Kangi v Gikunju & another (Civil Appeal 11 of 2019)
[2025] KEHC 9495 (KLR) (3 July 2025) (Judgment)

Neutral citation: [2025] KEHC 9495 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CIVIL APPEAL 11 OF 2019

JK NG'ARNG'AR, J

JULY 3, 2025

BETWEEN

PETER MWANGI KANGI ..... APPELLANT

AND

DAMARIS WANJIRA GIKUNJU ..... 1ST RESPONDENT

HELLEN WAMBUI KAGIA ..... 2ND RESPONDENT

(Being an appeal from the judgment and decree of the Senior Resident Magistrate's Court at Kerugoya (Hon. A.K. Ithuku, RM.) delivered on 8th December 2006 in SRMC SC NO. 41 OF 2002)

JUDGMENT

1. The 1st respondent filed Summons for Confirmation of Grant dated 26th January 2004. She sought to confirm the Grant of Letters of Administration issued to herself and the appellant jointly on 20th May 2002 in respect to the estate of the late Kangi Mugweru. The Chambers Summons were supported by the grounds on the face of it and the supporting affidavit of the 1st respondent. She deposed that the deceased's estate was survived by herself as the sole beneficiary and dependant. She was therefore entitled to a transfer of all that parcel of land namely KiineKibingotiNguguini719 in her sole name.

2. That application was protested by the appellant. His Affidavits in Protest against Confirmation of Grant sworn on 26th May 2004 and 20th June 2006 raised the following grounds objecting to the confirmation of Grant, as proposed by the 1st respondent: the appellant was the sole son of the deceased and was entitled to the estate in priority to the 1st respondent who was a married daughter; he had been in occupation of ½ of the parcel of land to the exclusion of the 1st respondent; the 2nd respondent was a wife of the deceased's step-brother's son and was therefore not entitled to a share of the estate; that the estate ought to be shared equally between himself and Wanjiru Kangi (the deceased's second wife); and the deceased died testate.

3. The 2nd respondent similarly filed her Affidavit of Protest sworn on 7th June 2006. She opposed the Summons on the following grounds: the deceased had a brother called Kigia Mugweru who is now deceased; the said Kigia Mugweru had a son called Gideon Kagia Njogu who was also deceased; the deceased took Gideon Kagia Njogu, who was her husband, as a son and had no other son; that the 1st respondent was married; the appellant was Sophia Wangithi's son who divorced the deceased before his death; the appellant was born out of wedlock; and she had lived on the suit land since 1970. For those reasons, she prayed that the suit land be distributed as follows: the appellant to get 1.95 acres, the 1st respondent to get 1 acre and she gets 1.95 acres.

4. The determination of the dispute proceeded by way of viva voce evidence. In its judgment dated 8th December 2006, the trial magistrate found that all the parties were beneficiaries of the estate. He therefore directed that LR No. KiineKibingotiNguguini719 measuring approximately 4.90 acres be shared as follows: the appellant and 2nd respondent to get 1.95 acres each while the 1st respondent does get 1 acre.

5. The appellant is dissatisfied with those findings. He filed his memorandum of appeal dated 12th March 2019 that raised five grounds disputing the learned judge's findings. In summary, the trial court lacked jurisdiction to determine the estate; the trial court disregarded the deceased's wishes in determining the mode of the estate; and the decision went against the weight of the evidence adduced. For those reasons, the appellant prayed that the appeal be allowed, the judgment be set aside and substituted with an order adopting his protest. He further prayed for costs of this appeal.

6. In similar fashion, the 1st respondent filed her memorandum of appeal dated 20th January 2020 disputing the findings of the trial magistrate. In summary, she lamented that the trial magistrate distributed the estate erroneously to persons who were strangers to the estate; the learned magistrate failed to distinguish between a beneficiary and a dependant as per the law of succession and as a result, fell into grave error; the trial magistrate applied issues of adverse possession and thus acted ultra vires; the learned magistrate failed to follow the order of rank in priority; and it was wrong for the trial court to find that since she was not married, she did not deserve to inherit from her father's estate. She urged this court to allow her cross appeal, be declared as sole beneficiary and costs of the suit together with this appeal.

7. The appeal was heard on the basis of the parties' written submissions. Dated 10th July 2023, the appellant filed written submissions, together with a list and bundle of authorities. He submitted that by dint of the provisions of section 48 (1) of the *Law of Succession Act* in force at that time, the court lacked the pecuniary jurisdiction to entertain the subject matter. This is because as per the 1st respondent's affidavit in support of petition for letters of administration, the gross value of the estate was estimated at Kshs. 200,000.00. The orders were a resultant nullity in the circumstances.

