Wathoni & another v Njeri (Civil Appeal E227 of 2023)
[2025] KEHC 11864 (KLR) (8 April 2025) (Judgment)

Neutral citation: [2025] KEHC 11864 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CIVIL APPEAL E227 OF 2023

DO CHEPKWONY, J

APRIL 8, 2025

BETWEEN

JANE WATHONI ..... 1ST APPELLANT

ANNE WANGUI KAMAU ..... 2ND APPELLANT

AND

SARAH NJERI ..... RESPONDENT

(Being an Appeal from the Ruling of the Hon. S. Atambo (CM) dated 7th July, 2022 at the Chief Magistrate's Court at Kiambu in MCSUCC Cause No.164 of 2011)

JUDGMENT

1. This appeal arises from the Chief Magistrate's Court Kiambu Succession Cause No.164 of 2011 as Consolidated with Kiambu Succession Cause No.163 of 201, where the trial Court delivered a ruling on 7th June, 2020 and distributed the Estate herein equally to all the beneficiaries as has been proposed by the Respondent herein.

2. The Affidavit of Protest dated 24yth September, 2020 was filed by Anne Wangui Kamau, as one of the Beneficiaries of the Estate of Serah Gathoni Kamau seeking to have her parcel of land No.Ndumberi/ Riabai/404 to remain un-interfered with and more expressly with no addition and or subtraction of the acreage therein and that too without interfering with its physical location.

3. In response, Penina Njeri Thiong'o filed a Replying Affidavit sworn on 19th October, 2020 wherein she urged that the claim by the Protestor be dismissed. She confirmed that, as one of the Administrators of the Estate of Serah Gathoni Kamau, the proposed distribution of the Estate is fair, reasonable and would not interfere with any structure or development on the property LR. No. Ndumberi/ Ndumberi/534 as must parts of the property have been used for subsistence farming. All she urged was that the distribution be undertaken fairly, equitably and ensure that all beneficiaries be considered as required by the *Law of Succession Act*.

4. Aggrieved by the ruling delivered on 7th June, 2022, the Appellants lodged an appeal vide a Memorandum of Appeal dated 7th July, 2023 on the following grounds:-

   a. That the learned Magistrate erred in law and in fact in failing to find that she lacked jurisdiction to hear the matter whose value was way beyond Kshs. 25,000,000/=.

   b. That the learned Magistrate erred in law and in fact by misdirecting herself as to the issues before her when determining the cause in issue.

   c. That the learned Magistrate erred in law and in fact in relying and considering the alleged son as a dependent of the 2nd Appellant's husband as a foundation of her ruling.

   d. That the learned Magistrate erred in law and in fact in failing to consider there is currently pending a Children Cause No. 29 of 2013 a determination on the paternity filed by the appellant no substantive evidence on the distribution of the estate was tendered by the Respondent.

   e. That the learned Magistrate erred in law and in fact in failing to appreciate the very solid points of law raised by the Appellants in their submissions.

   f. That the learned Magistrate erred in law and in fact in arbitratly favouring the respondent with an award in absolute conflict with the deceased wishes and even the pleadings basis thereof.

   g. That the learned Magistrate erred in law and in fact in failing to find that the legal prerequisites of a Summons for Confirmation were non-existent and hence the summons were fatally defective and ought to have been dismissed.

5. On 26th October, 2023, the court directed the Appellants to file and serve a Record of Appeal and for the parties to canvass the appeal by way of written submissions. Although it is not indicated, having perused the record, I noted that inadvertently, the appeal had not been admitted for hearing. In the circumstances, this Court proceeds to direct that this appeal be deemed to have been admitted then. The parties filed their respective written submissions. The Appellants' submissions are undated while the Respondent's submission are dated 18th May, 2024.

Determination

6. This being a first appeal, it is the duty of the court to re-assess and re-analyse the evidence that was adduced before the trial court so as to arrive at an independent decision. This is a principle that was enunciated in the case of Selle & Another –vs- 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 – vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)."

7. In line with this findings, I have read through the Record of Proceedings before the trial court and written submissions filed by the parties herein in consideration of the Grounds of Appeal as set out in the Memorandum of Appeal dated 7th July, 2023. I find prudent to adopt the grounds raised in the Appellants' submissions for determination of this appeal. They are:-

    a. Whether the Learned Magistrate erred in law and in fact in failing to hold that the trial Court lacked jurisdiction to hear the matter whose value was way beyond Kshs.25,000,000/- (See Grounds 1 and 2 of the Memorandum of Appeal).

    b. Whether the Learned Magistrate erred in law and in fact in relying and considering the alleged son of the 2nd Appellant's husband as a foundation for her ruling? (See Grounds 3 and 4 of the Memorandum of Appeal).

    c. Whether the Learned Magistrate erred in law and infact in arbitrarily favoring the Respondent with an award in absolute conflict with the deceased's wishes and even the pleadings basis thereof? (See Grounds 5, 6 and 7 of the Memorandum of Appeal).

    d. Whether the Appellants are entitled to the remedies sought?

