



REPUBLIC OF KENYA



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**In re Estate of Munyi Kagio (Deceased) (Civil Appeal E025 & E058 of 2023
(Consolidated)) [2024] KEHC 9270 (KLR) (31 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9270 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E025 & E058 OF 2023 (CONSOLIDATED)**

LM NJUGUNA, J

JULY 31, 2024

IN THE MATTER OF THE ESTATE OF MUNYI KAGIO (DECEASED)

BETWEEN

EDWARD NYAGA KARANGI 1ST APPELLANT

IRENE MARIGU 2ND APPELLANT

AND

EDWARD NYAGA KARANGI 1ST RESPONDENT

IRENE MARIGU 2ND RESPONDENT

PETER MUTURI JOHN 3RD RESPONDENT

CONSOLATA WANGIRI 4TH RESPONDENT

PETER NYAGA MUNYI 5TH RESPONDENT

SIMON KAMBI MUNYI 6TH RESPONDENT

*(Being an appeal from the Judgment of Hon. D. Endoo RM in Embu
CM Succession Cause No. 217 of 2017 delivered on 28 th April 2023)*

JUDGMENT

1. The appellant filed memoranda of appeal dated 06th June 2023 in HCCA E025 of 2023 and another dated 09th October 2023 in HCCA E058 of 2023. Through HCCA E025 of 2023, the 1st appellant is seeking for orders that the appeal be allowed and the decision of the trial court be set aside. The appeal is premised on the grounds that:

1. The learned trial magistrate erred in law and fact by ignoring the findings by the High Court in HCCA 62 of 2018 that the elders award adopted as an order of court on May 12, 1995;



2. The learned trial magistrate erred in law and fact by finding that the elder's award was set aside by the court for failing to follow the law;
 3. The learned trial magistrate erred in law and fact by reaching a conclusion that only children of the deceased were beneficiaries of the estate, excluding Irene Marigu, Lincoln Ndwiga Mwarasomba Ireri despite the court in Embu HCCA 62 of 2018 declaring them beneficiaries through a court order; and
 4. The decision by the trial magistrate was against the weight of evidence on record and the findings of this superior court in Embu HCCA 62 of 2018.
2. Through HCCA E058 of 2023, the 2nd appellant prayed that the appeal be allowed by setting aside the decision of the trial court and awarding 1 acre out of the deceased's land. The appeal was premised on grounds that:
1. The learned trial magistrate erred in law and fact by ignoring the findings by the High Court in HCCA 62 of 2018 that the elders award adopted as an order of court on 12th May 1995 is still valid;
 2. The learned trial magistrate erred in law and fact by finding that the elders' award was set aside by the court for failing the law;
 3. The learned trial magistrate erred in law and fact by reaching a conclusion that only children of the deceased were beneficiaries of the estate to the exclusion of the appellant despite the High Court in Embu HCCA 62 of 2018 declaring her a beneficiary; and
 4. The decision by the trial magistrate was against the weight of evidence on record and the finding of this court in HCCA 62 of 2018.
3. Through Succession Cause No. 114 of 1990, the 1st appellant was appointed administrator of the estate of the deceased through a grant of letters of administration issued on 21st January 1991. Through Succession Cause No. 69 of 1992, the 5th respondent was also appointed as administrator of the estate of the deceased vide grant of letters of administration issued on 28th October 1992. Through Embu MC Succession Cause No 217 of 2017, the 1st appellant and the 5th respondent were appointed as joint administrators of the estate of the deceased on 19th December 1990. After a series of applications and appeals, the 1st appellant filed summons dated 30th August 2017 for confirmation of grant, in which he proposed that the estate be distributed as follows:
1. Gaturi/Weru/1027 to go to Edward Nyaga Karangi
 2. Ngandori/Kirigi/1784 to be shared as follows:
 - i. Peter Nyaga Munyi
 - ii. Emilio Njeru Munyi
 - iii. Simon Kambi Munyi
 - iv. Consolata Wangiri Munyi
 - v. Lincoln N.M. Ireri
 4. The 3rd respondent filed an affidavit of protest, challenging the mode of distribution on the basis of his interests as a purchaser of 1 acre in Ngandori/Kirigi/1784. He stated that the 6th respondent sold to him his interest in the said property and he produced a sale agreement as proof. That after purchase



of the land, he built a home and occupied the land and he has developed the same and has built a home on the land. That when he noticed that the family of the deceased was not making steps towards commencing succession proceedings, he cited them through citation Misc. Succ. 52 of 2019 before he learned about the proceedings at the trial court. He produced proof of acknowledgement of the purchase price by the 6th respondent.

