



REPUBLIC OF KENYA



KENYA LAW
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In re Estate of Njeru Murua Shimba alias Njeru Muruashimba (Deceased) (Civil Appeal E062 of 2022) [2024] KEHC 9284 (KLR) (30 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9284 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E062 OF 2022
LM NJUGUNA, J
JULY 30, 2024**

BETWEEN

ALVAN MURIUKI APPELLANT

AND

FAITH MUTHONI NJERU RESPONDENT

(Being an appeal from the Ruling of Hon. J.W. Gichimu in Runyenjes Succession Cause No. E048 of 2022 delivered on 08th November 2022)

JUDGMENT

1. The appellant filed a memorandum of appeal dated 07th December 2022 seeking that the ruling of the trial court be set aside and this court does order that parcel number Gaturi/Nembure/9962 vested to the appellant does not form part of the estate of the deceased. The appeal is premised on the following grounds:
 1. The learned trial magistrate erred in law and fact when he came concluded that “I am satisfied that the deceased intended that upon his demise, half share of the suit land would be inherited by his daughters whereas the remaining half would go to his son who is the protestor herein” because of the following;
 - a. There was no evidence of existence of an oral or written will to support the above conclusion since the petitioner pursued intestate succession;
 - b. That there is a clear title deed for parcel number Gaturi/Nembure/9962 dated 17th March 2003 showing that the property was jointly owned by the protestor and the deceased;
 - c. That the deceased died on 14th July 2019, 16 years after the joint registration and that if he intended to give half of the land to the petitioners, he would have done so; and



- d. That this was intestate succession and the court had no legal basis to infer the existence of an oral will.
 2. The learned trial magistrate erred in law when he defined a joint proprietorship from a title document which showed that the land was jointly owned by the protestor and the deceased and the scenario is provided for under section 91(4)(b) of the [Land Registration Act](#).
 3. The learned trial magistrate erred in law and fact in the comparison and definition of joint proprietorship and tenancy in common. The appellant avers that the evidence of title adduced by the protestor was conclusive that they were jointly registered as joint owners;
 4. The learned magistrate erred in law and fact and misapplied the caselaw cited because none of the judges in the cited cases changed the meaning of joint ownership and proprietors in common; and
 5. The learned trial magistrate erred in law and fact in failing to apply the evidence adduced by the appellant in his protest.
2. The appellant is the only son of the deceased and the respondent is one of the 5 daughters of the deceased. A grant of letters of administration in the estate of the deceased was issued to the respondent on 28th December 2020. The estate of the deceased comprises of land parcel number Gaturi/Nembure/9962. The title document for the said parcel indicates that the land is jointly owned by the deceased and the appellant. The respondent filed summons for confirmation of grant supported by an affidavit in which she proposed that the property be distributed as follows:
 1. $\frac{1}{2}$ share of land parcel no. Gaturi/Nembure/9962
 - a. Alvan Muriuki to get $\frac{1}{4}$ Acre
 - b. Faith Muthoni Njeru
 - c. Lucy Wanjuki Muriithi
 - d. Susan Wanja Njagi to get $\frac{1}{4}$ acres jointly
 - e. Jane Runji
 - f. Pauline Gicuku Njeru
 3. The appellant filed an affidavit of protest stating that the respondent did not involve him in petitioning for the grant. That the ownership document of the property shows that the property is jointly owned by himself and the deceased. That being a joint ownership, in the event of death of one of the proprietors in this case, the property ought to have vested in the surviving proprietor. That following the death of his father, he began the process of transferring the land to his name. That for this reason, the property does not form part of the estate of the deceased thus it cannot be distributed in the manner done by the trial magistrate.
 4. At the hearing of the protest, the court took viva voce evidence. PW1 was the appellant, who rehashed the averments made in the affidavit of protest. On cross-examination, he stated that the deceased said that upon his death, his property should be given to him. That it is not true that the deceased said that the property should be distributed according to the mode proposed by the respondent.
 5. DW1 was the respondent, who stated that the property should be distributed according to the mode proposed since it is the rightful share to the beneficiaries according to the wishes of the deceased. On cross-examination, she stated that she did not indicate in the summons that it was her father's wish



