



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of John Mutero (Deceased) (Succession Appeal E003 of 2021)
[2022] KEHC 15767 (KLR) (30 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15767 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION APPEAL E003 OF 2021
CM KARIUKI, J
NOVEMBER 30, 2022
IN THE MATTER OF THE ESTATE OF JOHN MUTERO ALIAS MUTERO
S/O KARIUKI - (DECEASED)**

BETWEEN

GERALD MUTERU MUTERO APPELLANT

AND

ROSALINE WANGUI MUTERU 1ST RESPONDENT

DUNCAN NDEGWA MUTERU 2ND RESPONDENT

(Being an appeal from a judgment dated 22nd January 2021 by Hon JHS DH Ileri, SRM, in Succession Case No 2 of 2019 at Othaya, Senior Resident Magistrate)

JUDGMENT

1. This is an appeal arising from the decision of Hon DM Ileri, Senior Resident Magistrate in Othaya Senior Resident Magistrate Court Succ No 2 of 2019 delivered on January 22, 2021. The background is that the matter arose from a protest about sharing two parcels of land, namely LR No Chinga/Kagongo/xxx and xxx which are the epicentre of the dispute.
2. The 1st petitioner's contended that the two disputed plots belong to Joel Mwangi, Juliana Wairimu and Simon Gachoka as per deceased persons wishes. He also maintains that two properties have already been sold to the late Lawrence Mutero Wambugu and the late Henry Waruiru Mwangi, but the respondents dispute this. He avers that the two plots should be transferred to those three dependants for onward transmission to the buyers.
3. On their part, the two Respondents' position is that the two plots belong to them since their father had given each of the five sons a plot. They said that they were not aware that the properties had been sold. At the end of the hearing and determination, the learned trial magistrate confirmed the grant in



favour of the Respondents and distributed the estate of the deceased by granting the Respondents LR No Chinga/Kagongo/xxx and Chinga/Kagongo/xxx as their rightful share in the inheritance.

4. Being dissatisfied with the judgment of the trial court delivered on November 22, 2021, the Appellant filed the instant appeal and set out three grounds of appeal, namely; -
 - i. The learned trial magistrate erred in law and fact when he failed to distribute the estate as proposed in the summons for confirmation of grant dated 2February 7, 2020, disregarding the evidence on record.
 - ii. The learned trial magistrate erred in law and fact when he made contradicting findings on whether the deceased had distributed his property during his lifetime.
 - iii. The Learned Trial Magistrate failed to appreciate the submissions of the learned counsel for the Appellant.
5. Parties were directed to canvass the appeal via submissions that they filed and exchanged.

Appellant's Submissions

6. It is submitted that there is unchallenged evidence that the deceased first sold 0.5 acres out of his land to build a house for his second wife. Then, he divided the remaining land into two equal portions, one for each wife, thus maintaining equality. Then, out of the portion for the second wife, he excised 0.5 acres being title number Nyeri/Endarasha/xxxx, and sold it to the same person who bought the first portion.
7. This portion was sold to raise money to cater for medical bills for the second wife's then-ailing child. This crucial evidence was not contested. The only reason why the second wife's portion appears smaller is that after the deceased divided the land, he excised the said 0.5 acres, which he sold to cater for the treatment of the second wife's child.
8. They further emphasized that it was not demonstrated that the deceased's wishes were illegal, unfair, discriminatory, and unjust to the beneficiaries or some of them; such wishes ought to be respected. Nor has it been shown that the deceased was biased, unfair, or discriminatory against any beneficiaries. In any event, it would appear that some beneficiaries were aware of the distribution in question during the deceased's lifetime. If they were disenchanted with the distribution, they should have taken it up with him.
9. Reliance is made on the case of *Martha Wanjiku Waweru v Mary Wambui Waweru* (2013), where the court held as follows;

“In this case, the deceased had, in his lifetime, distributed his estate as he wished. He had the power to do so. His family members did not protest change in mode distribution which they had the opportunity to do during his lifetime. He fixed clear physical boundaries, which no one interfered with at any stage, even after his death. In my view, his wishes should have been respected”.
10. Reliance was also made on *Joseph Wairagu Migwo v Mikielena Ngina* Succession Cause 404 of 2012[2016] eKLR, *Martha Wanjiku Waweru v Mary Wambui Waweru* [*supra*], *Paul Kiruhi Nyiringi & another v Francis Wanjobi Nyiringi*[*supra*]. And the *estate of Morogo A Mugun alias Moroko Mukumu* (2019), Success Cause No 113 of 2011.
11. It is submitted that, from the evidence on record, the deceased's wishes were known to his family. He had actualized those wishes by fixing clear boundaries. Those wishes ought to be respected.



12. It is contended that the proper handling of the sale issue should have been to place the two disputed portions aside as the parties filed a case in the Environment and Land Court for determination.
13. The fact that the Learned Magistrate analyzed the evidence and nullified the transaction negated his assertions that he does not have jurisdiction to deal with the matter. Reliance is made on the [*re Estate of Boniface Njeru Ngemi \(Deceased\)*](#) [2020] eKLR.

Respondent Submissions

14. They submit that they did not object to the distribution of the rest of the properties in the estate, as proposed by the appellant, and indeed, all the beneficiaries agreed that those were the wishes of their deceased father.
15. The Appellant categorically stated during the trial that he does not have any claim in the estate of the deceased herein. The problem was generated by the Appellant's attempt to defeat the protest, and he lined up several witnesses who alleged that the Respondents had sold their shares. It was alleged that the 1st Respondent's share had been sold by her late husband, a fact which she disputed. It was also alleged that the 2nd Respondent's share had been sold by one Geoffrey Githinji, which was also discredited in evidence by the letter dated December 30, 1999.
16. It is clear from the evidence on record that the Appellant's claim in the two disputed properties was based on a purported sale transaction. The trial court is a probate court and was correct in stating that it had no jurisdiction in deciding ownership rights issues or even interpreting the sale agreements as produced by the Appellants.
17. It argued that the court rightfully held that a person claiming as a purchaser cannot be brought into a succession cause. The learned magistrate was also correct in finding that nobody had a right to sell the deceased's property since they had not taken out letters of administration at the time of the purported sale.
18. It is also apparent on the record that no grant of representation was made prior to the proceedings before the trial court to validate the purported sale transactions.
19. Thus, it is submitted that the said Geoffrey Githinji and Joseph Mutero could not sell their portions as alleged. If there were such sales, the same amounted to intermeddling, which is outlawed by section 45 of the [*Law of Succession Act*](#), for the authority to handle the property of a deceased person emanates only from a grant of representation. Any person who took such property without a grant acts without authority and outside of the law, which is an offence under section 45 of the Law of Succession Acts.
20. Thus, it is contended that the Trial magistrate correctly observed the facts and applied the law in the circumstances, thus arriving at a just and reasonable determination.
21. Further, Respondents submit that the deceased died intestate and, therefore, the deceased's properties should be shared equally between his children. And that the onus of proving whether or not the deceased had distributed his property during his lifetime lies on the person alleging, and there must be clear and convincing evidence and absence of suspicious circumstances surrounding the case.
22. Both the Appellant and Respondents admitted that the deceased had distributed his property before his demise. The trial Magistrate, in his finding on page 140 of the record of appeal, stated that it was confirmed that the Respondents herein had had the subject plots, and the fact they had been allowed to take possession of the plots was a recognition of their right over them. Further, the trial court noted that the other three dependents had been granted the other three plots; the Magistrate was then right in holding that it was only fair that the two plots be issued to the Respondents herein.