5. The 4th, 5th and 6th respondents also filed an affidavit of protest in which they stated that the deceased owned parcel numbers Ngandori/Kirigi/1784 measuring 5 acres and Gaturi/Weru/1027 measuring 3 acres. That they all reside on parcel number Ngandori/Kirigi/1784 but in the year 2018, they discovered that the land had been fraudulently transferred to the 1st appellant without their knowledge. That the summons for confirmation of grant filed by the 1st appellant had been confirmed without their knowledge or consent. They deposed that the 1st appellant is not a son of the deceased, neither is Lincoln N.M. Ireri a dependant of the deceased. It was his case that Emilio Njeru Munyi is deceased and did not have dependants, yet the 1st appellant proposed and allocated him 1 acre out of Ngandori/Kirigi/1784. That the mode of distribution is utterly unfair. That at the time of selling the property to the 2nd appellant, the 1st appellant did not have capacity to sell the land. They supported the claim by the 3rd respondent as a purchaser since they were made aware of the transaction. They proposed that the estate be distributed as follows:
 1. Ngandori/Kirigi/1784 to be shared as follows:
 - i. Peter Nyaga Munyi- 1.9acres
 - ii. Consolata Wangiri Munyi- 1.9acres
 - iii. Simon Kambi Munyi- 0.3acres
 - iv. Peter Muturi John- 1.0acres which will be hived from the share of Simon Kambi Munyi
 2. Gaturi/Weru/1027 to go to:
 - i. Peter Nyaga Munyi- 1.5acres
 - ii. Consolata Wangiri Munyi- 1.5acres
6. The 2nd appellant also filed an affidavit of protest in which she claimed purchaser's interest in 0.41Ha of Ngandori/Kirigi/1784 which the 6th respondent was entitled to. That as soon as she learned of the succession proceedings, she filed an affidavit of protest dated 02nd September 1992 but the matter was referred for arbitration by the elders. The arbitral award was reached on 15th March 1995 and it granted the 2nd appellant 1.0acre of parcel number Ngandori/Kirigi/1784. That the arbitral award was adopted as an order of the court on 12th May 1995, thus securing her interest in the estate, something that the 1st appellant was determined to frustrate. She opposed the mode of distribution proposed by the 1st appellant because the same does not capture the position of the court. She produced a sale agreement as proof of her transaction with the 6th respondent.
7. At the hearing of the protests, court took *viva voce* evidence.
8. PW1 was the 2nd appellant, who relied on the contents of her affidavit of protest. On cross-examination, she stated that she bought the land from the 6th respondent for Kshs.48,000/= and she paid the full amount. That the arbitration proceedings were done before the District Officer at the time and in the presence of all the family members and some elders who are now deceased. That all the children of the deceased were given land, including Lincoln Ireri who was given 1 acre.



