



REPUBLIC OF KENYA



In re Estate of Dorcas Muthomi Njagi (Deceased) (Civil Appeal E063 of 2024) [2024] KEHC 16179 (KLR) (19 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16179 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E063 OF 2024
LM NJUGUNA, J
DECEMBER 19, 2024
IN THE MATTER OF THE ESTATE OF DORCAS MUTHONI NJAGI (DECEASED)**

BETWEEN

SILVESTER NJUE MUGO APPELLANT

AND

SANDRA MUKAMI NJUE RESPONDENT

(An appeal from the Ruling of Hon. N. Kabara, SRM in Siakago Succession Cause No. E213 of 2021 delivered on 26th June 2024.)

JUDGMENT

1. The appellant filed a memorandum of appeal dated 22nd July 2024 seeking that the appeal be allowed and the judgment of the trial court and consequential orders be reversed, reviewed and/or set aside and the succession cause be conducted legally. The appeal is premised on the grounds that:
 1. The Learned Magistrate erred both in law and fact in holding that Stall No. 35 Rwika Market be registered in the joint names of the appellant and Cathy Wanjuki Njue;
 2. The Learned Magistrate erred both in law and fact in holding that Land parcel number Mbeti/Gachuriri/2270 be registered jointly only in the names of Sandra Mukami Njue, Joan Wawira Njue and Cathy Wanjuki Njue, thereby excluding the applicant's name;
 3. The Learned Magistrate erred in law when she failed to consider the appellant's rights in his deceased's wife's net intestate estate;
 4. The Learned Magistrate erred in law when she failed to consider all the evidence and submissions for and on behalf of the appellant in respect to the suit before her; and



5. The Learned Magistrate erred in law when she failed to consider viva voce evidence, choosing instead to rely on the parties' unsubstantiated and unsupported submissions; which had no evidential value.
2. The respondent, a daughter of the deceased and Anne Ngito Njagi, the deceased's sister, petitioned for a grant in the estate of the deceased. The same was issued by the trial court on 11th March 2022. The appellant who is the husband of the deceased, filed summons dated 4th July 2023 for revocation of grant stating that the petitioners petitioned the grant without his knowledge. Through summons dated 5th September 2023, the appellant, who was previously seeking revocation of grant, sought confirmation of the grant and he proposed a mode of distribution through the supporting affidavit thereof. He named himself and his 3 daughters as the beneficiaries of the estate of the deceased. The respondent filed an affidavit of protest contesting the mode of distribution.
3. The mode proposed by the appellant was as follows:

Sandra Mukami Njue & Silvester Njue Mugo	Mbeti/Gachuriri/2270	1.2Ha
Joan Wawira Njue & Silvester Njue Mugo	Mbeti/Gachuriri/2270	1.2Ha
Cathy Wanjuki Njue & Silvester Njue Mugo	Mbeti/Gachuriri/2270	1.2Ha
Sandra Mukami Njue & Cathy Wanjuki Njue	Mbeti/Gachuriri/938	Jointly
Silvester Njue Mugo & Joan Wawira Njue	Rwika Stall No. 35	Jointly

KCB Shares, National Bank Shares, Kenya Power & Lighting Company Shares, FEB Holding Shares and all other monies to be deposited with Public Trustee to pay school fees until Joan Wawira Njue and Cathy Wanjuki Njue complete their education and the balance to be shared as follows:-

Silvester Njue Mugo - 25%

Sandra Mukami Njue - 25%

Joan Wawira Njue- 25%

Cathy Wanjuki Njue- 25%

4. The respondent proposed that since all the 3 children of the deceased are adults, parcel numbers Mbeti/Gachuriri/2270 and Mbeti/Gachuriri/938 should be held jointly by the 3 namely Sandra Mukami Njue, Joan Wawira Njue and Cathy Wanjuki Njue. It was her argument that parcel number Mbeti/Gachuriri/938 and Rwika Stall 35 were the deceased's properties before she got married to the appellant. That Rwika Stall 35 be given to the appellant and Cathy Wanjuki Njue. That the money held by the public trustee and the deceased's death gratuity be distributed as follows:

Silvester Njue Mugo - 15%

Sandra Mukami Njue - 15%



Joan Wawira Njue- 35%

Cathy Wanjuki Njue- 35%

5. She proposed that the larger shares be given to her 2 younger sisters who are still in college. She also proposed that the shares be divided as follows:
 - KCB Shares- Joan Wawira Njue
 - National Bank Shares- Silvester Njue Mugo
 - Kenya Power & Lighting Company Shares- Sandra Mukami Njue
 - FEB Holding Shares- Cathy Wanjuki Njue
6. Through a further affidavit, the appellant stated that since he married the deceased, he has been caring for her father who in turn blessed them with land parcel number Mbeti/Gachuriri/2270 which the deceased's father had bought for himself.
7. The dispute was referred for mediation through which a partial mediation settlement agreement was reached and it was adopted as the judgment of the court. The remaining issue was distribution of the deceased's death gratuity, the Rwika stall 35 and parcel number Mbeti/Gachuriri/2270 and the court directed parties to file written submissions on the same.
8. The trial court noted that the appellant had already remarried and settled his new wife in the home where the deceased lived with him. She noted the respondent's sentiments that her sister Joan is an academic weakling who would easily be taken advantage of by the appellant if she is left to co-own land with him.
9. On this basis, the trial magistrate ordered that Rwika Stall 35 be registered jointly in the names of the appellant and Cathy Wanjuki Njue and parcel number Mbeti/Gachuriri/2270 be registered in the joint names of the deceased's 3 children. The gratuity and money held by the Public Trustee was given to the respondent's younger sisters Joan Wawira Njue and Cathy Wanjuki Njue to help them facilitate their university education. This ruling is the subject of the appeal herein.
10. The appeal was canvassed by way of written submissions.
11. The appellant submitted that parcel number Mbeti/Gachuriri/2270 was a gift to him and the deceased from his father-in-law and that it should be owned by himself and the children of the deceased in equal shares. That it should be held as having been acquired during subsistence of the marriage. That Rwika Stall 35 should be given to him and Joan Wawira Njue who was academically disadvantaged and that he would help her to develop it and earn an income from it.
12. The respondent submitted that the conduct of the trial court was above par and that its decision should be upheld. That the trial court gave its reasons for the findings. She argued that it is suspect that the appellant is keen on co-owning Rwika Stall 35 with Joan and not with Cathy, knowing that Joan is a weakling. That the appellant did not contest that parcel number Mbeti/Gachuriri/2270 was given to him by his father-in-law and that he has since remarried. According to her, the distribution is fair and all the beneficiaries have been provided for.
13. The issue for determination is whether the appeal is merited.



14. The role of an appellate court is to re-examine the evidence at trial and come up with its own conclusions while keeping in mind the findings of the trial court. In the case of *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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...”

15. The parties agreed on distribution of part of the estate through mediation and the partial settlement agreement was adopted as the judgment of the court. The remaining part of the estate was subjected to a hearing through written submissions. The appellant has faulted the court for relying on the submissions. In my view, a hearing can be conducted by viva voce evidence or by written submission. In this case, there was no order or direction that viva voce evidence be taken. In any event, the appellant did not tell the trial court that he preferred viva voce hearing.

16. Through submissions, the parties argued their cases regarding distribution of Rwika Stall 35, parcel number Mbeti/Gachuriri/2270 and the death gratuity and money held by the public trustee. Rwika Stall 35 was given to the appellant to jointly own with Cathy, his daughter. The appellant is not happy about this because in his opinion, Joan is the only one who did not go to university but the other children did. He said before the trial court and this court that he wants to co-own the property with Joan.

17. The respondent expressed her apprehension that the appellant will scheme to manipulate Joan out of her right in the property and that Cathy is the best person for him to co-own the property with. Regarding parcel number Mbeti/Gachuriri/2270, the trial court excluded the appellant and gave it to the 3 daughters of the deceased, noting how the property was acquired and that the appellant has already remarried and settled with his new wife. The court ordered that the money be distributed to Cathy and Joan 30% each and the appellant and respondent to get 20% each.

18. A family court should concern itself with fair and equitable distribution of the estate of a deceased person and to ensure that none of the bona fide beneficiaries are disinherited. In this case, the deceased died and was survived by a husband and 3 daughters. Section 35(1) of the *Law of Succession Act* provides:

“(1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to-

(a) the personal and household effects of the deceased absolutely;
and

(b) a life interest in the whole residue of the net intestate estate:

Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.”

19. The appellant is the deceased’s widower; thus, he is not bound by the proviso to this provision. Ideally, the appellant is entitled to a life interest in the estate of the deceased. A life interest is not absolute. It



means that he may enjoy the property of the deceased until his death but the child/children may have the property absolutely through inheritance. Section 35(5) of the *Law of Succession Act* provides:

“(5) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.”

20. This means that the appellant is entitled to use the property of the deceased until his death and then the same shall devolve in equal shares to the 3 daughters of the deceased. The law, however, forbid the appellant from alienating the immovable property by selling or transferring it. In this case, as regards Rwika Stall 35, the issue is not that the appellant has been denied his right, the issue is that he is co-owning it with the daughter he has not chosen. My view is that this issue can be resolved by upholding the finding of the trial court since the appellant only holds a live interest in the property.
21. Regarding parcel number Mbeti/Gachuriri/2270, similarly, the appellant should be left to have a life interest in it according to the law. The distribution of the gratuity and money held by the public trustee is fair and I find no need to displace it in the circumstances.
22. That being said, I find that the appeal partially succeeds with orders as follows:
 1. Parcel number Mbeti/Gachuriri/2270 is hereby distributed to Sandra Mukami Njue, Joan Wawira Njue, Cathy Wanjuki Njue and Silvester Njue Mugo in equal shares with the appellant holding a life interest in his share.
 2. Rwika Stall No.35 to be registered in the name of Cathy Wanjuki Njue with the appellant, Silvester Njue Mugo holding a life interest in it, which life interest shall automatically lapse upon his death;
 3. The remaining properties of the estate are to be distributed as ordered by the trial court; and
 4. There shall be no order as to costs.
23. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 19TH DAY OF DECEMBER, 2024.

L. NJUGUNA

JUDGE

