



**In re Estate of Monica Wanjiru Macharia (Deceased) (Family Appeal
15 of 2023) [2024] KEHC 10437 (KLR) (20 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10437 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
FAMILY APPEAL 15 OF 2023
FN MUCHEMI, J
AUGUST 20, 2024**

BETWEEN

ESTHER MURUGI MACHARIA APPELLANT

AND

TABITHA WANGARI KARANJA 1ST RESPONDENT

RACHAEL NYAMBURA KIMANI 2ND RESPONDENT

JAMES NJOROGE MACHARIA 3RD RESPONDENT

MARGARET MUGURE GITAU 4TH RESPONDENT

MARIAM NJERI NJUGUNA 5TH RESPONDENT

*(Being an Appeal from the Judgment of Hon. M. W. Wanjala (SRM)
delivered on 30th August 2022 in Thika CM Succession Cause No.
75 of 2014 consolidated with Succession Cause No. 216 of 2016)*

JUDGMENT

Brief facts

1. This appeal arises from the ruling of Thika Senior Resident Magistrate in CM Succession Cause No. 75 of 2014 that was consolidated with Succession Cause No. 216 of 2016. The ruling was delivered on 30th August 2022 and the court allowed the protest of the 1st respondent and distributed the estate consisting of only one asset LR. No. LOC.1/CHOMO/410 equally amongst the respondents. The court further held that the appellant was not entitled to any share in the said property for she had immensely from another parcel of deceased during her lifetime. The land the appellant was gifted was LR. No. LOC.16/GATURA/796 which she has subdivided into two portions LR. No. LOC.16/GATURA/1371 and 1374 .



2. Dissatisfied with the court's decision, the appellants lodged this appeal citing 5 grounds of appeal summarized as follows:-
 - a. The learned trial magistrate erred in fact and law in finding that the appellant was not entitled to a share of LR. No. LOC.1/CHOMO/410.
 - b. The learned trial magistrate erred in law and in fact in failing to recognize that the appellant ought to solely inherit LR. No. LOC.1/CHOMO/410 based on the will of the deceased.
3. Parties put in written submissions to dispose of the appeal.

Appellant's Submissions

4. The appellant submits that LR No. LOC.1/CHOMO/410 be bequeathed to her solely according to the wishes of the deceased. The appellant submits that the magistrate conveniently ignored her testimony that she was present in a meeting held in 2011 which corroborates her evidence regarding the deceased's wishes. The appellant submits that the court has the discretion to share out the suit property to the beneficiaries and urges the court to include her in the distribution of the property.

The Respondents' Submissions

5. The respondents submit that this cause was commenced vide a petition for letters of administration intestate filed on 11th February 2014 by the appellant declaring herself the sole beneficiary. In the Summons for Confirmation of grant, the appellant was categorical that the deceased died intestate, but in a fraudulent scheme to disinherit the respondents, she deposed in the supporting affidavit that she was the sole heir to the deceased's estate and failed to disclose that there were other beneficiaries. Owing to the concealment of the aforesaid material facts, the grant issued to the appellant was revoked on application by the 1st respondent. The appeal of the 1st respondent was dismissed by the Kiambu High Court in Civil Appeal No 105 of 2018.
6. The respondents rely on Section 11 of the *Law of Succession Act* and the cases of *Charles Ndungu Wambugu vs Pauline Wangari Wambugu & 4 Others* [2014] eKLR and *Monica Wangari Mugo vs Jason Nyaga & Another* [2019] eKLR and submit that the letter produced by the appellant did not amount to a will as it was not signed by the testator or any witnesses. That notwithstanding, the cause was commenced as an intestate estate and not a grant of probate and therefore the alleged will by the appellant was an afterthought and a fabrication.
7. The respondents submit that the appellant did not provide any tangible evidence to prove that there was a valid will gifting her the suit premises and to prove her entitlement to LR. No. LOC.1/CHOMO/410. The respondents submit that the appellant testified that LR. No. LOC.16/GATURA/796 was gifted to her by her father but on cross examination she alleged that the said parcel was first registered to the deceased because she had lost her identity card and later it was transferred to her. The appellant was not truthful in her evidence since the green card demonstrates that LR. No. LOC.16/GATURA/796 measuring 1.17 hectares formed part of the deceased's estate. As such, the respondents submit that the appellant could not seek to claim LR. No. LOC.1/CHOMO/410 and leave them empty handed.
8. The respondents further submit that the appellant's second witness Nuhu Mwaura Waweru who was alleged to have witnessed the execution of the will, admitted that nothing to do with land was discussed in their meeting with the deceased and the meeting was a celebration where they ate, drank and left. On the other hand, the respondents state that they gave uncontroverted evidence that both parcels LOC.16/GATURA/796 and LOC.1/CHOMO/410 were registered to their deceased mother



