



REPUBLIC OF KENYA



**M'Ithinji v Mbijiwe (Family Appeal E010 of 2024)  
[2025] KEHC 6650 (KLR) (22 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6650 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
FAMILY APPEAL E010 OF 2024  
SM GITHINJI, J  
MAY 22, 2025**

**BETWEEN**

**JAPHET GITONGA M'ITHINJI ..... APPELLANT**

**AND**

**GERRARD M MBIJIWE ..... RESPONDENT**

*(An appeal from the Judgment of Hon. Temba A. Sitati (S.P.M) in  
Githongo Succession Cause No. E021 of 2020 delivered on 15/5/2024)*

**JUDGMENT**

1. This Appeal arises from the judgment of the learned Senior Principal Magistrate Hon. Temba A. Sitati delivered on 15.05.2024 in Githongo Succession Cause No. E021 of 2020.
2. Aggrieved by the said Judgment, the Appellant set forth the following grounds in the Memorandum of appeal dated 12<sup>th</sup> June, 2024;
  1. The learned magistrate erred in law and fact in failing to weigh and analyse the evidence as a whole and in dealing with the evidence of selected witnesses hence failed to determine the issues that were in dispute.
  2. The learned magistrate erred in law and fact in failing to determine the issues that were raised regarding the fact that Land Parcels Number Nkuene/Uruku/1933 and Nkuene/Uruku/1934 were not registered in the name of the deceased person, and in totality failing to address the same yet there were vital issues that had been raised regarding the said registration.
  3. The learned magistrate erred in law and fact by misinterpreting the judgment of the ELC 57 of 2014 and coming to a conclusion that Land Parcel Number Nkuene/Uruku/1934 were transferred to the appellant's name by fraudulent means yet the same was not determined in



the judgment of ELC 57 of 2014 and in totality failing to address the vital issues that had been raised regarding the said judgment.

4. The learned magistrate erred in law and fact by making a finding that Land Parcel Number Nkuene/Uruku/1933 and Land Parcel Number Nkuene/Uruku/1934 formed part of the estate of the deceased and that the latter was reserved for the daughters.
5. The learned magistrate erred in law and fact in his determination that Land Parcels Number Nkuene/Uruku/1933 and Nkuene/Uruku/1934 were part of the estate of the deceased and erred in distributing Land Parcel Number Nkuene/Uruku/1934 to Sacinta Kagwiria John, Margaret Gakii Peter, Joyce Mwituu M'Ithinji and Lucy Karambu M'Ithinji.

### **Evidence at Trial**

3. Protester's witness 1 Japhet Gitonga M'Ithinji, the Appellant herein adopted his witness statement dated 1/9/2021 together with his further affidavit of protest dated 19/12/2022 as his evidence in chief. He insisted that the deceased had, before his death, bequeathed him L.R Nos. Nkuene/Uruku/1933 and 1934, which were duly transferred to his name on 10/11/2011 and 11/12/2013 respectively. He had no money to transfer the latter parcel to his name during the lifetime of the deceased, because he was burdened by his medical bills.
4. Petitioner's witness 1 Gerrald M'Mbijiwe adopted his witness statement dated 9/2/2023 as his evidence in chief. He told the court that the deceased called them all for a meeting in 2009 where he gave him 1931 while the Appellant got 1933 and 1934 was reserved for the daughters. The deceased neither asked them to pay his medical bills nor sold 1934 to the Appellant. The Appellant fraudulently registered 1934 in his name and was in occupation thereof since 2020. He did not file a suit to cancel the title deed to 1934 issued to the Appellant or file a counterclaim in Meru CMCC No. 57/2014. The deceased had shared out his land before his demise to his 7 children.
5. Petitioner's witness 2 Sacinta Kagwiria John adopted her witness statement dated 9/2/2023 as her evidence in chief. She stated that the deceased was her father and she was unaware how 1934 was registered in the name of the Appellant.

### **Submissions**

6. The Appellant through the firm of J.K Ntarangwi & Co. Advocates filed submissions dated 10/12/2024. Counsel submitted that the succession court lacks jurisdiction to determine questions of trust, ownership, use and occupation of land, and relied on In the Matter of the Estate of Mbai Wainana (deceased) (Succession Cause 864 of 1996) [2015] KEHC 6978 (KLR) (Family) (23 January 2015) (Ruling), Micheni Aphaxard Nyaga & 2 Others v Robert Njue & 2 Others (2021) eKLR and Re Estate of Stone Kathuli Muinde (Deceased) (2016) eKLR.
7. The Respondent did not file any submissions.

### **Analysis and Determination**

8. This being a first appeal, the court is obligated to reconsider and re-evaluate the evidence adduced in the trial court and draw its own conclusions.
9. In *Selle & another v Associated Motor Boat Co. Ltd* [1968] EA, the court held 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 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.”

10. I have considered the appeal herein, the trial court’s judgment which is the subject of this appeal as well as the submissions by counsel.
11. From the grounds of appeal, the issue for determination is whether the trial court erred in distributing L.R No. NKUENE/URUKU/1934 on the mistaken belief that it formed part of the estate of the deceased.
12. There is no doubt that L.R No. Nkuene/Uruku/1933 was transferred to the Appellant on 9/11/2011 during the lifetime of the deceased herein. The Appellant subsequently acquired title thereto on 10/11/2011. The evidence on record is clear that the deceased had distributed his estate to his beneficiaries during his lifetime. The bone of contention is whether L.R No. Nkuene/Uruku/1934 formed part of the estate of the deceased. According to the certificate of official search dated 8/10/2020, the Appellant was registered as the proprietor of L.R No. Nkuene/Uruku/1934 on 16/12/2013 and acquired title thereto on 17/12/2013. Evidently, that registration took place long after the deceased herein had died on 12/5/2012. In its judgment dated 2/12/2019, the Meru Chief Magistrates Court in Civil Case No. 57 of 2014 addressed the question whether the said registration was fraudulent as follows; “There is no evidence the plaintiff has produced to show that the deceased sold him parcel of land 1934. There is no agreement produced...The subject parcel of land was transferred to the plaintiff almost one and half year after the death of the deceased. thus if there was a consent by the Land Control Board obtained by the deceased, the same would then have expired six (6) months after the death of the deceased way much earlier before the transfer done by the plaintiff. I thus cannot make any order favourable to the suspect transfer.”
13. While the duty of the trial court, as a probate court, was only limited to ascertaining the rightful beneficiaries, the assets for distribution and the share of each beneficiary, the authenticity of the registration of the Appellant as the absolute owner of L.R No. Nkuene/Uruku/1934 had already been determined in Meru Civil Case No. 57 of 2014 by a court of competent jurisdiction, which decision had not been appealed against.
14. For the foregoing reasons, I find that the trial court properly found that L.R No. Nkuene/Uruku/1934 formed part of the estate of the deceased, and was thus available for distribution to the 4 daughters of the deceased namely Sacinta Kagwiria John, Margaret Gakii Peter, Joyce Mwituu M’Ithinji and Lucy Karambu M’Ithinji.
15. Consequently, I find the appeal in want of merit and it is hereby dismissed with costs to the Respondent.

**DATED AND DELIVERED THIS 22<sup>ND</sup> DAY OF MAY, 2025.**

**S. M. GITHINJI**

JUDGE

Appearances:

Miss Atieno for the Appellant.

Ms. Murugi for the Respondent (Absent).

