



Land Registrar, Kiritiri & another v Anjerica Muthoni Kirauni (the Administratrix of the Estate of the Late Esphan Davis Kirauni) (Civil Appeal E012 of 2020) [2022] KEHC 10727 (KLR) (25 May 2022) (Judgment)

Neutral citation: [2022] KEHC 10727 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E012 OF 2020
LM NJUGUNA, J
MAY 25, 2022**

BETWEEN

LAND REGISTRAR, KIRITIRI 1ST APPELLANT

THE HONOURABLE ATTORNEY GENERAL 2ND APPELLANT

AND

ANJERICA MUTHONI KIRAUNI (THE ADMINISTRATRIX OF THE ESTATE OF THE LATE ESPHAN DAVIS KIRAUNI) RESPONDENT

JUDGMENT

1. The appeal herein was instituted vide a memorandum of appeal dated 25.11.2020. The appeal is challenging the decision of the trial court (Hon. W. Ngumi) in PMSUCC No. 183 of 2019 and which ruling was delivered on 18.11.2020. The appellant raised the following grounds of appeal:
 - i. The learned trial magistrate erred in law and in fact by erroneously directing the 1st appellant to comply with a court order dated 04.03.2020 which is against the procedure and the law.
 - ii. The learned trial magistrate erred in law and in fact by not considering the replying affidavit sworn by the 1st respondent on 06.10.2020.
 - iii. The learned trial magistrate erred in law and in fact in filling gaps which were left out by the respondent.
 - iv. The learned trial magistrate misdirected herself in not considering that the 1st appellant was not a party in the Succession Cause.
 - v. The learned magistrate erred both in law and fact by not considering that land Parcel Number Embu/Kithunthu/ 1632 is jointly registered into two names.



- vi. The learned trial magistrate erred in both law and fact by directing the 1st appellant to register the Land Parcel No. Embu/Kithunthu/1632 without requiring the production of the original title deed.
 - vii. The learned trial magistrate erred in law and in fact by directing the Mbeere district Land surveyor to excise the deceased's share without requiring the presence of the members of the other family.
 - viii. The learned trial magistrate erred in law and in fact by misdirecting her mind and failed to consider that the land in question is a private land.
2. The appellant as such prayed that the appeal be allowed; the ruling be set aside and costs of the appeal be awarded to the appellants.
 3. The respondent herein had moved the trial court vide summons dated 10.02.2020 and wherein she sought for orders that the Land Registrar Mbeere District Lands Registry do register her as the proprietor of half of estate of Esphan David Kirauni (Deceased) by transmission in reference to Land Parcel Number Embu/Kithunthiri/1632 without requiring the production of the original title deed and without requiring the presence of members of the family of Mugo Chiarunde (Deceased) , and issue a new parcel number. That the executive officer of Siakago Law Courts do execute all necessary documents to facilitate the vesting of the deceased's share upon the respondent.
 4. The lower court having ordered that the land registrar register the mutation issued by Mbeere District Surveyor and issue a title deed to the respondent herein, the Land Registrar Mbeere District Lands Registry executed the order only that the said transmission on the green card read as follows:

“ Angerica Muthoni Kirauni proprietor of share of the estate of Esphan Davies Kirauni vide court order in the PMC at Siakago dated 04.03.2020.”
 5. Upon the registrar being directed to amend the green card to reflect the correct position that the estate devolved via transmission, the appellant instead preferred an appeal herein against the orders of the learned magistrate.
 6. This court has perused through the pleadings which were before the learned trial magistrate and the grounds of appeal as enunciated in the memorandum of appeal and thus forms the view that the main issue it has been called upon to determine is whether the appeal herein has merits.
 7. As it is now settled by the numerous authorities both by this court and the superior courts, the duty of this court as the first appellate court is to revisit the evidence on record, re-evaluate it and reach its own conclusion in the matter. Further, this court ought not to ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. [See *Mwanasokoni v Kenya Bus Service Ltd.* (1982-88) 1 KAR 278 and *Kiruga v Kiruga & Another* (1988) KLR 348].
 8. The court gave an order on filing of submissions which the parties failed to comply with.



9. The jurisdiction of the probate court is always to distribute free estate of the deceased. The Law of Succession Act in section 47 provides for jurisdiction of the High Court in respect of matters falling under the Act as follows:-

The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.

10. In the case of Priscilla Ndubi and Zipporah Mutiga v Gerishon Gatobu Mbui, Meru Succession Cause No. 720 of 2013, held:-

“The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries....

11. From the court records, I note that the Land Parcel No. Embu/Kithunthu/1632 (estate subject to this appeal) has two proprietors namely Esphan Davis Kirauni and Mugo Chiarunde and that the two hold the property in half share. It is also clear that the title deed to the said piece of land had been issued and from the pleadings, the respondent filed an affidavit wherein she deposed that the family of Mugo Chiarunde holds the title deed in respect of the aforesaid land and that she has never seen it and that she has made all possible efforts to trace the surviving members of the family of Mugo Chiarunde (Deceased) to no avail.

12. As narrated hereinabove, the grant herein was confirmed, and a certificate of confirmation of grant issued. After a grant is confirmed the process of transmission is carried out in terms of Section 61 of the Land Registration Act which provides as follows:

“Transmission on death of a sole proprietor or proprietor in common.

61.

- (1) If a sole proprietor or a proprietor in common dies, the proprietor’s personal representative shall, on application to the Registrar in the prescribed form and on the production to the Registrar of the grant, be entitled to be registered by transmission as proprietor in the place of the deceased ...
- (2) Upon confirmation of a grant, and on production of the grant the Registrar may, without requiring the personal representative to be registered, register by transmission—
 - (a) any transfer by the personal representative; and
 - (b)
- (3) In this section, “grant” means the grant of probate of the will, the grant of letters of administration of the estate or the grant of summary administration of the estate in favour of or issued by the Public Trustee, as the case may be, of the deceased proprietor.”

13. In this particular case and guided by the law on transmissions as enunciated above, the respondent is within her legal rights to demand that she be registered as the proprietor of the said share of Land Parcel Number Embu/Kithunthiri/1632 as the law demands and the Land Registrar, Mbeere South – Kiritiri is obliged to carry out his mandate as per the stipulations of the law.



14. In view of the foregoing, I make the following orders that :

- i) The Land Registrar Mbeere District Lands Registry be ordered to register Angerica Muthoni Kirauni as proprietor of half share of the estate of Esphan Davis Kirauni (deceased) by transmission, under Land parcel No. Embu/ Kithunthiri/1632 without requiring the production of the original title deed.
- ii) Upon registration of the respondent as the proprietor of Land Parcel No. Embu/ Kithunthiri.1532, the Mbeere District Land Surveyor be and is hereby ordered to excise the deceased's estate share, without requiring the presence of the members of the family of Mugo Chiarunde (deceased) and issue a new parcel number.
- iii) The Executive Officer, Siakago Law Courts be and is hereby ordered to execute all necessary documents to facilitate the vesting of the deceased share upon the respondent.
- iv) Each party to bear its own costs of the appeal.

15. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 25TH DAY OF MAY, 2022.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent

