



REPUBLIC OF KENYA



**KENYA LAW**  
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**Gachoki & another v Karia (Civil Appeal E056 of 2021)  
[2023] KEHC 24061 (KLR) (24 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24061 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CIVIL APPEAL E056 OF 2021  
FN MUCHEMI, J  
OCTOBER 24, 2023**

**BETWEEN**

**BEATRICE KANYIBA GACHOKI ..... 1<sup>ST</sup> APPELLANT**

**DAVID MARINGA GACHOKI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**NAOMI WAMBUI KARIA ..... RESPONDENT**

*(Being an Appeal from the Judgment of Hon. E. O. Wambo (SRM) delivered  
on 17th January 2020 in Kerugoya CM Succession Cause No. 327 of  
2016 In the Matter of the Estate of Gachoki David alias Gachoki Daudi.)*

**JUDGMENT**

**Brief Facts**

1. This appeal arises from the judgment of Kerugoya Senior Resident Magistrate in CM Succession Cause no 327 of 2016 where the court allowed the protest and distributed the estate of the deceased between the protestor and the appellants whereas their siblings were to share with them the shares given to them in the grant.
2. Dissatisfied with the judgement delivered on 17<sup>th</sup> January 2020, the appellants lodged this appeal citing 3 grounds of appeal summarized as follows:-
  - a. The learned magistrate erred in law and fact in making a determination on a claim of trust in a succession matter;
  - b. The learned trial magistrate erred in law and in fact in failing to consider the applicable provisions of the Law of Succession Act while distributing the estate.
3. Parties put in written submissions to dispose of the appeal.



## Appellants' Submissions

4. The appellants submit that the deceased died on 3<sup>rd</sup> June 2014 and he was the registered proprietor of land parcel number INOI/KAMONDO/259. The applicants state that they are wife and son of the deceased respectively and that they filed the succession cause number 327 of 2016.
5. The appellants state that a protest was filed by the respondent who is a sister to the deceased. The protestor's mother one Agnes Muringo Daudi whose relationship to the deceased is not clear. In the affidavit of protest, the respondent averred that the deceased is her brother. However, the respondent's witness one Mwai Gachoki testified that Agnes Muringo did not have a son and that the deceased was a nephew to her. Furthermore, the appellants contend that when the respondent was being cross-examined, she stated that the deceased is her cousin.
6. It was further the respondent's case that she lives and uses ½ acre of the suit land. She further stated that the suit land was meant for her mother, Agnes Muringo but since Agnes was a woman and she did not have a son, the land was registered in the name of the deceased herein to hold the same in trust. The appellants further submit that Agnes Muringo filed a suit against the deceased being Kerugoya PMCC no 1993 claiming half share of the suit land but Agnes Muringo Daudi died on 4<sup>th</sup> July 2000 whereas the deceased herein died on 3<sup>rd</sup> June 2014 before the matter could be heard and thus the suit abated.
7. The appellants submit that they disputed the respondent's claim and the trial court held that the deceased was given the suit land by the clan during the time of demarcation and thus held it in trust. The trial court proceeded to allocate the deceased's children 7 ½ acres whereas the respondent and her sisters were allocated 7 ½ acres of land parcel number INOI/KAMONDO/259.
8. The appellants argue that the trial court sitting as a succession court could not make a determination on a claim of trust which is civil in nature. The appellant relies on the cases of Kerugoya High Court Succession Cause no 339 of 2012, *Lucy Muthoni Mucira v Priscilla Muthoni*, Nakuru High Court Succession Cause no 488 of 2010 *Joyce Waitthera Kinyua & 2 Others v Festus Ndegwa Waititu & 4 Others*, Kerugoya High Court Succession Cause no 90 of 2013 *Elijah Gachoki Githinji & Another v Stanley Mugo Kariuki & Another*, Nyeri HCCC no 56 of 2012 *Eunice Ngonyo Wabome v Joseph Kihara Theuri* and Kerugoya High Court Succession Cause no 295 of 2012 *Peris Wanjira Muriithi v Thomas Ndigwa Njogu & Others* and submits that the issue of trust cannot be determined by a succession court but is within the purview of the Environment and Land Court.
9. The appellants further submit that even if assuming the trial court had the requisite jurisdiction to determine a claim based on trust, the respondent did not prove on a balance of probability that the trust existed. To support this contention the appellants rely on the cases of *Mbothu & Others v Waititu & 11 Others* [1980] eKLR, *Karanja Wanjibia v Duncan Wanjibia & 4 Others* (2004) eKLR and Kerugoya ELC no 170 of 2016 *Purity Kabari Karuri & 6 Others v Nancy Kariuko Ndigwa* (2022) eKLR.
10. The appellants urge the court to dismiss the protest and confirm the grant as per their summons for confirmation of grant. The appellants submit that the reason for them being jointly registered as owners of a portion of ½ acre was that the ½ acre was to be sold to facilitate sub division and issuance of new titles to the beneficiaries.