and that the appellant had taken LR. No. LOC.16/GATURA/796 solely and therefore she was not entitled to any share in the suit property as the former parcel of land had to be taken into consideration during the distribution of the estate pursuant to Sections 28 and 42 of the Law of Succession Act and the case of William M'arimi Mutuambae vs Rosemary Karamuta [2017] eKLR.

9. The respondents submit that although costs are not ordinarily awarded in family matters, the appellant is a vexatious litigant who has dragged them to court for the last decade and thus they pray for an award of costs.

Issue for determination

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

The Law

11. 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.”

12. 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.

13. 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.

14. The appellant filed a petition for letters of administration intestate on 11th February 2014 in Thika CM Succession Cause no. 75 of 2014 where she listed herself as the only beneficiary of the deceased who died on 24th January 2012. The court below issued letters of administration intestate to the appellant on 28th April 2014 and confirmed the grant on 6th February 2015. The appellant solely inherited the suit property being LR. No. LOC.1/CHOMO/410.



15. The 1st respondent moved the High Court to have the grant issued to the appellant in Succession Cause No. 75 of 2014 revoked. On 13th April 2016, the High Court transferred the said matter to Thika Chief Magistrate's Court for disposal after the magistrate's courts were clothed with the requisite jurisdiction to issue orders revoking grants of letters of administration pursuant to Section 23 of the Magistrate's Court Act. The matter proceeded by way of viva voce evidence vide Succession Cause No. 216 of 2016 and the court allowed the application revoking the grant which had been issued in Succession Cause No. 74 of 2014. The court consolidated Succession Cause No. 216 of 2016 and 75 of 2014. The appellant appealed against the decision of revocation in Kiambu High Court Civil Appeal No. 105 of 2018 but her appeal was dismissed.
16. The appellant then filed Summons for confirmation of the grant on 3rd November 2021 where she stated that the deceased was survived by six beneficiaries but proposed that LR. No. LOC.1/CHOMO/410 should devolve to her solely. Her application was not accompanied by any consent executed by any of her siblings.
17. The 1st respondent in her protest confirmed that the deceased was survived by six beneficiaries and provided that the appellant had during the lifetime of the deceased benefited by being given LR. No. LOC.16/GATURA/1371, 1374 and 796 which measured 1.05 hectares, 0.04 hectares and 1.17 hectares respectively. The 1st respondent stated that only parcel number LOC.1/CHOMO/410 measuring 0.37 hectares remained as forming the estate and proposed that the same be shared out evenly amongst the four respondents and exclude the appellant from benefiting as she already benefited from the previous parcels of land. The 1st respondent led evidence that prior to the death of her father, he had two parcels of land whereby he shared out the land in Gatura amongst his sons and left portions for his two wives.
18. The 3rd respondent testified that LR No. Gatura/796 belonged to his father measuring 22 acres and it was sub divided amongst the four sons and two widows with the daughters getting nothing. The witness testified that LR. No. Gatura/796 was registered in the names of the deceased and it was meant to devolve to him or his sisters. He further stated that the appellant sold part of the Gatura parcel and remained with a portion where she currently stays.
19. The appellant testified that LR No. LOC.1/CHOMO/410 was originally 6 acres and it was sub divided amongst the four sons and two widows. She further testified that the Gatura parcel was registered in her mother's name as she had lost her identity card and that her father stated that the said land be registered in the deceased's name to hold in trust for the appellant. As regards, LR. No. LOC.1/CHOMO/410 she testified that the deceased called elders and stated that she should be given the said parcel of land as she was taking care of their mother.
20. The appellant called a witness, Nuhu Mwaura Waweru who testified that the meeting called by the deceased in November 2011 never discussed anything to do with any land. All that was done was a celebration whereas people ate and drunk.
21. From the record, it is evident that the deceased died intestate as the appellant herself initiated intestate succession whereas she petitioned for letters of administration intestate and not grant of probate. Although she claims that the document dated 20th November 2011 was a will bequeathing her the estate, the said letter does not constitute a will pursuant to Section 11 of the Law of Succession. On perusal of the said document, I note that the document is not executed by the deceased or attested by any witnesses.
22. Furthermore, from the actions of the appellant, the alleged will is an afterthought. If the will was in existence all along, the appellant would have petition for a grant of probate as opposed to letters of



