



REPUBLIC OF KENYA



**In re Estate of Kating'i Ndambuki Mutwota alias Katingi Ndambuki Mutwota (Deceased)
(Succession Appeal E001 of 2022) [2022] KEHC 14292 (KLR) (24 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14292 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION APPEAL E001 OF 2022
MW MUIGAI, J
OCTOBER 24, 2022**

BETWEEN

JULIUS WAMBUA MATIA APPELLANT

AND

MUYA KIYUKU RESPONDENT

*(Being an Appeal against the Ruling and the order of Hon. (Ms) Martha
Opanga Senior Resident Magistrate delivered on 21st day of December,
2021 in Kangundo SMPCC Succession Cause No. E251 of 2021)*

JUDGMENT

Trial court record

1. The succession process was commenced by a petition for letters of administration filed on September 7, 2021 by the Petitioner who sought to be appointed as the Administrator of the estate. In the affidavit in support of the Petition for letters of administration sworn on August 30, 2021 by Muya Kituku deposed that the deceased died on July 28, 1995 at Kithongoni Sub Location, Kathaana Location, domiciled in Kakuyuni Division- Kangundo Sub- County. The deceased last known residence was Kathaana Location.
2. It was deposed that the deceased was survived by the following grandchildren;
 - a. Joseph Kyalo Kituku Grandson
 - b. Muya Kituku Grandson
 - c. Kisoi Muya (Deceased) Grandson
(survived by Angeline Nduku Muia)
 - d. Mutunga Kituku Grandson



- e. Maingi Kituku Grandson
 - f. Muthama Kituku Grandson
3. It was deposed that there are no liabilities. The assets estimated to be valued at Three Million Kenyan Shillings were listed as;
- a. Land Parcel No Matungulu/Kawethei/2234
 - b. Land Parcel No Matungulu/Kawethei/2444
 - c. Land Parcel No Matungulu/Kawethei/2445
 - d. Land Parcel No Matungulu/Kawethei/2799
4. An objection to the making of a grant was filed on September 21, 2021 by Julius Wambua Matia seeking to strike out the Petition in which he contends that;
- a. The deceased died intestate and had two sons namely Matia Ndambuki(deceased) and Kituku Ndambuki(deceased).
 - b. He is the son of Matia Ndambuki(deceased) and thus a grandson and a beneficiary.
 - c. He had cited Muya Kituku and his siblings in Citation Cause Number E32 of 2021.
 - d. When the citation came up for directions, both parties agreed to file a joint Petition in respect to the estate with each side proposing an administrator.
 - e. On August 25, 2021 he was informed by the advocate for the Citees that the only set back was the death certificate that was yet to be issued and parties took a further mention date on October 13, 2021 for confirm that a petition had been filed.
 - f. He learnt that the Citees had filed a petition secretly without involving him and he was not mentioned anywhere nor any member of the family of Matia Ndambuki(deceased)
 - g. Consent for Muya Kitukuto be the administrator was not sought or ever at all and the Petitioner is guilty of making false statements and has concealed material facts from the court affecting the deceased estate.
 - h. A chief's letter was not presented together with the petition as is required by law
 - i. An assistant chief wrote a letter wrote a letter with far reaching consequences without involving the objector and thus condemned and disinherited him even though the objector is a grandson of the deceased.
 - j. He had previously written to the chief Kathaana location when he attempted to aid the Petitioner and his family to secretly obtain a grant without involving all the necessary parties and he complied.
 - k. There is need for the assistant chief to be investigated and her interest in this matter ascertained as she is attempting to cause miscarriage of justice
5. The Petitioner filed a replying affidavit on September 23, 2021 in which he deposed that when the citation came for hearing, he sought time to consult his siblings so that they could consider filing a joint Petition. However when they met as a family, they did not see any need of including the Objector since he was no longer a beneficiary of the estate after he acquired his share and went and obtained titles of the same.



6. The Petitioner contends that it is true that they had not processed the deceased's death certificate and it is not true that the objector learnt through his own means. The petitioner's Advocates wrote to the Objector's advocate to inform them of their decision. The Petitioner opined that he obtained the consent of all the beneficiaries of the deceased's estate herein. It was deposed that the acting Chief of Kathaana Location, one Violet W Peter duly issued a letter as required by law. Further, that the dispute herein has been handled in various ranks for disputes resolution at the family level, Chief's office and at one time before the Court and in all instances, the objector's complaints were found to be baseless.
7. The Petitioner deposed that the deceased herein had two sons, Matia Ndambuki, father of the Objector and Kituku Ndambuki, the father of Petitioner. She divided her land into two, gave her first son Matungulu/Kawethei 2443 but did not give the second one a title deed as at the time he was addicted to drinking and the land was registered in the deceased's name. As such, title deeds number 2799, 2234, 2445 and 2444 belong to Kituku Ndambuki and his heirs.
8. The Petitioner contends that the Objector is engaging in a fishing expedition and trying his luck to get a share of the remaining estate yet he already got his due entitlement. He opines that the actions amount to a fraud and an attempt to disinherit the Petitioner and his siblings. The objection is malicious, ill intentioned, vexatious and an abuse of the court process, a waste of judicial time and should be dismissed.
9. The objection was disposed by way of written submissions.

Trial court ruling

10. In its ruling dated on December 21, 2021, the court relied on section 29 of the [Law of Succession Act](#) (hereinafter referred to as 'the Act') and found that the Objector being a grandchild of the deceased in this case was a beneficiary.
11. As regards the question of whether land parcel numbers 2444, 2445, 2234, 2799 registered in the name of the deceased were held in trust for the benefit of the petitioners, the Trial court stated that trusts in Kenya are created under the [Trustees Act or the Trustees \(Perpetual Succession\) Act](#), Cap 164 of the Laws of Kenya. A trust deed ought to be stamped and then registered at the Lands Registry under the [Registration of Documents Act](#) (Chapter 285 of the Laws of Kenya).
12. The court discussed the characteristics and essentials of a trust and found that there was nothing to show that the four plots were registered in the names of the deceased to hold in trust for the petitioners. The court relied on the cases of *Wambugu vs Kimani (1992) 2KLR*, [Muirurui vs Kimemia \(2002\) 2KLR](#) and *Mbothus and others vs Waitimu and 11 others (1980) KLR 171*.
13. The court found that it is not disputed that the deceased gave the father of the objector a plot known as 2443 which he registered in his names and questioned why the deceased registered the other parcels in her name. It was found that this was probably preserved for the benefit of the Petitioner's father considering that he was reportedly an alcoholic thus irresponsible in the court's view. The Trial court found the objection unmerited and dismissed it.

The Appeal

14. Dissatisfied by this judgment, the Appellant filed a Memorandum of Appeal dated January 13, 2022 seeking the following orders;



- a. This Appeal be allowed, the ruling and the order of the subordinate court be set aside and be substituted therefore with a judgment and order of this court allowing the Appellants objection.
 - b. The costs be borne by the Respondent.
15. The grounds upon which the Appeal is premised on are that;
- a. The learned Magistrate erred in law and fact and misdirected herself by failing to consider that the Appellant had discharged his burden of proof in proving that he was entitled to participate in the cause as a beneficiary of the estate.
 - b. The learned Magistrate erred in law and fact by dismissing the Appellant's application as lacking in merit yet in its analysis the trial court had made a finding that the Appellant herein being a grandson of the deceased was a proper beneficiary of that estate.
 - c. The Hon. Court erred in law and fact for failing to allow the objection in favor of the appellant notwithstanding the fact that the pleadings and evidence on record had established a strong case to warrant grant of the reliefs sought.
 - d. The Trial court having made a finding that the Appellant was a beneficiary of the estate of the deceased misdirected itself by delving into issues of distribution of the assets yet it had not been called upon to make a determination at that point.
 - e. The Trial court misdirected itself by relying on extraneous matters and or factors to dismiss an otherwise legally tenable claim by the Appellant.
16. The Respondent filed a Replying affidavit deposed on January 31, 2022 in which he reiterated the contents of his replying affidavit in the lower court dated September 23, 2021.
17. The Appeal was canvassed by way of written submissions.

Appellants Submissions

18. The Appellant filed submissions on June 20, 2022 and contended that the Petition as drafted does not conform to the mandatory provisions of the Act and the *Probate and Administration Rules*. In addition, the Respondent did not consult, include nor seek the Appellant's consent or renunciation of his right or entitlement to participate in the proceedings as per Rule 26 of the Probate and Administration Rules. It was submitted that as a grandson of the deceased herein, he is entitled to participate in the succession proceedings and ought to have been consulted.
19. The Appellant submitted that the purpose of objection proceedings is to determine the issue of qualification, competence and suitability of the Petitioner to administer the estate and once that has been determined, the issue of distribution of the assets of the deceased are to be determined during the hearing of the summons for confirmation of grant. This point was buttressed by placing reliance as placed on the case of *Re estate of Dorcas Omena Binayo (deceased) [2021] eKLR*.
20. The Appellant submitted that the letter of the chief and the alleged letter of the family meeting are hearsay and the maker of the documents need's to be cross- examined and the veracity of the documents ascertained.
21. The Appellant contends that the evidence before the Trial court did not satisfy the requirements of Section 9, 10 and 11 of the Act on oral wills, proof of oral wills and written wills respectively. He opines



that the issue of distribution was premature at this stage and gravely denies the Appellant and other beneficiaries their day in Court.

Respondent Submissions

22. The Respondent filed submissions on July 14, 2015 in which he submitted that on November 13, 2001, the Appellant claimed to have purchased a quarter acre from Plot 2799, filed a case in Kangundo Senior Resident Magistrate which was dismissed for lack of evidence.
23. In 2019, the Appellant trespassed onto plot No 2444 claiming the same had been given to him as a grandson and the Chief with the assistance of the elders after hearing both parties dismissed the allegations as they lacked evidence, the Respondent submitted.
24. In addition, the Appellant filed a Citation cause dated February 4, 2021 Kangundo Court which prompted the Respondent and his siblings to file a succession cause on September 7, 2021 to which he filed an objection.
25. The Respondent narrowed the issues into two; whether or not the memorandum of Appeal meets the threshold for setting aside and or vacation of the judgement entered by the subordinate court on December 21, 2021 and the issue of costs.
26. On the first issue, the Respondent relied on the case of *Felista Muthoni Nyaga vs Peter Kayo Mugo [2016] eKLR* and submitted that the Appellant does not deny that their grandmother, the deceased herein distributed her property among her sons in equal portions, this is confirmed by the area chief, his assistant, the clan elder and the family members as per the documents on record.
27. In the letters dated December 7, 2020 and July 15, 2021 by the chief and the assistant chief, the fact that the deceased herein had registered the plots in her name in trust of the Petitioner and his siblings in 1996 or thereabout is illustrated. The family elders affirmed this position vide written minutes dated June 6, 2019. The Respondent contends that the Appellant has on several occasions fraudulently tried to forcefully deprive the Respondent and his siblings of their inheritance save for the chief, clan and other elder's intervention.
28. On the issue of costs, while relying on section 27 of the *Civil Procedure Act*, it was submitted that costs follow the event since the Respondent is the successful party, he should be awarded costs.

Determination

29. I have considered the Memorandum of Appeal, the Trial Court record and the submission of the parties.
30. This being 1st appeal, it is important to reiterate that its duty is to re - evaluate the evidence presented before it. This duty was well stated in *Selle & Another v Associated Motor Boat Co Ltd & Others (1968) EA 123* in the following terms:

' I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that 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 account of particular circumstances or



probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif v Ali Mohamed Sholan* (1955), 22 EACA 270).

31. From the record, it is not in dispute that Kating'i Ndambuku Mutwota alias Katingi Ndambuku Mutiwota, the deceased herein had two sons; Matia Ndambuki the father of the Objector and Kituki Ndambuki the father of the Petitioner. It is also not in dispute that the Appellant is a grandson of the estate and that his father Matia Ndambuki received a portion of land from the deceased herein. The only issue is whether he is entitled to participate in the succession proceedings and whether the current estate property was held in trust for the Respondent and his siblings.
32. First and foremost, the Appellant contends that the petition was filed secretly but upon perusal of the record is a letter dated September 15, 2021 from the firm of Calistus & Co Advocates to the firm of Nzuki Nzioka & Company Advocates, the Appellant through his advocates on record was informed that the Petition for letters of administration had been filed and proposed to have the citation closed and any disputes involving the estate canvassed in Kangundo Succession cause No 251 of 2021. I therefore find that this contention by the Appellant was not true.
33. Secondly, on the issue of whether the Appellant can participate in the succession proceedings, I find in the affirmative. Section 51 of the Act requires all the survivors of the deceased to be named. It provides that;
An application shall include information as to -
 - (a) The full names of the deceased;
 - (b) The date and place of his death;
 - (c) His last known place of residence;
 - (d) The relationship (if any) of the applicant to the deceased;
 - (e) Whether or not the deceased left a valid will;
 - (f) The present addresses of any executors appointed by any such valid will;
 - (g) In cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased; [Emphasis added]
 - (h) A full inventory of all the assets and liabilities of the deceased; and
 - (i) Such other matters as may be prescribed.
34. I find that the Respondent failed to comply with Section 51(2)(g) of the Act and I direct that a fresh Petition for letters of administration or amendment of the Petition to include Appellant be filed in compliance with the same provisions of Law.
35. If the Trial Court found that he was a beneficiary by virtue of Section 66 of LSA & Rule 26 of Probate & Succession Rules then his interests in the estate should not be curtailed. The contention of whether he had already benefited from the estate will be considered at the time of issuance of the grant and that share will be taken into account during the distribution of the estate. The issue of participation in the succession proceedings and benefiting from the estate are two distinct issues.
36. This matter is still in the preliminary stages, once the Administrators are appointed, they will have the duty to gather and collect all the assets of the estate among many other duties before distribution and if



the Appellant has already benefited then he cannot benefit twice from the same estate at the detriment of other beneficiaries.