23. It is submitted that the Appellant admitted that the deceased had made his wishes clear and further agreed on how the other plots had been shared; there was no explanation as to why the deceased then excluded the Respondents in the distribution of these two disputed plots. For instance, it is admitted by all parties that the Appellant had been given 4 acres of the deceased land, and perhaps this is why the Appellant testified that he did not have a claim in the deceased's property despite being a dependent as per the Chief's letter.
24. In discharging the burden of proof, the Respondents called two independent witnesses, PW2 and PW3. While PW2 was a neighbour and a friend of the deceased, PW3 was a member of the deceased's clan. Both witnesses confirmed and corroborated the Respondent's evidence before the trial court that the deceased had two wives and five sons.
25. He subdivided his land into six portions, selling one portion and allocating the remaining five plots to his five sons. They confirmed that they all took possessions of their plots, and the Respondents have continued to cultivate the said portions without any disputes
26. There was no explanation as to why the Respondents had been left out. In the absence of any explanation, the Appellant decided to allege that the Respondents had sold their shares. But as stated herein above, there was nothing to be sold as the seller did not have any grant of representation as required in law. The Respondents were clear that they had been in occupation of the disputed lands and were therefore entitled to the same.
27. It is submitted that the Appellant's contention that the trial magistrate should have placed the two disputed plots aside as the parties filed a case in the ELC court cannot be supported because he failed to make any application to that effect, despite being represented by counsel. Therefore, being a probate court, the trial court should not be faulted for the appellant's negligence.
28. Furthermore, Joseph Mutero (the 1st Respondent's husband) could not sell either on his behalf or any other person's behalf, as alleged by the Appellant. He had no grant of representation to the estate.
29. Further, it is contended, on the allegation that Geoffrey Githinji had sold the 2nd Respondent's plot No Chinga/Kagongo/xxx to Henry Waruiru if at all that sell ever took place, the deceased died in the year 1985.
30. Why didn't Henry effect a transfer in 2002 when Githinji was alive? Why lay a claim in 2019? He was indolent, and equity does not aid the indolent. In any event, a creditor to the estate of the deceased ought to have filed a separate claim against the estate, which they did not, as provisions of section 55 and 82 of the Law of Succession Act provides that no immovable property of the deceased shall be sold before confirmation of the grant.
31. The respondents submit that the trial Magistrate's decision was reasonably made. It should not be interfered with as there is no justification why the Appellant and the rest of the dependents of the deceased would be entitled to more shares than the Respondents, yet they are all children of the deceased.

Issues Analysis and Determination.

32. After going through the proceedings and submissions by the parties, I find the issues are; whether the Respondents are entitled to the two disputed plots, namely LR No Chinga/Kagongo/xxx and xxx and the order as to costs.
33. The duty of a first appellate court.



34. A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hear the witnesses first-hand. This duty was stated in *Selle & another v Associated Motor Boat Co Ltd & others* {1968} EA 123.
35. A first appellate court has jurisdiction to reverse or affirm the trial court's findings. A first appeal is a valuable right of the parties, and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons on all the issues arising along with the contentions put forth and pressed by the parties for the decision of the appellate court. While reversing a finding of fact, the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it. See *Santosh Hazari v Purushottam Tiwari (Deceased) by LRs* {2001} 3 SCC 179.
36. The only dispute is as regards two plots, namely LR No Chinga/Kagongo/xxx and xxx. On the first issue, whether the Respondents are entitled to the two disputed plots, this court has gone through the record and observes that the 1st Petitioner's case is that the two disputed plots belong to Joel Mwangi, Juliana Wairimu and Simon Gachoka as per deceased wishes. He also maintains that two plots have already been sold to the late Lawrence Mutero Wambugu and the late Henry Waruiru Mwangi, but the Respondents dispute this.
37. He avers that the two plots should be transferred to those three dependants for onward transmission to the buyers. The two Respondents' position is that the two plots belong to them since their father had given each of the five sons a plot. They said that they were not aware that the properties had been sold.
38. As regards plot number Chinga/Kagongo/xxx, it is the position of the 1st Petitioner that his deceased father sold the same to the late Lawrence Mutero. He produced a document written in Kikuyu dated October 6, 1981, together with the English translation done by his learned counsel in support of his evidence. that document which he refers to as a sale agreement (P Exhibit 1), shows that the deceased herein purportedly entered into a sale of land agreement with one Lawrence Mutero Wambugu for the sale of land and the agreed purchase price was Kshs 16,000/-. AW2, AW3, AW4, and AW5 support his evidence. Upon a keen perusal of that document, the same does not explicitly indicate that the deceased herein was selling parcel No Chinga/kagongo/xxx to the late Lawrence Mutero as alleged by 1st petitioner (AW1) and Lawrence's wife (AW5).
39. The said Plot xxx is claimed by the 1st Protestor. The trial court agonized with the question of whether the issue of the sale of land between the deceased herein and Lawrence Mutero can be determined in the present Succession Cause. Reliance and guidance were sought on the case of the *re Estate of Stone Kathuli Muinde (deceased)* [2016] eKLR. The court held as follows: -

“Regarding the assets, one of the questions that may present itself would be the ownership of the assets presented as belonging to the deceased. An outsider may claim that the property does not form part of the estate and, therefore, must not be placed on the probate table. The resolution of such questions does not necessitate a joinder into the cause of the alleged owner to establish ownership. It is not the function of the probate court to determine ownership of the assets alleged to be estate property. That jurisdiction lies elsewhere.



Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit properly brought before a civil court in accordance with the provisions of the Civil Procedure Act and the Civil procedure Rules. This could mean filing suit at the Magistrate's courts. And at the Civil or Commercial Division of the High Court or the Environment and Land Court. If a decree is obtained in such suit in favour of the claimant, then such decree should be presented to the probate court in the succession cause so that the court can give the effect of it "Emphasis added"

40. Also cited are *Re estate of Joseph Mutiso Kithome (deceased)* [2019] eKLR,
41. A person claiming as a purchaser cannot be brought into a succession cause. The Applicant herein seeks to have the subject plot transferred to the three named dependants, who will then transfer it to AW5, the wife of the late Lawrence Mutero, who claims that her late husband had bought Plot No xxx from the deceased. It is a fact that the late Lawrence Mutero Wambugu is not a dependant of the deceased and is not listed as one of the deceased's dependants by the Chief's introductory letter dated December 10, 2018 filed in this cause.
42. It is evident that the document presented as the sale of land agreement does not indicate the land which the late Lawrence Mutero was buying from the deceased. All this notwithstanding, the issue of whether there was the sale of the subject plot and whether the said Lawrence had bought it from the deceased cannot be determined in this succession cause.
43. Such a claim can only be resolved through a civil process in a civil suit, but this has not been done. The person claiming the said plot, ie, AW5, was only called as a witness in this matter. While being guided by the above decisions, the trial court considered the view that Lawrence's wife (AW 5) ought to have filed a civil claim in another forum against the estate claiming the said property and then present a decree in the cause for consideration, but which was not done.
44. I agree with the trial court finding that the 1st Petitioner and his witnesses cannot now argue that the said plot will be transferred to AW5 upon the conclusion of this cause. This court thus finds that the said plot is part of the deceased assets and will be distributed to the dependants.
45. As regards plot Number Chinga/Kagongo/xxx, it has been said that the same belonged to the late Geoffrey Githinji Mutero but was sold to one Henry Waruiru Mwangi vide the agreement dated February 14, 2002. It was also said that the late Joseph Mutero was the one who sold it on behalf of Geoffrey.
46. Whether the disputed plot belongs to the late Geoffrey Githinji is in dispute in view of the other letter dated December 30, 1999 produced by the 2nd Protestor as P Exhibit 2. In any case, no power of attorney was produced to prove that Geoffrey Githinji had legally authorized Joseph Mutero to sell the said plot on his behalf.
47. The above notwithstanding, it is confirmed that the plot was registered in the name of the deceased herein at the time of sale and the search filed herein in respect of the land confirms as such. The deceased herein died in 1985, as per the copy of the death certificate filed herein, and the said plot was sold in 2002. Did the deceased's sons, i.e., Joseph Mutero and Geoffrey Githinji have any legal authority to sell the deceased's land to Henry Waruiru at the time of sale?
48. Under section 82 of the *Law of Succession Act*, it is only a personal representative of a deceased person who is authorized to deal with the deceased person's property. In any case, provisions of law allow a personal representative to sell deceased assets, vide section 82 (b) (ii), which is to the effect that: "No immovable property shall be sold before confirmation of the grant."



49. 14. Reliance is also done on the *re Estate of M’Ajogi M’Tkiugu (deceased)* eKLR, where the Court held as follows on the issue thus: -

“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 restrictions on the distribution of any capital assets of the estate before confirmation of the grant. Therefore, no person shall have any power, legal authority, or capacity to sell the immovable property of the deceased before confirmation of the grant. As such, any attempted sale of the estate’s immovable property before confirmation of grant shall be null and void for all purposes and intents....” (Emphasis added)

50. Also, In *Virginia Mwari Thurania v Purity Nkirote Thurania* [2017] eKLR, the court held as follows: -

“The said sale agreement is null and void for violating section 82 (b) (ii) of the Law of Succession Act, as the said Julia Thurania had not obtained Letters of administration of the estate of the deceased at the time of the alleged sale. The property of the deceased person vests in the legal did not clothe him with any authority. He and Felix Kinuthia intermeddled with the estate, and no doubt committed an offence under Section 45 (2) (a) of the Act.....As the Respondent had no authority to sell the property in question, Felix Kinuthia acquired no interest in it as the seller had no title to it whatsoever.”

