



REPUBLIC OF KENYA



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**In re Estate of Jackson Karani Livasia (Deceased) (Succession Appeal
E022 of 2023) [2025] KEHC 3028 (KLR) (5 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3028 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION APPEAL E022 OF 2023**

AC BETT, J

MARCH 5, 2025

IN THE MATTER OF THE ESTATE OF JACKSON KARANI LIVASIA (DECEASED)

BETWEEN

MARY KALANI APPELLANT

AND

ERNEST KALANI LUHYAKHA RESPONDENT

JUDGMENT

Background

1. The Respondent petitioned for Grant of Letters of Administration to the estate of his deceased father and was issued with a Certificate of Confirmation to the estate of Grant dated 22nd June 2022 in which the estate of the deceased was distributed between him and the Appellant being the sole surviving beneficiaries of the deceased.
2. Prior to the confirmation of Grant, the Appellant had filed a protest to the confirmation in which she averred that the deceased had sold 0.45 hectares comprised in L.R. No. Kakamega/Virembe/1123 during his lifetime and allocated 0.27 hectares from the said parcel to the Respondent. She therefore proposed that the Respondent and Wycliffe Widava Muliru do share the said land proportionately while the land comprised in L.R. No. Kakamega/Virembe/1070 do devolve to her.
3. The Respondent denied that the deceased had sold any property during his lifetime and proposed that the entire land in L.R. No. Kakamega/Virembe/1123 in which the family homestead had been established do devolve to him while L.R. No. Kakamega/Virembe/1070 goes to the Appellant.
4. After hearing the parties and considering their written submissions, the trial court delivered a ruling in which it found that the sale of land occurred after the demise of the deceased and before Grant of Letters of Administration. The trial court therefore held that the sale transaction was illegal as it was



contrary to Section 82 (b) (ii) of the *Law of Succession Act*. The court then allowed the Summons for Confirmation of Grant dated 29th March 2017 as prayed.

5. The Appellant was aggrieved by the decision of the trial court and filed an appeal. In her appeal, the Appellant faulted the trial court on the following grounds:-
 1. That the learned trial Magistrate erred in fact and law in making a decision that was clearly unfair and discriminating.
 2. That the learned trial Magistrate misdirected himself and failed to equitably distribute the property of the deceased in this case in accordance with the law and even after properly observing that a purported buyer after the death of the deceased and without the authority of the court was not entitled to the estate of the deceased.
 3. That the learned trial Magistrate erred in fact and law in making a decision that was not supported with reason.
6. The court directed that the appeal be disposed of by way of written submissions.

Appellant's Submissions

7. The Appellant submits that the proposal by the Respondent on the mode of distribution of the estate, which proposal was adopted by court would mean that the Appellant would be getting more than twice the portion of land that the Appellant would get.
8. The Appellant further submits that having found that the sale of the land to the purchaser Wycliffe Widava Muliru could not hold, the court erred in making a finding that the whole of L.R. No. Kakamega/Virembe/1123 measuring 0.7 hectares devolves to the Respondent while L.R. No. Kakamega/Virembe/1070 measuring 0.29 hectares devolve to her. The Appellant submits that the two parcels of land should be shared equally between her and the Respondent.

Respondent's Submissions

9. The Respondent submits that the Appellant did not demonstrate any protest to her entitlement to L.R. No. Kakamega/Virembe/1070 and hence the appeal must fail as the Appellant never at any point indicated her interest in a portion of L.R. No. Kakamega/Virembe/1123 and her appeal is therefore an afterthought.
10. The Respondent also submits that there is no proper appeal before the court for determination as the appeal was filed out of time without leave of the court. He relies on the cases of Anthony Burugu & Co. Advocates v. Electrowatts Limited [2027] KECA 415 (KLR), Kenya Hotel Properties Limited v. Attorney General & 5 others [2021] KESC 49 (KLR) and County Government of Kisumu & 8 others [2017] eKLR.
11. Additionally, the Respondent submits that the Record of Appeal is incompetent in that the Appellant has failed to include a copy of the petition/pleadings, order/decreed appealed from being Certificate of Confirmation of Grant, proceedings of the trial court and a certified copy of the ruling in the Appeal. He has cited the case of Lucas Otieno Masaye v. Lucia Olewe Kidi [2022] eKLR where the court proceeded to find as incompetent an appeal premised on a Record of Appeal without the mandatory essential documents.
12. The Respondent further submits that the Appellant is estopped from seeking orders of redistribution. The Respondent contends that the Appellant participated in the purported sale of a portion of Parcel No. 1123 and is therefore precluded by the doctrine of estoppel as recognized under Section 120 of the



Evidence Act from asserting her rights subsequent to the finding by the court that the purported sale was illegal. As an ancillary, the Respondent submits that, having sworn an affidavit of protest proposing the distribution of the two parcels of land comprising the estate of the deceased in the manner she did, the Appellant is estopped from a fresh proposition on distribution.

13. The Respondent further submits that the evidence adduced before the trial court was that each party has been in occupation of the parcels of land as distributed by the trial court and the Appellant has not justified her new proposition. The Respondent relies on the *Re Estate of Josphat Muturi Njoroge (Deceased)* [2020] eKLR and urges this court to dismiss the appeal.

Analysis And Determination

14. This being a first appeal, the duty of the court is as set out in the case of *Selle & Another v. Associated Motor Boat Co., Ltd & others* [1968] EA 123 where the court held thus:-

“...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...”

15. Accordingly, I need to review the evidence adduced before the trial court and re-evaluate the same in order to come to my own independent conclusion while bearing in mind that I did not have the privilege of observing the demeanour of the witnesses as they testified.

16. The issues for determination herein are as follows:-

- i. Whether the Record of Appeal is incompetent.
- ii. Whether the Appellant is estopped from making a new proposition for distribution.
- iii. Whether the appeal is merited

17. On the first issue, I have perused the Record of Appeal and the further Record of Appeal. Indeed, the P&A forms that constitute the petition for letters of administration are missing from the record as are copies of the proceedings and the Certificate of Confirmation of Grant of Letters of Administration issued on 22nd June 2022. The copies of typed proceedings are also missing from the Record of Appeal and therefore the Record of Appeal as it is, is incomplete.

18. The question is whether the absence of the said documents renders the Record of Appeal incompetent.

19. Order 42 Rule 2 of the Civil Procedure Rules provides as follows:-

“Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79B of the Act until such certified copy is filed.”

20. Order 42 Rule 13 (4) (f) of the Civil Procedure Rules provides:-

“Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—



- (a) the memorandum of appeal;
- (b) the pleadings;
- (c) the notes of the trial magistrate made at the hearing;
- (d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
- (e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
- (f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:

Provided that—

- (i) a translation into English shall be provided of any document not in that language;
- (ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).”

21. It is my considered opinion that the requirement that the Record of Appeal be complete with all the primary documents failure to which the appeal shall be rendered incompetent is in respect of appeals to the Court of Appeal and not the High Court. The reason is that, this court has the benefit of access to the original lower court file that has all the documents.

22. In the case of *Odera v. Adoyo & Another* (Suing as legal representatives of the estate of Vincent Ochieng Adoyo – Deceased) [2023] KEHC 17962 (KLR) the court held as follows:-

“...In my view, a Decree for purposes of an Appeal is an extract of the decision appealed against which is the Judgment. While it may be improper for a litigant to attach the Judgement appealed against and omit the Decree, I do not find such an omission fatal. I am inclined to agree with the findings in *Nyota Tissue Products vs Charles Wanga Wanga & 4 Others* (2020) eKLR where the court held that: -

“The rule applicable to the appeals to the High Court makes provision under Order 42 rule 13 (f) of the Civil Procedure Rules for the filing of a copy of the “judgment, order or decree appealed from” and does not make it mandatory to attach the judgment and the decree. The Record of Appeal herein attached the Judgment of the trial court according to the requirements of Order 42 rule 13 (4) (f) of the Civil Procedure Rules, and in my respectful view, I would agree with the Court in *Silver Bullet Bus* case on the point, that it would be too draconian to strike out the appeal in these circumstances.”