37. Section 42 of the Act provides as follows;

Previous benefits to be brought into account

Where-

- (a) An intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or
- (b) Property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.

38. In this case, the estate is survived by the grandchildren who stepped into the shoes of their deceased parents and were/are children of the deceased and taken their parent's share in the estate of the grandparents. This was stated in *Re Estate of Wahome Njoki Wakagoto (2013) eKLR* where it was held:-

' Under Part V, grandchildren have not right to inherit their grandparents who die intestate after 1st July 1981. The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents' indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren's own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents.'

39. This Court notes that the Appellant has not made reference to Matungulu/Kawethei 2443 that was given to his father Matia Ndambuki. As such this position remains uncontroverted. A copy of the ownership documents of plot number 2443 have not been produced.

40. The Respondent on the other hand has provided the letter dated July 15, 2021 from the acting chief, Violet W Peter stating/showing that that;

' The deceased had two sons; Matia Ndambuki and Kituku Ndambuki. The deceased had subdivided the land between the two where the first son had a title deed but the second one did not have a title deed because by that time he was addicted to drinking therefore his land was registered under his mother - Katingi Ndambuki Mutwota.'

41. Also a letter dated June 6, 2019 from the family panel stating/showing that;

' Mary Katingi Ndambuki later subdivided her plot between her two sons namely Matia Ndambuki and Kituku Ndambuki. Matia Ndambuki got one large Plot No 2443 while Mr Kituku got small plots in different destinations ie Plot No 2444, 2445, 2234 and 2799. Although they are four (4) they equaled to 2443.

On November 13, 2001, one Julius Wambua Matia claimed to have purchased a quarter acre in Plot No 2799 and filed a case in the Senior Resident Magistrate Court at Kangundo before B Malomba SRM, the case lacked evidence and was refereed back.'

42. This Court finds that there is need to call the elders and the Chief to Court as provided under Section 70 of the Act which provides as follows;



Whether or not there is a dispute as to the grant, every court shall have power, before making a grant of representation-

- (a) Examine any applicant on oath or affirmation; or
 - (b) Call for further evidence as to the due execution or contents of the will or some other will, the making of an oral will, the rights of dependants and of persons claiming interests on intestacy, or any other matter which appears to require further investigation before a grant is made; or
 - (c) Issue a special citation to any person appearing to have reason to object to the application.
43. The commencement and participation of Succession proceedings is not synonymous to distribution of the estate of the deceased. The administration of the deceased's estate ought to be as provided by LSA. The Appellant shall be included in the list of beneficiaries and contents obtained with regard to appointment of Administrators. Thereafter during Summons of Confirmation of Grant, proceedings protests will be heard first and the Trial Court shall confirm distribution of the deceased's estate as per Section 71 LSA.

Disposition

44. In the end, this Court gives the following orders;
- a. The Respondent is at liberty to file for a fresh petition and/or amend the Petition within 60 days of this Ruling and include ALL the beneficiaries of the estate and/or grandchildren of the estate in the Trial Court.
 - b. The beneficiaries shall meet discuss and agree on the appointment of administrators if not the Trial Court shall appoint as required under Section 66 LSA including the Appellant as Co-Administrator.
 - c. To the extent of whether there was/is a trust I uphold the Trial Court's finding that what is referred to as a trust is not in compliance with a legally recognized trust under the Trustees Act or the *Trustees (Perpetual Succession) Act*, Cap 164 of the Laws of Kenya & *Registration of Documents Act* (Chapter 285 of the Laws of Kenya).
 - d. Each party to bear its own costs.
45. It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 24TH DAY OF OCTOBER, 2022
(VIRTUAL/PHYSICAL CONFERENCE)**

M.W MUIGAI

JUDGE

IN THE PRESENCE OF:

NO APPEARANCE - FOR THE APPELLANT

NO APPEARANCE - FOR RESPONDENT

GEOFFREY/PATRICK - COURT ASSISTANT(S)

