



REPUBLIC OF KENYA



**Karunga v Mwai & 2 others (Civil Appeal 32 of 2019)
[2023] KEHC 24213 (KLR) (25 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24213 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL 32 OF 2019
FN MUCHEMI, J
OCTOBER 25, 2023**

BETWEEN

DAVID NJIRAINI KARUNGA APPELLANT

AND

GEOFFREY GAKUO MWAI 1ST RESPONDENT

JOSPHAT KARANI MWAI 2ND RESPONDENT

JUSTUS KARANI NJIRAINI 3RD RESPONDENT

*(Being an Appeal from the Judgment of Hon. S. M. Soita (CM) delivered
on 24th April 2019 in Kerugoya CM Succession Cause No. 206 of 2016.
In the Matter of the Estate of Josephat Karunga Gakuo (Deceased))*

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Kerugoya Chief Magistrate in CM Succession Cause No. 206 of 2016 where the learned magistrate dismissed the appellant's protest and distributed the estate of the deceased based on the mode proposed by the respondent.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing seven (7) grounds of appeal summarized as follows:-
 - a. The learned trial magistrate erred in law and in fact by distributing land Plot No. Inoi/ Kerugoya/250/15 to the 1st respondent thereby disinheriting the appellant;
 - b. The learned trial magistrate erred in law and in fact in finding that the appellant was only entitled to inherit a share of the deceased's land in Plot No. 1 Nyagithuci and disregarded evidence to the effect that the deceased had already distributed his estate during his lifetime.



3. Parties put in written submissions to dispose of the appeal.

Appellant's Submissions

4. The appellant submits that he is aggrieved by the mode of distribution as pertains Plot No. Inoi/Kerugoya/250/15. He argues that the said parcel ought to go to him as it was a gift inter vivos from the deceased as indicated in his letter dated 15th December 1981. The appellant states that he took over the said parcel of land and which was developed after the death of the deceased and started running its operations as per the said letter. He contends that the 1st respondent confirmed the same as he testified that he never participated in its operations. He further contends that the trial magistrate did not give his reasons why he did not consider the letter marked DN1 and furthermore none of the beneficiaries opposed the distribution of the said parcel of land to himself save for the respondent. He further contends that the deceased's wishes were not considered in respect of land parcel Inoi/Kerugoya/250/15 yet all the beneficiaries were aware of the deceased's wishes. The appellant relies on the case of Kapenguria High Court Succession Cause No. 14 of 2016 In the Matter of the Estate of the late Siwanyang Ngilotochi to support his submissions.

The 1st Respondent's Submissions

5. The 1st respondent submits that the bone of contention is in respect to land parcel number Plot No. Inoi/Kerugoya/250/15. He argues that in the trial court, the appellant based his claim on exhibit DN8 (page 100 of the Record of Appeal) which is in respect of Plot No. 1 Nyagithuci and not Plot No. Inoi/Kerugoya/250/15. Thus the appellant cannot introduce DN1 as having been mentioned in the protest as the one giving him the plot. The 1st respondent argues that would prejudice him.
6. The 1st respondent states that the documents referred to by the appellant giving him Plot No. Inoi/Kerugoya/250/15 cannot stand as a will under the *Law of Succession act*. The 1st respondent further states that the appellant referred to several documents that were filed as alleged wills none of them qualifies as a will. There is no valid will and if indeed the appellant believed that there was a will, he ought to have filed testate proceedings which he never did yet he is the one who initially brought the proceedings to court intestate.
7. The 1st respondent states that the appellant rightfully got which is contained in Exhibit DN8 as proposed in his protest. The 1st respondent states that he fairly distributed the properties where all the beneficiaries were content.

Issue For Determination

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

The Law

9. 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.”

10. 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.
11. 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.”
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.

Whether The Appeal Has Merit.

13. In this appeal the appellant is aggrieved by the distribution of only one asset in the estate of the deceased LR Inoi/Kerugoya/250/15. The appellant has no issue with the distribution of the other three assets of the deceased.
14. The background of this matter is that the appellant filed this succession cause on 30th December 2010 without the knowledge of the 1st respondent and other family members. The said grant was revoked by consent of the parties on 08/03/2015 and both the appellant and the 1st respondents were appointed administrators of the estate. It is imperative to state that the appellant and the 1st respondent are step-brothers and sons of the deceased. The 2nd and 3rd respondent are grand children of the deceased.
15. The appellant in filing the cause had attached a letter and minutes of the deceased’s clan meeting whereas he purported that the documents especially the letter said to have been written by his father amounted to a will bequeathed him of two assets known as LR. Inoi/Kerugoya/250/15 and shares in Nyagithuci plot. The plot was co-owned by the deceased and other people. This case was heard by the Chief magistrate Kerugoya through viva voce evidence. the deceased’s estate was finally distributed as follows:-
 1. Gaturi/Githimu/2382 – to be shared equally by:-
 - a. Eunice Wanjiru Ngunyi
 - b. Teresa Wangithi Mugeru
 - c. Daniel Muriithi Karunga
 - d. Jane Waruguru Marite
 - e. Margaret Wanjiru Kinyua
 - f. Geoffrey Gakuo Mwai
 - g. John Muriuki Karunga



