



**Muriuki alias Jane Wanjiru Muriuki & another v Ngari (Civil Appeal  
20 of 2019) [2023] KEHC 24182 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24182 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CIVIL APPEAL 20 OF 2019  
FN MUCHEMI, J  
OCTOBER 26, 2023**

**BETWEEN**

**MARY WANJIRU MURIUKI ALIAS JANE WANJIRU MURIUKI .... 1<sup>ST</sup>  
APPELLANT**

**FRANK MURIMI KARANI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**MERCY WANGITHI NGARI ..... RESPONDENT**

*(Being an Appeal from the Judgment of Hon. S. M. Soita (CM) delivered  
on 24<sup>th</sup> April 2019 in Kerugoya CM Succession Cause No. 73 of  
2017. In the Matter of the Estate of Grace Wangechi Hinga (Deceased))*

**JUDGMENT**

**Brief facts**

1. This appeal arises from the judgment of Kerugoya Chief Magistrate in CM Succession Cause No. 73 of 2017 whereas the court below heard the protest and allowed it distributing the estate equally between the 2<sup>nd</sup> appellant and the respondent.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 9 grounds of appeal summarized as follows:-
  - a. The learned trial magistrate erred in law and in fact in finding that the respondent was a lawful beneficiary whereas she did not prove dependency as per Section 29 of the *Law of Succession Act*;
  - b. The learned trial magistrate erred in law and in fact in not taking into consideration that the estate of the deceased emanated from Succession Cause No. 55 of 1995 and that the grant in the said succession cause has never been revoked;



- c. The learned trial magistrate erred in law and in fact by sharing the estate equally between the 2<sup>nd</sup> appellant and the respondent who is a stranger and therefore disinheriting the lawful beneficiaries of the estate.
3. Parties put in written submissions to dispose of the appeal.

### **Appellants' Submissions**

4. The 1<sup>st</sup> appellant submit that her parents were the deceased and Raban Hinga (deceased). She further states that her father married two wives, her mother, the deceased and Jane Wambui Hinga (deceased). The 1<sup>st</sup> appellant submits that her father was the registered owner of land parcel number Mweura / Kanyokora/505 measuring 0.9 ha which was sub divided equally into Mweura / Kanyokora/974 and 975 in Succession Cause No. 55 of 1995 in respect of her father's estate. She further states that the deceased was allocated land parcel number Mweura / Kanyokora/975 and Jane Wambui Hinga, land parcel number Mweura / Kanyokora/974.
5. The 1<sup>st</sup> appellant states that the 2<sup>nd</sup> appellant is purchaser for consideration having purchased the whole portion of land parcel number Mweura / Kanyokora/975 from the deceased vide a sale agreement dated 4<sup>th</sup> February 2002. The 1<sup>st</sup> appellant further submits that the respondent alleges to be a child of Raban Hinga who married her mother, Muthoni (deceased). She further states that the respondent filed a protest against the confirmation of grant claiming that the deceased was her step mother. The 1<sup>st</sup> appellant contends that the respondent has never objected to the confirmation of grant in respect of her father's estate being Succession Cause No.55 of 1995 and the said grant has never been set aside, repealed or revoked to date. She further argues that the respondent only sought a share of the deceased's estate and not from her mother's co-wife who would also be the respondent's step mother.
6. The 1<sup>st</sup> appellant argues that the respondent did not prove her case on a balance of probability and thus the trial court erred by finding that she was a lawful beneficiary to the estate. The 1<sup>st</sup> appellant states that the respondent did not produce any documentary evidence to support her allegations. Particularly during the hearing, the respondent testified that the deceased gave her a portion of land and took her to the land board but did not produce any documents to support her claim. She further claimed that she was picking coffee on the subject property but she failed to prove that she used to take the coffee to Riakiana Coffee Factory. Respondent only claimed that her son had all the documents to prove her claim and yet she did not called her son to testify. Moreover, the 1<sup>st</sup> appellant argues that even if the son had testified and produced the documents, the green card dated 23/9/2014 would indicate the respondent's names which was not the case. The 1<sup>st</sup> appellant further argues that the respondent did not know when the deceased died, nor where she was buried. The respondent and her 7 children did not attend the burial of the deceased.
7. The 1<sup>st</sup> appellant further argues that the respondent failed to prove that she was a dependant of the deceased and therefore she could not lawfully claim a share of the estate. The 1<sup>st</sup> appellant states that the respondent stated that she was a child of Muthoni and that her mother died and was buried at her parents' home and not at her husband's place. That that the respondent did not prove that she was a daughter to 1<sup>st</sup> appellant's and furthermore that her mother took her in after the respondent's mother died. Neither did she prove that the deceased cared, educated her or received her bride price or even sate how long she lived with the deceased.
8. The 1<sup>st</sup> appellant relies on Section 107 of the *Evidence Act* and the case of *Sarab Kanini Thigunku v Elizaphan Njuki Thigunku* [2016] eKLR and states that he who alleges must prove. It is therefore



