



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**In re Estate of Hezron Vulugu (Deceased) (Succession Appeal 92 of 2021)
[2023] KEHC 27103 (KLR) (20 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 27103 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
SUCCESSION APPEAL 92 OF 2021**

JN KAMAU, J

DECEMBER 20, 2023

IN THE MATTER OF THE ESTATE OF HEZRON VULUGU (DECEASED)

BETWEEN

HARUN KIMANI JAIRO APPELLANT

AND

JAIRO MAGUI RESPONDENT

(Being an appeal from the Judgment of Hon W. K. Cheruiyot (RM) delivered at Vihiga in Senior Principal Magistrate's Court Succession Cause No 6 of 2013 on 12th April 2018)

JUDGMENT

Introduction

1. In his decision of 12th April 2018, the Learned Trial Magistrate, Hon W.K. Cheruiyot, Resident Magistrate, dismissed the Chamber Summons application dated 18th October 2017 in which the Appellant had sought to set aside and /or vary his orders of 14th September 2017.
2. Being aggrieved by the said decision, the Appellant filed a Notice of Motion application dated 29th October 2018 on even date in which he sought to be granted leave to appeal against the said decision within fourteen (14) days of the orders being issued. He had also attached a Memorandum of Appeal.
3. On 11th March 2019, the DR High Court Kakamega granted him to appeal the aforesaid decision within fourteen (14) days.
4. On 25th March 2019, the Appellant filed a Memorandum of Appeal of even date. He relied on six (6) grounds of appeal.



5. His Written Submissions were dated and filed on 16th June 2023. Although the Respondent was given ample time to file Written Submissions, he did not do so. This court therefore reserved its Judgment herein based on the said Written Submissions which the Appellant herein relied upon in their entirety.

Legal Analysis

6. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
7. This was aptly stated in the case of *Selle & Another vs. Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.
8. Having looked at the grounds of Appeal and the Appellants' Written Submissions, it appeared to this court that the only issue that had been placed before it for determination was whether or not the Learned Trial Magistrate erred in having dismissed his proposed mode of distribution as per his Affidavit of Protest.
9. Grounds of Appeal Nos (1), (2), (3), (4), (5) and (6) of the Memorandum of Appeal were therefore dealt with together as they were all intertwined and related.
10. Right at the outset, this court encountered difficulties in pronouncing itself on Ground of Appeal No (4) relating to an application as it was not possible to know which application the Appellant was referring to.
11. Having said so, this court wished to point out that in the headings of the Memorandum of Appeal and Record of Appeal that were filed on 25th March 2019 and 15th November 2019, the Appellant had indicated that he was appealing against the decision of the Learned Trial Magistrate of 12th April 2018.
12. In his said decision, the Learned Trial Magistrate dismissed the Appellant's Chamber Summons application dated 18th October 2017 in which the Appellant herein had sought that he varies and/or sets aside his orders of 14th September 2017 to the effect that there was no provision of the law for setting aside orders for confirmation of grant.
13. Notably, a party who was aggrieved by the distribution of a deceased's assets could only seek revocation and/or annulment of grant under any of the grounds that have been set it out in Section 76 of the Law of Succession Act Cap 160 (Laws of Kenya) and not a review or setting aside of the certificate of confirmation of grant.
14. Section 76 of the Law of Succession Act provides as follows:-
 - “A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—
 - a. that the proceedings to obtain the grant were defective in substance;
 - b. that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;