23. On review of the Record of Appeal, I have established that the appeal is against an order for distribution of the estate of the deceased. The Record of Appeal filed comprises the Summons for Confirmation of Grant, the Affidavit of protest and the Ruling being appealed against. To me, the said documents are the primary documents relevant to this appeal. It was not necessary to attach the Certificate of Confirmation of Grant or an extracted order as Order 42 Rule (13) (4) (f) is not couched in mandatory terms in that respect. Moreover, the original court file was forwarded to this court.



24. In the case of Paul Lawi Lokale v. Auto Industries Limited & Another [2020] eKLR, Nyakundi J. stated thus:-

“...To my mind, the use of the conjunction “or” suggest that litigants are not mandatorily obliged to attach both the judgement and the decree...”

25. As to whether the appeal was filed out of time, there is, in the Further Record of Appeal, an order dated 23rd November 2023 where leave to appeal out of time was granted. The Appeal was filed on 5th December 2023 which was well within time. The order granting leave was filed alongside the Memorandum of Appeal.

26. Based on the foregoing, I am convinced that the Appeal herein should not be struck off.

27. On the second issue, I have reviewed the evidence. The Appellant tendered her proposal on the mode of distribution on the premise that the deceased and the mother of the two parties had sold 0.45 hectares of his land during their lifetime. She therefore believed that the said land was not available for distribution.

28. The Appellant also stated that one Josphat Mbeye Karani who is a son of her sister Florence Oromo was entitled to a share of the estate of the deceased. The Respondent did not dispute the Appellant’s contention that Florence was entitled to a share of the land. He only stated that she had died and her son Josphat had land elsewhere.

29. The doctrine of estoppel in legal proceedings operates on the premise that a party who has taken a certain position in a case may be precluded from taking a contradictory position later.

30. The doctrine of general estoppel is captured in Section 120 of the *Evidence Act* which section stipulates that:-

“When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.”

31. A simple interpretation of Section 120 of the *Evidence Act* is that for one to be estopped, the party pleading estoppel must have acted upon the declaration, act or omission to his detriment. It cannot be gainsaid therefore, that it is incumbent upon the Respondent to prove that he acted upon the Appellant’s representation that she would be content with L.R. No. Kakamega/Virembe/1070 to his detriment.

32. In the case of First Assurance Company Limited v. Seascapes Limited [2008] eKLR, the Court of Appeal held that estoppel could not be acted upon where there was no evidence that the representation had been acted upon and stated thus:-

“Related to that issue is the question of estoppel. Mr. Gautama for the respondent submitted before us that the two letters in which the appellant stated that they were on cover with effect from 31st May 1997, raised an estoppel against the appellant. But for there to be an estoppel there has to be a representation which is acted upon by the opposite side to its detriment. It does not give rise to a cause of action. It may only be used as a defence. (see The Law of Contract 3rd Ed. By G.H. Treitel – P.342). If indeed the respondent acted on the appellant’s representation, there was no evidence tendered before the trial court to prove it.



We earlier stated that the respondent did not make any single payment before its property was damaged by a fire. It paid by cheque after the fire, but the payment was rejected by the appellant. The payment was made on the 11th month since the alleged date of the insurance cover. The cover was for twelve months and the respondent's property was damaged when the cover, if at all it was still in force, had only one more month to run. It is noteworthy that despite demand by Jaidip Agencies the respondent did not make any payment of the premium. That is prima facie evidence that the representation by the appellant in the two aforesaid letters was not acted upon as to raise an estoppel. The learned trial Judge did not address his mind to this aspect of the matter, and we think he erred when he said that an estoppel could be and was raised against the appellant."