## The Respondent's Submissions

11. The respondent submits that the deceased was an adopted son of the late David Karia, who was her father. The respondent further states that the deceased was left as a little boy by his mother who was the sister to David Karia.



12. The respondent further submits that during the period of land demarcation land was only allocated to the male children of the family and since there was no male child in the family of David Karia, the respondent argues that land parcel number INOI/KAMONDO/259 which measures approximately 15 acres was registered in the names of the deceased on behalf of the family members.
13. The respondent states that her mother instituted a suit against the deceased in Civil Case Number 267 of 1993 demanding a share of the suit land however the parties died and no substitution was ever done.
14. The respondent further submits that the appellants filed summons for confirmation of grant dated 16/6/2016 and distributed the property allocating her only a portion of 1½ acres. Being dissatisfied with the distribution she filed a protest claiming that her family ought to receive half share of the land INOI/KAMONDO/259. Moreover, the respondent states that by the appellants allocating her 1½ acres of the suit land, they recognized her as a beneficiary to the estate.
15. The respondent argues that from the evidence adduced at the trial court, it is evident that the deceased did not purchase the land and was given by the clan as the only son. Further, on the allegation by the appellants that there was a will, the respondent states that that is a ploy employed by the appellants in order to disinherit her as they have not attached any will to their petition.
16. The respondent submits that she has lived on the suit land all her life and that her mother, Agnes Muringo now deceased cultivated 7½ acres during her lifetime.

#### **Issue for Determination**

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

#### **The Law**

18. 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.”

19. 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.

20. 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.”



21. 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.

### **Analysis and Determination**

Beatrice Wanyira Gahcoki – wife  
Agnes Wanjiku Gachoki – daughter  
Josephine Wambui Gachoki – daughter  
David Maringa Gachoki – son  
Justus Warui Gachoki – son  
Grace Micere Gachoki – daughter  
Judy Wairimu Kamakia – daughter  
Nahashon Njeru Gachoki – son  
Moses Muriithi Gachoki – son  
John Murimi Gachoki – son  
Julius Mucira Gachoki – son  
Ann Muthoni Gachoki – daughter  
Margaret Wanjiru Gachoki – daughter  
Naomi Wambui Karia – sister  
Benina Wanjiru Muciri – sister  
Ann Muthoni Muciri – sister

22. This appeal arises from the judgement in Kerugoya Succession Cause no 327 of 2015. The respondent had filed a protest against confirmation of grant in the estate of the deceased Gachoki David Karia alias Gachoki Daudi. In the said cause the appellant had acknowledged the respondent herein as a beneficiary of the estate and proposed she gets 1.5 acres out of LR INOI/KAMONDO/259 measuring fifteen acres. The appellant and his siblings were to share the rest of the land. The magistrate found the protest merited and allowed it in terms of equal distribution to the protestor and her siblings on one hand and the appellants and their siblings on the other hand.

23. In this appeal, the appellants raised two main grounds. Firstly that the case of the respondent was based on trust and that the honourable magistrate lacked jurisdiction to decide on the said issue. Secondly, that the magistrate failed to adhere to the provisions of the Succession Act in distribution of the estate. The background facts are that the deceased was an adopted child of the sister to the mother of the respondent but was later abandoned by his adopting mother and was taken up by her sister one Agnes Muringo Daudi, the mother of the respondent and two other siblings. Agnes then raised the deceased as her own child.

24. In the succession petition, the appellants acknowledged the respondent Naomi Wambui Karia as a beneficiary in the estate of the deceased and offered to give her 1½ acres. The respondent's mother had filed a claim based on trust Kerugoya PMCC no 261 of 1993 against the deceased.



