



**Mutie v Mutie & another (Family Appeal E001 of 2023)
[2024] KEHC 17239 (KLR) (12 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 17239 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
FAMILY APPEAL E001 OF 2023
TM MATHEKA, J
AUGUST 12, 2024
CASE NUMBER: HCFA/E001/2023
CITATION: PIUS MAWEU MUTIE VS STEPHEN
MUTUNE MUTIE AND PATRICK KATUU MUTIE**

BETWEEN

PIUS MAWEU MUTIE APPELLANT

AND

STEPHEN MUTUNE MUTIE 1ST RESPONDENT

PATRICK KATUU MUTIE 2ND RESPONDENT

JUDGMENT

1. Mutie Mulili Kitonga died on 28/2/2014 at age 100 years. This is according to the certificate of death issued on 13/1/2015. It says he died at Mumbuni Nziuni, Machakos.
2. There is a letter from the chief Lumbwa Location, P O Box 01 - 90100 Machakos dated 12/8/2021 speaking about the beneficiaries of the estate of the deceased.
3. Letter of administration of estate intestate was made to Stephen Mutune Mutie & Patrick Katuu Mutie on 5/11/2021 in the CM's Succession Cause No. E264/2021. They filed Summons for confirmation of grant on 10/1/2022 dated 4/1/2022.
4. An affidavit of protest was filed by Paul Maweu Mutie on 26/1/2022 objecting to confirmation.
5. He filed Summons for Revocation of Grant dated 12/5/2022. This was heard by way of viva voce evidence.
6. The learned trial court found that the court had territorial jurisdiction as provided for under Section 49(1) of the [Law of Succession Act](#), that pecuniary jurisdiction is a matter of evidence, which evidence



had not been rendered before the court - that the property/ land of the deceased was situated in Makueni - i.e LR Konza South Block 5(Konza) 2853 hence the matter was properly before the court. That the omission of some of the sisters (Children of the deceased) from the petition was not fatal to the grant & could be cured by inclusion. The trial court followed in the estate of Gedraph Kamau Wanyoike (deceased) [2017] eKLR. Nelson Ndung'u Kagiri & 2 others vs Leah Waithera Kagiri & Another [2015] eKLR.

7. That trial court followed Albert Imbuga Kisigwa Vs Recho Kawai Kisigwa Succession Cause 158/2000 - to the effect that revocation of a grant is discretionary, to be done judiciously and only on sound grounds - the learned trial court found that there were no sound grounds for the annulment of the grant and dismissed the summons.
8. The applicant was aggrieved by the ruling of the court and filed this appeal - challenging the ruling of the trial court on the following grounds;that the trial court misinterpreted Section 49(I) of the Law of Succession Act on the meaning of last known place of residence of the deceased person which in this case was Machakos and not Makueni in LR Konza South/Konza South Block 5/2853.that the court erred by not finding that it had no jurisdiction to deal with the matter under Section 49(I) of the Law of Succession Act and in declining to include other properties of the deceased which had been omitted, to this cause.
9. Parties filed submissions through their respective counsel For the Appellant
10. The court has reminded of its duty on appeal and urged to follow *Selle vs Associated Motor Boat Co. Ltd & others* (1968) EA 123 as discussed in *Abok James Odera t/a A. JOdera & Associates Vs John Patrick Machira t/a Machira Co. Advocates* [2013] eKLR

“ This being a first appeal, we are reminded of our primary role as first appellate court namely, to re-evaluate, re-asses and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.” This is augmented by the Court of Appeal holding in *Peters vs Sunday Post Limited* [1958] EA 424

11. The appellant’s counsel summed up the principles to guide the court on some first appeal vis;
 - i. That on first appeal, the court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions.
 - ii. 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
 - iii. 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.
12. On the grounds for the appeal - on whether or not the court had jurisdiction to deal with the matter, it was submitted that the jurisdiction of magistrate’s court is both territorial & pecuniary as conferred by Section 48 of the Law of Succession Act and Section 7(1) of the magistrate’s Act, 2015 respectively.
13. For this, the appellant cited Section 49 of the Law of Succession Act.
14. That according to Section 49(1) of the Law of Succession Act the territorial jurisdiction of magistrate’s court is determined by the last known place of residence of the deceased - except where there is need for



- temporary grant for purposes of collection of assets situate within the area of jurisdiction & payment of debts.
15. It is argued that the trial court could not have assumed jurisdiction in any other manner – Owners of Motor Vessel ‘Lillian S’ Vs Caltex Oil (Kenya) Ltd (1989) KLR
- “By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision... Where a court takes it upon itself to exercise a jurisdiction which it does not possess its decision amounts to nothing.”
16. It is submitted that the appellant availed a valuation report that showed the estate was valued above Ksh. 20 million and hence the trial court at the rank of Senior Resident Magistrate could not have exercised jurisdiction as that is the jurisdiction of a Chief Magistrate as per Section 7
- (a) of the magistrates Court Act - See Janet Kaphiphe Ouma & Anor Vs Marie Stopes International (Kenya) Kisumu HCC No. 68 of 2007.
17. That the grant was null and void, that as per Lord Denning in the case of Macfoy vs United African Ltd (1961) 3 All ER 1169 & 1172
- “If an act is void, then it is in law a nullity and not a mere irregularity. It is not only bad but incurably bad. There is no need for an order to set aside. It is automatically null and void and without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”
18. It was also argued that the administrator/personal representative left out the larger estate of the deceased named as Kalama/Nziuni/452 ~ 30.83 Acres, Machakos /Konza North Block1/455 ~ 9.63acres and the daughters of the deceased and for those reasons - they were guilty of concealment of material facts - and being guilty of non - disclosure ought to have been subjected to “reverse osmosis” as per Gikonyo J in Re Estate of Julius Ndubi Javan [2018] eKLR (deceased) where he stated;
- ... in any judicial proceeding, parties must make full disclosures to the court of all material facts to the case including succession case...non-disclosure of material facts undermines justice and introduces festering waters into the pure streams of justice; such must, immediately be subjected to serious reverse osmosis to purify the streams of justice, if society is to be accordingly regulated by law.
19. Further that the representatives were required by Rule 40(4) of the P&A Rules to disclose all the beneficiaries of the deceased and their respective shares.
20. That by leaving out the daughters of the deceased they were being discriminatory, an act that is prohibited by both the law, *the Constitution* Article 27 Section 38 of the *Law of Succession Act*, and numerous precedents.
21. It is also submitted that the appellant did not consent to the grant - hence the court ought to have found the grant defective in substance - Re estate of Ndirangu (deceased) [2021] eKLR, I.e. Antony Karukenya Njeru Thomas M Njeru [2014] eKLR where the grant was revoked because persons of equal priority did not consent.



For the Respondent

22. It was submitted that these proceedings were with respect to one single asset of one Mutie Mulili Kitonga (deceased) and the property is in Makueni; LR Konza South /Konza South Block 5(Konza) 2853 - that the title shows the property is in Makueni
23. It was submitted that the deceased's last known place of residence was immaterial because the cause was about the distribution of his estate which is clearly in Makueni, and that there is no logic to the appellant's insistence on the matter being filed in Machakos.
24. It is submitted that the primary purpose of a probate court is at Section 48(1) of the [Law of Succession Act](#) see Re Estate of Meshack Nyangi alias Nyangi Kabuga (deceased) 2019eKLR- that the purpose is to facilitate the expeditious disposition of these matters.
25. It is submitted that the pecuniary jurisdiction is set by the Magistrates' court Act - and that the amendment to Section 48 of the [Law of Succession Act](#) - to include the pecuniary jurisdiction of magistrate's courts was intended for this purpose.
26. Regarding the two other properties - it is conceded that these properties exist but are in Machakos County and that the family has never agreed on distribution.
27. It is submitted that the entire family except the appellant has agreed on the distribution of the Makueni property - and that the appellant is driven only by greed as he wants the whole property for himself that omission is not fatal - see Re estate of Kitele Kitingu (deceased) [2021] eKLR where the court stated;

“ However, revoking the grant will be too drastic an action as the same has the effect of setting he parties herein as well as the beneficiaries back to the drawing board yet the matter has been pending since 2005. The court has a discretion whether or not to order for revocation of the grant. As the Objector's grouse has to do with omission of beneficiaries including himself as well as other assets, the same can be ameliorated by including the names of beneficiaries in the distribution schedule as well as adding the new assets. This then calls for interference with the certificate of confirmation of grant so that the family can file a fresh summons for confirmation of grant. This route will take care of the concerns of all the parties as it will be a win - win for them”
28. I have carefully considered the rival submissions and authorities cited - it appears to me that two issues stand out for determination -
 1. Whether the last known place of residence of a deceased person is the determinant of territorial jurisdiction - and
 2. Whether lack of territorial jurisdiction is fatal to this matter.
 3. Whether the omission of some properties and beneficiaries is fatal to the grant
 4. Whether the trial court had pecuniary jurisdiction to make the grant
29. The key issue here is whether or not the learned trial magistrate had the jurisdiction to hear and determine this matter.



30. The jurisdiction of the magistrate's court is set out under;

Section 48 & 49 of the *Law of Succession Act* and Rule 7(3) of the P & A Rules - the law provides for the place where the matter will be found and the value of the property that falls within each rank of the magistracy.

31. Section 49 of the *Law of Succession Act* states; Territorial jurisdiction of Magistrates

The Magistrate's Court within whose area a deceased person had his last known place of residence shall, if the gross value of the estate of the deceased does not exceed the pecuniary limits set out in section 7(1) of the Magistrates' Courts Act, 2015, have in respect of that estate the jurisdiction conferred by section 48.

Provided that -

- (I) the magistrate may, with the consent or by the direction of the High Court, transfer the administration of an estate to any other Magistrate's court where it appears that the greater part of the estate is situated within the area of that other magistrate or that there is other good reason for the transfer;
- (ii) if the deceased had his last known place of residence outside Kenya, the High Court shall determine which magistrate shall have jurisdiction under this section; (iii) every Magistrate's Court shall have jurisdiction, in cases of apparent urgency, to make a temporary grant of representation limited to collection of assets situated within his area and payments of debts, regardless of the last known place of residence of the deceased.

32. It clearly provides for the place of instituting a succession cause as the area where the deceased had his last known place of residence -

33. This must be read together with Section 48 of the *Law of Succession Act* which grants the magistrates the jurisdiction in succession matters. It states;

Jurisdiction of Magistrates

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, *Act (No. 26 of 2015)*.
2. For the avoidance of doubt it is hereby declared that the Kadhis' courts shall continue to have and exercise jurisdiction in relation to the estate of a deceased Muslim for the determination of questions relating to inheritance in accordance with Muslim law and of any other question arising under this Act in relation to such estates

34. It means that the magistrate within whose are, a deceased person had his last known place of residence shall, if the gross value of the estate of the deceased does not exceed the pecuniary jurisdiction of the magistrate, has jurisdiction to hear and determine that matter. See the Court of Appeal in *Josphat Mwanja Muia Vs Loise Atieno Oduk* [2020] eKLR.

35. In this case the last place of residence for the deceased was Machakos. This is confirmed by the letter from the chief & the certificate of death.



36. On pecuniary jurisdiction it is correct that the appellant did not annex the alleged valuation report in the affidavit in support of the summons for revocation of the grant. In the circumstances there was nothing before the trial magistrate to persuade him that estate exceeded his pecuniary jurisdiction. However, the record does show that the other assets were left out - and these two from the bulk of the of the deceased 's estate they were almost 40 acres, as compared to the 10 acres that is the subject of the cause before the trial court.
37. It is ingenious for the respondent to argue that they are not concerned with the assets that were excluded but are very concerned with the assets in Makueni.
38. It does not work that way - the estate of a deceased person is the total estate - you cannot have causes all over the place depending on where the assets are. The law determines how the estate of a deceased person will be dealt with and it has to be through one cause before court (if a magistrate's court) that has both territorial & pecuniary jurisdiction unless for good reason.
39. In this case - it is evident that territorial jurisdiction is with the magistrate's court in Machakos. It would also appear that the estate could exceed the pecuniary jurisdiction of the Senior Resident Magistrate which is 7 million for an estate that may be~ 50 Acres of land - it would not be for inconceivable to conclude that the value would exceed Ksh. 7 million. I would find that the applicants filed the petition in the court without jurisdiction
40. Regarding the other issues of omission of persons beneficially entitled to the estate and part of the estate, these omissions are all admitted. It was argued that that is not fatal.
41. The omissions become fatal when it becomes clear that they were by design - as is in this case.
42. The respondent omitted the two properties in Machakos because they intended to simply deal with part of his estate; they did not involve the other beneficiaries and the applicant by design ; and in my view though in many cases such omissions are redeemable. In this case they appear to have been by design and that is not acceptable Under the Law of Succession Act as they amount to non-disclosure of material facts.
43. The learned trial court had before himself the certificate of death, the letter from the chief clearly showing the last known place of residence of the deceased; the registry saw that as well but still proceeded to file the cause; - the administrators were represented, and the documents were clear the primary consideration where to institute the cause was Machakos - the representative were aware of the existence of rest of the estate and as administrators had the legal duty to put together the whole of the estate of the deceased, all those beneficially entitled and place that before the court with jurisdiction-
44. The administrators did not do that. The grant is not redeemable. The grant is null and void for want of jurisdiction.
45. The appeal is allowed and the grant is accordingly revoked.
46. Each party to bear its own costs.

DATED SIGNED AND DELIVERED VIA CTS THIS 12TH AUGUST 2024

JUDGE

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA

THE JUDICIARY OF KENYA.

MAKUENI HIGH COURT



HIGH COURT DIV

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