51. It is trite law that the property of a deceased person cannot be lawfully dealt with by anybody unless such a person is authorized to do so by the law and such authority emanates from a grant of letters of representation. Secondly, until a legal representative is appointed in intestacy, any act done in respect of the estate of a deceased person without the authority of the law amounts to intermeddling with the estate.

52. Thirdly, under section 82 (b) (ii) of the *Law of Succession Act*, the sale of immovable property of a deceased person before confirmation of grant is prohibited, and no person shall have any power or legal authority or capacity to sell the immovable property of the deceased before confirmation of the grant. Fourthly, any sale or attempted sale of immovable property of a deceased’s estate before confirmation of grant shall be null and void for all purposes and intents.

53. Applying the above decision in the present case, it means that Joseph Mutero and Geoffrey Githinji had no legal rights to purport to sell plot no Chinga/Kagongo/xxx since the two were not legal representatives of the deceased’s estate as at the time of sale.

54. Secondly, the plot was also purportedly sold before any grant had been confirmed. Thirdly, section 82 (b) (ii) and 45 of the *Law of Succession Act* prohibited them from selling the deceased’s land to anyone considering that they had no grant of representation and that no confirmation of grant had been issued to them at the time of purported sale.

55. In other words, the two persons had no plot they could sell since the subject plot did not belong to them but to the deceased at the time of the purported sale.

56. It, therefore, means that the purported sale of land agreement dated February 14, 2002, in respect of LR No Chinga/Kagongo/xxx was thus null and void for all purposes and intents and cannot be relied upon in this succession cause by the 1st Petitioner to propound a claim in favour of the late Henry Waruiru.



57. The plot thus forms part of the deceased asset and is available to be distributed to the dependents. Therefore, this court finds no fault in the trial court finding the two subject properties of the estate subject herein were not validly sold and thus available for distribution to deceased dependants.
58. Having found that the two disputed plots form part of the deceased estate, I uphold that the trial court was justified in exploring the mode distribution considering all factors thereof and the provisions of law applicable. Therefore, the trial court went ahead to answer the next question: who should be given them?
59. The deceased herein died intestate. Section 38 of the *Law of Succession Act* provides that such property is supposed to be shared equally between the surviving children. Still, in doing so, the court is duty-bound to consider situations whereby a beneficiary has already benefitted from another property. In this case, Joel Mwangi, Juliana Wairimu, and Simon Gachoka have benefitted from plots number Chinga/Kagongo/xxx,xxx and xxx. The Appellant stated categorically in his evidence that he is not claiming any plot, while Grace Wambui Gachuhi did not file any protest or lay any claim from the estate.
60. It is confirmed that the two Respondents have been and are still cultivating portions of the subject plots. The fact that the Respondents were allowed to take possession and cultivate the disputed plots is a recognition that they had rights over them. Thus, this court up-holdings the trial court finding that the two Respondents are therefore entitled to the two disputed plots.
61. In view of the above, it is only fair that the two subject plots be given to the two Respondents considering that the other three plots have been given to the other three dependants.
62. Thus, the protest succeeded, and this was the correct conclusion that which trial court reached, which this court agrees is sound in law and facts on record. Consequently, plot no Chinga/Kagongo/xxx is hereby given to Duncan Ndegwa Mutero, while Chinga/Kagongo/xxx is given to Rosaline Wangui Muteru. Joel Mwangi, Juliana Wairimu, and Simon Gachoka are in support of the applicant's proposal that they share plots No Chinga/Kagongo/xxx, xxx, and xxx in equal shares, and the court will not interfere with those arrangements.
63. Thus, this court finds no merit in the appeal and makes the following orders;
 - i. Appeal is dismissed with no orders as to costs as this is a family dispute.

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 30TH DAY OF NOVEMBER 2022.

.....
CHARLES KARIUKI
JUDGE