As the suit was pending in court, the parties passed on at different times. The respondent was substituted in place of her deceased mother Agnes Muringo. The respondent said the suit was delayed by the family of the deceased including the appellant. Finally, it is admitted that this suit abated due to lack of substitution. The respondent joined the Succession cause as a protestor while the grant was on course for confirmation.

25. On the 1<sup>st</sup> ground of appeal it is not in dispute that although the respondent gave the background in her protest that the estate comprising of LR. INOI/KAMONDO/259 was registered in the name of the deceased during land consolidation to hold in trust for himself and his sister Agnes Muringo, it is not in dispute that the appellant in his petition recognised the respondent as a beneficiary of the estate. The only dispute between the parties before the magistrate was the share that the respondent was entitled to inherit. The issue of the trust was raised before the magistrate but it only formed the basis as to how the deceased acquired the land in question. The magistrate may have expressed himself on the issue but he did not make any findings on trust. The fact that the land was allocated to the family of the deceased which had no male child and was thus registered in deceased's name was not in dispute in the cause. The magistrate then proceeded to address the issue of distribution of the estate between the appellant and his siblings vis a vis the respondent and her siblings. This was after establishing that both parties and their siblings were heirs of the deceased's estate. It is in HC Civil Case no 261 of 1993 filed by the protestor's mother that claimed half share of LR INOI/KAMONDO/259 that was on based on trust. The appellants admits that this case abated after he death of both parties. In my view, the said case no longer exists. The respondent joined the succession cause as a protestor in a cause where she was named as a beneficiary.
26. I have perused the entire judgement of the magistrate and it is evident that the issues he determined were issues under the Law of Succession Act and not issues of a claim based on trust. Consequently, I find no merit in the first ground of appeal.
27. The ground is based on the claim that the magistrate failed adhere to the provisions of the Law of Succession Act in the distribution. It was not in dispute that the deceased was survived by the following beneficiaries:-
  - a. Beatrice Wanyira Gahcoki – wife
  - b. Agnes Wanjiku Gachoki – daughter
  - c. Josephine Wambui Gachoki – daughter
  - d. David Maringa Gachoki – son
  - e. Justus Warui Gachoki – son
  - f. Grace Micere Gachoki – daughter
  - g. Judy Wairimu Kamakia – daughter
  - h. Nahashon Njeru Gachoki – son
  - i. Moses Muriithi Gachoki – son
  - j. John Murimi Gachoki – son
  - k. Julius Mucira Gachoki – son
  - l. Ann Muthoni Gachoki – daughter



- m. Margaret Wanjiru Gachoki – daughter
  - n. Naomi Wambui Karia – sister
  - o. Benina Wanjiru Muciri – sister
  - p. Ann Muthoni Muciri – sister
28. I have perused the appellants submissions and noted that their submissions are only on the first ground of appeal and not on the second one. As such, the appellants who alleged are under an obligation to expound on the issue raised that the law was not complied with. The court will proceed to examine magistrate’s finding and the evidence thereof.
29. In regard to the distribution of the estate, the appellants had proposed that the land INOI/KAMONDO/259 be divided into four portions, giving himself and his siblings a total of 13.5 acres and only 1.5 acres to the respondent. Infact, the appellants were to benefit from two of the four portions which the magistrate objected to stating that the appellants mode of distribution was “very unfair” in regard to what he had proposed as the share of the respondent and her two siblings. This mode of distribution was rejected.
30. The court distributed the only asset LR.INOI/KAMONDO/259 between the appellants’ family and the respondent. The respondent was to share the half portion of 7.5 acres with her two sisters namely Benina Wanjiru Muchiri and Anne Muthoni Muchiri. The other beneficiaries of the deceased were to share the other half portion of 7.5 acres in equal shares.
31. This was a cause with peculiar facts based on family history of land tenure whereas the respondent and her siblings were accepted and recognised as heirs of the estate. This gesture by itself ruled out any issues of land tenure and ownership being taken to court for determination.
32. In my considered view, I find that the distribution of the estate was fair and reasonable based on the peculiar facts presented to the court and that the trial magistrate did not err in his finding.
33. I find no merit in the appeal and is hereby dismissed with no order as to costs.
34. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT KERUGOYA THIS 24<sup>TH</sup> DAY OF OCTOBER, 2022.**

**F. MUCHEMI**

**JUDGE**

Judgement delivered through video-link this 24<sup>th</sup> day of October, 2023

