. The letter also mentions 1 buyer. These 13 individuals are what the Chief ascertained to be the persons beneficially entitled to a share in the estate. When the respondent filed his petition, he listed the 1 widow, 5 sons and 6 daughters as the survivors of the deceased. The 1 buyer was omitted. I repeat that, according to the petition, the survivors of the deceased were ascertained as the 1 widow and the 11 children. When it came to the summons for confirmation of grant, the respondent disclosed that indeed the deceased was survived by 1 widow, 5 sons and 6 daughters, but in the distribution proposed, the property was only shared out between the 1 widow and the 5 sons, the 6 daughters were left out. The 6 daughters had not signed the consent filed in court, and no other consent or renunciation of their share was placed on record. They were not brought to court, to be heard, under Rule 41(1), yet the application disinherited them. How could they be disinherited, without being given a chance to have a say on the matter? The proposals by the respondent amounted to maladministration of the estate, to the extent that distribution of the estate was being proposed only amongst ½ of the survivors of the deceased, leaving out the other ½. It provided a fertile ground for revocation of the grant. It was also fraudulent, for the daughters of the deceased are entitled to equal share from the estate with the sons, by dint of sections 35(5) and 38 of the *Law of Succession Act*, fraudulent because the design was to have the sons benefit unduly from the exclusion of the daughters from the distribution.

36. Sections 35(5) and 38 of *the Act* state as follows:

> " 35(5) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, remarriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children."
>
> 38 Where intestate has left a surviving child or children but no spouse
>
> Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children."

37. Of course, sections 35(5) and 38, are to be read together with Article 27 of the *constitution*, which requires that women be treated equally with the men. That would mean that the daughters of the deceased herein ought to have been treated equally with the sons at distribution, unless they opted out. They did not opt out, and, therefore, their omission amounted to exclusion, and was discriminatory, and amounted to a violation of the constitution. Article 2(4) of the *constitution* states the effect of a law which is inconsistent with the *constitution*, and an act which is in contravention of the *constitution*. I believe that the respondent was purporting to rely on customary law to disinherit the 6 daughters, yet Article 2(4) of the *constitution* states that any law, including customary law, which is inconsistent with the *constitution* is void. The customary law that the respondent was, probably, relying on to exclude the 6 daughters from benefit, is inconsistent with the *constitution*, to the extent that it requires that daughters be treated differently from the sons, and it is void to that extent. Secondly, the act of discriminating against any person on the basis of their gender, is itself a contravention of the *constitution*, and such act is rendered invalid by Article 2(4) of the *constitution*. The act of seeking confirmation of grant, by proposing distribution of an estate in a manner that discriminates against daughters of the deceased, unless they consent to being treated differently, is rendered invalid by Article 2(4) of the *constitution,* and orders made by a court, based on such an invalid act, would, themselves, be equally invalid.

38. Article 2(4) and 27 state:

> " 2(4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this *Constitution* is invalid."
>
> QUOTE{startQuote "}
>
> 27 Equality and freedom from discrimination.
>
> (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
>
> (3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

(6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

(7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.

(8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender."

39. The court handling a confirmation application, is also under a duty, under the proviso to section 71(2) of *the Act*, to be satisfied, by the administrator applying for confirmation of grant, that the administrator has ascertained the persons who are beneficially entitled to a share in the estate, and has also ascertained the shares due to those persons. This presupposes that the court has to be proactive, to go out of its way, to ensure that it is satisfied that everything has been done properly, and that none of the persons beneficially entitled, be they survivors of the deceased or creditors, were not being disadvantaged or shortchanged, in the distribution proposed. The court ought not act mechanically, and allow a confirmation application, merely because one has been placed before it. The court is duty-bound to look beyond the application, and examine the petition and the letter from the Chief, and any other filings by the parties, and question the parties, to satisfy itself that all have been ascertained and allocated their proper shares before proceeding to allow the application.

40. Did the trial court do duty in this case? It did not. The court allowed the application as placed before it by the respondent, without bothering to look at the Chief's letter and the petition, for if it had done so, it would have noted that the deceased had 11 children, yet out of the 11 only 5 were being provided for. It would have noted that those omitted had not executed the consent placed on record, to allow the court to overlook the fact that they were not benefitting from the estate. It would have also noted that the Chief listed a person who claimed to be a buyer, yet that buyer was not listed in the petition, nor in the application, neither was he provided for. Such glaring omissions should have whetted the appetite of the trial court, to want to know why the 6 daughters had not been provided for, and whether they had consented to their exclusion. The court should have also enquired about the alleged buyer, to understand the position of the respondent as to why he left him out, despite the Chief listing him as such. The duty the trial court should have exercised after noting this should have been to delay the confirmation, postpone the proceedings, and allow the respondent to avail the 6 daughters and the 1 buyer in court so that it could hear them, as required by Rule 41(1). The court did not do its duty under section 71(2) and the Rules. The trial court should have proceeded to handle the application in accordance with the provisions of the law governing the matter that it was seized of. With respect to confirmation applications, it behooves the court to go beyond the parties that are before it, and apply the law as required.