8. In regard to Grounds 1 and 2 on whether the trial Magistrate failed to find that she lacked jurisdiction to hear the matter whose value was way beyond Kshs. 25,000,000/=, it is the Appellants contention in this ground holds that without jurisdiction the court cannot hear a matter as it will be a hopeless adventure . They argue that in the ruling, the trial court correctly stated that when the suit was filed in June, 2011, in the Affidavit filed in support of letters of administration , the value of the estate of the deceased was not indicated in the affidavit filed in support of Letters of Administration. They further state that the trial court stated that since there was no Valuation Report was submitted to support the claim that the value of the estate was beyond Kshs. 25,000,000/= and this was wrong. However, the Appellants have submitted that the trial Court ought to have ordered a valuation to be conducted of all immovable assets in the Estate to confirm whether or not it had jurisdiction to handle the matter. The Appellants have relied on the case of Samuel Kamau Macharia & Another -vs- Kenya Commercial Bank Limited & 2 Others [2012] eKLR, to state that jurisdiction flows from Constitution or legislation or both and court cannot arrogate itself jurisdiction it does not have and this is what the trial court did.

9. The Respondent agrees with the trial court that since the Appellants did not provide a Valuation Report to assist the court determine the issue of jurisdiction as per the principle in the Law of Evidence that 'he who alleges must prove' as provided for under Section 109 of the *Evidence Act* and has also relied on the case of Phelista Mukamu Makau v Elizabeth Kanini Mulumbi [2005]eKLR, to advance the position. Further, the Respondent holds that the suit in the trial court lasted for ten (10) years within which period the Appellants ought to have raised the issue of jurisdiction, hence they are now estopped from raising the same at the last juncture as this amounts to adducing new facts in the case.

10. In consideration of the arguments by the parties on this issue of jurisdiction, it is trite for a court in any dispute is to establish whether or not it has jurisdiction because without it, the court has to down its tools. This was the holding in the classic case of The Owners of the Motor Vessel "Lillian S" Vs Caltex Oil (Kenya) Ltd (1989) KLR 1. where Nyarangi J.A. held as follows:-

> "I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for

a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'

11. It is also trite that a court derives its jurisdiction from either *the Constitution* or statute or both. This is the holding by the Supreme Court of Kenya in the case of Samuel Kamau Macharia Vs KCB & 2 Others, Civil Application No. 2 of 2011, where it was stated thus:-

> " A Court's jurisdiction flows from either *the Constitution* or Legislation or both. Thus a Court of Law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by Law"

12. Having read through the ruling of the trial court on this ground, the Court finds that when the parties were directed to file their submissions, the Protestor's counsel indicated that the estate was beyond Kshs. 25,000,000/=. It also indicated that at the time of filing of the suit, the estimated value of the assets was unstated but that the protestor's counsel did not tender any evidence in terms of a Valuation Report to confirm the value of the property which is contrary to the principle that he who alleges a fact must prove the same. Section 107 of the *Evidence Act*, Cap 80 Laws of Kenya, which deals with the burden of proof provides that:-

[1]. 'Whoever desires any court to give judgment as to any legal right or liability dependent on the existence facts which he asserts must prove that those facts exist.

[2]. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.'

13. In line with this provision, the Court of Appeal in the case of Jennifer Nyambura Kamau –vs- Humphrey Mbaka Nandi, NYR CA Civil Appeal No. 342 of 2010 [2013] eKLR, held as follows:-

> " We have considered the rival submissions on this point and state that Section 107 and 109 of the *Evidence Act* places the evidential burden upon the Appellant to prove that the signature on these forms belong to the Respondent. Section 107 of the *Evidence Act* provides that;
>
> 'Whoever desires any court to give judgment as to any legal right or liability dependent on the existence facts which he asserts must prove that those facts exist'
>
> Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the Appellant to call the expert witness. The Appellant did not discharge the burden and as Section 108 of the *Evidence Act* provides, the burden lies on that person who would fail if not evidence at all were given on either side."