9. That she was chased away from the land in 2007 and by that time, she had been using it for 16 years. She stated that she was living on the land because she had bought it. That Lincoln Ireri was an adopted son of the deceased under the Ki-embu tradition of slaughtering of a goat. That after the arbitration proceedings, she does not know what became of the arbitral award but she filed a protest when she heard that the land was being given to the children of the deceased only.
10. PW2 was the 3rd respondent who stated that he purchased a portion of the land the 6th respondent was supposed to inherit and the sale agreement was witnessed by advocates, the 4th respondent and the 6th respondent. That the day after he bought the land, he moved and settled on it and he started developing it. That he has planted perennial crops on the land and he lives there with the children of the deceased. On cross-examination, he denied knowledge of the 2nd appellant and of any succession proceedings. That he bought the land knowing that it was owned by the seller. That he objects to giving the land he bought to the 2nd appellant who also alleges to have bought the same land. He stated that he knew the family of the deceased since 2008 but he does not know the 1st appellant. That he bought 1 acre of land from the 6th respondent at the price of Kshs.500,000/= . That he paid Kshs.360,000/= and they agreed that he moves into the land and will pay the balance after the transfer is done. That he does not have a title deed for the land but he has never sued the 6th respondent over that issue. That by the time he cited the 4th and 6th respondents he did not know about the succession proceedings.
11. PW3 was the 5th respondent. He testified on behalf of himself, the 4th and the 6th respondents. He stated that the deceased had a wife known as Agnes Kanini Munyi who is their mother and she only had 3 children. That the 1st appellant is not a son or foster son of the deceased and that he is a stranger to them. He stated that they are all objecting to the 1st appellant being an administrator in the estate of the deceased. On cross-examination, he stated that he was unaware of the court order awarding land to the 2nd appellant. He denied knowledge of arbitration proceedings from 1995 and that he was not present at the meeting but he did not know if his siblings were there. He said that he was not aware of the sale transactions made over the land by the 6th respondent. That he is aware that the 6th respondent sold land to the 3rd respondent and he supports that the land should be given to him. That the 1st appellant is unknown to him but he just came and settled on their father's land Gaturi/Weru/1027. That his father did not have 3 wives and that Lincoln was never adopted by his father as a son. That the 6th respondent did not have any land to sell because the land belonged to his late father.
12. DW1 was the 1st appellant who stated that the deceased had 3 wives. That he is a son of the 1st wife, whom the deceased inherited following the death of his (DW1's) biological father. That the 6th respondent is only entitled to 0.05acres according to the tribunal findings but he has been selling the deceased's land without title to it. That if the 6th respondent is left to continue selling the land, he will disinherit the rightful beneficiaries of the estate. He denied any knowledge of Lincoln Ireri and termed him as a stranger whom he first saw at the tribunal hearing.
13. On cross-examination, he stated that he does not have the deceased name on his National ID because the deceased advised him to use his biological father's name. That the deceased had 5 children but only 3 were present in court at the time of the testimony. That the Ki-embu customary laws do not permit adoption of a child after the death of the deceased and that Lincoln is not a biological son of the deceased. That the chief's letter recognizes him as a son of the deceased and that none of the beneficiaries had a problem with him taking that position since nobody contested this position since they were all attending court. That the claim by the 2nd appellant is well known by the 4th, 5th and 6th respondents.



14. DW2 was Lincoln Ndwiga Mwarasomba Ileri who stated that at first, he was a purchaser of land but later he was adopted as a son of the deceased. That he is claiming land from the deceased both as a purchaser and as a son of the deceased. That he was adopted as a family member by the Ngai clan. He named the 4th, 5th and 6th respondents as children of the deceased. That he purchased the land from the 6th respondent whom he believed was the owner of the land. That he paid Kshs.97,000/= for 1½ acres out of which Kshs.77,000/= was given to the 6th respondent and Kshs.20,000/= to the elders. That he was present at the arbitration where all the children of the deceased were present and were given land, including the 6th respondent who was in prison at the time but he was brought for the meeting. That the award of the arbitration was adopted as an order of the court. That he is claiming as an adopted member of the family and also because of the agreement he has with the 6th respondent.
15. The trial court in which the learned magistrate relied on the case of *In Re Estate of George Ragui Karanja (Deceased)* (2016 eKLR) stated the administrators of the estate of the deceased were correctly appointed, the court having satisfied itself of their eligibility under section 66 of the *Law of Succession Act*. That the 1st appellant, being a nephew of the deceased, is a proven dependant, hence he had the right to petition for letters of administration. The court held that Lincoln Ileri was not a legitimate adopted son of the deceased since he was adopted into the family by the clan and after the death of the deceased. In addition, the court stated that the purchase of properties by the purchasers who are Lincoln Ileri, Peter Muturi and Irene Marigu from the 6th respondent was unlawful in light of section 82(b)(ii) of the *Law of Succession Act* and it amounted to intermeddling under section 45 of the same *Act*. The trial court distributed the estate according to the mode proposed by the 1st appellant.
16. The appeals were canvassed by way of written submissions.
17. The 1st appellant filed submissions stating that the trial court erred in stating that the arbitral award of 1995 was set aside yet the position is different in the High Court's judgment delivered on 02nd December 2020 in HCCA 62 of 2018 in which the court stated that the order adopting that consent order was still valid. It was his argument that the lower court cannot purport to overwrite the findings of a superior court as was stated in the case of *Kenya Hotel Properties Ltd v. Attorney General, JSC & 4 Others*, Supreme Court Petition 16 of 2020. That the distribution should be done according to the arbitration award since the same was upheld by this court in HCCA 62 of 2018.
18. The 2nd appellant submitted that the arbitral award was never set aside and has never been challenged since it was adopted as an order of the court. That the issue in HCCA 62 of 2018 was that the 2nd appellant was not involved in the confirmation of grant done on 22nd May 2018. That the trial court erred in failing to include her in the distribution yet she was affirmed as a beneficiary through the proceedings in HCCA 62 of 2018. The gist of this appeal is that the trial court purported to set aside an arbitral award that had been adopted by a Superior Court.
19. She referred to the proceedings of the court on 14th August 1997 through which the court dismissed an attempt to set aside the arbitral award, stating that the award was properly adopted. She placed reliance on the case of *Republic v. County Chief Officer, Finance & Economic Planning, Nairobi City County (ex parte David Mugo Mwangi)* (2018) eKLR where it was held that an order of the court remains valid unless the same is set aside on review or appeal.
20. The 3rd - 6th respondents submitted that the 1st appellant's argument in his appeal is misplaced since the findings of this court in HCCA 62 of 2018 were in relation to the 2nd appellant's case. That the elders' award was set aside by the High Court. That re-hearing of the confirmation was ordered in appeal HCCA 62 of 2018. That the trial court was correct in finding that Lincoln Ileri and Irene Marigu were not beneficiaries of the deceased. They stated that in HCCA 62 of 2018, the court held that the 2nd