incumbent upon the respondent to prove on a balance of probabilities that she was a dependant of the deceased.

9. The 1<sup>st</sup> appellant maintains that she is the only daughter of the deceased and she did not know the respondent nor was she her sister or stay at her mother's place. The 1<sup>st</sup> appellant argues that if at all the respondent was a child of Raban Hinga, she ought to have made a claim from her father's estate during Succession Cause No. 55 of 1995 or by applying for annulment or revocation of grant. The respondent ought not claim a portion of the deceased's estate as she failed to prove dependency as per Section 29 of the *Law of Succession Act*.
10. The 1<sup>st</sup> appellant further submits that sharing out a half of the deceased's estate to the respondent was unlawful and disinherited the lawful beneficiary
11. The 1<sup>st</sup> appellant submits that the 2<sup>nd</sup> appellant purchased the whole share of land parcel number Mweura / Kanyokora/975 from the deceased for a consideration of KShs. 150,000/-. She states that she witnessed the said agreement and therefore she contends that the 2<sup>nd</sup> appellant was an innocent purchaser for valuable consideration. The amount paid by him was for the whole portion of the land and therefore for him to eventually get a half of the estate without any valid and justifiable reason is a violation of the doctrine of the bonafide purchaser for valuable consideration. The 1<sup>st</sup> appellant further states that although the deceased had not transferred the land to the 2<sup>nd</sup> appellant during her lifetime, he had already taken possession of the land as was evidenced by the testimony of the respondent.

### **The Respondent's Submissions**

12. The respondent submits that she is a step daughter of the deceased and that the deceased was allocated land parcel number Mweura / Kanyokora/975 whose mother title deed was Mweura / Kanyokora/505 registered in the name of Raban Hinga Mambo. She states that the other portion land parcel number Mweura / Kanyokora/974 was allocated to Jane Wambui Hinga, a co-wife to the deceased and that the said sub division was a result of Succession Cause No. 55 of 1995. The respondent submits that the deceased was alive when she sold the subject property.
13. The respondent further states that the 1<sup>st</sup> appellant confirmed that she knew Joseph Maina Hinga and that the appellant, Joseph Maina Hinga and herself are siblings. Their father was Raban Hinga the deceased in Succession cause No. 55 of 1995 but they have different mothers. The respondent further contends that the said Joseph Maina Hinga having grown together with the 1<sup>st</sup> appellant and herself cannot lie to the court when he testified that the deceased had two daughters.
14. The respondent urges this court not to interfere with the ruling of the trial court as it was made in accordance with the law.

### **Issue for determination**

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

### **The Law**

16. 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.”