14. The court finds that indeed the Appellants had a burden in the trial court to demonstrate that the trial court lacked jurisdiction to handle the dispute since the value of the Estate was beyond Kshs. 25,000,000/= which they did not discharge. They ought to have done more just to prove the same and not merely state so in their submissions. Therefore, without any proof of the value of the property, the trial court was justified to hold that the claim had failed and thus these grounds fail.

15. On whether the Learned Magistrate erred in law and in fact in relying and considering the alleged son of the 2nd Appellant's husband as a foundation for her ruling? As stated in Grounds 3 and 4 of the Memorandum of Appeal, it is the Appellants' submissions that the foundation of the ruling of the trial court was that since there was no proof as to the paternity of George Ikonya's children with Monica

Wanja and since Jane Wathoni and Monica Wanja are to inherit their late husband's share equally and since Monica Wanja had predeceased the deceased, her children Kennedy Mwangi and Christopher Kamau are to inherit her share.

16. According to the Appellants, the 2nd Appellant provided evidence to show that there is a pending Children's Cause No. 29 of 2013 to determine the paternity of Christopher Ikonya. They submitted that the trial Court on one hand submitted that there was no proof as to the paternity of George Ikonya's children with Monica Wanja but on the other hand stated that since the said Monica Wanja predeceased her children, Kennedy Mwangi and Christopher Kamau, they were to inherit her share, a finding which was contradictory. The Appellants argue that under Section 3 (4) of the *Evidence Act* , 'a fact is not proved when it is neither proved nor disproved.'

17. Further, the Appellants contend that since the paternity of Kennedy Mwangi and Christopher Kamau was neither proved nor disapproved, the court's finding that the two are beneficiaries of the deceased' s Estate is unwarranted hence irregular and detrimental to them.

18. In the Respondent's submissions, she holds that the Appellants claim is that the paternity of the children was not ascertained and thus are not beneficiaries of George Ikonya's Estate. She also holds that as stated in the pleadings, the said George Ikonya married the late Monica Wanja in 1990 when she already had a son known as Kennedy Mwangi who he took up as his son and in the union, they got Christopher Kamau Ikonya whose Birth Certificate indicates George Ikonya as his father. However, later, due to marital differences, the two separated in the year 1997.

19. The Respondent further submitted that when the said George Ikonya suffered from depression, the 1st Appellant was hired as his care giver but turned to be his wife. She submits that at the time of George Ikonya's burial, the children of the deceased were left out of the eulogy despite their being known in the family. According to the Respondent, the trial Court correctly stated that the 1st Appellant did not provide substantial proof that the children are not the dependants of the deceased and has relied on the case of Veronica Njoki Wakagoto [2013]eKLR to show that the children can inherit from their grandparents if their own parents are also deceased and thus the two children are entitled to the Estate herein as was stated by the trial Court.

20. In its ruling, the trial Court declined the claim that the George Ikonya had not introduced the two subject children and stated the pending Children's Case No. 29 of 2013 on paternity was not sufficient while relying on Section 29 of the Law of Succession which provides for all dependants of an Estate, and in reliance on the finding in the case of Veronica Njoki Wakagoto [2013]eKLR, the Court found that grandchildren of an Estate can inherit from their grandparents if their own parents are also deceased.

21. Having considered the arguments by the parties and their respective submissions, this Court finds that it is trite that grandchildren of a deceased did not have an automatic right over this/her Estate unless their own parents are also deceased. In the case Cleopa Amutala Namayi –vs- Judith Were [2015] eKLR, the Court held as follows on similar circumstances:-

> [17]. "Be that as it may, under Part V of the Act grandchildren have no automatic right to inherit their grandparents who died intestate after 1st July, 1981 when the Act came into operation. The argument behind this position 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 their grandparents. The children to the grandparents inherit first and thereafter the grandchildren inherit from their parents. The only time where the grandchildren can inherit directly from their grandparents is when the grandchildren's own parents are dead. Those grandchildren can now step into

the shoes of their parents and take directly the share that ought to have gone to the said parents. Needless to say such grandchildren must hold appropriate representation on behalf of their parents."

22. In this particular case, as found by the trial Court, the deceased has been shown to have had five (5) children being Hannah Wangui- deceased, James Mwai , Rachael Wanjiru- deceased, Peninah Njeri and George Ikonya- deceased. Therefore, in line with the principle that if all the deceased children of the deceased have children then those children (i.e. grandchildren) should inherit from the Estate of their whereby they will be entitled to get the share which their parents would have gotten if they had lived. Therefore, this Court finds that the trial court was justified in finding that the claim that there was a pending children case is not sufficient proof that the said children are not children of George Ikonya since there is no proof of the outcome of paternity in the said case or even DNA to confirm that they are not his children. For this reason, the Court finds that the trial court did not err in its finding in reliance and consideration of the alleged on being a dependent of the 2nd Appellant's husband.