appellant had a right to be heard before confirmation of the grant to allow her to ventilate her case. They applauded the trial court's reliance on caselaw that supported her findings that the 6th respondent did not possess the land that he purportedly sold to the alleged purchasers. That the illegality of the purchases of the land was well supported in evidence and that the trial court was well guided.

21. The issues for determination herein are:
 1. Whether the trial court erred in failing to distribute the estate of the deceased according to the arbitral award adopted as an order of court on 12th May 1995; and
 2. Who are the beneficiaries of the estate of the deceased who should inherit?
22. The first appellate court is, without a doubt, bound to re-examine the evidence adduced at trial before making its own finding while appreciating the role played by the trial magistrate in taking the said evidence. This was the position echoed in the case of *PIL Kenya Limited v Oppong* [2009] KLR 442, it was held that:

“It is the duty...of a first appellate court to analyze and evaluate the evidence on record afresh and to reach its own independent decision, but always bearing in mind that the trial court had the advantage of hearing and seeing the witnesses and their demeanor and giving allowance for that”.
23. The greatest contention, from the grounds of appeal, is founded on the arbitration award adopted by the court. Through an order issued on 25th August 1993 in Embu MC Succession No. 114 of 1990, Hon. F.M. Mutahi RM ordered thus:

“by consent, the case is referred for arbitration by the District Officer Gachoka. Each party to have 2 elders who will assist the DO.

Award to be filed in court on or before the 19.11.93”
24. An arbitral award was reached and it was adopted by the court on 09th May 1995. The 1st appellant filed an application dated 08th June 1995 seeking to set aside the order of the court adopting the arbitral award on grounds that the distribution should have been according to customary law since the deceased died before enactment of the *Law of Succession Act*. The application was dismissed vide ruling delivered on 19th September 1997. The 1st appellant sought review of the court's orders of 19th September 1997 through an application dated 17th December 1997 but the same was also dismissed.
25. Through an application dated 04th November 1997, the 1st appellant, who is the administrator of the estate of the deceased, moved the court for orders, inter alia, that judgment be entered in terms of the award. Through this application he also sought that the 2nd appellant be registered as proprietor of 1 acre of parcel number Ngandori/Kirigi/1784. Through a similar application of even date, the 2nd appellant sought the same orders.
26. The arbitration award was reached after hearing on 15th March 1995, as follows:

“

 1. Edward Nyaga Karangi gets 1.5 acres from the farm where he now stays Gaturi/Weru
 2. Emilio Nyaga gets the remaining share in Gaturi/Weru



3. That Ngandori/Kirigi be shared as follows:

Peter Nyaga- 1.0 acre

Simon Kambi- 0.5 acre

Consolata Wangiri- 1.0 acre

Lincoln M. Ireri 1.0 acre

Eliud Mwaniki- 0.5 acre

Irene Marigu- 1.0 acre

The last 2 being purchasers. That the remaining balance of Kshs.4,000/= that is to be paid by Irene, be used as part of the subdivision fee instead of being given to Kambi who has sold all his share but has now been given a token 0.5 acre.”

