



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Estate of Nelson Kinyua Muiga (Deceased) (Succession Appeal E004 of 2021) [2023] KEHC 339 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 339 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
SUCCESSION APPEAL E004 OF 2021  
FN MUCHEMI, J  
JANUARY 26, 2023**

**BETWEEN**

**MARTIN MWAI KINYUA ..... APPELLANT**

**AND**

**JULIET WANGECHI KINYUA ..... RESPONDENT**

*(Being an appeal from the Ruling and Orders of Principal Magistrate,  
Hon. A. Mwangi in the Principal Magistrate court in Karatina,  
Succession Cause No. 50 of 2013 delivered on 4th February 2021)*

**JUDGMENT**

**Brief facts**

1. The appeal is in respect to the ruling in Karatina PM succession cause no 50 of 2013 in which the court confirmed the grant on March 3, 2021 and distributed the estate of the deceased.
2. Being aggrieved with the decision, the appellant lodged the instant appeal citing 8 grounds of appeal which can be summarised as follows. The learned magistrate erred in law and in fact in:-
  - a. Relying on an annexed uncertified *ex parte* restraining order for injunction to distribute the estate of the deceased;
  - b. Failing to make a finding on whether land parcel no Iriani/Kairia/254 is ancestral land thereby arriving at a flawed finding.
3. By consent parties agreed to dispose of the appeal by written submissions.



## The Appellant's Submissions

4. It is the appellant's submission that the main borne of contention is that the trial court erred by relying on an uncertified ex parte restraining order for injunction issued in Nyeri CMCC No 261 of 2010, to distribute the estate which disinherited the appellant. The appellant further submits that the restraining order does not comply with sections 64, 67, 81 and 82 (e) of the Evidence Act as it is was not proved by primary evidence and further it was not certified. The appellant further contends that the document is an exparte interim order issued before he had presented his response to the court for consideration. As such, the appellant submits that without a final order granted upon hearing of both parties and the fact that before the death of the deceased, he lived on land parcel no Iriaini/Kairia/254 the document is insufficient to warrant him being dispossessed of the land in which the deceased apportioned to him.
5. The appellant relies on article 50 of the Constitution and the case of Giella v Cassman Brown & Company Limited (1973) EA 358 and argues that by relying on the ex parte interim order to distribute the estate, he was adjudged unheard. He further argues that since the deceased did not ventilate his case to enable the court reach a final determination it is insufficient to demonstrate that the intentions of the deceased at the time of his death on August 29, 2012 had changed with regard to his prior settling of the appellant on the suit property. Consequently, the trial court erred by relying on an interim order as conclusive evidence and arriving at the decision to evict the appellant on the suit property. The appellant further urges the court to rely on section 42 of the Law of Succession Act and find that he was a beneficiary of land parcel Iriaini/Kairia/254.
6. The appellant submits that land parcel no Iriaini/Kairia/254 is ancestral land and this was confirmed by the respondent who confirmed a green card which shows that the land was registered in the family names of the parties, Kinyua s/o Muiga on March 4, 1959, which is a clear indication that the land parcel was not acquired by the deceased in his lifetime and was bequeathed upon him. As such, the deceased had no right to disinherit him.

## The Respondent's Submissions

7. The respondent submits that land parcel no Iriaini/Kairia/254 belongs to the deceased as evidenced by the official search and the green card pertaining to this parcel of land. The official search dated May 27, 2013 bears the name of the deceased as Kinyua s/o Muiga and a certified copy of the register as annexed, also shows that the land is registered to the deceased. The respondent relies on section 26 (1) of the Land Registration Act and the case of Betty Mukui & another v Ben Mokaya & 2 others [2021] eKLR and submits that the certificate of title is *prima facie* evidence that one is a registered proprietor of the land in question.
8. The respondent relies on section 35 of the Law of Succession Act and the cases of Re Estate of Mungai Munyaka (Deceased) [2017] eKLR and Tau Katungi v Margrethe Katungi & another (2014) eKLR and submits she enjoys a life interest in the estate of the deceased up until she donates it or terminates it upon her demise.
9. The respondent argues that Nyeri CMCC No 261 of 2010 which later became CM ELC No 22 of 2018 is a suit between the appellant on one hand and his deceased father on the other hand. The suit was instituted by the deceased who claimed that the appellant was being abusive to him and his wife, the respondent herein to the extent that they were unable to live in peace with him. The court gave interim orders to the effect that a temporary injunction do issue against the appellant to restrain him from coming to their home or insulting the deceased and from entering, trespassing, cultivating, harvesting or picking tea leaves growing on land parcel Iriaini/Kairia/254. The respondent argues that the suit



was initiated by the deceased against his own son and although he had allowed him to build on the land, it was evident that their relationship had become strained and thus he did not want the appellant to continue living with them. The deceased allocated the appellant a share of land parcel no Ngobit/Supuko/Block 4/2019 measuring 4.5 acres to compensate him for not living on the suit property. The appellant also had a share of land parcel no Gilgil/karuga/block 9/47/kiamukie.

10. The respondent further submits that the orders issued in that case are meant to lapse upon determination of the suit. As for now the said case is still pending before the court. The respondent states that the appellant still continues to disobey the interlocutory orders and is therefore prevented from seeking equity in the current court as he has approached this court with unclean hands. In any event, the appellant ought to appeal on the decision of that court in a higher court and not in the present succession cause.

