



**Mwaniki v Mwaniki (Family Appeal 19 of 2023)
[2024] KEHC 1080 (KLR) (8 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1080 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
FAMILY APPEAL 19 OF 2023**

FN MUCHEMI, J

FEBRUARY 8, 2024

IN THE MATTER OF THE ESTATE OF MWANIKI GICHINA (DECEASED)

GICHINA MWANIKI.....APPELLANT

VERSUS

JOHNSON SAMUEL MUIGAI MWANIKI.....RESPONDENT

BETWEEN

GICHINA MWANIKI APPELLANT

AND

JOHNSON SAMUEL MUIGAI MWANIKI RESPONDENT

*(Being an Appeal from the Ruling of Hon. E. Riany (SRM) delivered
on 18th November 2020 in Thika CM Succession Cause No. 69 of 1984)*

JUDGMENT

Brief facts

1. This appeal arises from a ruling in Thika SRM CM Succession Cause No. 69 of 1984 where the court found that it lacked jurisdiction to hear and determine the application dated 19/12/2019 which sought for orders of rectification of entries on the deceased’s certificate of title in respect of land parcel LOC 16/Ndunyu Chege/456.
2. Dissatisfied with the court’s decision, the appellant lodged this appeal citing 5 grounds of appeal summarized as follows:-
 - a. The learned trial magistrate erred in law and in fact in finding that the lower court lacked jurisdiction to determine the appellant’s summons general for rectification of the green card dated 19/12/2019 to the deceased’s land;



- b. The learned trial magistrate erred in law and in fact in failing to find that the matter was purely a succession dispute and not a claim for the use and/or occupation of land and therefore fell squarely within the jurisdiction of the trial court.
3. The appellant filed written submissions to dispose of the appeal as directed by the court herein. However the respondent failed to file submissions despite being given chances to do so.

Appellant's Submissions

4. The appellant submits that he filed Summons General dated 19th December 2019 under Section 49 of the *Law of Succession Act* seeking for orders of rectification of the green card to L.R. NO. LOC 16/NDUNYU CHEGE/456 by cancelling entries 2, 3, 4 and 5 in order to revert the land in the names of the deceased. The said entries had been noted on the register pursuant to a confirmed grant issued by the trial court in Thika on 4th September 1985.
5. Subsequent to the said entries, the appellant states that he moved to the High Court Nairobi in HC Succession Cause No. 2726B of 2006 seeking to revoke the grant which the court cancelled the certificate of confirmation of grant issued on 4th September 1985 and ordered the administrators including the appellant to make a fresh application for confirmation of grant at Thika Magistrate's court.
6. Following the judgment of the High Court in Nairobi, fresh confirmation was undertaken in Thika CM Succession Cause No. 69 of 1984 culminating in an amended certificate of confirmation of grant which shared equally land parcel LOC 16/NDUNYU CHEGE/456 amongst five beneficiaries, the appellant included. Pursuant to that, the appellant submits that he then filed the summons general dated 19/12/2019 seeking for orders of rectification of the green card so as to revert the same to the names of the deceased to enable distribution of the estate in accordance with the amended confirmation of grant. That notwithstanding, the appellant submits that no appeal has been filed against the court's judgment on re-distribution of the deceased's estate.
7. The appellant argues that the respondent in the trial court argued that the court had no jurisdiction as cancellation of entries in the land register is a reserve of the High Court only and that the matter fell under the purview of the Environment & Land Court pursuant to Section 13 of the Environment & Land Court Act. The respondent further argued that Rule 73 of the Probate and Administration Rules was only meant to fill gaps in the *Law of Succession Act* and Rules. The respondent supported his arguments by relying on the case of Kisii HC Succession Cause No. 30 of 2014, whose facts the appellant argues are quite complex and distinguishable from the facts of the instant case.
8. The appellant relies on the cases of *Munyasya Mulili & 3 Others vs Sammy Muteti Mulili* [2017] eKLR and *In Re Estate of Mwaura Mbira (Deceased)* [2018] eKLR and argues that the trial court was clothed with jurisdiction under Section 47 of the *Law of Succession Act* and Rule 73 of the Probate & Administration Rules to resolve matters before it to secure the ends of justice. In this instance, the appellant argues that the trial court had jurisdiction to determine the application for rectification as it was ensuring compliance with its own judgment on distribution of the deceased's estate. Moreover, the appellant further submits that the beneficiaries are sick and elderly and subjecting them to file a fresh suit in the ELC Court to revoke the entries in the green card is not just or expedient. The appellant reiterates that the respondent does not contest the fact that the said entries must be revoked if the amended confirmed grant dated 27th June 2019 issued at the lower court is to be executed.



