



REPUBLIC OF KENYA



**In re Estate of Wanjiru Mbogo (Deceasd) (Family Appeal 18 of 2023)
[2024] KEHC 10419 (KLR) (20 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10419 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
FAMILY APPEAL 18 OF 2023
FN MUCHEMI, J
AUGUST 20, 2024**

BETWEEN

**LUCY NJERI NJUNA 1ST APPELLANT
CAROLINE WAMBUI KIBE 2ND APPELLANT
SAMUEL KIMANI NJOROGE 3RD APPELLANT
PETER MBOGO WANJIKU 4TH APPELLANT
MARY WAMAITHA GICHANE 5TH APPELLANT**

AND

**SIMON MWANGI MACHARIA 1ST RESPONDENT
JAMES NGIGE KARIKUI 2ND RESPONDENT**

*((Being an Appeal from the Judgment and Decree of Hon. O. Wanaga (SRM)
delivered on 29th June 2022 in Thika CM Succession Cause No. 145 of 2008))*

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Thika Senior Resident Magistrate in CM Succession Cause No. 145 of 2008 whereas the court distributed the estate of the deceased comprised of Gatundu Women Horticultural Growers Association to be shared equally amongst the 1st appellant, Margaret Wambui Gitau, the 2nd appellant, the 3rd appellant and the 4th appellant. The other asset LR. No. Ruiru/Ruiru East Block 2/2255 was to be shared equally between the respondents with each getting ½ 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 disinheriting the children and rightful beneficiaries of the deceased and rewarding intermeddlers of the estate with the entire legacy of the deceased.
 - b. The learned trial magistrate erred in law and in fact in distributing the entire estate of the deceased to the respondents who are strangers of the estate and have never dealt with the deceased while disinheriting the appellant who are children and grandchildren of the deceased.
 - c. The learned trial magistrate erred in law and in fact in finding that the deceased had gifted the late John Gitau Mbogo her entire estate being LR. No. RUIRU/RUIRU EAST BLOCK 2/2255 intervivos yet the said property was the subject of the succession cause.
 - d. The learned trial magistrate erred in law and in fact in disregarding the entirety of the evidence of the appellants thereby arriving at an erroneous finding in the judgment.
3. Parties put in written submissions to dispose of the appeal.

Appellants' Submissions

4. The appellants submit that at the time the deceased died in 2005, she was survived by the appellants but at the time of filing the petition, it had been indicated that she was survived by three (3) children. At the hearing of the confirmation of grant, the administrators agreed that the deceased was survived by six (6) children at the time of her death. Thus the court had a clear picture of who the rightful beneficiaries of the estate were as the respondents indicated that they were purchasers. Further, the respondents confirmed that they had purchased the suit land from John Gitau Mbogo, a son to the deceased before the succession cause was concluded which was a clear case of intermeddling of the deceased's estate. Additionally, the respondents testified that they were aware of the status of the suit property belonging to the deceased and yet they proceeded to intermeddle with her estate contrary to Section 45 and 82(ii) of the [*Law of Succession Act*](#).
5. The appellants submit that the wife to John Mbogo indicated in her evidence that she had no evidence showing the gifting of the property to the late John Gitau. Further, the late John Gitau filed the succession cause secretly as an intestate cause and nowhere in the petition did he indicate that the suit property was a gift intervivos. That notwithstanding, whilst relying on the case of [*Nyaga vs Kangeri \(Civil Appeal 19 of 2020\)*](#) [2023] KEHC 21054 (KLR) (31 July 2023) (Judgment), the appellants argue that the gift remained an incomplete gift as it did not vest in John Gitau by way of transfer prior or at the time of the deceased's death and therefore the property remained free property of the deceased.
6. The appellants rely on the case of Succession Cause No. 5 of 2015 In the Matter of the Estate of M'Thuranira M'Mwereria (Deceased) and submit that the sale of the suit property was null and void as it violated Section 82(b)(ii) of the [*Law of Succession Act*](#) and therefore the trial court erred by validating an illegality that was advanced by the respondents.
7. The appellants submit that the trial magistrate placed reliance on evidence not tendered in court as he asserted that the suit property was sub divided and buildings were erected thereon and yet no evidence was tendered in court on the sub division or the development of the land. The appellants argue that the aforesaid assertions by the trial magistrate demonstrate the actual bias he had against them.



