



REPUBLIC OF KENYA



**In re Estate of Peter Ayugu Ngaira (Deceased) (Family Appeal
13 of 2021) [2024] KEHC 10568 (KLR) (26 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10568 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
FAMILY APPEAL 13 OF 2021
SC CHIRCHIR, J
AUGUST 26, 2024**

IN THE MATTER OF THE ESTATE OF PETER AYUGU NGAIRA (DECEASED)

BETWEEN

MILLAH NGAIRA APPELLANT

AND

STANELY SHIVACHI NGAIRA RESPONDENT

(Being an appeal from the Ruling of Zachariah Joseph Nyakundi (SPM) and delivered on the 16th day of September 2021 in Butali SPM SUCCESSION Cause no. 77 of 2018.)

JUDGMENT

1. The Appellant and the Respondent are Administrators of the Estate of peter Ayugu Ngaira(Deceased). On 9 / 2 /2018 the respondent filed summons for confirmation of Grant and in response, the Appellant filed an objection
2. The hearing proceeded by way of oral hearing and at the conclusion of the trial, the court delivered a ruling in which the trial magistrate ordered as follows:
 1. That county surveyor do visit land parcel No. S/Kabras/Bushu/1518 to survey the suit land with a view to ascertain the acreage.
 2. That upon such survey, the suit land be sub- divided among the two houses in equal shares
 3. That upon such division the administrators do file jointly a fresh Application for confirmation of Grant.
3. It is the above orders that has given rise to this Appeal.



Memorandum of Appeal

4. The Appellant has set out the following grounds:
 1. That the trial magistrate erred in law and in fact by entertaining the Respondent's summons for confirmation dated 9th February 2018 when the co-tenant Manoah Ngaira was still alive.
 - a. That the learned magistrate erred in both law and in fact by failing to take into account and acknowledge and find that land parcel number S/Kabras/Bushu/1519 was part and parcel of the estate(Homestead)
 - b. That the learned trial magistrate of the subordinate court erred in ordering the county land surveyor to visit and survey land parcel number S/Kabras/Bushu/1518 when he had no jurisdiction.
 - c. That the learned trial magistrate of the subordinate court erred in both fact and in law in unreasonably, injudiciously and wrongly finding that land parcel number S/Kabras/Bushu/1518 should be equally shared between the two houses.
 - d. That the trial magistrate erred in law and in fact by totally disregarding the objector and her witness's evidence.
 - e. That the learned trial magistrate erred in law and in fact by misunderstanding and misrepresenting evidence adduced in court and proceeding to make ruling.
5. The appeal was canvassed by way of written submission.

Appellant's submissions

6. It is the Appellant's submissions that the trial court ignored land parcel No. S/ kabras / Bushu/1519 and only directed the distribution of parcel No. S/Kabras/ Bushu/ 1518.
7. It is further submitted that the trial court ought not to have entertained the Application for confirmation of grant as the same was touching on the principle of transmission and survivorship , which principles fall under the purview of the Environment and land Court.
8. It is further submitted that considering that a portion of 1.43 hectares had already been hived off from parcel No. 1518 and given to the respondent's sister, then this acreage should be discounted from the portion due to the Respondent.

Respondent's submissions

9. It is the respondent's submissions that the only property forming the subject matter for appeal and proceedings in the lower court is land parcel S/KABRAS/BUSHU/1518.
10. The respondent further states that on 13/9/2016 the high court gave orders that a new grant of representation be issued in the joint name of Stanley Shivachi Ngaira and Millah Ngaira and that the parties were given the liberty to file summons for confirmation of the grant.
11. On the order for survey given by the trial court , the respondent submits that the same was necessary as the Appellant had understated the size of parcel No. 1518.
12. It is further submitted that the succession proceedings were necessary as the parcel was owned by the deceased and the Appellant's brother, Manoah and that the two were holding the parcel in trust for



their respective families; that pursuant to the provisions of 91(5) of the [land registration Act](#), the family of the deceased was entitled to half share of the suit property.

The Evidence

13. The first witness was the Appellant herein . She told the court that her father had two wives; that the deceased was her half -brother; She was from the 2nd house while the deceased was from the 1st house.
14. She further stated that following a decision of the court it was decided that the suit property was to be registered in the names of the deceased and her brother, one Manoa Shivachi.
15. The Appellant further testified that her said brother, manaoh, suffers from a mental disability and when the deceased died , the respondent took advantage of his disability and divided the suit property into the current portions.
16. On cross- examination, she stated that that her brother Manoah was given 13 acres , which they sold; that she had a power of Attorney giving her the right to represent her brother in the said sale.
17. The 2nd witness identified himself as a relative of the family. He told the court that he was aware that the suit property was to be shared between the two houses.
18. PW3 testified that he was a relative of the family. He told the court that the family homestead stands on the suit property and it was to be divided equally between the two families.
19. Pw5 told the court that one Jedidah, the sister to the deceased was also given a portion from the suit property.