Issue for determination

9. The main issue for determination is whether the Magistrate erred in law and fact in his ruling delivered on 19th December 2019 in Succession Cause No.69 of 1984.
10. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another vs Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:

“.....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. In particular,, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”
11. In *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR the Court of Appeal stated that:-

An appeal to this court from a trial by the High 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.
12. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-
 - a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
 - b. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and
 - c. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.
13. The record shows that the deceased died on 13th June 1963 and left the following survivors: -
 - a. Njeri Mwaniki – 1st wife
 - b. Josephine Kabura Mwaniki – 2nd wife
 - c. Kamau Mwaniki – son
 - d. George Mwangi Mwaniki – son
 - e. Gichina Mwaniki – son
 - f. Muigai Mwaniki – son
 - g. Mwangi Mwaniki – son
 - h. Maina Mwaniki – son
 - i. Wangui Mwaniki – daughter



- j. Kabura Mwaniki – daughter
 - k. Wanjiru Mwaniki – daughter
 - l. Wambui Mwaniki – daughter
14. Two sons of the deceased namely George Mwangi Mwaniki and Johnson S. Muigai Mwaniki applied for letters of administration intestate on 27th April 1984 and the grant was issued to them on 10th January 1985. The grant was confirmed on 3rd September 1985 and land parcel LOC 16/Ndunyu Chege/456 was distributed as follows:-
- a. George Mwangi Mwaniki – 2.69 acres
 - b. Johnson S. Muigai Mwaniki – 1.91 acres
 - c. Mwangi Mwaniki – 1.14 acres
 - d. Maina Mwaniki – 1.14 acres
15. The appellant then moved the High Court, Nairobi in HC Succession Cause No. 2726B of 2006 seeking for orders for revocation of grant. The court then set aside the orders made by the lower court in Thika CM Succession Case No. 69 of 1984 confirming the grant and cancelled the certificate of confirmation of grant issued on 4th September 1985. The court further directed that the administrators apply afresh for confirmation of grant in Magistrate’s court in a process that would include and involve the appellant.
16. The administrators filed their Summons for Confirmation of grant on 27th June 2018 against which the appellant filed Affidavits of Protest dated 20/7/2018 and 20/7/2018. The protest proceeded by way of viva voce evidence and on 26th June 2019, the court found merit in the protest and shared out the suit land equally amongst the five beneficiaries namely:- George Mwangi Mwaniki, Deborah Njeri Kamau, Gichina Mwaniki, Johnson S. Muigai Mwaniki and Geoffrey Mwangi Mwaniki.
17. This then necessitated the filing of the application dated 19/12/2019 in which the appellant sought for the rectification of the green card seeking to have the land L.R. NO. LOC 16/NDUNGU CHEGE/456 to the names of the deceased to enable distribution of the estate. The respondent however filed a preliminary objection to the effect that the Magistrate’s court had no jurisdiction to entertain the application as the matter was in the purview of the Environment & Land Court. The trial court rendered its ruling on 18th November 2020 which necessitated the instant appeal.
18. It is not contested by any of the parties that the estate was distributed equally amongst the five beneficiaries on 26th June 2019. Notably, the administrators have not filed any appeal against the said ruling and therefore as it stands the mode of distribution stands uncontested. It is imperative to look at the law that applies to the issues herein. The jurisdiction of the succession court is set out in Section 47 of the [Law of Succession Act](#) and Rule 73 of the Probate & Administration Rules. Section 47 of the Act provides:-
- The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.
- Provided that the High Court may for the purpose of this section be represented by resident magistrates appointed by the Chief Justice.
19. Rule 73 of the Probate & Administration Rules provides;-



Nothing in these rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

20. The court pronounced itself on the same in *Floris Pierro & Another vs Giancarlo Falasconi (as the Administrator of the Estate of Santuzza Billioti alias Mei Santuzza)* [2014] eKLR:-

We have no doubt at all that the *Law of Succession Act* gives the court wide jurisdiction in dealing with testamentary and administration issues of an estate. Indeed Section 47 of the said act gives the court jurisdiction to entertain any application and determine any dispute under the Act and to pronounce such decree and orders as may be expedient.....In other words, we are of the firm view that Section 47 of the Act gives the court all embracing powers to make necessary orders, including injunctions where appropriate to safeguard the deceased's estate. This section must be read together with rule 73 of the Probate and Administration Rules which further emboldens Court's jurisdiction to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

21. It follows that the Magistrate's court was clothed with jurisdiction to order rectification of the green card to revert to the names of the deceased because in doing so, it was ensuring the compliance of its own judgment on the distribution of the estate. The trial court was clothed with the requisite jurisdiction to safeguard the deceased's estate. The purpose of the orders of the court in the succession cause estate could only be accomplished by reverting the estate to the names of the deceased to ensure distribution of the estate as per the orders of the court. Every court of law that makes orders is possessed of the powers to ensure the execution of such orders. The Environment and Land Court (ELC) has power to hear and determine land disputes but such power does not extend to succession cases.

22. It is therefore my considered view that the court erred in finding that it was not possessed of the jurisdiction to hear the application. The said application was within the purview of the succession cause before the said court. It is therefore, my finding that this appeal has merit and it is hereby allowed. I hereby grant the following orders:-

- a. That entries No. 2, 3, 4 and 5 in the register for L.R. No. LOC.16/Ndunyu Chege/456 be cancelled and the land revert to the names of the deceased.
- b. That the Deputy Registrar of this court is hereby authorized to execute the transmission documents in the event that the administrators or any of the beneficiaries declines to do their part.

23. Being an appeal arising from a family cause, this court hereby orders that each party meets their own costs.

24. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 8TH DAY OF FEBRUARY 2024.

F. MUCHEMI

JUDGE