23. In regard to the issue of whether the Learned Magistrate erred in law and infact in arbitrarily favoring the Respondent with an award in absolute conflict with the deceased's wishes and even the pleadings basis thereof as pleaded in Grounds 5,6 and 7 of the Memorandum of Appeal, it is the Appellants' submission that in the year 1983, the deceased indicated in the presence of the 1st Appellant that the subject parcel of land being Ndumberi/Riabai/404 should be distributed among her surviving beneficiaries. And with this declaration, the beneficiaries developed their respective parcels of land and have resided therein for years so that the inclusion of the two children as found by the trial Court will affect the distribution of the parcel to the detriment of the Appellants.

24. In response to this claim, the Respondent submitted that the argument by the 2nd Appellant that the deceased informed her of his wishes on the properties was suspicious as it turns out that she is the greatest beneficiary. According to the Respondent, the 2nd Appellant did not produce any written Will and thus in its ruling, the court was only governed by the rules of an Oral Will as per the provision of Section 9 of the *Law of Succession Act*, which provides for the ingredients of an Oral Will that it should be made before two competent witnesses and the testator must die within three (3) months of making the same. The Court also relied on the decision in the case of Beth Wambui & Another –vs- Gathoni Gikonyo & Others [1988]eKLR. The Respondent contends that what the Appellants have submitted does not qualify to be an Oral Will since there were no two competent witnesses and the deceased died on 21st July, 2001 which is not within the three (3) months' period provided for from the time of making the Will, if at all.

25. A reading of the ruling shows that the trial Court reiterated the provisions of Section 9 of *Law of Succession Act* and Rule 13 of the Probate and Administration Rules on Oral Wills and stated that the Affidavit of protest did not indicate when the Oral Will was made or the persons who were present when the same was made and neither is there a statement that deceased died within three (3) months. Therefore, the validity of the oral will could not be ascertained and thus the trial court made a presumption that the deceased died Intestate without leaving a valid Oral Will.

26. In view of the aforesaid arguments and findings of the trial Court, the Court appreciates that the law on Oral Wills is enshrined under Section 9 of the *Law of Succession Act* which provides in mandatory terms that:-

    1. No Oral Will shall be valid unless:

        a. It is made before two or more competent witnesses and

        b. The Testator dies within a period of three months from the date of making the Will.

27. Further, the Court is guided by the finding by Musyoka, J. in Re Estate of Evanson Mbugua Thong'ote (Deceased) [2016] eKLR, where he stated that:-

> "An Oral Will is made simply by the making of utterances orally relating to disposal of property. In assessing whether the deceased had made a valid Oral Will, it needs to be considered first whether there was an utterance of the will. The question being whether there was an oral utterance of the terms of the Will." The Honourable Judge continued "... The other consideration is that the utterance ought to be made in the presence of two or more persons"

28. In regard to this case, this Court finds that the trial court did not err in finding that there was no Oral Will which had been left by the deceased since it was established that the said wishes of the deceased did not meet the threshold of Oral Wills as envisioned under Section 9 of the *Law of Succession Act* since there was no mention of two competent witnesses and the deceased did not die within three (3) months of the said wishes, if at all, which provision is worded in mandatory terms.

29. Lastly is the issue of whether the Appellants are entitled to the remedies

sought. In this regard, the Court is guided on the provisions of Section 27 of the *Law of Succession Act* which provides that:-

> (27) Discretion of court in making order
> "In making provision for a dependant the court shall have complete discretion to order a specific share of the estate to be given to the dependant, or to make such other provision for him by way of periodical payments or a lump sum, and to impose such conditions, as it thinks fit.

30. In conclusion, it is trite that the Appellate court can only interfere with the decision of the trial Court if it establishes that the trial Court relied on wrong principles of law. In this appeal, having gone through all the grounds raised in the Memorandum of Appeal and the submissions filed by both parties, this Court finds that the trial Court was well within the law in its arguments and finding in the ruling delivered on 7th June, 2023 and therefore this appeal must fail.

31. The upshot is that the Appeal lacks merit and is hereby dismissed with costs to the Respondent.

It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 8TH DAY OF APRIL 2025.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Njugi counsel for Appellants

Mr. Olaka counsel for Respondent

Court Assistant - Martin