In re Estate of Kariuki Njoroge alias Kariuki s/o Njoroge (Deceased) (Probate & Administration Appeal 4 of 2010) [2025] KEHC 7036 (KLR) (22 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7036 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

PROBATE & ADMINISTRATION APPEAL 4 OF 2010

DKN MAGARE, J

MAY 22, 2025

IN THE MATTER OF THE ESTATE OF KARIUKI NJOROGE ALIAS KARIUKI S/O NJOROGE (DECEASED)

BETWEEN

WANJARIA WAMBUGU ..... 1ST APPELLANT

MAINA WAMBUGU KARURI ..... 2ND APPELLANT

AND

WACHIRA KARURI MUHAKURA ..... RESPONDENT

(Being an appeal against the Ruling and orders of the Hon. Lucy Mbugua, principal magistrate as then she was, given on 22.09.2010 in Karatina Succession Cause Number 10 of 2006)

JUDGMENT

1. This is an appeal from the ruling and orders of the hon. Lucy Mbugua, principal magistrate as then she was, given on 22.09.2010 in Karatina succession cause number 10 of 2006. The estate constitutes one parcel of land, namely, Githi/Muthambi/1275 measuring 1.47 hectares (3.63 acres).

2. The petition indicated 5 beneficiaries, one of who was said to be a purchaser.

   The deceased in respect of whom the estate relates died at a ripe old age of 86 years

   on 26.04.2005.

3. The parties did not find anything wrong with feuding over an agreement purported to have been written on 25.06.2005, a date before the demise of the deceased. Nevertheless, upon the court making its decision, the appellant filed grounds of appeal challenging the decision the grounds were:

   1. The learned trial magistrate erred in law and fact by relying on the mode of distribution as proposed by the Respondent.

2. The learned trial magistrate erred in law and fact by terming the 1st Appellant an intermaddler in the Estate of the deceased. (Sic)

3. The learned trial magistrate erred in law and fact by determining that the deceased left no will.

4. The learned trial magistrate erred in law and fact by failing to award the 2nd Appellant any portion in the deceased's Estate.

5. The learned trial magistrate erred in law and fact by failing to consider as valid the 1st Appellant's agreement dated 25th April 2005.

6. The learned trial magistrate erred in law and fact by awarding the 1st Appellant half an acre while he was entitled to one acre.

7. The learned trial magistrate erred in law and fact by finding that the 1st protestor did not pay the balance while the same was not rebulted. (Sic)

4. Parties filed submissions half of which was to repeat the memorandum of appeal. It is unnecessary to regurgitate the same in the submissions.

Analysis

1. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. In the case of Mbogo and Another vs. Shah [1968] EA 93 where the Court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

2. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968]EA 123, where the law looks in their usual gusto, held by as follows;-

> ".. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

3. The Court is to bear in in mind that it had neither seen nor heard the winesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

4. It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses In the case of Peters vs Sunday Post Limited [1958] EA 424, court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses... But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

5. A document's meaning should be derived from the document itself, without reference to anything outside of the document In Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd (2017)eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth;-

> " Courts adopt the objective theory of contract interpretation, and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. This is what sometimes is called the principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it.

6. In Prudential Assurance Company of Kenya Limited V Sukhwender Singh Jutney and Another, Civil Appeal No. 23 of 2005 the Court citing a passage in Odgers Construction of Deeds and Statutes (5th edn.) at p.106 emphasized that in construing the terms of a written contract;

> " It is a familiar rule of law that no parole evidence is admissible to contradict, vary or alter the terms of the deed or any written instrument. The rule applies as well to deeds as to contracts in writing. Although the rule is expressed to relate to parole evidence, it does in fact apply to all forms of extrinsic evidence."

7. The court heard witnesses and confirmed the grant in favour of the beneficiaries.

   The court found the 1st Appellant as an intermeddler of the state. Nevertheless, the court awarded him half an acre out of the said parcel. This aggrieved the Appellants. Three issues arise from the memorandum of Appeal:

   a. whether the deceased left a will.

   b. whether the 1st Appellant was an intermeddler

   c. whether the 2nd Appellant is a dependant.

8. There was a purported agreement written in a language other than English and Kiswahili. The same was purported be written a day before the deceased succumbed to pneumonia. The court dealing with succession has no business dealing with ownership of land. The agreement is of no probative value. Reading the evidence around the said agreement, I note that the same could not have been done by the deceased. The deceased neither had the time to address occupation or payment.

