



REPUBLIC OF KENYA



KENYA LAW
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**Nkando v Muriuki & another (Family Appeal 22 of 2023)
[2025] KEHC 10883 (KLR) (24 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10883 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
FAMILY APPEAL 22 OF 2023**

**SM GITHINJI, J
JULY 24, 2025**

IN THE MATTER OF THE ESTATE OF STEPHEN MUTIA M'ITONGA (DECEASED)

BETWEEN

BASILIO KIMATHI NKANDO APPELLANT

AND

EDWARD MURIUKI 1ST RESPONDENT

ESTHER NJOKI KIMATHI 2ND RESPONDENT

JUDGMENT

1. This Appeal arises from the Ruling of the learned Principal Magistrate Hon. S.K Ngetich delivered on 21.12.2022 in Nkubu Succession Cause No. 90 of 2019, wherein the court confirmed the grant as proposed by the 1st Respondent in his in affidavit of protest sworn on 27/12/2020.
2. Aggrieved by the said Judgment, the Appellant set forth the following grounds in the Memorandum of appeal dated 9th January, 2023;
 1. The honorable court erred in fact and law by failing to appreciate the appellant's evidence in totality hence arriving to a wrong ruling/order.
 2. The honorable court erred in fact and law by failing to consider the respondent's documentary evidence that supported the appellant's case hence arriving to a wrong ruling/order.
 3. The honorable court erred in fact and law by finding that there was no agreement for sale of land between the respondent and the deceased but went on to hold, that he bought the land vide an undertaking dated 27th September, 2019 hence arriving to a wrong ruling/order.



4. The honourable court erred in law and fact by finding that the respondent's claim to have bought the land in 1989 and the undertaking dated 27th September, 2019 not being fraud hence arriving to a wrong ruling.
5. The honourable court erred in law and fact by ordering the appellant to distribute the deceased estate to the respondents pursuant to an undertaking done by the beneficiary.
6. That the honorable court erred in law and fact by admitting the respondent's claim despite the 1st respondent claiming to have sold land to the 2nd respondent belonging to the deceased.
7. The honorable court erred in law and fact by failing to apply law of succession in the instant matter hence arriving to a wrong ruling/order.
8. The honorable court erred in law and fact by finding out that the 1st respondent never bought the land from the deceased but vide a memorandum of undertaking dated 27th September, 2019 and neglected the appellant's evidence that they cancelled the memorandum of undertaking by way of demand letter.
9. The honorable court erred in law and fact by finding that the 2nd protestor mere denials that she never worked for the appellant in the instant matter despite clear evidence from the office of the said Muthomi that she worked in his office.
10. The honorable court erred in law and fact by holding an undertaking on deceased estate cannot be rejected by the administrator of the estate in the instance call.
11. The honorable court erred in law and fact by admitting the respondent's trial testimony as the correct position of the matter despite their contradiction.
12. The honorable court erred in law and fact by failing to appreciate the proceeding of Cr. Case No. 364 of 2019 which parties never disputed in favor of the respondents and the fact the same court handled both suits hence arriving to a wrong decision.
13. The honorable court erred in law and fact by raising proper issues for determination only to apply the law of contract wrongfully hence arriving to a wrong judgment.

Evidence at Trial

3. Protestor's Witness 1, Edward Muriuki and the 1st Respondent herein adopted the affidavit of protest sworn on 27/12/2020 and a further affidavit sworn on 13/6/2022 as his evidence in chief. He told the court that he bought L.R No. Nkuene/Mitunguu/1866 and 612 from Stephen Mutei M'itinga, the deceased herein in 1989 and 1982 respectively. They did not write an agreement because they trusted each other, and the deceased died before the transfer process could be finalized. Subdivision was done and the deceased gave him the original title issued on 9/4/2001 to keep, as his confirmation of his intention to transfer it to him. He was present when the scene was visited by the surveyor and there was a boundary dispute. He sold ½ acre to Esther Njoki in 2010 and they executed an agreement at G.G Mugambi Advocate's office. The undertaking in 2019 was done after he was approached by the children of the deceased, where he was ordered to give Florence Gacheri and Lydia Kagendo ¾ acre out of the 2 acres.
4. Protestor's Witness 2, Esther Njoki Kimathi and the 2nd Respondent herein adopted her statement dated 13/6/2022 as her evidence in chief. She denied either working with Muthomi J.A Advocates, preparing the P & A documents, receiving any payment to file the succession or presenting herself as an advocate. She knew Lydia Kagendo, and she knew the deceased in 2009. The 1st Respondent told



her that he bought L.R No. 1866 in 2009, and that he had been in occupation thereof for 30 years. She bought the land from the 1st Respondent at Ksh. 150,000 and began to utilize it. They later went to G.G. Mugambi Advocate, where they signed the undertaking, and she was at the scene when the court visited and during the survey.

5. Petitioner's Witness 1, Basilio Kimathi Nkando, and the Appellant herein adopted her supporting affidavit sworn on 23/6/2020 together with the annexures thereon as her evidence in chief. She stated that she signed the undertaking, which was prepared by the 2nd Respondent, without understanding it and the deceased had sold L.R No. 612 to the 1st Respondent. The 1st Respondent was on the land in 1989, and they surrendered the original title deed to the 2nd Respondent, who posed as an advocate during the filing of the succession cause. The deceased never sold 1866 to the 1st Respondent, and the 1st Respondent must have obtained the title deed from the 2nd Respondent.