8. Continuing, the appellant submitted that the deceased died leaving an oral will within the parameters of section 9 of the *Law of Succession Act* as testified and witnessed by Gichira Githinji and Cyrus Maina. In that will, he submitted that the suit property was bequeathed to the appellant and the respondents were not to inherit from the estate. By finding that all parties were entitled to a share, the trial magistrate offended the provisions of sections 26, 27 and 28 of the *Law of Succession Act*. He reinforced his claim stating that the 2nd respondent, in her own evidence admitted that the deceased attempted to evict her, demonstrating that it was not the deceased's intention that she inherited from him. Finally, since all parties confirmed that the appellant was a step son of the deceased, he was therefore entitled to the estate. He prayed that his appeal be allowed with costs.

9. The 1st respondent's written submissions dated 11th June 2024 submitted that the appellant was not a biological child of the deceased. He was therefore not entitled to a share of the estate. That since no sufficient evidence proved that an oral will existed, the trial court properly found that the deceased died intestate. Regarding the 2nd respondent, it was her submission that since she confirmed from her evidence that the deceased tried to evict her twice, she ought not to benefit from the estate. In any case, the doctrine of adverse possession could not arise in the circumstances. Withal, as a daughter in law to the deceased's nephew, her status as beneficiary went beyond a stretch of imagination. She maintained that she was the sole beneficiary and dependant as she was the only biological child of the deceased within the meaning ascribed to the term under section 29 of the *Law of Succession Act*. She prayed that her cross appeal be allowed with costs.

10. The 2nd respondent filed her written submissions dated 30th July 2024. She submitted that though an affidavit dated 19th April 2001 stated that the estate was valued at Kshs. 200,000.00, an affidavit sworn by Joseph Mugo Karebe sworn on 27th February 2003, confirmed that the value of the estate stood at Kshs. 60,000.00. Since there were conflicting values, the court ought to consider the lower estimate to find that the estate was valued at Kshs. 60,000.00 failing the 1st appellant's ground of appeal.

11. Turning to the evidence of the oral will, the 2nd respondent submitted that it failed to meet the threshold set out in our law as to be admissible. It was therefore proper for the trial court to find that no oral will exists since it did not meet the criteria set out in section 9 of the *Law of Succession Act*. Justifying her right to a share of the estate, she explained that she had lived the parcel of land from 1967 and had ten children with her husband, who died in 1970. She also had four grandchildren all of whom live on the parcel of land. She also clarified that it was not the deceased but some elders who evicted her.

12. The 2nd respondent submitted that from the 1st respondent's affidavit in support of the petition for letters of administration intestate, the 1st respondent recognized the 2nd respondent as one of the beneficiaries of the deceased's estate. She was therefore estopped from denying that. She thus prayed that the appeal and cross appeal be both dismissed with costs to the 2nd respondent.

13. I have carefully considered the memorandum of appeal, the memorandum of cross-appeal and the submissions of the parties, critically examined the record of appeal as well as the supplementary record of appeal and analyzed the law. As a first appellate court, I am reminded of my duty of re-evaluating, re-analyzing and re-examining the evidence on record before me afresh in order to arrive at my own independent conclusions. In so doing, I should also make due allowance of the fact that I did not have the advantage of seeing or hearing the witnesses. [See *Selle & Another vs. Associated Motion Boat Co. Ltd & Others* (1968) EA 123]

14. It is not disputed that the deceased Kangi Mugweru died on 12th August 1996. He is the proprietor of all that parcel of land namely LR No. KiineKibingotiNguguine719 measuring 4.90 acres. Three persons have laid claim to a share or whole of the estate of the deceased; the appellant who claims to the deceased's step son, the 1st respondent who claims relationship with the deceased as his biological daughter and the 2nd respondent who claims to be the deceased's daughter in law having married the deceased's brother's son. Against that background the following issues fall for determination and shall be analyzed sequentially:

Whether the trial court lacked jurisdiction to hear and determine the subject matter?

15. The appellant submitted that the trial court was not vested with the pecuniary jurisdiction to entertain the dispute. He justified this submission relying on the estimated value of the estate at Kshs. 200,000.00

as per the 1st respondent's affidavit in support of petition for letters of administration of the estate sworn on 19th April 2001.