The Respondents' Submissions

8. The respondents submit that this succession cause was instituted by John Gitau Mbogo (deceased) who was issued with the grant of letters of administration but he died and his wife Margaret Wambui Gitau took over as administrator. The respondents further submit that the 1st appellant and her deceased sister Jane Waringa Gichane applied to have the grant of letters of administration revoked. The court allowed the summons thereby appointing the 1st appellant and the said Margaret Wambui as the administrators of the estate.
9. The respondents submit that at the time of filing the succession cause, the letter by the chief indicated that the beneficiaries of the deceased were John Gitau Mbogo, Lucy Njeri Njuna and Jane Waringa Gichane. The respondents further submit that all the three children of the deceased were in agreement and signed the consent allowing their brother John Gitau Mbogo to be the sole administrator and beneficiary of the suit property. None of them ever raised any objection to the said process.
10. The respondents argue that the trial court did not err by finding that LR. No. RUIRU/RUIRU EAST BLOCK 2/2255 was not free property as the family has agreed that the said property belonged to John Gitau Mbogo which had been bequeathed to him by the deceased with the other beneficiaries' privity to that agreement. It was further argued that the said property was intended to pass to John Gitau Mbogo and this explains the failure by the appellants in raising any complaint since the year 2005 when their mother died and subsequently in 2018 when John Gitau Mbogo died. Further, the trial court noted that the appellants had to wait to be prompted by the petitioner's advocate for them to realize that there were issues that needed to be addressed.
11. The respondents submit that the appellants did not explain where they have been since 2005 when their mother and grandmother died. Further, the respondents argue that the introduction of other beneficiaries by sneaking into the succession cause a different letter from the one initially filed, was a grand scheme to benefit twice from what the appellants knowingly agreed belonged to their brother. The respondents argue that it is clear from the chief's letter that the only beneficiaries were the petitioner and his two sisters including the 1st appellant and who were present during the discussions to have the petitioner as a sole beneficiary without any objection. Therefore, on the strength of that agreement, the petitioner passed ownership to the respondents. Thus, the respondents submit that the trial court did not err to find that the appellants were not the rightful beneficiaries then or now.
12. The respondents submit that John Gitau Mbogo could not be guilty of intermeddling as the property was gifted to him by the deceased and he subsequently applied to the court to become administrator of the estate and was issued with letters of administration. Further, the respondents submit that they got into the property in 2008 and 2012 under the authority of John Gitau Mbogo, the 1st appellant and her sister and therefore it does not amount to intermeddling. The respondents further submit that the trial court posed the question why there has never been any claim of trespass since the year 2008 to 2020. The respondents argue that the appellants were not interested in the property until the 2nd, 3rd, 4th and 5th appellants sniffed an opportunity for enriching themselves fraudulently and unjustly. They devised a scheme to push the administrator out after his death.
13. The respondents submit that the allegations that the trial magistrate was biased against the appellants is ill advised. The judgment of the trial court is indicative of the evidence tendered before the court which is reflected by the record of appeal. The respondents submit that their evidence was supported by the 1st appellant indicating that there were buildings and people living on the suit property. Further, the 1st respondent avers in his replying affidavit in the lower court that he has been living on the property since 2008 and that he has never sold part of the property to other people. Further, the affidavit of protest



by Margaret Wambui Gitau confirmed that there are people who have been living on the suit property since the year 2009 and the statement by the 2nd respondent confirms that he purchased and disposed part of the suit property between the year 2011 and 2012. Furthermore, the 1st appellant during cross examination confirmed that she visited the suit property once after her brother died and she found a building on the said property and never complained about it. The respondents thus submit that, that is confirmation that there were people living on the suit property. Further, there is no evidence to the contrary that was tendered by the appellants indicative of the position they are now advancing in the appeal.

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 15th August 2005. The deceased’s son one John Gitau Mbogo petitioned for grant of letters of administration on 13th May 2008. In his affidavit in support for the petition for letters of administration he listed the surviving children of the deceased as follows:-

