



REPUBLIC OF KENYA



**Ng'ang'a v Mwangi & another (Family Appeal E024 of 2024)
[2025] KEHC 6520 (KLR) (23 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6520 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
FAMILY APPEAL E024 OF 2024**

**H NAMISI, J
MAY 23, 2025**

BETWEEN

STANSLAUS KIMANI NG'ANGA APPELLANT

AND

JOSPHAT NG'ANG'A MWANGI 1ST RESPONDENT

JOHN MACHARIA MWANGI 2ND RESPONDENT

(Being an Appeal from the Ruling of Hon. L. W. Gicheba, Senior Resident Magistrate delivered on 14 January 2010 in Thika Succession Cause No. 60 of 2009)

JUDGMENT

1. The Deceased, Jeremiah Mwangi Githongo, died intestate on 14 September 1986. He was survived by two wives and 11 children. Grant of Letters of Administration Intestate was issued to Josphat Nganga Mwangi and John Macharia Mwangi, the Respondents herein, and subsequently confirmed on 14 July 1994.
2. By Summons dated 16 May 2007, the Administrators (Respondents herein) sought to have the confirmed Grant amended by 1/3 share of parcels of land, References Chania/Ngorongo/T.193, Chania/Ngorongo T.191, Chania/Ngorongo T.181 and Chania/Ngorongo T.188. In the Affidavit in support thereof, the Respondents averred that the said properties had been erroneously omitted from the Schedule of assets of the Deceased. At the time of confirmation of Grant, the Respondents were of the mistaken belief that the shares held by the Deceased jointly with others would be handled separately from the other property since the titles to these plots had not been issued at the time.
3. On the mode of distribution of the additional assets, the Respondents averred that it had been agreed that the said plots would be distributed to the Respondents.



4. The Appellant filed a Replying Affidavit opposing the Application on the basis that while the subject properties had initially belonged to the Deceased, the Appellant and Mwangi Kinuthia, the Deceased had, during his lifetime, sold one half (1/2) of his share of the half acre plot to Mwaura Mumu, Mungai Thumbi and the Appellant at the price of Kshs 1,000/=. It was the Appellant's case that at a meeting held on 4 April 2001, Patrick Githongo, a son to the Deceased, conceded that the Deceased had sold his plot to Mwangi Kinuthia, Mwaura Mumu and the Appellant. He annexed a copy of the handwritten proceedings and findings at the said meeting.
5. The matter was set down for viva voce hearing. Thereafter, the trial Court rendered its Ruling and allowed the Application for rectification.
6. Aggrieved by the Ruling, the Appellant lodged this appeal on the following grounds:
 - i. That the learned Senior Resident Magistrate erred in law and in fact in allowing the amendment of the Certificate of Confirmation of Grant of Letters of Administration of the Estate of Jeremiah Mwangi Githongo (Deceased) by adding one third (1/3) share to the estate of the Deceased of LR No. Chania/Ngorongo/T.193, Chania/Ngorongo T.191, Chania/Ngorongo T.181 and Chania/Ngorongo T.188;
 - ii. That the learned Senior Resident Magistrate erred in law and in fact in failing to appreciate that the Estate of Jeremiah Mwangi Githongo was not seized of an interest in all the four above mentioned plots;
 - iii. That the learned Senior Resident Magistrate erred in law and in fact in misapprehending the evidence adduced by all witnesses that the Deceased Jeremiah Mwangi Githongo had an interest only in one of the plots, the subject of the application for amendment of the confirmed Grant of Letters of Administration issued to the Respondent;
 - iv. That the learned Senior Resident Magistrate erred in law and in fact in failing to take into account the material contradiction between the one third share of the plots claimed in the Petitioner's application and the half share claimed in their oral evidence;
 - v. That the learned Senior Resident Magistrate erred in law and in fact in failing to consider the only independent evidence adduced at the hearing;
 - vi. That the learned Senior Resident Magistrate erred in law and in fact in failing to appreciate the lack of candidness on the part of the Petitioners/Applicants when they failed to call their brothers, Patrick Githongo Mwangi and Peter Ngugi Mwangi, who had attended the elders meeting on 4 April 2001;
 - vii. That the learned Senior Resident Magistrate erred in law and in fact in failing to consider the Minutes of the meeting of the 4 April 2001 and particularly in disregarding the finding therein of the elders that indeed the Deceased, Jeremiah Mwangi Githongo, had sold a half of his interest in the two plots which sale left him with only a half (1/2) share in one of the plots;
 - viii. That the learned Senior Resident Magistrate erred in law and in fact in failing to heed the objection raised by the Appellant to the amendment of the confirmed Grant and particularly failing to find that the amendment had the effect of giving the Respondents interest in properties that did not devolve to the estate of the Deceased, Jeremiah Mwangi Githongo;
 - ix. That the learned Senior Resident Magistrate erred in law and in fact in granting the amendment of the confirmed Grant as the same has the effect of dispossessing the Appellant of that which was not even in dispute or claimed by the Respondents;