16. In response to this submission, the 2nd respondent submitted that at page 7 of the record of appeal, the affidavit of Joseph Mugo Karebe revealed that the value of the estate was approximately Kshs. 60,000.00. However, that record relied on emanates from the proceedings in HC SC No. 41 of 2003; In the matter of the estate of Kabrebe Mithari. That does not concern the subject matter herein and in fact should not have been filed before this court. Since it is not related to the present estate, the same shall not be considered.

17. Interestingly, this issue of jurisdiction has only arisen in this appeal. In fact, the appellant gave substantive evidence and made considerable submissions before the trial court as to demonstrate that the appellant was satisfied with the trial court's jurisdiction. In fact, the issue of jurisdiction was not even raised in his pleadings. He gave evidence and urged the trial court to find in his favor. However, it is only when he was dissatisfied with the learned magistrate's findings that he presupposes that the dispute should never have been heard in the first place.

18. In my view, the appellant is intent on defeating the claim all together by hook, line and sinker. It is mysterious and preposterous as to why this submission is conveniently coming at this stage. To my mind, it is not made in good faith. Since it was never pleaded or determined at trial, I find that this issue lacks merit and is accordingly dismissed.

Whether the deceased died leaving an oral will?

19. It was the appellant's position that the deceased died testate having left an oral will. In support of his evidence, the appellant called Gichira Githinji who testified that the deceased was his brother. He confirmed that appellant had continued to live on the parcel of land even after the death of his deceased brother together with the 2nd respondent. That the deceased informed them, before his death, that the land should be inherited by the appellant, who was his recognized son. That declaration was made in the absence of the 1st respondent.

20. The appellant's second witness, Cyrus Maina, testified that the deceased invited him to arbitrate on the land and explain his wishes of bequest upon his death. There were nine elders present. He corroborated the testimony of the appellant's 1st witness to state that the deceased wished that the suit land be inherited by the appellant. It is on the premise of these two witness accounts that the appellant contended that the deceased died testate.

21. Section 9 of the *Law of Succession Act* 1990, in force at the time of the proceedings herein, provided that an oral will was only valid if it was made before two or more competent witnesses and the testator died within a period of three months from the date of making the will. Thus, the validity of an oral will must meet two conjunctive elements. They are not autonomous from each other and both must be qualified for an oral will to be declared valid since they are couched in mandatory terms.

22. In this case, the appellant called two witnesses whose competency was certainly not challenged. However, none of the witness gave exactitude testimonies describing the dates when the oral will was made. It is purely speculative to the extent that we do not know whether those utterances were made three months prior to the death of the deceased. It is trite law that decisions are not made in a lacuna. The appellant did not establish that this second component had been mandatorily met as set out in law. Accordingly, I find that the trial court properly determined that the deceased died intestate. The appeal on that ground fails and is accordingly dismissed.

Who are the dependants of the deceased's estate?

23. As stated earlier, all parties lay claim as dependants of the deceased's estate. They all wanted a share of the estate with varying degrees of entitlement. Starting with the appellant, his testimony was that the 1st respondent was his sister and the deceased had three wives; the 1st wife who was the 1st respondent's mother, the 2nd wife was called Wanjira and the 3rd wife called Sophia Wangithi, who was the appellant's mother. The 2nd wife had no children with the deceased. His mother had separated with the deceased during his lifetime. He claimed that he was entitled to inherit the entire property. He also recalled that his brother had gone away with his mother.

24. He testified that the 2nd respondent was his deceased cousin's wife. He added that his father had land in Kiandai. His evidence was that the 1st respondent, who is married, did not stay in the land and that he had lived on the suit land with the 2nd respondent since 1992. The 2nd respondent was using the portion of land that had been occupied by her husband before he died. Though he had brothers, they were living with their mother and were not claiming from the estate.

25. The 1st respondent's evidence was that her deceased father had two wives called Wangithi and Wanjira. Though Wanjira had no children, Wangithi had four children out of whom, three died. She was that surviving child of Wangithi. She recalled that the appellant came onto the property when he was an adult. He was employed by his father and his mother never stayed on the property. She testified that she did not know the 2nd respondent but recalled that she lived on her father's land. She denied that she was married to Gideon Kagia Karuru but later admitted that she did and that she was married to another man. In light of her evidence, she urged the trial court to allow her to inherit the entire estate solely. Currently, she was living with her husband. She confirmed that the appellant and the 2nd respondent were living on the land having come when the deceased was alive.

