



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 160 OF 2019

1. SIMON MWANGI NGOTHO

2. JOTHAM NGOTHO MBUGUA.....APPELLANTS

VS.

SUSANNAH WANJIKU MUCHINA.....RESPONDENT

(Being an appeal from the judgment of the Chief Magistrate's Court at Thika,

Hon. M.W. Wanjala, (Mr.) SRM dated 17th October, 2019 in Succession Cause No. 139 of 1999)

JUDGMENT

1. This is an appeal from the decision of Thika Chief Magistrate's Court in Succession Cause NO. 139 of 1999.
2. The brief facts culminating in this appeal are as follows:- the deceased, **NGOTHO KIARII alias NGOTHO KIARIE (deceased)** died on 6th September, 1993.
3. A petition for grant of letters intestate in respect to the deceased's estate was filed on 21st April, 1999. The petitioner was one of the deceased's sons namely, **PATRICK KARANJA NGOTHO** (hereinafter **Patrick**). Patrick deponed through his said petition that he was the only son of the deceased. However, in that petition, he named **SUSAN WANJIKU MUCHINA** (hereinafter **Susan**) as a beneficiary of the estate. The petitioner did not elaborate on the status of Susan vis-à-vis to the deceased's estate. Patrick listed the property **Loc.16/Ndunyu Chege/967** as the only asset of the deceased.
4. The Thika court issued Patrick with a grant on 30th June, 1999.
5. By an application dated 6th January, 2000 Patrick applied for confirmation of the grant. In Patrick's affidavit in support of that application and for the first time, described Susan as a purchaser of 1½ acres and the remaining acreage to go to Patrick.
6. An affidavit of protest was filed by **Eliud Mbugua Ngotho**, another son of the deceased who stated that, Patrick had omitted to state all the beneficiaries of the deceased's estate. He stated those beneficiaries were:-
 - 1) Eliud Mbugua Ngotho – son
 - 2) Jacinata Muthoni Mbugua – daughter in law
 - 3) Daina Njeri – Daughter in law
 - 4) Jeremiah Mbaya Ngotho – son
 - 5) James Kariuki Ngotho – son
 - 6) Simon Mwangi Ngotho – son
 - 7) Patrick Karanja Ngotho – son

8) Flora Waithira Ngotho – daughter in law

Eliud further revealed that, Patrick had failed to set out in full the assets of the estate. He stated that deceased additionally had properties Loc/Kiriaini/408 and Loc 6A/Ndunyu-chege.

7. The Thika court delivered a Ruling dated 8th June, 2006 which only determined one issue. It determined that all the beneficiaries of the estate would share plot **NO. Loc.6A/Ndunyu-Chege** equally. No party appealed against that Ruling. That order therefore remains in force.

8. Susan applied by her summons dated 18th February, 2019 for confirmation of the grant issued to Patrick on 30th June, 1999. By that application, Susan sought inter alia for 1½ acres of **Loc.16/Ndunyu-Chege/967** to be distributed to her.

9. That application received the protest of **Simon Mwangi Ngotho** and **Jotham Ngotho Mbugua** (collectively protestors). The main issue raised by the protestors was that Susan had failed to prove she purchased 1½ acres of land and that if indeed she did purchase, such purchase was null and void having been sold by a beneficiary who had no capacity to sell.

10. The Thika Magistrate's court considered parties affidavits and written statements before delivering its Ruling on the protest. The Ruling was delivered on 17th October, 2019. The trial court by that Ruling upheld Susan's claim as a purchaser for 1½ acres of deceased's property. It is that Ruling which is appealed against by this appeal. The protestors stated in their grounds of appeal that the trial court erred to distribute 1½ acres of deceased's property to Susan when that sale to Susan of that land was null and void.

ANALYSIS

11. Before delving into the main appeal, I wish to deal with submissions filed by Susan to the effect that the appeal before court is incompetent. In support of that argument, Susan relied on the provisions of **Section 79G** of the Civil Procedure Act. In relying on that Section, Susan emphasised part of that Section as follows:-

“Every appeal from a subordinate court to the High Court shall be within a period of thirty days from the date of the decree or order appealed against...”

12. Susan's argument is that the stated Section shows that it is pertinent that a decree or order appealed from be part of the record of appeal.