- a. John Gitau Mbogo - son



- b. Lucy Njeri Njuna – daughter
 - c. Jane Waringi Gichane – daughter
19. The petitioner further annexed a consent to the making of the grant in favour of the petitioner which was signed by both of his sisters. Grant of letters of administration was issued on 8th March 2013. The petitioner died on 19th April 2018 and the petition was dismissed for want of prosecution on 25th July 2018.
 20. The 1st appellant and her sister Jane Waringa Gichane (deceased) filed summons seeking to reinstate the petition, that the grant issued on 8th March 2013 be revoked and fresh letters of administration of the estate be issued. The 1st appellant and her sister argued that their brother petitioned for letters of administration secretly, without their knowledge and that the said grant ought to be revoked. The grant was subsequently revoked and the court appointed Margaret Wambui Gitau, the wife of the petitioner and Jane Waringa Gichane as the administrators of the estate vide its ruling on 31st May 2021.
 21. The said Jane Waringa Gichane passed away before they could apply for summons for confirmation of grant and she was substituted by the 1st appellant as an administrator. The 1st appellant thereafter applied for summons for confirmation of grant on 22nd October 2021 to which her co administrator Margaret Wambui Gitau filed an Affidavit of Protest. The protest proceeded by viva voce evidence whereby the protestor testified that LR. No. RUIRU/RUIRU EAST BLOCK 2/2255 was bequeathed to her by the deceased to her late husband, John Gitau Mbogo during deceased's lifetime. All the family members knew of that fact as claimed by Margaret. The protestor further testified that the asset had not been free since the year 2008 and no complaints had been raised by anyone right from when the petitioner applied for letters of administration and even later when the petitioner sold the land parcel to the respondents.
 22. The protestor called the 1st respondent as a witness. He testified that he bought the land from John Gitau in 2008 although the land was registered in the name of the deceased. The witness stated that the petitioner showed him the title deed of the suit property and the petition for letters of administration. The witness further testified that he lived on the suit property since 2008 and no one had ever objected to him acquiring the land or even living there.
 23. The protestor called the 2nd respondent as a witness who testified that he purchased the land on 27th August 2012 from one Simon Mwangi who had bought the entire suit property. The witness testified that at the time he purchased his parcel of land from the suit property, succession was in progress. He further stated that when he purchased the land, all the children of the deceased as per the chief's letter were present.
 24. The 1st appellant testified that the deceased had six children and she is the only surviving child. The 1st appellant stated that the succession cause was initiated by her late brother although they never consented for him becoming the administrator to their mother's estate. On cross examination, the 1st appellant testified that she did not report the forgery of her signature on the consent to the authorities. Further she testified that she only came to learn of the succession cause when her brother died.
 25. From the record, it is evident that the succession cause was instituted in 2008 and yet the 1st appellant and her sister first objected to the same in 2020 which is over 12 years since the cause began. It is interesting that the 1st appellant never raised any concerns about the succession cause for such a long duration of time. Despite the 1st appellant feigning ignorance that her brother had petitioned for letters of administration, she had signed a consent for her brother to be appointed administrator of the estate. Although the 1st appellant claims that her signature was forged, she has not made any report of forgery



to the respective authorities or approached the court diligently to address the issue. From the actions of the 1st appellant, it can be discerned that she was aware and even consented to her brother petitioning for letters of administration. It is curious that the 1st appellant did not raise any complaint at the time the 1st respondent purchased ½ acre of the suit property in 2008. The 2nd respondent equally purchased ½ acre of the same property in 2012 but the 1st appellant remained mum. The 1st appellant alleged that she knew about the succession cause after the death of her brother which in my view is not true given the foregoing facts and the passage of time.

26. The evidence by the 1st respondent supports the fact that the 1st appellant was present and aware of the sale of the land in question to the respective purchasers. The 1st respondent testified that he was present in a family meeting where the family members and the 1st appellant confirmed that they had no issues with the late John Gitau Mbogo selling the suit property. It is on record that the 2nd respondent testified that the 1st appellant was present at the material time of purchase of the half acre portion. The evidence was not controverted by the 1st appellant. The evidence adduced supports the case that the deceased bequeathed the suit property to her son, John Gitau Mbogo during her lifetime who later sold it with the consent and acknowledgement of his siblings who include the 1st appellant. This fact is confirmed by the fact that during the life of the late John Gitau Mbogo none of his siblings attempted to oppose the sale of the land. The 1st appellant is coming in a bit too late. Thus, the appellants cannot claim that the petitioner was intermeddling with the deceased's property knowing very well that the said property was bequeathed to him as a gift.
27. It is my considered view that the appellants have failed to prove the property LR No. Ruiru/Ruiru East Block 2/2255 was free property to be distributed as part of the deceased's estate.
28. Accordingly, I find that the appeal lacks merit and is hereby dismissed.
29. This being a family cause, there shall be no order as to costs.
30. It is hereby so ordered.

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

F. MUCHEMI

JUDGE