17. 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.
18. 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.”
19. 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.**

20. It is not in dispute that the deceased was married to Raban Hinga and was a co-wife to Jane Wambui Hinga. It is also not disputed both wives acquired land parcels Mweura / Kanyokora/974 & 975 being resultant parcels from LR No.Mweura / Kanyokora/505 which was divided and distributed in Succession Cause No.55 of 1995. It is also not disputed that the grant in the said succession cause has never been annulled or revoked. It is further not disputed that the respondent is not a biological child of the deceased. The bone of contention is whether the respondent is a dependant of the deceased so as to be entitled to a share in the deceased's estate.
21. The protest in the court below was heard by way of viva voce evidence. The respondent called 2 witnesses to support her claim that she was a dependent of the deceased by virtue of the deceased taking her in and caring for her following the death of her mother. The appellant called two witnesses as well who all stated that the respondent was not a daughter of the deceased but a stranger to them. The court below heard and determined the protest and found that the respondent proved her case on a balance of probabilities. She testified that she had been working on the suit property picking coffee and delivering it to Riakiania factory. The court after hearing all the evidence proceeded to distribute the estate equally between the respondent and the 2<sup>nd</sup> appellant.
22. Section 29 of the *Law of Succession Act* which provides:-

For the purposes of this part dependent means-

  - a. The wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
  - b. Such of the deceased's parents, step parents, grandparents, grandchildren, step children, children whom the deceased had taken into his family as his own, brothers and sisters and half-brothers and half sisters, as were being maintained by the deceased immediately prior to his death; and



- c. Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.

Section 3(2) of the [Law of Succession Act](#) describes a child to:-

Include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, a child born to her out of wedlock, and, in relation to a male person, any child whom he expressly recognized or in fact accepted as a child of his own or of whom he has voluntarily assumed permanent responsibility.

23. The standard and burden of proof provided by the [Evidence Act](#) ought to be discharged; he who alleges must prove. Section 107 of the [Evidence Act](#) places the burden of proof on the party that alleges. In [Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 Others](#) (2014) eKLR the Supreme Court held *inter alia*:-

The person who makes such allegations must lead evidence to prove the fact. She or he bears the initial legal burden of proof, which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence of a fact in issue.

24. The issue is whether the respondent proved that she was a dependant of the deceased. The respondent testified that after her mother one Muthoni died, the deceased took her in his home and brought her up. The respondent stated that she planted and was tending 80 stems of coffee on the land of the deceased until 2004 when she was chased away by the appellant who later sold the land to the 2<sup>nd</sup> appellant. On cross-examination she stated that she is the one who was taking care of the deceased before he passed on. The respondent called one witness PW3, the son of Raban his second wife and Jane Wambui Hinga. The witness testified that the deceased Grace Wangeci had two children, the 1<sup>st</sup> appellant and the respondent. He further said that he did not know Muthoni the biological mother of the respondent.
25. The 1<sup>st</sup> appellant denied that the respondent was her step sister. She said she did not know the respondent and that she was not entitled to inherit the deceased's land. Neither did the 1<sup>st</sup> appellant know or ever heard of Muthoni the biological mother of the respondent. The 1<sup>st</sup> appellant called her son as a witness who corroborated her evidence that she did not know the respondent or her later mother Muthoni. He said he was aware that in the Succession cause of his late grandfather, the estate was divided into two equal shares between his maternal grandmother Grace Wangeci and her co-wife Jane Wambui. DW2 corroborated her mother's evidence that the portion of grace was sold to the 2<sup>nd</sup> appellant but added that he had no documentary evidence to prove that there was any such sale.
26. I have perused the copy of register dated 23/09/2014 for LR. Mwerua/kanyokora/975 and noted that at the time the 1<sup>st</sup> appellant says he bought the land from the deceased, there was already a restriction on the title. The restriction was placed on 11/06/2001 and removed on 26/06/2002. If the 1<sup>st</sup> appellant had conducted an official search which is critical for a buyer to obtain, he would have known that the deceased could not pass title to him on the date of the purported agreement on 04/02/2002. It would not have been possible for the 1<sup>st</sup> appellant to even obtain consent of the relevant Land Board since the land was not free for sale. This information is on record and it goes further to cast doubt on the 1<sup>st</sup> appellant's claim that the deceased sold him LR Mwerua/kanyokora/975. In my view the claim sale of



