



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Karanja Wainaina (Deceased) (Family Appeal
36 of 2023) [2024] KEHC 10439 (KLR) (20 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10439 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
FAMILY APPEAL 36 OF 2023
FN MUCHEMI, J
AUGUST 20, 2024**

IN THE MATTER OF THE ESTATE OF KARANJA WAINAINA (DECEASED)

BETWEEN

MARGARET NJERI KARANJA APPELLANT

AND

DEBORAH WANJIKU MWATHI RESPONDENT

*(Being an Appeal from the Judgment of Hon. D. Milimu (SRM) delivered
on 9th January 2023 in Thika CM Succession Cause No. 166 of 2008)*

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Thika Senior Resident Magistrate in CM Succession Cause No. 166 of 2008 where the court allowed the protest of the respondent on grounds that she was a purchaser in good faith. The court then distributed the estate namely LR. No. Chania/Ngorongo/46 as follows:- Margaret Njeri Karanja – 2.6 acres; Daniel Kamau Karanja – 1.3 acres; Elizabeth Wambui Karanja – 1 acre; Richard Ndungu Karanja – 0.9 acre and Deborah Wanjiku Mwathi – 1 acre.
2. Dissatisfied with the court’s decision, the appellants lodged this appeal citing 10 grounds of appeal summarized as follows:-
 - a. The learned trial magistrate erred in fact and law in finding that the protestor was a beneficiary of the estate despite the respondent affirming that she was not a beneficiary or dependent under the *Law of Succession Act*.
 - b. The learned trial magistrate erred in law and in fact in awarding the respondent 1 acre out of LR. No. Chania/Ngorongo/46 despite not being a beneficiary of the estate of the deceased.



- c. The learned trial magistrate erred in law and in fact in recognizing an alleged purchaser as a proper beneficiary of the estate of the deceased.
 - d. The learned trial magistrate erred in law and in fact in finding that there was a valid sale agreement between the appellant and the respondent despite there being no evidence to support such sale.
 - e. The learned trial magistrate erred in law and in fact in disregarding the entirety of the evidence of the appellant thereby arriving at an erroneous finding in the judgment.
3. Parties put in written submissions to dispose of the appeal.

Appellant's Submissions

4. The appellant submits that she is the wife of the deceased who died on 25th February 1990. She further submits that she filed summons for confirmation of grant dated 26th April 2021 seeking to have the letters of administration issued to her on 24th September 2008 confirmed and proposed the mode of distribution as follows:- Margaret Njeri Karanja – 3.6 acres; Daniel Kamau Karanja – 1.3 acres; Richard Ndungu Karanja – 1 acre and Elizabeth Wambui – 0.9 acres.
5. The appellant submits that the respondent filed an affidavit of protest dated 2nd September 2021 claiming 1 acre of the suit property as a purchaser. The respondent claimed that she purchased the said property from the appellant in 2009 and produced a sale agreement dated 23rd April 2009 at a consideration of Kshs. 400,000/- and some several acknowledgements of receipts between herself and the appellant. The appellant submits that she disputed there being a sale and/or in the alternative if such sale did occur, the property at the time of the alleged sale was still in the name of the deceased and therefore she had no capacity to sell. The appellant further states that the suit property was to benefit her children who are the proper beneficiaries of the estate.
6. The appellant relies on the case of *Re Estate of Charles Gungu Gwlyanga (Deceased) (Succession Cause No. 44 of 2021) [2022] KEHC 10300 (KLR) (22 July 2022) (Ruling)* and submits that the respondent is not a creditor of the estate as she is not a relative of the deceased and thus not a survivor of the deceased. The appellant argues that the respondent did not buy the suit land from the deceased as the deceased died in 1990 and the sale agreement was allegedly entered into in 2009. Further, the respondent did not tender any evidence to show that the deceased owed her anything at the time of his death and thus she did not acquire any stake in the estate by the dint of her alleged transactions with the appellant.
7. The appellant relies on Section 45, 79 and 82(b)(ii) of the *Law of Succession Act* and the cases of *In the Matter of the Estate of Veronica Njoki Wakagoto (Deceased) [2013] eKLR* and submits that the letters of administration of the estate of the deceased issued in 2008 making the respondent an administrator, the grant was never confirmed. The appellant argues that the summons for confirmation of grant was never prosecuted and was dismissed for want of prosecution and therefore the same cannot be deemed to amount to have given the protestor 1 acre of the suit property.
8. The appellant further submits that the trial court misdirected itself in relying on the case of *Morris Mwiti Mburugu vs Dennis Kimathi M'mburugu (2016) eKLR* as the facts in the said case were not similar to the instant matter as in the former case the court allowed for the sale of the suit property where evidence was tabled that the sale was for the purposes of obtaining money meant to prosecute the succession cause and that all the beneficiaries of the estate had consented to the payments. However, the facts in this case are different. The respondent did not provide evidence of such an agreement with the beneficiaries of the estate to such sale and/or that the sale was for the benefit of the estate. Thus,