- x. That the learned Senior Resident Magistrate erred in law and in fact in failing to consider the evidence of Joseph Wanyoike, the Chief Gituamba Location, who chaired the meeting of elders held on 4 April 2001;
- xi. That the learned Senior Resident Magistrate erred in law and in fact in failing to notice that the Administrators of the Estate of the late Jeremiah Mwangi Githongo had not mentioned or provided for the inalienable interest of the Appellant in or any other party in the subject plots in their application for amendment of the Certificate of Confirmation of Grant;
- xii. That the learned Senior Resident Magistrate erred in law and in fact when she failed to take into account the evidence adduced by the Appellant particularly disregarding that the Respondents could only adduce hearsay evidence;
- xiii. That the learned Senior Resident Magistrate erred in law and in fact in failing to appreciate that while the Petitioners/Respondents claimed to have been aware of their late Father's interest in the subject plots all along, they had failed to include them in their petition for grant of Letters of Administration and that the application for an amendment took inordinately long to file and this should have alerted the learned Senior Resident Magistrate to the possible mischief intended by the Respondents;
- xiv. That the learned Senior Resident Magistrate erred in law and in fact in failing to appreciate that by allowing the application for amendment of the Certificate of Grant, she had effectively deprived and dispossessed the Appellant of his full right to the subject plots particularly the ones that were not in dispute;
- xv. That the learned Senior Resident Magistrate erred in law and in fact in failing to notice that the Application for amendment of the Certificate of Confirmation of Grant had failed to provide for or acknowledge the interests of the Appellant in the plots;
- xvi. That the learned Senior Resident Magistrate erred in law and fact in disregarding the submissions of counsel for the Appellant.

7. The Appeal was canvassed by way of written submissions.

Analysis and Determination

- 8. This being the first appeal, it is this court's duty under Section 78 of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya, to re-evaluate the evidence tendered before the trial court and come to its own independent conclusion, taking into account the fact that it did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of *Selle v Associated Motor Boat Co. Ltd* (1968) EA 123.
- 9. It is trite that though an appellate court has mandate to interfere with findings of fact made by a trial court, this mandate should be exercised cautiously and only when it is clear that the trial court's decision or finding of fact was not based on any evidence or was based on a misrepresentation of the evidence or on wrong legal principles.
- 10. I have keenly read the contents of the Record of Appeal and the submissions by the respective parties.
- 11. At the hearing, the Appellant testified and called 4 witnesses. It was the Appellant's testimony that he and the Deceased had been business partners. The Appellant stated that the Deceased had sold his portion of the property to the Appellant and 2 others. He referred to a meeting with the Chief where



- the issue of the sale of the property was discussed. Further, he produced certificates of official searches for the four plots. The Appellant's claim was for Chania/Ngorongo T.181.
12. The second Protestor witness confirmed that a meeting was held with the Chief, where it was found that the Deceased had sold the subject property. However, the witness did not know whether or not the Deceased sold the land to the Appellant. Nonetheless, the witness confirmed that the Chief had taken minutes of the meeting.
 13. The third Protestor witness was not aware of the transaction between the Appellant and the Deceased. The fourth witness was the Chief, who produced the Minutes of the meeting.
 14. The Respondents admitted that business relationship between the Deceased and the Appellant, but denied the transaction relating to sale of any property by the Deceased to the Appellant.
 15. In its Ruling, the trial court opined that in the absence of documents to support the said transaction or a witness who saw the Deceased sell the property to the Appellant, there was no evidence to prove the Appellant's claim.
 16. In his submissions herein, the Appellant argued that the trial Court misdirected itself in choosing to believe the evidence of the 1st Respondent who had not attended the meeting, and disregarded the evidence of the Chief who had presided over the same. The Appellant also took issue with the trial court for disregarding the evidence of the Appellant, Josephat Kombo Muhika and Francis Mugo Ngonda, who were in attendance at the meeting on 4 April 2001.
 17. The Appellant further argued that by allowing and relying on the evidence of the Respondents, the trial court gave weight to hearsay evidence of persons who were neither present during the transactions touching on the subject plots nor the subsequent elders meeting.
 18. Section 109 of the *Evidence Act* provides as follows

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
 19. In this instance, the burden of proving the transaction between the Appellant and the Deceased lay on the Appellant. None of the witnesses called was able to confirm the sale of the said property because none of them witnessed the said transaction. The second Protestor witness was only able to confirm that there was a sale, but he was unaware if the sale was from the Deceased to the Appellant. As the trial court duly observed, there were no eye witnesses to the transaction, nor any documentary evidence of the same.
 20. Further, the minutes or proceedings produced by the Chief (the fourth Protestor witness) were unsigned, even by the Chief himself. Certainly, this document was not sufficient evidence to persuade the trial court that the Deceased had sold his interest in the disputed properties to the Appellant.
 21. In view of the foregoing, the appeal is unmeritorious and the same is dismissed with costs to the Respondents assessed at Kshs 50,000/=.

DATED AND DELIVERED AT THIKA THIS 23 DAY OF MAY 2025.

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:



..... for the Appellant

..... for the Respondent

Libertine AchiengCourt Assistant