- c. that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
 - d. that the person to whom the grant was made has failed, after due notice and without reasonable cause either—
 - i. to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or
 - ii. to proceed diligently with the administration of the estate; or
 - iii. to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
 - e. that the grant has become useless and inoperative through subsequent circumstances.”
15. The Learned Trial Magistrate was therefore correct when he found that there was no provision of law for the setting aside and/or reviewing a certificate of confirmation of grant. To that extent therefore, the Appellant’s Appeal was not merited.
16. However, assuming that the Appellant intended to appeal against the decision of 14th September 2017 which was the basis of the aforesaid Chamber Summons application and he may have been confused which decision to appeal against as he was a layman, this court proceeded to determine the merits or otherwise of the Appeal herein based on his grounds of appeal which touched on the evidence that was adduced during trial.
17. It is important to point out that the Appellant did not annex the decision of the Learned Trial Magistrate of 14th September 2017 in the Record of Appeal that was dated and filed on 15th November 2019 making it difficult for this court to establish which decision the Appellant was appealing against.
18. Nonetheless this court addressed its mind to the merits or otherwise of the Appeal herein with a view to conclusively dealing with the matters herein, In this regard, it was guided by the provisions of Article 159(2)(d) of the Constitution of Kenya, 2010 that mandates courts to administer justice without undue regard to procedural technicalities.
19. In his said decision of 14th September 2017, the Learned Trial Magistrate distributed the deceased’s property as follows:-



Name	Asset	Share
Jairo Magui	L.R. No Kakamega/ Lugovo/1226	0.25 ha
Ephraim Senelwa Vulugu	L.R. No Kakamega/ Lugovo/1226	0.25 ha
Hannah Ingaiza	L.R. No Kakamega/ Lugovo/1226	0.1 ha
Florence Mmbone	L.R. No Kakamega/ Lugovo/1249	0.34 ha
Dedan Imali	L.R. No Kakamega/ Lugovo/1249	0.1 ha
Harun Kimani	L.R. No Kakamega/ Lugovo/1255	0.19 ha
Florence Nyangasi	L.R. No Kakamega/ Lugovo/1255	1. ha

20. On his part, the Appellant had proposed distribution as follows:-



Name	Asset	Share
Jairo Magui Vulugu	L.R. No Kakamega/ Lugovo/1226	0.20 ha
Ephraim Senelwa Vulugu	L.R. No Kakamega/ Lugovo/1226	0.20 ha
Hannah Ingaiza	L.R. No Kakamega/ Lugovo/1226	0.1 ha
Dedan Imali	L.R. No Kakamega/ Lugovo/1226	0.1 ha
Harun Kimani Vulugu holding in trust of Bathlemew Elegwa Vulugu	L.R. No Kakamega/ Lugovo/1249	0.24 ha
Samuel Opati	L.R. No Kakamega/ Lugovo/1249	0.1 ha
Florence Nyangasi	L.R. No Kakamega/ Lugovo/1255	0.1 ha

21. On his part, the Respondent had proposed distribution as follows:-



Name	Asset	Share
Jairo Magui Vulugu	L.R. No Kakamega/ Lugovo/1226	0.20 ha
Ephraim Senelwa Vulugu	L.R. No Kakamega/ Lugovo/1226	0.20 ha
Hannah Ingaiza	L.R. No Kakamega/ Lugovo/1226	0.1 ha
Dedan Imali	L.R. No Kakamega/ Lugovo/1226	0.1 ha
Harun Kimani Vulugu holding in trust of Bathlemew Elegwa Vulugu	L.R. No Kakamega/ Lugovo/1249	0.24 ha
Samuel Opati	L.R. No Kakamega/ Lugovo/1249	0.1 ha
Florence Nyangasi	L.R. No Kakamega/ Lugovo/1255	1. ha