27. As things stand, the arbitral award is still in place and this court stated as much in a judgment delivered on 02nd December 2020 in HCCA 62 of 2018. The arbitral award was not the subject of the appeal but the position was affirmed in the said judgment. The subject of that appeal was confirmation of the grant. The 2nd appellant sought for orders that the summons for confirmation of the grant be re-heard since she had been excluded as a beneficiary of the estate of the deceased yet she was recognized as a beneficiary through the arbitration proceedings. This court held that she was a legitimate beneficiary who had the right to make her case at the confirmation proceedings. The court set aside the confirmation proceedings and ordered that the same be re-heard at the trial court. The effect of this was that the 2nd appellant argued her case alongside all the other protestors and the trial court delivered the impugned ruling that is the subject of the appeals herein.

28. In the said appeal, which has since been reported as *Irene Marigu v Edward Nyaga Karangi* [2020] eKLR the court stated thus:

“However, the orders of 19/9/1997 were set aside by consent 4/12/2002. The essence of this consent is that the application dated 8/06/1995 seeking setting aside of the award by the elders was reinstated. However, there is nothing on record indicating the fact that the said application was heard and determined and the award by the elders (which was adopted as an order of the court on 12/05/1995) set aside. As such, it is my opinion that the orders adopting the award are still valid.... As I have noted above, the appellant’s interest in the estate of the deceased was as a result of the alleged purchase of 0.4 Ha from a beneficiary of the deceased. However, in my opinion, upon the award having been read and adopted as a court order, the appellant herein became a beneficiary of the estate. As such, her claim ceased to be against the beneficiary who sold the land to her but against the estate itself. That being the case, she had a right to participate in the proceedings for confirmation of the grant. The question therefore is whether the appellant participated in the said proceedings?” (emphasis added)

29. The position of this court on the first issue was already settled through HCCA 62 of 2018 and this court needs not re-state it herein. For as long as the arbitral award is still in force, the 2nd appellant is to be regarded as a beneficiary of the estate of the deceased as previously adjudged by this court.

30. On the second issue of who the eligible beneficiaries of the estate of the deceased are, having determined that the arbitral award is still in force, it is therefore important to note that the distribution of the estate should be done according to it. In any event, the estate as distributed in the arbitral award does not disinherit the children of the deceased and it also provides for the purchasers of the estate.



31. If the arbitral award had been set aside, the grievances of the alleged purchasers should have been the subject of an ELC suit to determine ownership. In fact, this court, sitting as a family court would have to invoke the relevant provisions of the Law of Succession Act and the Probate and Administration Rules to pave way for the ELC suit. However, given that the arbitral award has been consistently upheld by this court, it should inform the distribution of the estate in the case of the 2nd appellant.
32. From the evidence adduced, the court gathers that Emilio Nyaga passed away without any dependants. That means that his share of the estate that was allocated to him through the arbitral award will be redistributed herein. Further, the share awarded to Mwaniki will also be passed to his estate through the administrator.
33. Therefore, I find that the trial court erred in finding that the arbitral award had been set aside and in distributing the estate as stated in its judgment. The appeals herein have merit and they are hereby allowed with orders as follows:
 1. The Judgment in Embu CM Succession Cause No. 217 of 2017 delivered on 28th April 2023 is hereby set aside;
 2. The certificate of confirmation of grant issued on 11th July 2023 is hereby set aside;
 3. The estate of the deceased is hereby distributed as follows:
 - a. Edward Nyaga Karangi gets 1.5 acres from the farm where he now stays Gaturi/Weru/1027
 - b. The remaining share in Gaturi/Weru/1027 to be held in equal shares by Peter Nyaga Munyi, Consolata Wangiri and Simon Kambi Munyi.
 - c. Ngandori/Kirigi/1748 be shared as follows:
 - Peter Nyaga Munyi- 1.0 acre
 - Simon Kambi Munyi- 0.5 acre
 - Consolata Wangiri- 1.0 acre
 - Lincoln M. Ireri - 1.0 acre
 - Peter Muturi John- 0.5 acre
 - Irene Marigu- 1.0 acre
 4. A certificate of confirmation of grant to be issued indicating the distribution in (3) above; and
 5. There shall be no order as to costs.
34. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 31ST DAY OF JULY, 2024.

L. NJUGUNA

JUDGE