- 2) Inoi/Keruguya/909 equally to:-
 - a. Lucy Wangari Karunga
 - b. Tabitha Wambura Gakuo
 - c. Josphat Karani Mwai
 - d. Justus Karani Gakuo
3. Inoi/Kerugoya/250/15 – Geoffrey Gakuo Mwai
4. Plot No. 1 Nyagithuci equally to:-
 - a. John Muriuki Karunga
 - b. Daniel Murithi Karunga
 - c. David Njiraini Karunga
16. I have perused the evidence of the parties before the court below and find that the trial magistrate found there existed no will in the estate of the deceased to guide the court in distribution. Although the magistrate avoided analyzing the said will, it is evident that the outcome of the cause and in particular distribution, is self-explanatory.
17. This court as the first appeal court is empowered to examine the evidence afresh and reach its own conclusions and also deal with any issues that the court below did not address.
18. In regard to the said will, I have looked at the letter referred to by the appellant and formed the opinion that it cannot be said to be a will as provided for by Section 11 of the *Law of Succession Act*. The requirements of a valid will are that it is witnessed by two independent witnesses. There were no such witnesses in the said letter said to be authored by the deceased. The deceased affixed his signature but no other signature exists. The letter talks of land but does not identify the land or plot by its reference number. Except the appellant and the 2nd and 3rd respondents, no other member of the deceased's family was aware that the deceased left a will.
19. The appellant had an obligation to call witnesses who were present during the meeting of clan elders and the deceased. It is noted no such witness was called to support the appellant's evidence.
20. The appellant filed an intestate Succession and is as well claiming that there was a written will. If that was the case, the appellant ought to have filed testate succession and applying for a grant of probate. He did not explain why he took that route.
21. In my considered view, I find that the letter and minutes filed by the appellant do not constitute a valid written will under the law. The deceased in this case died intestate and his property was bound to be distributed as such.
22. It is important to state that the evidence of the parties which was not disputed was that the deceased gave gift *inter vivos* to some of his children during his lifetime. The affidavit of protest of the appellant explained that deceased subdivided his land LR Inoi/Kerugoya/322 into three equal parcels measuring 0.72ha each. He gave LR Inoi/Kerugoya/908 to his son Julius Mwai Karunga and L.R Inoi/Kerugoya/910 to the appellant. It is not in dispute that the 1st respondent was not given any land by the deceased during his lifetime. The 3rd parcel Inoi/Kerugoya/909 remained in the name of the deceased and was available for distribution. This land was given to deceased's daughter Lucy Wangari Karunga, his sister Tabitha Wambura and two grandsons, one of them being a son to the appellant.



23. Section 42 of the *Law of Succession Act* provides that any assets given by the deceased to beneficiaries during his lifetime must be taken into consideration during distribution.
24. The appellant was allocated land LR Inoi/Kerugoya/910 measuring 1.72ha . This placed the appellant at an advantage over and above the other children of the deceased. It is noted that the 1st respondent did not get any gift intervivos. In this case he was given a plot in Kerugoya LR. Inoi/Kerugoya/250/15 which the appellant is claiming to be his entitlement. No other asset was given to the 1st respondent by the deceased. The appellant was bequeathed the deceased's shares in plot No. 1 Nyagithuci together with his two other brothers which in my view, was sufficient for him in view of the fact that the deceased did not have many assets and had a large family.
25. The appellant said that the 1st respondent was given land at Mbeere by the deceased but he did not produce any evidence to prove its existence. Neither was it proved that it was given to the 1st respondent. It was also alleged that the deceased owned plot numbers 15 and 16 in Kerugoya and two parcels of land at Mbeere which were omitted as assets of the deceased in this cause. Having produced no records of such plots and land, this court will put the matter to rest. However, if such records are to be found in the near future, the administrators may file an application for review of grant and distribute the remaining assets to the beneficiaries.
26. In conclusion, I find no merit in this appeal and it is hereby dismissed with costs to the 1st respondent.
27. It is hereby so ordered.

DATED AND SIGNED AT Kerugoya THIS 25TH DAY OF OCTOBER, 2023.

F. MUCHEMI

JUDGE

Judgement delivered through video link this 25th day of October , 2023