administration intestate. In *Charles Ndung'u Wambugu vs Pauline Wangari Wambugu & 4 Others* [2014] eKLR the Court of Appeal stated:-

This cause was commenced as a petition for the grant of letters of administration intestate and not as grant of probate. Accordingly, it is irrelevant that the deceased left behind a written will. The estate of the deceased will thus have to be distributed as intestate. In any event, other than making the bold statement that the deceased left behind a valid will, no such will was exhibited in the affidavit of protest.

23. It is clear that the appellant's witness testified that the meeting of November 2011 in which the appellant alleges the deceased bequeathed her the asset in issue did not discuss anything to do with any land devolving to the appellant. It is evident that the deceased did not bequeath the appellant with the suit property.
24. Additionally, from the record and the testimony of the 1st and 3rd respondents show that the appellant had already benefited from LR. No. LOC.16/GATURA/796 during the lifetime of the deceased. It is trite law that a court is enjoined under Section 42 of the *Law of Succession Act* to take into account gifts inter vivos given to beneficiaries before the death of the deceased. Section 42 of the *Law of Succession Act* which provides: -
 1. Where-
 - a. An intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house;
 - b. Property has been appointed or awarded to any child or grandchild under the provisions of Section 26 or Section 35,
That property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.
The court below recognized the gift *inter vivos* bequeathed to the appellant and rightly found that it was a sufficient share for her. Her siblings who are five in number will get less than half of what the appellant got in the event that this court finds that they ought to share the remaining parcel equally.
25. The magistrate rightly found that the document produced by the appellant as a will was not signed by witnesses and did not comply with Section 11 of the *Succession Act*. In my considered view, the decision of the court was in accordance with the law. I also find that the deceased died intestate and that she did not bequeath the appellant No. LOC.16/GATURA/410 during her lifetime.
26. It was not in dispute that the appellant benefited from the estate through a gift *inter vivos* from the deceased LR. No. LOC.16/GATURA/796 measuring 1.17 ha. The respondents are children of the deceased like the appellant and got nothing during the deceased's lifetime. The only parcel available for distribution is LOC 16 GATURA/410 measuring 0.37 ha. It is surprising that the appellant by wanting to inherit this parcel solely wants to disinherit her siblings in her late mother's estate. This is a move that cannot be entertained in the arena of justice and it is contrary to both *the Constitution* and the *Law of Succession Act*. The appellant in this appeal and in the Succession Cause in the court below has demonstrated a sense of greed and lack of compassion for her siblings.
27. The magistrate distributed LR LOC.16/GATURA/410 equally among the respondents which in my considered view was the right thing to do for it was in compliance with the law.
28. I hereby find no merit in this appeal and upheld the Magistrate's decision made on 30th August 2022.



29. This appeal is hereby dismissed with costs to the respondent.

30. It is hereby so ordered.

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

F. MUCHEMI

JUDGE