22. It was evident that there was not too much variance in two (2) modes of distribution by both the Appellant and the Respondent herein and the one that the Learned Trial Magistrate finally came up with.
23. Notably, the Learned Trial Magistrate distributed the deceased's property to all the children. However, he stated that he awarded the daughters a smaller share because they were married and settled elsewhere. He noted that most of the children had been shown where to reside and were actually residing on their parcels of land.
24. However, this court was not able to follow his reasoning of why Florence Mmbone was awarded 0.34 ha while the Appellant herein was awarded 0.19 ha and Dedan Imali was given 0.1 ha. There had been a reference of a daughter who had been deceased earlier and it was not clear if she had children. It was not clear from the judgment whether this Dedan Imali was a daughter and if that was the reason she was allocated 0.1 ha and if the Appellant was awarded 0.19 ha because that was the portion that he had been living on.
25. It did appear from the Respondent's evidence that Bathlemew Elegwa Vulugu was given L.R. No Kakamega/Lugovo/1249 by the deceased. Florence Nyangasi corroborated the evidence of Florence Mmbone and asserted that the said parcel of land had never been subdivided into two (1) parcels.
26. This court had to go to the judgment to establish how the decision was arrived at. This should never be as the reasoning should be evident on the face of the decision.



27. To that extent, this court agreed with the Appellant that the said Learned Trial Magistrate erred in law and fact when he did not give reasons to support his decision. Indeed, Order 21 Rule 4 of the Civil Procedure Rules, 2010 states as follows:-
- “Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.”
28. Be that as it may, there were some reasons that were given in the decision albeit very sketchy and this court was able to follow the reasoning with a lot of difficulty. For that reason, it did not therefore find this matter to have reached the threshold of being sent for re-trial. It was also an old matter and needed to be determined expeditiously.
29. Going further, contrary to the Appellant’s assertions, there was nothing in the proceedings that suggested that the Respondent herein conceded to his proposed mode of distribution. There was a departure as far as the share of their deceased brother Bathlemew Elegwa Vulugu was concerned.
30. The Appellant had proposed that he hold his deceased brother’s children’s share in L.R. No Kakamega/Lugovo/1249 in trust for them. On the other hand, the Respondent told the Trial Court that his brother Bathlemew Elegwa Vulugu lived in the parcel of land and when their father died, he inherited it.
31. Florence Mmbone, who was the wife to Bathlemew Elegwa Vulugu testified that she surrendered her portion in L.R. No Kakamega/Lugovo/1249 to Moses Obondo Obege and purchased another parcel of land in Nandi due to frequent squabbles between her and the Appellant herein.
32. Pursuant to an objection that she had raised on 14th May 2015, Hon Susan N. Mwangi (RM) determined that the sale of the aforesaid property before the Certificate of Grant was confirmed amounted to intermeddling contrary to Section 45(1) of the Law of Succession because the Grant of Letters of Administration had not been confirmed. The said Learned Magistrate did not take action against her.
33. The above notwithstanding the Learned Trial Magistrate found and held that the Appellant herein could not purport to hold L.R. No Kakamega/Lugovo/1249 in trust for the children of his deceased brother when their mother was still alive. This was the position of the law as a person could not be a trustee to children when their mother was still alive without her consent. As this was not the decision that was presently before this court for analysis, this court did not wish to say more on it.
34. This court perused the Certificate of Confirmation that was confirmed on 14th September 2017 and noted that the same was in accordance with the decision of the Learned Trial Magistrate. If there was a difference, the Appellant did not point it out to this court. It did not therefore agree with him that the Learned Trial Magistrate signed a Certificate of Confirmation of Grant that was different from what he himself made in his judgment.
35. It therefore came to the firm conclusion that the Learned Trial Magistrate exercised his discretion judiciously in distributing the parcels of land in the manner that he did. The Appellant did not expound his position in his Written Submissions making it difficult for this court to come to any other conclusion.
36. In the premises foregoing, Grounds of Appeal Nos (1), (2), (3), (4), (5) and (6) of the Memorandum of Appeal were not merited and the same be and are hereby dismissed.



Disposition

37. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was dated and filed on 25th March 2019 was not merited and the same be and is hereby dismissed.
38. As this was a family matter, this court will deviate from the general principal that costs follow the events and direct that each party will bear its own costs of the Appeal herein.
39. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 20TH DAY OF DECEMBER 2023

J. KAMAU

JUDGE