- the land to the 1<sup>st</sup> appellant by the deceased was designed to disinherit the respondent of her rightful share in the estate.
27. The court below believed the evidence of the respondent and her witness PW1 who was a son of the deceased by his 2<sup>nd</sup> wife the late Jane Wambui. The respondent said she was taken up by the deceased after the death of her mother Muthoni and lived with the deceased in his home with his first wife Grace Wangeci. Her witness PW2 testified that although he did not know Muthoni, he was aware that she left the home of the deceased when her daughter the respondent was a child. the said Muthoni returned to her parents home where she lived for the rest of her life. According to the respondent, her mother Muthoni died and was buried by the deceased in her parents home where she had lived.
  28. The evidence of the respondent is that she cultivated the land of her stepmother Grace which had 80 stems of coffee and bananas. After her step mother died, the respondent used to sell her coffee from the farm at Riakiania factory but did not produce documents to that effect because her son was in possession of the documents. The respondent said she was evicted from the land by the 1<sup>st</sup> appellant after the death of stepmother and that it is the 1<sup>st</sup> appellant she purported to sell the land to the 2<sup>nd</sup> appellant since her grandmother Grace had not sold the land. This evidence was corroborated by PW2 who said he was not aware that Grace had sold her portion of the land LR Mwerua/kanokora/975 to anyone. He said it was two years after the death of Grace that he learnt that the land had been sold.
  29. The 1<sup>st</sup> appellant said her mother sold the land to the 2<sup>nd</sup> appellant during her lifetime at a consideration of Kshs.150,000/- . He produced a sale agreement which was challenged in cross-examination but he insisted it was genuine. The court below was in a better position to assess the credibility of the witnesses and it believed the respondent and her witness as opposed to the appellant. In my own assessment, I also found the evidence of the respondent as credible after weighing it alongside that of the appellant and her witnesses. The chronology of events as described by the respondent was credible. The evidence of the appellants that the late Grace sold her land to the 2<sup>nd</sup> appellant before she died did not add up. The issue that arises is why the said land was not transferred to the 2<sup>nd</sup> appellant if Grace sold it to him during her lifetime. I have reason to believe the respondent evidence that the purported sale of the land took place after she was chased from the land by the 1<sup>st</sup> appellant. Her witness estimated the time of sale to have been about two years after the death of Grace.
  30. Even assuming that the land may have been sold to the 2<sup>nd</sup> appellant by the 1<sup>st</sup> appellant which is the most likely scenario, the 1<sup>st</sup> appellant was not possessed of the requisite capacity to sell the land which was yet to go through succession proceedings.
  31. This is a succession court and even if the deceased sold the land and did not transfer it to the appellant, the right court to deal with such a sale would be the Environment and Land court.
  32. It is my considered view that the court below did not err in finding in favour of the respondent. She gave evidence that was well corroborated. She was taken in by the deceased at her tender age, brought up by him and his late wife Grace. Under Section 3(2) of the *Law of Succession Act*, the respondent is a child of the deceased and his wife Grace Wangeci and has a right to inherit alongside the only biological child of Grace, the 1<sup>st</sup> appellant.
  33. The respondent said she did not attend the burial of her deceased stepmother but this was explained in her evidence that the 1<sup>st</sup> appellant had chased her away and taken over the land of the deceased. It is not a legal requirement that a beneficiary attends the burial of the deceased or is able to point out his gravesite in order to be entitled to inherit. The finding of the honourable magistrate in my view was supported by cogent evident.



34. The appellant has failed to establish any of the grounds in this appeal.  
consequently, I find no merit in this appeal and it is hereby dismissed.

35. This being a succession appeal, I direct that each party meets its own costs.

36. It is hereby so ordered.

**DATED AND SIGNED AT KERUGOYA THIS 26<sup>TH</sup> DAY OF OCTOBER, 2023.**

**F. MUCHEMI**

**JUDGE**

Judgement delivered through video link this 26<sup>th</sup> day of October , 2023