9. Reading the agreement, it is noted that the deceased was not one of the authors of the letter dated 25.04.2005. Within the agreement, it refers to the succession of the estate of the deceased Kariuki Njoroge, who was then alive. The signatories were not administrators of the estate. Consequently. The earlier agreement refers to payment of Ksh 65,000/= for 0.5 acres of land on 31.10.2004.

10. If there was any land sold, this is within the realm of the environment and land court. The succession has no business in that respect, nevertheless the court had already awarded o0.5 acres, gratuitously. There was no appeal in respect thereto. this court will say no more.

11. The second question is whether there was a will. The matter was filed and prosecuted as an intestate succession. There was no propounding of a will. The court cannot rely on rumours and hyperbole to decided cases. 20. In Re Estate Of Gatuthu Njuguna (deceased) [1998] eKLR where it quoted an excerpt from Halsbury's Laws of England, 4th Edition vol 17 at page 903-904-

> " Where any dispute or doubt or sanity exists, the person propounding a will must establish and prove affirmatively the testator's capacity and that where the objector has proved incapacity before the date of the will, the burden is shifted to the person propounding the will to show that it was made after recovery or during a lucid interval. The same treatise further shows that the issue of a testator's capacity is one of fact to be proved by medical evidence, oral evidence of the witnesses who knew the testator well or by circumstantial evidence and that the question of capacity of is one of degree, the testator's mind does not have to be perfectly balanced and the question of capacity does not solely depend on scientific or legal definition. It seems that if the objector produces evidence which raises suspicion of the testator's capacity at the time of the execution of the will which generally disturbs the conscience of the court as to whether or not the testator had necessary capacity, he had discharged his burden of proof, and the burden shifts to the person setting up the will to satisfy the court that the testator had necessary capacity."

12. There was no evidence led on any of the aspects related to making of a will and witnesses other than the beneficiaries under the will. Without witnesses, the allegation of a will remains phantom.

13. The last question is whether the 2nd Appellant is a dependant. The cardinal rule is that succession is not a matter of entitlement but a matter of grace. The beneficiaries get to inherit depending on affinity and consanguinity or dependency and nothing more. No effort can increase a share in intestate succession while no laziness or hostility will drive away a beneficiary in intestate succession. That is why, even those dependants yet to be born are entitled equally with first born who may have borne the blunt of raising the rest. It is different for testate succession. It is the testator's free will.

14. Section 35 of the Succession Act provides as follows:

    Where intestate has left one surviving spouse and child or children (1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to

    a. the personal and household effects of the deceased absolutely; and

    b. a life interest in the whole residue of the net intestate estate: Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.

    (2) A surviving spouse shall, during the continuation of the life interest provided by subsection (1), have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date.

    (3) Where any child considers that the power of appointment under subsection (2) has been unreasonably exercised or withheld, he or, if a minor, his representative may apply to the court for the appointment of his share, with or without variation of any appointment already made.

(4) Where an application is made under subsection (3), the court shall have power to award the applicant a share of the capital of the net intestate estate with or without variation of any appointment already made, and in determining whether an order shall be made, and if so, what order, shall have regard to

(a) the nature and amount of the deceased's property;

(b) any past, present or future capital or income from any source of the applicant and of the surviving spouse;

(c) the existing and future means and needs of the applicant and the surviving spouse;

(d) whether the deceased had made any advancement or other gift to the applicant during his lifetime or by will;

(e) the conduct of the applicant in relation to the deceased and to the surviving spouse;

(f) (the situation and circumstances of any other person who has any vested or contingent interest in the net intestate estate of the deceased or as a beneficiary under his will (if any); and

(g) the general circumstances of the case including the surviving spouse's reasons for withholding or exercising the power in the manner in which he or she did, and any other application made under this section.

15. The second Appellant is a grandchild of the deceased's brother, Karuri Muhakura. The second appellant's father was Wambugu Karuri. He is not entailed to inherit independent of his parents. He is not within the degrees of consanguinity. He is in the fifth degree of consanguinity relative to their great-aunt or grand mother and therefore in the sixth degree of consanguinity relative to the individual whose side they are on, that is the deceased herein. He is a rank outsider and a stranger. In re Estate of Elijah Kaseke Makau (Deceased) [2021] eKLR, Odunga J stated as doth:

17. As regards the claim by the Protestor, a grandson of the deceased, Elijah Makau Kaseke, is not claiming a share as a beneficiary of the Estate herein but the share her mother is entitled from the Estate based on a letter from the area assistant chief certifying that he is the only surviving child and heir to Regina Ndinda Makau. According to the Protestor, whatever share belongs to Regina should be registered in the name of the Protester herein. In this regard, the Protestor relied on the case of In re Estate of Joyce Kanjiru Njiru(Deceased) [2017] eKLR, where the court stated as follows;