Submissions

6. The Appellant did not file any submissions.
7. The Respondent through the firm of Kuria Karatu & Co. Advocates filed submissions dated 13/5/2025 citing National Bank of Kenya Limited v Pipe Plastic Samkolit (K) Ltd [2002] 2 EA 503, Springboard Capital Limited v Njenga & another (Civil Appeal 14 of 2024) [2024] KEHC 7013, Orieny & another v National Bank of Kenya (Civil Appeal E016 of 2023) [2024] KEHC 6002 (KLR) (20 May 2024) (Judgment), Kinyanjui v Kinyanjui & another (Civil Appeal E201 of 2023) [2024] KEHC 11217 (KLR) (23 September 2024) (Judgment), on the proof of fraud allegations. Counsel lauded the trial court for rightly ordering that the purchasers were given parcels of land, and cited Adome v Ogutu (Succession Appeal 24 of 2021) [2024] KEHC 7682 (KLR) (28 June 2024) (Judgment). Counsel urged the court to dismiss the appeal with costs, and cited Republic v Rosemary Wairimu Munene, Ex-Parte Applicant v Ihururu Dairy Farmers Co-operative Society Ltd Judicial Review application No. 6 of 2014.

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 Ruling which is the subject of this appeal as well as the submissions on record.
11. From the grounds of appeal, the issue for determination is whether the trial court's decision was grounded on law and supported by the evidence on record.
12. The deceased herein died intestate survived by Ronjino Kinyua Mutea, Basilio Kimathi Nkando, Samson Kirimi Mutea, Shadrack Kirugi, Florence Gacheri Mutea and Lydia Kagendo Mutea.
13. In her affidavit in support of the summons for confirmation of grant dated 11/11/2020, the Appellant, in her capacity as the wife to the deceased, proposed that L.R No. Nkuene/Mitunguu/1866 (hereinafter referred to as the disputed property) be devolved to Lydia Kagendo Mutea, in whole.



14. The 1st Respondent swore an affidavit of protest on 27/12/2020 in opposition to the Appellant's proposed mode of distribution. He contended that the deceased herein had sold to him the disputed property in 1989 during his lifetime, but he died before transfer could be effected. He has been in exclusive possession thereof and he subsequently sold ½ acre to the 2nd Respondent who is equally in possession. In 2019, he undertook in writing to give Lydia Kagendo and Florence Gacheri Mutea ¾ of the disputed property so that they could settle there. He thus proposed that the disputed property be distributed as proposed at paragraph 13 of his protest.
15. The 1st Respondent maintained that, "The parcel Nkuene/Mitunguu/1866 is land I bought from Stephen Mutei M'itinga (deceased). I bought it in 1989. He sold me Nkuene/Mitunguu/612 in 1988. He died before we finalized the process of transfer. I sold half acre to Esther Njoki in 2010."
16. The Appellant admitted in her testimony that, "I signed the undertaking without understanding the effect to it. I came to know Edward when I married from that family. That was in 1989. He was in that land. Edward bought parcel Number 612 and another from the deceased."
17. The Appellant does not dispute executing the undertaking made on 27/9/2019 where the 1st Respondent accepted to give ¾ of the land jointly to Lydia Kagendo Mutea and Florence Gaceri Mutea, ½ to the 2nd Respondent while he retained the remaining ¼ acre thereof. The Appellant cannot thus purport not to have understood the import of the said undertaking.
18. I find that the said understanding was a contract for all its intent and purpose, which can only be set aside where vitiating factors exist.
19. The Appellant's concession that the 1st Respondent was on the disputed property in 1989 leads to the inference that he had lawfully purchased it from the deceased herein, and taken possession thereof, with the knowledge and consent of the deceased.
20. *In re Estate of Nasotokini Ole Sane alias Nasotokini Lesane (Deceased)* [2019] KEHC 6589 (KLR), the court (R. Nyakundi J) expounded that; "60. The enjoyment of those proprietary rights over land continued to subsist even after the death of the deceased. This is given credence by the administrators in their own affidavit (P and A.5 form) confirming existence of the purchasers' interest or liabilities. Therefore, there is misrepresentation and concealment of material facts, lack of notice to the protestors when they applied for confirmation of the grant of letters of administration. The administrators intended to seek confirmation of the grant and have the estate left by the deceased to be distributed without their involvement."
21. Section 116 of the *Evidence Act* places the burden of disproving ownership on the Appellant as follows; "When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner."
22. I find that the Appellant did not discharge the burden of proving that the Respondents were not the owners of ¾ and ½ respectively of the disputed property.
23. I further find that the Respondents were in the strict sense of it, creditors to the estate, who were beneficially entitled to the disputed property.
24. For the foregoing reasons, I find that the appeal is in want of merit and it is hereby dismissed with no order as to costs.

DATED AND DELIVERED AT MERU THIS 24TH JULY, 2025



S.M. GITHINJI

JUDGE

Appearances:-

Mr. Karatu for the Respondent.

Mr. Mutunga for the Appellant.