the appellant submits that the court cannot enforce an illegal contract that impugns various provisions of the Law of Succession Act and the same ought to be held invalid and prejudicial to the estate of the deceased and the beneficiaries at large.

The Respondent's Submissions

9. The respondent submits that the grant was issued in 2008 and at the time of filing for the grant, the respondent was listed as an interested party and in the initial application for confirmation of grant made on 22/9/2009, the respondent had been proposed to receive a portion of 1 acre from the estate property.
10. The respondent relies on the case of *Morris Mwititi Mburugu vs Dennis Kimathi M'Mburugu* [2016] eKLR and submits that she purchased a plot of 1 acre from the appellant which was done to offset several financial obligations of the entire estate including the hospital bills left by the deceased and no single beneficiary had a problem with the respondent getting her share of 1 acre. Further, the respondent argues that the trial court did not make a decision on distribution randomly, the court picked on the share of 1 acre from what the appellant would have been entitled to after making a finding that the appellant consciously made the sale with support of the entire estate.
11. The respondent submits that she only agreed to buy the 1 acre in 2009 with the agreement of the beneficiaries in good faith. Thus the distribution as done by the trial magistrate was fair and took into account all the prevailing circumstances and should not be disturbed.
12. The respondent further submits that she paid to the estate and the appellant the monies agreed for the purchase of 1 acre from the estate. The respondent submits that the trial court found indeed that the entire estate was aware of the transaction and that money was exchanged for the purchase of the 1 acre. Indeed, in the initial application for confirmation of grant done in 2009, the estate was in agreement that the respondent was deserving of the 1 acre of the suit property.
13. The respondent relies on the case of *Re Estate of Kahoro Muchiri Kahoro* (2016) eKLR and argues that the appellant never really denied the existence of the sale agreements or the receipt of Kshs. 400,000/- purchase price from herself. Relying on Section 71(2) of the Law of Succession Act and the case of *In Re Estate of Simon Ndirangu Ngugi (Deceased)* [2016] eKLR, the respondent submits that the sale was to benefit the estate of the deceased as there were liabilities left by the deceased and all the beneficiaries were in agreement of the sale to herself. Relying on the case of *Stephen Waweru Ng'ang'a vs Kimani Ng'ang'a Nyeri HC P & A No. 1 of 2011*, the respondent urges the court to find that where a beneficiary has sold land from the estate, such a transaction should be saved and the share of such a beneficiary be devolved to such a purchaser.

Issue for determination

14. The main issue for determination is whether the appeal has merit.

The Law

15. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another vs Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:

“.....this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular,, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some



point to take into account of particular circumstances or probabilities materially to estimate the evidence.”

16. In *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR the Court of Appeal stated that:-
An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.
17. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-
 - a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
 - b. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and
 - c. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

Whether the appeal has merit.

18. The deceased herein died on 25th February 2009 intestate and left a parcel of land namely LR. No. CHANIA/NGORONGO/46 as his estate. The deceased was survived by his wife, the appellant and their eight children. The appellant petitioned for letters of administration intestate on 27th May 2009 which was issued on 15th September 2008 and she proceeded to file summons for confirmation of grant on 22nd September 2009. In her application for confirmation of grant, the appellant listed the respondent as an interested party to get 1 acre from the suit property. However, the suit was dismissed for want of prosecution on 19th November 2018.
19. On 29th March 2021, the suit was reinstated for hearing and the appellant filed a fresh Summons for Confirmation of grant on 11th May 2021 but she did not list the respondent as one of the beneficiaries of the estate.
20. The respondent on the other hand filed an Affidavit of Protest dated 2nd September 2021 in opposition to the confirmation of the grant opposing the distribution of the estate as proposed by the appellant. According to the respondent, she entered into a sale agreement with the appellant on 23rd April 2009 for the sale of 1 acre of the suit property at a consideration of Kshs. 400,000/- whereby the transfer of the said parcel of land to the purchaser would be carried out at the confirmation of the grant. The respondent further produced an acknowledgements of receipt of Kshs. 20,000/- dated 23rd April 2009, Kshs. 30,000/- dated 29th July 2009, Kshs. 20,000/- dated 20th December 2010, Kshs. 10,000/- dated 20th December 2010, Kshs. 20,000/- dated 8th June 2011, Kshs. 25,000/- dated 29th June 2012, Kshs. 200,000/- dated 23rd April 2009 being part payments of the purchase price.
21. From the record, the appellant never denied the existence of the agreement or the receipt of the monies paid by the protestor. The appellant however argues that the purported sale is illegal and amounts to intermeddling as she had no capacity to sell the suit property as the grant was not yet confirmed.
22. On perusal of the record, it is evident that the grant was not yet confirmed at the time the parties entered into the sale agreement. This was further provided for in clause 3 of the agreement which provided