26. The 1st respondent also called Murogo Mugweru as her witness. He stated that the deceased was his elder brother and had two wives called Wanditi, the 1st respondent's mother and Wanjira, who did not sire a child with the deceased. He was aware that the appellant stayed on the land and had been employed while the 2nd respondent's husband also lived there. He is buried on that parcel of land. He was Kigia's son and the deceased's brother. In his view, the land ought to be inherited by the 1st respondent. He added that according to kikuyu customary law, a son is buried at his father's land.

27. Lastly, the 1st respondent called Kaburi Mbogo to the stand. He testified that the 1st respondent's father was his cousin. He had two wives called Wangithi and Wanjira. He had only one child who is the 1st respondent. He did not know the appellant and the 2nd respondent and had never seen them. He confirmed that Karuru was Kigia's son; a brother to the deceased. He was buried in the parcel of land. That the appellant and 2nd respondent live on the parcel of land.

28. The 2nd respondent testified that the deceased was her father-in-law. Her husband, Gideon Kagia Karuru, who was the deceased's nephew, died in 1972. He is buried there. She testified that she had been living on the suit land since 1970. She proposed that the 1st respondent does get one acre while the appellant and herself to get 1.95 acres. She confirmed that the appellant moved into the property in 1984 and erected a structure. He came as an adult. She confirmed that he had two brothers and two sisters. That she had ten children and four grandchildren. During his lifetime, the deceased and elders tried to evict him from the parcel of land.

29. Section 29 of the *Law of Succession Act* provides as follows:

> " For the purpose of this Part of this Act, "dependant" means:

(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

(b) such of the deceased's parents, step-parents, grandparents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

(c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death."

30. None of the parties contest that the 1st respondent was the deceased's daughter. I therefore find that she was a dependent within the meaning of section 29 of the *Law of Succession Act*. It is also not denied that the 2nd respondent was married to the deceased's nephew who is now deceased. The deceased's nephew, Gideon Kagia Karuru, died in 1972 and had lived on the property with the 2nd respondent since 1970 to date. He was the son of the deceased's brother. It was also confirmed that the said Gideon Kagia Karuru was buried on the suit property.

31. According to the 1st respondent's witness, under Gikuyu customary law, a son is buried at his father's land. In this case, the 2nd respondent's husband was buried at the suit land. He came onto the parcel of land when the deceased was alive. It appears that he had permission to live on that parcel of land by the deceased. Evidently, from this piece of evidence, I find that the 2nd respondent's husband was a child within the meaning of section 3 (2) of the *Act* which provides as follows:

> " references in this Act to 'child' or 'children' shall include a child conceived but not yet born (as long as the child is born alive) and, in relation to a female person, a child born to her out of wedlock, and, in relation to a male person, a child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility."

32. In light of my above, analysis, I find that the 2nd respondent, as wife of her late husband, was similarly a dependant within the meaning ascribed to the term. Though the deceased attempted to evict her after the death of her husband, it is not clear as to the circumstances that led to the deceased's decision. Perhaps they had a family dispute; we do not know that. It is however clear that he had welcomed them to his homestead.

33. What about the appellant? He was emphatic that he was taken in as a son of the deceased when he moved onto the parcel of land in 1984. His mother however lived on another parcel of land as to suggest that she married elsewhere. It is true that the appellant was not the deceased's biological son. He however testified that he moved onto the property where the deceased took him as a son; a fact countermanded by the 1st respondent who stated that he was employed by the deceased.

34. As rightly pointed out by the learned magistrate, the 1st respondent did not substantiate the allegations that he came onto the property as an employee; taking into account the fact that she has not lived on the parcel of land. This court believes the fact that it is possible that the appellant was taken in and treated as a son of the deceased; just like the 2nd respondent's husband. Equally thus I find that the appellant is considered as one of the deceased's children for purposes of the estate herein.

35. Having said that, what share is each dependant entitled to? In my view, since they are all considered children of the deceased, they are entitled to equal shares in terms of the assets of the deceased's estate. The deceased died only leaving all that parcel of land namely KiineKibingotiNguguini719 measuring

approximately 4.90 acres. I therefore find that each party should get 1.63 acres each. To that extent, this court interferes with the findings of the learned magistrate. Since this is a family dispute, I direct that each party shall bear its own costs of this appeal.

It is so ordered.

JUDGEMENT DATED, SIGNED AND DELIVERED VIRTUALLY THIS 3RD DAY OF JULY 2025 IN THE PRESENCE OF;

Wanjire for the Appellants

Muthoni for the Respondents

Siele Mark (Court Assistants)

.....

HON. J. NG'ARNG'AR

JUDGE