13. Susan also cited **Order 42 Rule 2 and Rule 13(4)** of the Civil Procedure Rules which Rules provide that where no certified copy of the decree or order is filed with the memorandum of appeal it should be filed as soon as possible and also requires before an appeal is heard, such certified decree or order is filed.

14. Susan was correct in citing those provisions of the law. She however is in error to argue that this appeal is incompetent for not having a decree or order appealed from. This is because in the definition Section 2 of the Civil Procedure Act where a decree was defined it is provided as follows:-

“Provided that, for the purpose of appeal, “decree” includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn.”

15. The protestors at page 47 to 49 of their record of appeal included a copy of the judgment of Thika Magistrate's court which they are appealing against. That therefore, makes it clear that the present appeal is competent.

16. The only remaining issue for consideration is whether the trial court erred in distributing 1½ acres of the deceased's property to Susan as a purchaser.

17. Susan's evidence before the trial court was that she purchased 1½ acres of land from Patrick, the deceased's son. The sale agreement is dated 6th May, 1999. The deceased died on 6th September, 1993. **Section 82(b)(ii)** of the Law of Succession Act provides that no immovable property of the deceased shall be sold before confirmation of grant.

18. In this case Patrick by the time he entered in an agreement with Susan to sell the deceased's property, to Susan, he had not obtained a grant of Letters of Administration. It follows that Patrick had no lawful authority to sell to Susan that land. In this regard, I support the holding in of *Justice F. Gikonyo* in the case ***In re Estate of ISAAC KABURU MARETE (DECEASED) (2017) eKLR*** as follows:-

“[6] Upon meticulous consideration of the protest, all arguments filed and the law, I am of the following persuasion. I will restate once again what I stated in the case of the Matter of the Estate of M'AJOGI M'IKIUGU alias IKIUGU AJOGI (Deceased) on sale of estate property before confirmation of grant as follows:-

Sale of estate property before confirmation

Courts have said time and again- and I will not be tired of stating it again- that, under Section 82(b) (ii) of the law of Succession Act, sale of immovable property of the estate before confirmation of grant is prohibited. Again, under Section 55 of the Law of Succession Act, the law has placed restriction on distribute on of any capital assets of the estate before confirmation of grant. Therefore, no person shall have any power or legal authority or capacity to sell immovable property of the deceased before confirmation of grant. As such, any such attempted sale of immovable property of the estate before confirmation of grant shall be

null and void for all purposes and intents. I need not also state that beneficial interest of a person beneficially entitled to a share in the estate must be identified and be capable of registration in his name before it could be sold or pledged as security or exchanged with another type of property.”

19. In the same vein, Justice W. Musyoka in the case ***In re Estate of BARASA KENENJE MANYA (Deceased)*** Succession Cause NO. 263 of 2002 (2020) KEHC 1(KLR) 30th July, 2020 as follows:-

“It should be made clear that the property of a dead person vests in his estate upon his death. In turn, when personal representatives are appointed to administer the estate, whether in testacy or intestacy, the property then vests in the personal representatives, by dint of Section 79 of the Law of Succession Act, Cap 160, Laws of Kenya. Section 79 of the Law of Succession should be read together with section 80 of the Act, which states when grants of representation become effective. A grant of probate relates back to the date of death, and, therefore, it applies retrospectively, to authenticate any acts of the executor done between the date of death and the date of the making of the grant. A grant of letters of administration is effective from the date of the making of the grant, and it does not relate back or apply retroactively...”

It must be emphasized that the mere fact that a person is a surviving spouse or child of the deceased does not make him or her a personal representative of the deceased. One only becomes a personal representative, usually known as administrator, in the event of intestacy, upon being appointed by the court as such. The property of the intestate would not vest in any person until such person is appointed administrator by the court. Any transaction, entered into with a person who is yet to be appointed administrator, over estate assets, would be null and void, since such assets would not have vested in such a person, and such person would have no standing in law to transact over such property. Section 45 of the Law of Succession Act outlaws such dealings, and designates them as amounting to intermeddling with the estate of the deceased, which is a criminal offence, according to that provision.”