41. The other point is that the trial court, being a magistrate's court, is established underthe *constitution*, and the presiding officer was, therefore, a State officer underthe *constitution*. Judicial officers, whether Judges or magistrates, are part of the State, and they are enjoined, under Article 27 of the *constitution*, to take steps to ensure that the law is applied in a manner that does not lead to discrimination against women. The injunction in Article 27 should be applied by the courts when handling confirmation matters, for it is at distribution that discrimination of women is manifested most. The court should not look the other way, when the proposals on distribution, that it is called upon to sanction at confirmation, are discriminatory against women, on the basis of their gender. There is a *Constitution* to preserve and protect. Sanctioning proposals that are discriminatory is to promote a state or a form of lack of constitutionalism. Courts should be mindful that orders made by them, which contravene the *constitution*, because they are based on applications which contravene the constitution, are invalid, according to Article 2(4) of the *constitution*.

42. There is now ample caselaw on that. Most of them are on validity of wills, but the principle stated in them is universal. Although there is freedom of testation, and probate law allows testators to will away their property as they wish, courts are increasingly holding that where that freedom is exercised in a manner that violatesthe *constitution*, in terms of testators giving away their property by will in a manner that is discriminatory against women, purely on the ground of gender, would have the effect of rendering such wills invalid. That position was stated in *In re Estate of M'Itunga M'Ibutu (Deceased)* [2018] eKLR (Gikonyo, J), *In re Estate of Stanley Mugambi M'Muketha (Deceased)* [2019] eKLR (Gikonyo, J) and *Wanjiru & 4 others vs. Kimani & 3 others* (Civil Appeal 36 of 2014) [2021] KECA 362 (KLR) (W Karanja, H Omondi & Laibuta, JJA). In *Wanjiru & 4 others vs. Kimani & 3 others* (Civil Appeal 36 of 2014) [2021] KECA 362 (KLR) (W Karanja, H Omondi & Laibuta, JJA), it was held that the will in contention was valid in all respects, for it was made in proper form, by a person of sound mind, but it was rendered invalid, by virtue of Article 2(4), for disposing of property in a manner that was discriminatory of the daughters of the testator. See also *In re Estate of Elijah Kuria (Deceased)* [2018] eKLR (Nyakundi, J), *In re Estate of Chepleke Chemusany (Deceased)*[2020] eKLR (Sitati, J) and *In re Estate of Peter Gathogo (Deceased)* [2020] eKLR (Meoli, J).

43. The final point, that I would like to make, relates to how to deal with the interests of survivors or beneficiaries, who do not participate in the proceedings. In the impugned ruling, the trial court appeared to hold and find that since the daughters had not come forward to claim their share or participate in the proceedings, then it should be deemed that they were not complaining, and that they had waived their rights and interests in the estate. Nothing could be farther from the truth. The position adopted by the trial court was contrary to that stated by the High Court, in *Christine Wangari Gichigi vs. ElizabethWanjira Evans & 11 others* [2014] eKLR (Emukule, J) and *In re Estate of Joyce Kanjiru Njiru (Deceased)* [2017] eKLR (Gitari, J), that failure by daughters to attend court at confirmation, and generally to participate in the proceedings, should not be construed to be lack of interest or to amount to renunciation of their entitlement. When faced with such a situation, the courts said, the daughters ought to be provided for, the fact of their non-participation notwithstanding. They are entitled to a share in the estate, and their share they should get, whether they participate in the proceedings or not, unless they expressly renounce the said entitlement. After all, their failure to attend or to participate could have something to do with their not being notified, and the court should not assume they are aware of the proceedings, until it is established that they were in fact served with the process, and chose to stay away. Even then, they can only be excluded from the sharing at their own word.

44. A court that takes the position taken by the trial court abdicates its responsibility, under the proviso to section 71(2), with respect to satisfying itself that all the persons beneficially entitled had been

ascertained, and their interests too had been ascertained. The said daughters had been listed in the Chief's letter and the petition, their omission in the confirmation application was glaring. The trial court should have sought to find out why they were omitted at confirmation, yet they had been disclosed in the pleadings as beneficiaries. The trial court should have put the respondent to task to explain their exclusion, for he had a duty, under the proviso to section 71(2) and Rule 40(4), to ascertain them and provide for them, and where provision is not made for them, account for the non-provision. It should have postponed the confirmation proceedings, under section 71(2)(d), to require their attendance, so that it could hear them on the matter of their rights and entitlements, as required by Rule 41(1). Compliance with the proviso to section 71(2) and Rule 40(4) is so critical that it was said, in *In the Matter of the Estate of Ephrahim Brian Kavai (Deceased)*, Kakamega High Court Succession Cause Number 249 of 1992 (Waweru, J) (unreported), that an order made where there is no such compliance would be illegal.

45. I believe that I have said enough, to demonstrate that the appeal herein has merit. It is hereby allowed. The decision of the trial court, of 28th January 2021, is hereby quashed and set aside, and it is substituted with an order that the grant made to the respondent is hereby revoked, and a fresh grant shall issue to the appellant and the respondent, out of the cause at the lower court. The order, on confirmation of grant and distribution of the estate, made on 21st September 2020, is hereby set aside, and any certificate of confirmation of grant, issued on the basis of it, is hereby cancelled. Any transaction made on the basis of any such certificate of confirmation of grant is hereby nullified. The trial court records shall be returned to the registry at Butali, for compliance, after which the new administrators shall file for confirmation of grant, in proceedings that shall be conducted at Butali, and which shall involve all the beneficiaries of the estate. Each party shall bear their own costs.

46. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 24th DAY OF MARCH 2023

WM MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Mr. Matete, instructed by Matete Mwelesi & Company, Advocates for the appellant.

Mr. K'Ombwayo, instructed by M. Kiveu, Advocate for the respondent.