"The second consideration is whether the grand children are entitled to inherit the deceased's estate. From the definition given under Section 29 (supra) the spouses and children of the deceased have priority to inherit the estate. The grandchildren and others can inherit if they were being maintained by the deceased prior to her death. In this present cause, the two grand children are not claiming interests as dependants but are coming in to claim the interests of their respective parents who are now deceased. My view is that the children are entitled to inherit the share which their deceased parents would have inherited. In persuasive decision by Musyoka J. in the case of Estate of Veronica Njoki Wakagoto (deceased) (2013) eKLR it was stated:

".....grandchildren can only inherit their grandparents indirectly through their own parents, the children of the deceased. The children inherit first and thereafter the grand children inherit from the parents. The only time grandchildren inherit directly from their grandparents is when

the grandchildren's own parents are dead. The grand children step into the shoes of their parents and take directly the share that ought to have gone to the said parents."

18. It was submitted that from the case of Estate of Veronica Njoki Wakagoto (deceased) (2013) eKLR, it is clear that the protester did not require letters of Administration for Estate of her mother. He has a right to directly get the share of her mother from the Estate.

16. Having perused the Appellant's evidence, I note that it is such evidence that Odunga J, as he then was, in Kioko Peter v Kisakwa Ndolo Kingóku [2019] eKLR, was lamenting about as follows Parties and Counsel ought to give the court's some credit that the courts are not manned by morons who can be easily duped into believing all manner of incredible stories with little or no iota of truth. It is these kinds of allegations that Madan, J (as he then was) had in mind when in N vs. N [1991] KLR 685 expressed himself in the following terms:

> " I wish people would not tell me absurd and unbelievable lies. I feel disappointed if a lie told in court is not reasonable imitation of the truth and is not reasonably intelligently contrived. I wish people who tell lies before me would respect my grey hair even if they consider that my intelligence is not of high order. I wish the witness had not told me the most stupid of his lies, which both disappointed and made me feel intellectually insulted."

17. The act of creating imaginary agreements and keeping the estate in a state of suspended limbo for the last 19 years is cavalier and in bad taste. It is such dishonesty is an act which is antithesis to transparency. In the South African case of Matatiele Municipality & Others vs. President of the Republic of South Africa & others (1) (CCT73/05) (2006) ZACC 2: 2006 (5) BCLR (CC); 2006(5) SA 47 (CC) it was held that

> " In my view a person who deliberately either by commission or omission misleads the court and the public that a particular state of affairs exist while knowing very well that that is not the position cannot be said to be open, candid and transparent. Dishonest in my view is an Act which is antithesis to transparency and vice versa..."

18. The purported agreements are worthless and not worth the paper they are written on. It is sad that Life could be easier if everyone were honest and did not engage in subterfuge and skullduggery in order to obfuscate issues and steal a march on parties. The matter herein is a story of fraud, and utter disregard for the rule of law and engaging in acts meant to tire the tire beneficiaries and steal a match on the hapless beneficiaries over a miniscule parcel of land in the hinterland of Karatina having failed to discharge the onus probandi, placed upon the appellant, I find that that each of the three questions are decided against the Appellants. I find no reason not to dismiss the Appeal herein. The next question is the costs. The Court of Appeal in the case of Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR) had this to say:

> " It is our finding that the position in law if that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

19. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and

out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

20. In the case of Rai & 3 others v rai & 4 others [2014] KESC 31 (KLR), the Supreme Court posited as follows:

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation....Although there is eminent good sense in the basic rule of costs- that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this court in other cases."

21. In the circumstances the appeal lacks merit and is accordingly dismissed with costs of Ksh 75,000/= to the Respondent

Determination

22. In the upshot, I make the following orders:

a. The Appeal lacks merit and is accordingly dismissed.

b. The Appellants shall bear the Respondent's costs of the Appeal of Kshs. 75,000/=, which shall be paid within 45 days, in default execution do issue.

c. Any orders of stay of execution are lifted forthwith. The file be returned to the lower court for enforcement of the certificate of confirmation of grant

d. In order to expedite conclusion of the matter, any share belonging to a deceased beneficiaries shall be registered in the estate of that deceased.

e. The court below shall execute any document that is unexecuted by beneficiaries. The transmission be completed by 22.11.2025.

f. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 22ND DAY OF MAY 2025.

KIZITO MAGARE

JUDGE

In the presence of:

N/A for the Appellant

Mr. Kamwenji for the Respondent

Court Assistant - Michael

Judgment delivered through Microsoft Teams Online Platform.