- that the land would be transferred to the respondent at the confirmation of the grant. On further perusal of the record, the respondent purchased the suit property from the appellant to assist in settling liabilities in the estate. The respondent provided a list of expenses that the appellant was to settle from the proceeds of the sale of the suit property. In that regard, there is evidence on record to the effect that the respondent purchased the portion of land measuring one (1) acre for the benefit of the estate and furthermore no beneficiary of the estate has filed any affidavit to the contrary. It is noted that it is only the appellant who sold land to the respondent who is opposing the claim of the respondent.
23. Thus, the appellant was fully aware of what she was doing by selling a portion of the land to the respondent. At the onset of the proceedings the appellant listed the respondent as a beneficiary of the estate to acquire 1 acre of the suit land as per the sale agreement. In my considered view, this is an admission by the appellant that she sold one (1) acre to the respondent and was ready to honour the agreement until she changed her mind after quite sometime. As such, for the appellant to argue that the transaction amounted to intermeddling would be prejudicial and unfair to the respondent who paid the purchase price on request of the appellant. The appellant seeks to benefit twice from the estate by receiving the purchase price and keeping the land.
 24. I have perused the persuasive authority of *Morris Mwiti Mburugu vs Dennis Kimanthi M'Mburugu* [2016] eKLR where the court posed the question of what would happen in the circumstances where all the beneficiaries participate in a disposition and the said disposition is for the benefit of the estate. The court in that case provided that it would not strictly apply the provisions of Section 45 of the [Law of Succession Act](#) as doing so would be using the provision as a vehicle of fraud. Similarly, in this case, the respondent purchased the suit property from the appellant for the benefit of the estate and therefore in applying Section 45 of the Act strictly would be encouraging fraud perpetrated by the appellant as against the respondent. The court below found that since the appellant is the one who sold the land measuring one acre to the respondent on her request to raise funds to clear debts of the deceased, her share of 1 acre ought to be excised from her share and not shares of the other beneficiaries.
 25. In my view, if the said transaction of a purchaser in good faith was to be referred to as intermeddling, the court would be promoting fraud on part of the appellant and putting the respondent at a disadvantage. Such a decision would encourage beneficiaries to sell land prematurely to innocent buyers and receive consideration just to later claim that the act of the innocent buyer amounts to intermeddling. This argument was explained and upheld by the Court of Appeal in the *Morris Mwiti Mburugu* case (supra) and I totally agree with the holding of the court.
 26. In the case before me, the appellant had moved partly to fulfil her obligations under the transaction by including the respondent as a beneficiary of one acre of L.R. Chania/Ngongoro/46 in the Summons for confirmation dated 22/09/2009. It appears she later changed her mind and abandoned the Succession Cause leading the Summons to be dismissed for want of prosecution. The appellant did not deny she sold the portion of land to the respondent but says her children later refused to support the arrangement.
 27. The magistrate's judgment was to the effect that the one (1) acre sold to the respondent be removed from the appellant's share of 3.6 acres in the estate. As such the shares of the children of the deceased were not affected by the one acre bought by the respondent. The said shares remained as proposed in the Summons for confirmation of grant. In my considered view, the magistrate administered justice to the parties in accordance with the law and her judgment ought not to be interfered with;
 28. Consequently, I find no merit in this appeal and it is hereby dismissed with costs to the respondent.
 29. It is hereby so ordered.



**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 20TH DAY OF
AUGUST 2024.**

F. MUCHEMI

JUDGE