The Respondent's case

20. The first defence witness was Francis Ayuku, the deceased's son. He told the court that the suit property was a sub- division of parcel No. 100; that the sub- division was done following a dispute which was resolved by the court in the year 1978; that it was ordered that the suit property be held jointly between the deceased and Manoa. He further stated that it was his grandfather who sub- divided the land to parcels numbers 1519 and 1518; that parcel No. 1517 belonging to Manoa was sold by the Appellant, and that parcel No. 1518 was to be shared between the two houses.
21. DW2 was the respondent herein , and the son of the deceased. He told the court that the homestead stood on the suit property; that the size has since reduced as a portion was given to his sister. On cross-examination he stated that the equal sharing of 1518 was pursuant to an order of the court.

Determination

22. The role of this court, as the first Appellate court is to review the evidence afresh , evaluate and arrive at its own findings , without necessarily ignoring the conclusions of the trial court. (Ref: [Gitobu Imanyara & 2 others v the AG](#) (2016) e KLR.
23. From the onset , it is imperative to point out that the proceedings herein relate to the estate of the , peter Ayugu Ngaira(Deceased) . The Appellant's assertion that the proceedings ought to be in relation to her father's Estate , one Joseph Ngaira is therefore misconceived . The Appellant is also a co- Administrator of the Estate of the deceased herein and for her to state that proceedings ought to relate to any other person other than the deceased herein is odd, insincere and if genuine, is devoid of any seriousness on her part.
24. I will proceed to address the grounds of Appeal in the order in which they have been pleaded.



Whether the trial court ought to have entertained the succession proceedings when the co-tenant was still alive (Ground 1)

25. The dispute herein revolves around the whole of that property known as S/ Kabras/ Bushu/1518. The title deed of the property shows that the registered owners were the peter Ayugu Ngaira , the deceased herein and Manoah Ngaira. Upon the demise of peter Ayugu Ngaira , the present proceedings in respect of his Estate was commenced.
26. It came out, during the proceedings , that Manoah is mentally incapacitated and the Appellant herein represent him, under a power of Attorney.
27. The Appellant has not addressed the issue of transmission and survivorship directly in her submissions, save to state that the trial court should have left the matter to the Environment and Land court.
28. Firstly, the survivorship principle was never raised in during trial. It is being for the first time in this Appeal. This court cannot therefore address itself on an issue that had not been raised from the beginning. Secondly , there is nothing to indicate whether the owners were joint tenants or tenants- in-common. The Title Deed of the suit property was issued in the year 1995, under the then Registered Land Act, cap 300, laws of Kenya (now repealed). Section 101(1) of the said Act provided that

” An instrument made in favour of two or more persons and the registration giving effect to it shall show interalia whether those persons are joint proprietors or proprietors in common”
29. Further there was no instrument of transfer submitted in evidence. The title deed (page 152 of the record of Appeal) and the a copy of the register(page 73 of the record) are both silent on the nature of tenancy.
30. Thus even if this court was to consider this issue there is no evidence at all that the deceased and Manoah Ngaira were joint tenants so as to invoke the application of the survivorship principle.
31. In the circumstances , proceedings in respect of the estate of the deceased herein during the life time of the co- proprietor was validly admitted and determined by the trial court. I make this conclusion , based on the fact that in the absence of any evidence on ownership based on joint- tenancy then the correct presumption, in my view is that the property was owned on the basis of Tenancy -in-common. Consequently the heirs of the deceased were entitled to take out succession proceedings in the deceased’s presumed 50% share in the suit property.

Whether parcel No. S/ Kabras / Busgu/ 1519 should have been treated as part of the Estate.

32. A perusal of the high court Ruling in in succession cause No. 557 of 2012 show that the main contention was that the respondent herein had misrepresented the suit property as belonging solely to the deceased while the true position was that the Appellant’s brother , Manoah Ngaira was a joint owner. The high court returned a verdict in her favour , cancelled the grant that had been issued to the Respondent alone , the certificate of confirmation arising therefrom and ordered any of them to file fresh summons for confirmation of grant.
33. Thus parcel No. 1519 was not a subject of the objection proceedings at the high court . The high court (Justice Mwita) I believe ,appointed the Appellant herein as a co- administrator to take care of the interest of her mentally challenged brother..
34. The Appellant’s contention in the lower court was that parcel No. 1518 was a property of her late father’s Estate , one Joseph Ngaira and that the deceased herein had no share in it; that her nephew,



the respondent, had benefited more from their late grandfather's estate and should therefore cede the whole of parcel No. 1518 to the Appellant's brother, manaoa.