### **Issue for determination**

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

### **The Law**

12. Being a first appeal, the court relies on a number of principles as set out in *Selle and another v 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.”

13. It was also held in *Mwangi v Wambugu* [1984] KLR 453 that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence.
14. Dealing with the same point, the Court of Appeal in *Kiruga v Kiruga & another* [1988] KLR 348, observed that:-

“An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand.”

15. Therefore this court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering and giving allowance for it, that the trial court had the advantage of hearing the parties.

### **Whether the appeal has merit**

16. Section 35 of the *Law of Succession Act* outlines distribution of the estate of a deceased who has left behind a spouse and children. It provides:-



Subject to the provisions of section 42, 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 remarriage to any person.

Section 42 of the Act provides:-

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; or
- b. Property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act;

That property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.

17. The appellant's main contention is that the trial court erred by relying on an uncertified ex parte interim order of temporary injunction and disinherited him from land parcel Iriaini/Kairia/254 where he built his house and developed his portion. The respondent does not deny that initially the deceased had allowed the appellant to build his house on the said parcel of land, but he became abusive to the extent that the deceased instituted a suit against him to be kicked out of the deceased's land. The record shows that the protest in the trial court proceeded by way of viva voce evidence. The appellant testified that he ought to be included in the distribution of land parcel Iriaini/Kairia/254 as he has lived there for over 50 years and he has built a permanent house on the parcel of land. He told the court that he has no differences with the respondent and the case instituted by the deceased against him had ended. The respondent testified that there were differences between the deceased and the appellant before his passing on and the appellant wrote an apology in the presence of the deceased, but the appellant denied that he gave any apology. The respondent further testified that the appellant still insults her. She further stated that he insulted her just before the hearing date of the trial case.
18. It was after the appellant settled on the portion of land shown to him by the deceased that he fell out with his parents who found it difficult to co-exist on the same land with him for being disrespectful and abusive to them. This led to the deceased filing a suit to injunct the appellant from using and occupying that land. The matter could not have been resolved by the chief of that area to whom it was first referred. The appellant had been provided with alternative land by the deceased for settlement measuring 4.5 acres out of LR Ngobit/Supuku/Block 4/2019 but he refused to move there. A temporary order for injunction was given in favour of the deceased in Nyeri CMCC No 261 of 2010 to restrain the appellant from occupying or using the portion on which he had settled.
19. The appellant argues that the order was temporary and that the suit was never full heard and determined following the death of the deceased. As such, he argued that the magistrate erred in relying on the temporary order. I have perused the said order issued in Nyeri CMCC case No 261 of 2010 on 4<sup>th</sup> June 2010. It restrained the appellant from coming near or insulting the deceased herein and from entering, trespassing, cultivating or harvesting or picking tea for LR Iriaini/Kairia/254 on the land until the determination of the suit. It is not in dispute that the suit is still pending in court and as such the order is still valid despite the death of the deceased. The appellant has not obtained an order to terminate the case after the death of the deceased. More importantly, the filing of the ease and the issue



of the order demonstrate that the relationship between the appellant and his parents had deteriorated to an extent that they could not live together in harmony. This made the deceased change his mind to move the appellant to another parcel of land away from his home. It is important to note that the deceased had ten (10) children and that he had no problem with any of them on property and domestic issues save for the appellant.

20. I have perused the ruling of the learned magistrate in Karatina Succession Cause No 50 of 2013 that gave rise to this appeal. The court heard the case by way of viva voce evidence and was convinced by the evidence of the Administrator that the appellant had proved to be a nuisance to his parents and that the deceased had changed his mind to give him the portion of land on Iriaini/Kairia/254 and obtained an order to restrain him from using or occupying the portion. The evidence adduced by the administrator in court was overwhelming that the deceased's wishes before his death was to have the appellant settle elsewhere as opposed to Iriaini/Kairia/254. The magistrate in distributing the estate of the deceased relied on the evidence adduced as well as the annexures which included the court order. It is therefore not correct to say that the court relied only on the court order.
21. The official search of the land Iriaini/Kairia/254 supports the evidence of the respondent that the deceased was the proprietor of the land. The appellant did not adduce any evidence that the land was ancestral land or it originated from his grandfather. Even assuming that it was, the wishes of the deceased ought to be respected. The respondent is the widow of the deceased living on the said land and she is entitled peaceful occupation and use of the land during her lifetime.
22. On the appellant's allegation that he has been disinherited, this has not been demonstrated. He was given a portion of LR Ngobit/Supuku/4/2019 measuring 4.5 acres as well as on Gilgil/Karunga Block 9/47 Kiamukie on equal shares with all the children of the deceased.
23. In conclusion, I find that the appellant has failed to establish any of his grounds of appeal rendering it unmeritorious. This appeal is accordingly dismissed for lack of merit.
24. Each party to meet their own costs.
25. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 26TH DAY OF JANUARY, 2023.**

**F. MUCHEMI**

**JUDGE**

**JUDGEMENT DELIVERED THROUGH VIDEOLINK THIS 26TH DAY OF JANUARY, 2023.**

