



REPUBLIC OF KENYA



KENYA LAW
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**Gachoki & another v Kago (Civil Appeal 58 of 2019)
[2023] KEHC 24214 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24214 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL 58 OF 2019
FN MUCHEMI, J
OCTOBER 26, 2023**

BETWEEN

NESTER WARUI GACHOKI 1ST APPELLANT

CHARLES MUGANE GACHOKI 2ND APPELLANT

AND

MAGANJO JOSHUA KAGO RESPONDENT

*(Being an Appeal from the Ruling of Hon. S. M. Soita (CM) delivered
on 2nd April 2019 in Kerugoya CM Succession Cause No. 167 of
2017. In the Matter of the Estate of Josphat Gachoki Njanja Solomon)*

JUDGMENT

Brief facts

1. This appeal arises from the ruling in Kerugoya CM Succession Cause No. 167 of 2017 whereby the court found that the preliminary objection dated 22nd August 2018 did not raise pure points of law and dismissed it.
2. Dissatisfied with the court's decision, the appellants lodged this appeal citing 3 grounds to the effect that the learned trial magistrate erred in law and in fact by finding that the preliminary objection dated 22nd August 2018 did not raise points of law.
3. Parties put in written submissions to dispose of the appeal.

Appellant's Submissions

4. It is the appellants' case that LR No. INOI/KAITHERI/262 is not part of the estate of the deceased available for distribution as it was jointly owned by the deceased and the appellants. Thus due to the principle of survivorship, the land automatically passes to them. The appellants rely on the case of



Isabel Chelangat vs Samuel Tiro [2012] eKLR and W. M. Musyoka in his book Laws of Succession at page 3 to buttress their point.

5. The appellants argue that the respondent claimed to have purchased the subject land from the deceased. They argue that they never participated or executed the sale agreement as they were already joint owners of the suit land. They therefore rely on the case of Mukisa Biscuit vs West End Distributors Ltd (1969) EA 696 and urge the court to find that the preliminary objection raised has merit.

The Respondent's Submissions

6. The respondent submits that he had filed a citation to accept or refuse letters of administration intestate and cited the appellants. In the said citation, he argues that he expressed his interest over LR No. INOI/KAITHERI/262 as he bought it from the deceased and therefore he was a creditor of the estate.
7. The respondent relies on the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696 and submits that the preliminary objection raised does not raise pure points of law and evidence has to be adduced in order to substantiate the claim. Thus since facts have to be ascertained and the court has to exercise its judicial discretion in deciding whether the deceased sold out his interest in the suit property, the preliminary objection lacks merit. To support his submissions, the respondent relies on the case of Martha Akinyi Migwambo vs Susan Ongoro Ogenda [2022] eKLR.

Issue for determination

8. The main issue for determination is whether the preliminary objection was sustainable.

The Law

9. 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.”

10. It was also held in *Mwangi vs 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.

11. Dealing with the same point, the Court of Appeal in *Kiruga vs 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.”

12. 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 or their advocates depending on whether the matter appealed against was a hearing, an application or an objection.

Whether the preliminary objection is sustainable.

13. The case of Mukisa Biscuits Manufacturing Ltd vs West End Distributors (1969) EA 696 is notorious on the issue of what constitutes a preliminary objection. The court observed thus:-

.....a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.

14. Sir Charles Newbold P. stated:-

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop.

15. Similarly the Supreme Court in the case of Hassan Ali Joho & Another vs Suleiman Said Shabal & 2 Others SCK Petition No. 10 of 2013 [2014] eKLR held that:-

A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.

16. Further in the case of Hassan Nyanje Charo vs Khatib Mwashetani & 3 Others, [2014] eKLR the court held that:-

Thus a preliminary objection may only be raised on a 'pure question of law.' To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.

17. Evidently, a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law.

18. The appellants argue that LR No. INOI/KAITHERI/262 does not comprise part of the estate of the deceased as they and the deceased are joint proprietors of the suit land and therefore the land automatically passes to them pursuant to the doctrine of survivorship. I have perused the court record and noted that entry no. 6 on the green card lists the proprietors of the property as the appellants and the deceased. The respondent however contends that he entered into a sale agreement with the deceased in respect of the suit land whereby the deceased borrowed Kshs. 352,500/- and put up his title as security for the loan. The appellants have argued that they did not take part in the alleged sale despite the fact that they have legal interest in the property.

19. The respondent is an interested party in the succession cause and is claiming the same land as the appellant. The issues that arise are somehow complex because they go beyond the subject of succession. It is not in the interests of justice that such a matter is disposed of through a preliminary objection.



The parties ought to ventilate their issues through evidence either before the Environment and Land Court or in the current succession cause depending on the forum they may choose. Both parties have advocates on record for them in Succession Cause No. 167 of 2018 and as such, they are not in want of advice.

20. The preliminary objection, in my considered view, is not a pure point of law and the issues raised thereon can only be resolved through evidence of the parties.
21. I have perused the ruling of the learned magistrate that dismissed the preliminary objection. I find no basis to fault the magistrate's finding.
22. I find no merit in this appeal and I hereby dismiss it with costs.
23. It is hereby so ordered.

DATED AND SIGNED AT KERUGOYA THIS 26TH DAY OF OCTOBER, 2023.

F. MUCHEMI

JUDGE

Judgement delivered through video link this 26th day of October, 2023.