35. This , in my view would amount to inviting this court to determine issues belonging to the estate of the Appellant's father , John Ngaira , and not the deceased herein. Neither the trial court nor this court could determine issues to do with the senior Ngaira's Estate as their mandate was and is confined to determining matters touching on the estate of the deceased herein.
36. Further , if the Appellant had any other claim against the deceased Estate outside of parcel No. 1518, that ought to be treated as a separate claim against the estate and which should be submitted to the Environment and Land court for adjudication.
37. It must be remembered that the mandate of a succession court is to deal purely with the Assets and liabilities of the deceased ' Estate and anything attendant to the estate at the point of succession proceedings or anything that may arise later in respect thereof. Anything else outside of this mandate is outside the purview of the succession court.
38. In effect the Appellant's contention that the trial court ought to have treated parcel No. 1519 as part of and subjected to the succession proceedings is misplaced.
39. The appellant has also argued that the trial court had no jurisdiction to order the Land surveyor to survey the suit property with a view to ascertaining the size.
40. Section 48(1) of the Act was amended by the enactment of the Magistrates' Court Act No. 26 of 2015 (hereinafter referred to as 'the new Act'). Section 23 of the new Act repealed the said Section 48(1) of the Act and substituted it with the following new subsection: -
 - '23. The Law of Succession Act is amended, by repealing section 48(1) and substituting therefor the following new subsection –
 1. Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49, a magistrate shall have jurisdiction to entertain any application and to determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed the pecuniary limit prescribed under section 7 (1) of the Magistrates' Courts Act, 2015.' (Emphasis added).
41. The trial court ordered for the survey for purposes of determining the size of the suit property to facilitate the distribution of the estate . It is part of the tasks undertaken by succession court , where necessary, in the process of determining issues succession. This complain is without merit

Whether the trial court erred in ordering equal distribution between the two houses.

42. The Appellant faults the trial court for ordering for equal distribution of property, between the two houses, arguing that if such distribution was to be effected , the size of 1.43 hectares that had been allegedly excised from parcel No. 1518 should be included before distribution.
43. From the testimony of the Appellant, this portion had been hived off before the registration of the suit property in the name of the deceased and Appellant's brother.
44. To the extent that no claim had been instituted and the alleged portion of 1.43 hectares portion reclaimed, it never became the property of the deceased and Manoa. Consequently the trial court , having been presented with no evidence of what portions was the property held , the order on Equal distribution was valid. I have no reason to fault the trial court in this regard.



Other orders

45. Under Rule 73 of the *probate and Administration Rules* this court is empowered to make any order in pursuit of justice. This court therefore find it necessary to make a determination of some issues not raised in the appeal but which I consider necessary to conclusively dispose off this matter conclusively.
46. I have taken note of the trial court's last two final orders. The second last order is that: (ii) 'Upon survey, the suit land be divided among the two houses in equal shares'. The contest herein was not between any two houses but the deceased's estate and the Appellant, Manaoh Ngaira. The distribution therefore should be between the Appellant and the estate of the deceased herein.
47. The last order stated that : " That upon such division the administrators do file jointly a fresh application for confirmation of grant.
48. The trial court had taken oral evidence on the current on the matter and had determined all the issues, including the mode of distribution. A fresh application for confirmation of grant is therefore unnecessary. It may give rise to another unnecessary trial if the parties bring up the same or other contentions. For this reason this court finds it necessary to set aside the two orders and substituted them with appropriate ones.

In the end I hereby proceed to make the following orders:

- a). The Appeal herein is without merit and it is hereby dismissed.
- b). Order 2 of the lower court ruling delivered on 16th June 2021 is hereby set aside and substituted with an order that upon survey, the suit property will be divided equally between the Estate of the deceased and Manoah Ngaira.
- c). Pursuant to order (i) of the said Ruling the surveyor to file the survey report within 30 days from the date of this ruling to facilitate distribution of the property. The distribution of the suit property will proceed before this court after the filing of the survey report.
- d). This matter will be mentioned on a date to be given at the date of delivery of this Ruling for confirming compliance with order (b) above

DATED , SIGNED AND DELIVERED AT NAIROBI, VIA MICROSOFT TEAMS THIS 26TH DAY OF AUGUST 2024.

S. CHIRCHIR

JUDGE

In the presence of :

Godwin- Court Assistant

Stanley Shivachi-The Respondent.

