



**In re Estate of Kamay Kabunua (Deceased) (Probate & Administration
Appeal E011 of 2022) [2025] KEHC 4606 (KLR) (10 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4606 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
PROBATE & ADMINISTRATION APPEAL E011 OF 2022**

MA ODERO, J

APRIL 10, 2025

IN THE MATTER OF THE ESTATE OF KAMAU KABUNUA (DECEASED)

BETWEEN

ROSE WANJA NDERITU APPELLANT

AND

LUCY WATARE KAMAU RESPONDENT

*(An appeal against the ruling of Honourable V. S. Kosgei(R.M) in Karatina
P.M Succession Cause No. 4 of 1996 delivered on 5th August 2022)*

JUDGMENT

1. Before this Court is the Memorandum of Appeal dated 15th August 2022 by which the Appellant ROSE WANJA NDERITU seeks orders that the Appeal be allowed and/the Ruling delivered by the Lower Court on 5th August 2022 in Karatina PM succession No. 49 of 1996 be set aside with costs. The Appellant also prays for orders that the matter be heard afresh.
2. The Respondent LUCY WANJA NDERITU opposed the appeal. The matter was canvassed by way of written submissions. The Appellant filed the written submissions dated 10th October 2024 whilst the Respondent relied on her written submissions dated 29th October 2024.

BACKGROUND

3. This matter relates to the estate of the late KAMAU KABUNUA (hereinafter ‘the Deceased’) who died intestate on 20th December 1988. A copy of the Death Certificate Serial No. 312422 is in the lower court file. The Deceased who was a polygamous man was survived by two widows ANNA WAMUYU KAMAU (1st House) and RACHEL WAMBUI KAMAU (2nd House) and several children.



4. Following the demise of the Deceased Grant of letters of Administration Intestate was on June 1997 made jointly to the two widows.
5. The 1st widow Annah Wamuyu Kamau passed away on 28th January 1999 and was substituted by her daughter Lucy Watere Kamau.
6. The 2nd widow Rachel Wambui Kamau also passed away and was substituted by her daughter Rose Wanja Nderitu.
7. The Grant was duly confirmed on 7th October 1998 and it was directed that the estate of the deceased be shared equally between the two Houses. One of the beneficiaries filed an appeal challenging the confirmation of the Grant which appeal was dismissed.
8. On 7th July 2022 the two administrators filed a summons seeking confirmation of the Grant. Some of the beneficiaries namely Rose Wanja Nderitu filed an Affidavit of Protest dated 2nd August 2022 in which she argued that the confirmation dated 7th October 1998 had lapsed. It was argued that the protestor had lived on and developed the property known as Kirimukuyu/Gachuiro/108 which fact ought to be taken into account in the distribution of that property.
9. On 5th August 2022 the learned trial magistrate delivered a brief ruling in which she dismissed the Affidavit of protest and proceeded to allow the Summons for confirmation of Grant dated 7th July 2022 directing that the estate be distributed in accordance with Paragraph 8 of the Supporting Affidavit dated 7th July 2022.
10. Being aggrieved by this ruling the Appellant filed the instant appeal which was premised upon the following grounds;-
 - “1. That the learned trial magistrate erred in law and fact by relying on a 1997 judgement in re-distributing the deceased’s estate.
 2. That the learned trial magistrate erred in law and fact by failing to rely and consider the doctrine of laches in her ruling.
 3. That the learned trial magistrate erred in law and fact by failing to consider that judgement had not been executed and implemented for over a period of over 25 years.
 4. That the learned trial magistrate erred in law and fact by failing to have the Appellants Affidavit of protest dated 2/8/2022 heard and determined on merit.
 5. That learned trial magistrate erred in law and fact by dismissing the protestor’s protest summarily.
 6. That the learned trial magistrate erred in law and fact by failing to order a fresh trial of the estate of the deceased herein this matter.”

Analysis And Determination

11. This is a first appeal. It is settled law that the duty of the first appellate court is to re-evaluate the evidence which was adduced in the subordinate court both on points of law and fact and come up with its own findings and conclusions [see Peters -vs- Sunday Post Limited [1958] E.A 424]



12. In *Selle And Another -vs- Associated Motor Boat Company Ltd & Others* [1968] 1 E.A 123 it was stated as follows:-

“.....this court must reconsider the evidence, evidence, evaluate it itself and draw its own conclusions though it should always bear in mind [the fact] that it has neither seen nor heard the witness 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 that he has clearly failed on some point to take into account particular circumstances or probabilities materially to estimate the evidence.”

13. Likewise in *Gitobu Imanyara & 2 Others -vs- Attorney General* [2016] eKLR, the court of Appeal stated thus:-

“An appeal to this court is by way of a 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 he witnesses and should make due allowance in this respect.”

14. Therefore the appropriate standard of review in cases of appeal can be summarized in the following principles:-

1. On first appeal the court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions.
2. In reconsidering and re-evaluating the evidence the first appeal court must bear in mind and give due allowance for the fact that the trial court had the advantage of seeing and hearing the witnesses.
3. It is not open to the first appellate court to review the findings of a trial court simply on the basis that it would have reached a different conclusion had it been hearing the matter for the first time.

15. The record indicates that on 9th October 1998 Hon. Kiarie Senior Resident Magistrate (as he then was) directed that the estate of the Deceased be shared equally between the two Houses and equally among the survivors of the estate including the two widows.

16. The Appellant in her protest stated that this ruling of 9th October 1998 has been defeated by the doctrine of laches i.e that having not been implemented the said ruling is no longer valid. By this argument the Appellant appears to be relying on Section 4(4) of the *Limitation of Actions Act* Cap 22 which provides that

“4(4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after “the expiration of six years from the date on which the interest became due.”



17. It must be noted that the Appellant and the Respondent are the joint administrators of the estate of the deceased. They both had a duty to ensure the distribution of the estate as directed by the court. The Appellant failed to take any action from the year 1998 to distribute the estate. I am mindful of the fact that an appeal against the ruling of 9th October 1998 had been filed, therefore the administrators had to await the determination of that appeal. That appeal being Nyeri H.C Miscellaneous No. 160 of 1998 was eventually dismissed for want of prosecution.
18. Once the appeal was dismissed the administrators ought to have Moved with haste to distribute the estate. They still did not act. If the Appellant or indeed any other party had issues with the proposed mode of distribution of the estate they were at liberty to file an objection to the same and give her own proposal on distribution.
19. I do agree with the learned trial magistrate that by her protest the appellant was seeking to re-open a matter that had already been dealt with.
20. A Grant of representation does not expire – it remains valid pending the distribution of the entire estate. The only way to have a Grant cancelled is to have the same revoked. The Grant in this case has not been revoked. It remains valid and enforceable.
21. All in all I find no merit in this appeal. The same is hereby dismissed in its entirety. This being a family matter, I make no orders on costs.

DATED IN NYERI THIS 10TH DAY OF APRIL 2025

.....

MAUREEN A. ODERO

JUDGE