- that the land be distributed as she proposed. That the title deed is in the name of the appellant and the deceased jointly.
6. DW2 was John Njiru, who stated that he had known the deceased and his family for more than 40 years. That in July 2019, the deceased called him because he wanted to state his last wishes. That he pointed out the place where he had wished to be buried and that half of the land owned jointly with the appellant, should be distributed according to the mode proposed by the respondent. That after the deceased said those words, he died within one week and he was buried according to his last wishes.
 7. DW3 was Benard Kiarago, the deceased's brother, who stated that the deceased held a meeting which was attended by DW3, DW2 and all the members of his family including the appellant and the respondent. That in this meeting, he stated his final wishes for his interment and that half of the property should be given jointly to his daughters. That he died after 2 weeks. Upon cross-examination, he stated that the deceased did not leave a will but he said that the portion of the land that belongs to him should go to his daughters.
 8. The trial court relied on the provisions of section 91, 101, 102, 103 and 118 of the [Land Registration Act](#) and determined the issue of whether land parcel no. Gatari/Nembure/9962 formed part of the estate of the deceased. The trial court distinguished between joint ownership of land and proprietorship in common, relying on the case of Isabel Chelangat v. Samuel Tiro Rotich & 5 Others (2012) eKLR. The learned trial magistrate isolated the issue of how the court should proceed where the title instrument fails to indicate the nature of proprietorship or the nature of co-tenancy. He went on to rely on the cases of In Re Dorica Lumire Mapesa (deceased) (2018) eKLR, Diana Muchiri v. Lydia Wariera Njenga & Another (2022) eKLR, B.I. v. Kericho District Land Registrar & Another (2015) eKLR and Mukaziton Josphine v. Attorney General (2015) eKLR. The trial magistrate concluded that the deceased and the appellants were tenants in common in equal shares according to section 91(2) of the [Land Registration Act](#). He subjected half of the parcel of land to the mode of distribution proposed by the respondent and dismissed the protest.
 9. In this appeal, the court directed the parties to file their written submissions but only the respondent complied.
 10. In her submissions, it was her argument that the trial court was correct in finding that half of the portion of land forms the estate of the deceased. she supported the interpretation of joint tenancy and tenancy in common as held by the trial court and she relied on the text by William Blackstone, Commentaries on the Laws of England, 179, B Adams Ed. 1983-1985.
 11. The issue for determination herein is whether this court is clothed with the relevant jurisdiction to determine the appeal herein.
 12. The role of the appellate court is to re-examine the evidence adduced at trial (see the case of Selle & Another vs. Associated Motor Boat Co. Ltd & Others (1968) EA 123). However, the more pertinent issue herein is on jurisdiction. The issue that arose at the trial court in the protest, which issue is still before this court is an issue of ownership of the suit property. The family court can only determine succession proceedings when the estate of the deceased has been identified to the court. Identification of the estate and the beneficiaries is the role of the administrator of the estate according to the proviso at section 71(2) of the [Law of Succession Act](#) which provides that 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.
 13. In this case, the appellant's protest raises issues of ownership of the suit land, such that there is a contest about the portion of it that forms the estate of the deceased. In other words, in order to properly



identify the estate of the deceased, the administrator had to prove the deceased's share in the land which the appellant claims to wholly belong to him. The trial court was forced to delve into the ownership issue and it took evidence on the same. It is not uncommon for a family court to find itself tempted to veer off into issues of land ownership, but it is the constitutional principle that those issues fall within the purview of the Environment and Land Court.

13. If this court attempts to re-examine the evidence of the trial court, it does so without regard to the necessary jurisdiction. Whether or not the trial court had jurisdiction is a different matter altogether. However, the bottom-line is that the issues arising before the trial court and in this appeal touch on ownership of land. The issue is so key that the estate cannot be distributed if it cannot be identified. That being said, the issue of ownership of parcel number Gatari/Nembure/9962 should be determined before the ELC which will also pronounce the nature of proprietorship.

14. Article 162(2)(b) of *the constitution* confers jurisdiction to the ELC to determine disputes relating to the environment and the use and occupation of, and title to, land while Article 165(5)(b) of *the constitution* expressly denies the High Court jurisdiction to determine disputes that should be placed before the ELC. Additionally, it is imprudent for a family court to take it upon itself to resolve issues of ownership since its mandate stops at distributing the identifiable estate of the deceased. In the case of *In re Estate of M'mukira M'arimi (Deceased)* [2019] eKLR the court stated:

“...a family court is not a forum for settling land disputes...its jurisdiction is only limited to identifying the estate of a deceased, the beneficiaries and distributing the estate accordingly.”

15. Jurisdiction is the most important thing for any court, so much so, that without it, a court is completely crippled. In the celebrated case of *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] eKLR, it was held thus:

“Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

16. The most that the family court should do is to hive out the portion of the estate that requires to be placed before the ELC and the carry on with distribution of the remainder. This is provided for under Rule 41(3) of the Probate and Administration Rules which also refers to Sections 71(2) and 82 of the *Law of Succession Act* on the duties of personal representatives in regards to defining the estate for distribution. It provides thus:

“Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71 (2) of the Act, proceed to confirm the grant.”

17. Unfortunately for the parties herein, and the beneficiaries, the suit property is the only one named and so there is no other portion of the estate to be distributed in the meantime. However, if the parties



should choose to place the dispute before the ELC, which bears jurisdiction to determine it, this court may then be moved to distribute the estate accordingly.

18. There is another issue of the testimonies to the effect that the deceased left a will, or that the distribution of the estate is made to conform to the final wishes of the deceased. I reiterate that even that issue should be determined once the court is clear as to the extent of the estate of the deceased. Therefore, this court will not be able to determine that issue at this moment.
19. For now, having considered the pleadings and the relevant laws, I find that the appeal lacks merit and the same is hereby struck out with no orders as to costs.
20. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 30TH DAY OF JULY, 2024.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent

