



**Kaaria & another v M’Imanyara (Civil Appeal E082 of 2021)  
[2024] KEHC 13691 (KLR) (29 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13691 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E082 OF 2021  
LW GITARI, J  
OCTOBER 29, 2024**

**BETWEEN**

**LYDIA KAIRUTHI KAARIA ..... 1<sup>ST</sup> APPELLANT**

**JOYCE NKIROTE KAAI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**FLORENCE KINAITORE M’IMANYARA ..... RESPONDENT**

**JUDGMENT**

1. The appeal arises from the ruling in Chief Magistrate’s court Meru in succession cause No. 295 /2016 in the estate of Martin M’Imanyara M’Itonga (deceased). The appellants were the objectors in the said succession cause. They moved the court with a notice of motion dated 27<sup>th</sup> November,2019 and filed in court on 5<sup>th</sup> December,2022 seeking orders that there be a stay of execution of a ruling delivered by the learned Magistrate dated 30<sup>th</sup> May 2019 dismissing the objection and an order of inhibition be issued stopping all dealings in LR NO. Kiirua/Ruiriri/1688 pending the hearing of the notice of motion. The motion was also seeking a review of the said ruling dated 30<sup>th</sup> May 2019 and all the consequential orders. The appellants were also seeking an order that the case be re-opened to allow the appellants to adduce the evidence on the aspect of gift intervivos.
2. In a ruling delivered on 16<sup>th</sup> June 2020 the learned magistrate dismissed the said application with costs.
3. The appellants were dissatisfied with the said ruling and filed this appeal based on three grounds and pray that the said ruling be set aside, the ruling dated 30<sup>th</sup> May 2019 be set aside and the court to allow the re-opening of the succession cause to allow the appellants to tender evidence on gift intervivos. The grounds of appeal are a follows-;
  1. That the learned magistrate erred in law and in fact by failing to appreciate that the aspect of gift intervivos (incomplete gifts) is purely legal point which cannot be accentuated fully without



the guidance of a legal counsel and the appellant discovered this after the court pronounced its decision.

2. That the learned magistrate erred in fact and in law by failing to appreciate that in as much as a review is discretionary in nature an issue of gift intervivos/incomplete gifts is a new and important matter which was not within the knowledge of the appellants at the time of passing the order.
3. That the learned magistrate failed to appreciate the difficulty and uncertainty that the beneficiaries of the estate will be faced with in the administration of the estate as sufficient reasons to warrant an order to review judgment.
4. The court directed the parties to file written submissions but failed to do so within the time given and the court proceeded to fix the matter for judgment.

## Background

5. This matter relates to the estate of Martin M’Imanyara (deceased) who died intestate on 27<sup>th</sup> April 2016. A grant of letters of administration was issued to Florence Kinaitore M’Imanyara who is the widow of the deceased on 10<sup>th</sup> April 2017. The beneficiaries of the estate were listed as follows;- Agnes Mukiri Gakui Joyce Nkirote Kaai Moses Kaaria Manyara Ann Karwirwa Nturibi Margaret Karimi Manyara Martha Kinya Manyara Joseph Muthomi M’Itwerandu Jerica Kajuju Manyara Lucy Kathambi Manyara Jane Karambu Manyara Mariam Nkaimiri purchasers Faith Kananu
6. A summons was filed by Lydia Kairuthi Kaaria and Joyce Nkirote Kaai seeking orders that the grant issued to the petitioner be revoked and having been obtained clandestinely without their knowledge. They were contending that as the daughters of the deceased they were dependants of the deceased who should have been included in the succession cause. In the meantime before that summons was determined, the petitioner moved the court with a summons of confirmation grant dated 15<sup>th</sup> January, 2018. The record shows that Lydia Kairuthi Kaaria and Joyce Nkirote Kaai the present appellants were treated as the protestors. They were ordered to file a protest. The appellants do not seem to have filed a protest as what I have seen on record is the objectors’ submissions in opposition to the application for confirmation of grant. The objectors claim they are spouses of sons of the deceased who are Kaaria and Kaai. Their claim to the estate is that the deceased had during his lifetime given their spouses two (2) acres each where their homestead(s) are located and have developed the portions extensively which the petitioner has refused to recognize. They urged the court to recognize their claim. It would appear from the record that the summons dated 10<sup>th</sup> July, 2017 was treated as protest and was heard by way of viva voce evidence in court.
7. The learned magistrate gave a ruling on 30<sup>th</sup> May 2019 dismissing the application by the protestors. The objectors did not relent, they filed a notice of motion dated 27<sup>th</sup> November, 2019 seeking an order that the ruling of the learned Magistrate dated 30<sup>th</sup> May 2019 be stayed and an order of inhibition be issued stopping all dealings in LR NO. Kiirua/Ruiriri/1688 be issued pending the hearing of the application for review varying and/or setting aside of the ruling dated 30<sup>th</sup> September, 2019 and all the consequential orders thereto. They urged the court to re-open the case for the court to consider the aspect of gift intervivos.
8. The summons was heard and determined. The learned magistrate held that the application lacked merits and dismissed it. The appellants were dissatisfied with the ruling and filed this appeal. I have considered the appeal. The issue for determination is whether the appeal has merits.



9. This is a first appeal. The duties of the 1<sup>st</sup> appellate court have been well laid down in the decision of this court and the Court of Appeal. In *Selle & another Vs Associated Motors Boat C. Ltd & others* (1968) E.A 123. The court stated that a 1<sup>st</sup> appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it bearing in mind that it did not have an opportunity of seeing and hearing the witnesses and leave room for that (see *Peters Vs Sunday Post Limited* 1958 EA 424).

The duty of the first appellate court is to re-evaluate the evidence, analyse it and come up with its own independent findings. An appellant in a first appellate has a valid expectations that the decision will be subjected to a fresh consideration and the appellate court's own decision.

10. The appellants contend that the learned magistrate failed to appreciate that the aspect of gift intervivos is a legal point which could not have been accentuated fully without the guidance of a legal counsel which the applicant came to realize after the court rendered its decision. It has been stated by courts that the right to legal representation in civil cases should not be impeded as it is a constitutional right that is implicit in the provisions therein.
11. In *Tom Kusienga & others Vs Kenya Railways Corporation and others* (2013) eKLR Mumbi Ngugi J ( as then was) stated that-;

“However, I believe that the right to legal representation by counsel of one's choice in civil matters is implicit in the constitutional provisions with regard to access to justice particularly articles 48, 50(1) and 159 (2) (a) of [the constitution](#) and it is only in exceptional circumstances that this right should be taken away.”

12. The Court of Appeal in *Delpus Bank Limited Vs Chanvan Sign Chatthe & 6 others* observed as follows-;

“the starting point is of course to reiterate that a most valued constitutional right to a litigant, the right to a legal representative or advocate of his own choice.”

The Court of Appeal espoused how valued the right to legal representation can be and that a party's right to choose an advocate is his constitutional right. Article 50 of [the Constitution](#) provides for right to a fair trial. Article 50 (1) provides as follows-;

“50. Every person has the right to have any dispute that can be resolved  
(1) by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

Right to legal representation is an issue of access to justice which is guaranteed under [the constitution](#). Article 48 of [the constitution](#) provides that-;

“48. The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.”

The right to legal representation cannot be denied to a party in a Civil dispute. Unlike in criminal cases where a person charged has a right to be informed of the right to legal representation by a legal counsel of his choice and a right to have an advocate assigned to him by the state and at state expenses if substantial injustice would otherwise result and be



informed of that right, unfortunately the right is not available to parties in civil proceedings. See Article 50 (2) (g) (h) of *the Constitution* which refers to every accused person. The record of the lower court shows that the appellants appeared before the learned magistrate in person and did not at any stage apply for time to be represented by an advocate. The appellants are now seeking this court's discretion to be given an opportunity to engage a lawyer who will assist them to articulate the principles of gift intervivos. The courts are enjoined to adopt an interpretation of the provisions of the bill of rights to the one that favours the enforcements of the right. Article 20 (1) (2) & (3) (b) of *the constitution* provides as follows

- “20(1) The bill of Rights applies to all law and binds all state organs and all persons.
- (3) In apply the bill of Rights, the court shall
- (b) Adopt the interpretation that most favours the enforcement of a right or fundamental freedom.”

The appellants have a right to legal representation by counsel of their choice. The issue is whether the learned trial magistrate erred by failing to allow the appellants application for review. In an application for review there are three elements which the court has to consider and these include-;

1. Whether there is a mistake or error on the face of the record.
2. Whether there exists sufficient reason to justify review.
3. Whether the application was filed without unreasonable delay.

13. Review is provided under Section 80 of the *Civil Procedure Act* and Order 54 Rule 1 Civil Procedure Rules.

On whether there was an error apparent on the face of the record, the appellant. In the notice of Motion dated 27<sup>th</sup> November, 2019 the appellants did not allege that there was an error on the face of the record. I should consider the second element as to whether there was any other sufficient reason. Order 40 Rule 1 Civil Procedure Rules provides-;

- (1) Any person considering himself aggrieved— (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

The appellant had stated that they were laymen and did not get the benefit of legal representation. The impugned ruling only considered whether there was an error apparent on the face of the record and failed to consider whether there was any sufficient reason to warrant review of the ruling. The learned magistrate erred as she only considered the issue of gift intervivos whereas the appellants were also seeking to revoke the grant on the grounds in the chamber summons. Furthermore, the respondent had sold a portion of the estate before confirmation of grant and had proposed to distribute the estate to two persons Miriam Nkaimiri & Faith Kananu who were strangers to the estate. Although the respondent testified that it is the deceased who had sold the land she did not tender any credible



evidence before the court. The appellants had also requested the court to do a scene visit which was declined. Based on this background, I find that the learned magistrate erred by failing to find that there were sufficient reasons to warrant a review of the ruling.

14. The learned magistrate also failed to find that purchasers are not beneficiaries and yet the respondent purported to distribute the estate to them at the expense of the lawful beneficiaries of the estate of the deceased.
15. For these reasons I come to the conclusion that the appeal has merits. This court should exercise its discretion in favour of the appellants to exercise their right to legal representation and have all the issues laid before the court and be determined on merits.

### **Conclusion**

1. I allow the appeal.
2. The ruling dated 16<sup>th</sup> June 2020 dismissing application for review of the ruling dated 30<sup>th</sup> May 2019 is set aside.
3. The appellants to engage legal counsel within a reasonable time.
4. The matter is referred back to the trial court before another magistrate for the appellants to adduce evidence on the issue of gift intervivos and any other matter as they may be advised by their advocate of their choice.
5. Costs to the appellants

**DATED, SIGNED AND DELIVERED AT MERU THIS 29<sup>TH</sup> DAY OF OCTOBER, 2024.**

**L.W. GITARI**

**JUDGE**

**29/10/2024**

Ms Nelima for Respondent

Court Assistant- Muriuki

No appearance for Respondent

**L.W. GITARI**

**JUDGE**

**9/10/2024**