33. Based on the above arguments, I find that the doctrine of estoppel cannot operate to estop the Appellant from claiming a larger share in the estate of the deceased.
34. Additionally, I am convinced that the Appellant's willingness to accept the smaller portion of land was premised on her belief that the Respondent would be sharing L.R. No. Kakamega/Virembe/1123 with a buyer, Wycliffe Widava Muliru, a belief that was debunked by the court's decision that the alleged buyer acquired the land through an illegal transaction that was contrary to Section 82 of the Law of Succession Act which forbids the sale of immovable property before confirmation of Grant.
35. The final issue to be addressed is whether the appeal is merited. In the face of the finding that the property comprised in L.R. No. Kakamega/Virembe/1123 was disposed of after the deceased had died and before confirmation of Grant, the said property remained the property of the deceased. Consequently, the said property, and the property comprised in L.R. No. Kakamega/Virembe/1070 ought to be distributed to the dependants of the deceased in accordance with the provisions of the Law of Succession Act.
36. Under the Law of Succession Act the right of inheritance is provided under Section 29 of the Law of Succession Act which states as follows:-
 - "29. For the purposes of this Part, "dependant" means—
 - (a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
 - (b) such of the deceased's parents, step-parents, grandparents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and
 - (c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death."
37. It is not in dispute that both the Appellant and the Respondent are children of the deceased. They are therefore entitled to equal treatment during distribution of the estate of the deceased.
38. In his evidence during the protest proceedings, the Respondent listed the five (5) children of the deceased. He is apparently the only son. There is no indication that the sisters who did not take part in the proceedings had waived their right to the estate of the deceased. I have perused the pleadings. There is no Form P&A 38 and 37 that would signify consent in alignment with the Respondent's position.



Conspicuously missing also is Form P&A 98. In absence of evidence of renunciation of their rights by the other dependants of the deceased, the court should not have proceeded to confirm the Grant.

39. The *Law of Succession Act* does not discriminate a deceased person's children. Whether son or daughter, married or unmarried, they are equal before the law. It does not also matter whether the dependant has acquired other property. A dependant's right to inherit their parent's estate is sacrosanct.

40. Section 35 (5) of the *Law of Succession Act* states as follows:-

“Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.”

Section 38 goes further to state:-

“Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.”

41. In Re Estate of Solomon Ngatia Kariuki (Deceased) [2008] eKLR, the Court held as follows:-

“The *Law of Succession Act* does not discriminate between the female and male children or married and unmarried daughters of the deceased person when it comes to the distribution of his estate. All children of the deceased are entitled to stake a claim to the deceased's estate. In seeking to disinherit the protestor under the guise that the protestor was married, her father, brothers and sisters were purportedly invoking a facet of an old Kikuyu Customary Law. Like most other customary laws in this country they are always biased against women and indeed they tend to bar married daughters from inheriting their father's estate. The justification of this rather archaic and primitive customary law demand appears to be that such married daughters should forego their father's inheritance because they are likely to enjoy the inheritance of their husband's side of the family.”

42. Pursuant to the foregoing express provisions of the *Law of Succession Act* and the prevailing legal authorities, it is evident beyond all peradventure that all the children of the deceased person are entitled to an equal share of the estate of the deceased regardless of their gender, marital or economic status. In any event, Article 27 of *the Constitution* prohibits any form of discrimination and stipulates in sub-Article 3 as follows:-

“Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.”

43. Contrary to the Respondent's submissions that the Appellant did not prove unfairness, discrimination and misdirection, the element of unfairness and discrimination is manifest in the adopted mode of distribution which disregards the evidence that at least one dependant being a child to Florence who is the parties' deceased sister, had been left out of the distribution.

44. In Re estate of Florence Mukami Kinyua (Deceased) [2018] eKLR, the court held:-

“A grandchild is a direct heir to the estate of the grandparent where the parent predeceased the grandparent. The grandchildren get into the shoes of their deceased parents and take



the 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.”

45. The fact of unfairness and discrimination is also discernable in the manner in which the estate of the deceased was distributed in a skewed manner that resulted in the Respondent getting more than double the share assigned to the Appellant.
46. I need not say more as there are myriad decisions that have been made by various courts concerning the rights of daughters to a share of the estate of their deceased parents.
47. For the foregoing reasons, I find that the Appeal is merited. I therefore allow the appeal in whole and make the following orders:-
 - a. The file be remitted back to the trial court for hearing of a fresh Summons for Confirmation of Grant.
 - b. The trial court shall ensure the attendance of the other children and grandchildren of the deceased who are entitled by right to participate in the estate of the deceased.
 - c. Since this is a family matter, each party shall bear its own costs of the appeal.

DATED, SIGNED AND DELIVERED AT Kakamega THIS 5TH DAY OF MARCH 2025.

A. C. BETT

JUDGE

In the presence of:

Mr. J. Mukavale for Appellant

No appearance for Mr. Shifwoka for Respondent

Both parties present

Court Assistant: Polycap