20. The sale of the deceased’s property by Patrick was after the death of the deceased. The sale was before a confirmed grant had been issued to Patrick. It follows that the estate of deceased had not vested in Patrick. He could therefore not sell the land by reason of Section 82 of the Law of Succession Act. Patrick could not enter into a binding contract with Susan. Susan could not acquire a valid title from Patrick. As Justice W. Musyoka stated in the case ***In re of the Estate of BARASA KENENJE MANYA (Deceased)*** (Supra), Patrick “had nothing to sell”. The sale agreement between Patrick and Susan is for that reason null and void.

21. In view of the above finding, the trial court erred to state in the Ruling the subject of this appeal as follows:-

“The copy of the sale agreement on record shows that indeed the applicant (herein Susan) bought one and a half acres out of parcel No. 967. Even though her purchase was done after the demise of the deceased herein and before the confirmation of grant, I do think that making a decision to exclude her would be perpetrating injustice on the applicant based on a technicality. The objectors’ (Protestors) are not even willing to refund her (Susan) the purchase price. I do not agree with the objectors’ position that she be excluded just because she bought the land after the death of the deceased.”

22. The trial court’s magistrate erred to fail to apply the law, Section 82 of Cap 160 and further failed to adhere to the doctrine of *stare decisis* when the case ***In re Estate of ISAAC KABURU MARETE (Deceased)*** (supra) was cited to that court by the protestors.

23. The importance of the principle of *stare decisis* was discussed in the case ***OKIYA OMTATAH OKOITI & ANOTHER VS. ATTORNEY GENERAL & 2 OTHERS (2015) eKLR*** thus:-

“13. The principle of stare decisis was expounded in the same case by DUFFUS, V.P. who stated that: -

‘The adherence to the principle of judicial precedent or stare decisis is of utmost importance in the administration of justice in the Courts in East Africa and thus to the conduct of the everyday affairs of its inhabitants, it provides a degree of certainty as to what is the law of the country and is a basis on which individuals can regulate their behaviour and transactions as between themselves and also with the State. There can be no doubt that the principle of judicial precedent must be strictly adhered to by the High Courts of each of the States and that these courts must regard themselves as bound by the decision of the Court of Appeal on any question of law, just as in the former days the Court of Appeal was bound by a decision of the Privy Council, or in England as the Court of Appeal or the High Courts are bound by the decisions of the House of Lords, and of course, similarly the magistrates courts or any other inferior court in each State are bound on questions of law by the decisions of the Court of Appeal and subject to these decisions also to the decisions of the High Court in the particular State.’”

24. In the end, I find that this appeal must succeed.

DISPOSITION

25. The judgment of this Court is:-

(a) The Ruling of the trial court is hereby set aside and is substituted by the orders hereafter.

(b) A grant and the confirmed grant in the estate of the Late **Ngotho Kiarri Alias Ngotho Kiarie (Deceased)** is hereby issued to **Simon Mwangi Ngotho** and **Jotham Ngotho Mbugua**.

(c) The deceased’s estate shall be distributed as follows:-

SCHEDULE

<u>Name</u>	<u>Description of Property</u>	<u>Share of Heirs</u>
JEREMIAH MBAE NGOTHO	LOC.1/KIARIA-INI/408	To be shared equally
JAMES KARIUKI MBAE	“	
JAMES MWANGI KARANJA	LOC.16/NDUNYU-CHEGE/967	
STEPHEN NGOTHO KARANJA	“	To be shared equally
FRANCIS MBUGUA KARANJA	“	
ISAAC NJAU KARANJA	“	
FLORA WAITHERA NDERITU	“	To hold in trust for herself & on behalf of Hellen Wairimu Karanja, Alice Wambui Karanja, Susan Wanjira Karanja & Rose Wanja Karanja
SIMON MWANGI NGOTHO	PLOT NO. 6A NDUNYU-CHEGE	1 Room
JOTHAM NGOTHO MBUGUA	“	1 Room & Store
JECINTA MUTHONI MBUGUA	“	1 Room
JEREMIAH MBAE NGOTHO	“	1 Room
FLORA WAITHIRA KARANJA	“	1 Room

JUDGMENT, SIGNED DATED AND DELIVERED AT KIAMBU THIS 21ST DAY OF FEBRUARY, 2022.

MARY KASANGO

JUDGE

Coram:-

Court Assistant: Maurice

For Appellant:- N/A

For Respondent: - N/A

COURT

Judgment delivered virtually.

MARY KASANGO

JUDGE