



REPUBLIC OF KENYA



**KENYA LAW**  
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**Maina v Baiya & 2 others (Civil Appeal E024 of 2022)  
[2024] KEHC 3864 (KLR) (19 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3864 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CIVIL APPEAL E024 OF 2022**

**DK KEMEL, J  
APRIL 19, 2024**

**BETWEEN**

**MARY MAINA ..... APPELLANT**

**AND**

**NJENGA BAIYA ..... 1<sup>ST</sup> RESPONDENT**

**ROSE NJOKI NYAMBURA ..... 2<sup>ND</sup> RESPONDENT**

**HARUN GITHINJI MWAMBURA ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the Judgement of Hon. A. Odawo, Resident Magistrate in Bungoma Chief Magistrate's Court Civil Case No. 277 of 2019, delivered on 7th February 2022)*

**JUDGMENT**

1. Being aggrieved by the Judgement of Hon. A. Odawo, Resident Magistrate in Bungoma Chief Magistrate's Court Civil Case No. 277 of 2019, delivered on 7<sup>th</sup> February 2022 the Appellant preferred this appeal vide a Memorandum of Appeal dated 7<sup>th</sup> March 2022 wherein she listed the following grounds of appeal:
  1. The learned trial magistrate erred in law and in fact in that she failed to consider the property attached by the Respondent for sale belonged to the Appellant and did not form part of the deceased's estate.
  2. The learned trial magistrate erred in law and in fact in ignoring and failing to consider or sufficiently consider the evidence that was adduced.
  3. The learned trial magistrate erred in law and in fact by failing to give reasons for dismissing the Appellant's objection.



4. The learned trial magistrate erred in law and in fact in bringing into the issues facts which no party had pleaded.
  5. The decision of the trial magistrate is against the weight of evidence and the law applicable.
  6. The learned trial magistrate erred in law and fact in that she brought in extraneous matters into her decision by concluding that it was the deceased who bought the attached goods.
  7. The learned trial magistrate erred in law and fact by finding that the attached goods are part of the estate of Henry Gitonga Mwambura (deceased).
  8. The learned trial magistrate erred in law and in fact in failing to consider the Appellant's submission thereby arriving at a wrong conclusion.
2. The Appellant prayed that the appeal be allowed, that the Judgement of the lower Court be set aside and substituted with one in favour of the Appellant and that the Appellant be awarded costs of this appeal and in the lower Court.
  3. On 26<sup>th</sup> July 2023, this court directed inter alia that this appeal be canvassed by way of written submissions. Parties were directed to file submissions on the appeal within a period specified in the order. The Appellant filed her record of appeal on 16<sup>th</sup> June 2023. It is only the Appellant who filed submissions in the matter.
  4. From the Memorandum of Appeal, the major quarrel is that the trial magistrate allowed personal properties of the Appellant herein to be attached and sold in execution of a decree against her as an administrator of the estate of the deceased.
  5. In the main suit, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants (now 2<sup>nd</sup> and 3<sup>rd</sup> Respondents) were sued by the Plaintiff (now 1<sup>st</sup> Respondent). It is clear from the proceedings that the 1<sup>st</sup> Defendant is the widow of the deceased while the 2<sup>nd</sup> Defendant is the son. This is very relevant because the Plaintiff alleged that the debt arose at a time which made it a liability on the Estate. The Appellant herein was not a party to the suit.
  6. The Fast Track Plaintiff was filed on 27<sup>th</sup> August 2019. The Plaintiff (now 1<sup>st</sup> Respondent) averred that on or before 9<sup>th</sup> September 2014, he entered into a loan agreement with the deceased, Henry Gitonga Mwambura, wherein he lent him Kshs. 400,000/=. He averred that the amount still remains unpaid until the demise of the deceased and that the Defendants are liable to pay the same as Administrators of the deceased's estate.
  7. According to him, despite several demands and notice of intention to sue to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants (now 2<sup>nd</sup> and 3<sup>rd</sup> Respondents), the same remained ignored thus the suit.
  8. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants (now 2<sup>nd</sup> and 3<sup>rd</sup> Respondents) entered appearance and filed their statement of defence on 7<sup>th</sup> October 2019. They denied all the allegations in the Plaintiff save for the description and address of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants (now 2<sup>nd</sup> and 3<sup>rd</sup> Respondents). They averred that they are not privy to the facts pleaded in the Plaintiff and that there was no succession cause in regard to the estate of the deceased and if the same happened, it was simply limited to Grant of Letters of Administration ad litem for purposes of enabling them to defend the suit. They averred that they did not owe the Plaintiff (now 1<sup>st</sup> Respondent) any money. They averred that they are not aware of the existence of any legal agreement and know that the deceased died without any debt.
  9. The Plaintiff (now 1<sup>st</sup> Respondent) was the only witness who testified in support of his claim against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants (now 2<sup>nd</sup> and 3<sup>rd</sup> Respondents). He relied on his witness statement dated 26<sup>th</sup> August 2019 and adopted the same as his evidence in chief. He also relied on his documents as



contained in the document list dated 26<sup>th</sup> August 2019, which he produced in Court as PEXH1 and PEXH2 respectively. He further produced an additional list of documents dated 22<sup>nd</sup> October 2019 as PEXH3. According to him, he knew the 1<sup>st</sup> and 2<sup>nd</sup> Defendants (now 2<sup>nd</sup> and 3<sup>rd</sup> Respondents) as the administrators of the estate of the deceased, Henry Gitonga Mwambura and that the deceased had borrowed from him Kshs. 400,000/= prior to his demise and that he didn't pay him back. He told the Court that he kept following up on the said amount but the deceased kept on telling him that he would repay him. On the demise of Henry Gitonga Mwambura, he approached the Defendants for the repayment but they were reluctant. He told the Court that he wanted the 1<sup>st</sup> and 2<sup>nd</sup> Defendants (now 2<sup>nd</sup> and 3<sup>rd</sup> Respondents) to be compelled to meet their legal obligations by paying the liabilities of the estate of the late Henry Gitonga Mwambura.

10. On cross-examination, he told the Court that the loan agreement was executed in 2014 and that the deceased, Henry Gitonga Mwambura, died in 2018. He relied on PEXH1. According to him, the deceased was to refund the money on 30<sup>th</sup> November 2014 with an interest of 10% and that he was his dear friend and that's why he did not resort to litigation at first instance. He told the Court that he asked the deceased to refund the money on several occasions. He relied on PEXH3 testifying that the amount involved was sourced from the bank with his title deed as collateral. According to him, he took a loan on behalf of the deceased from Faulu and that if he defaulted, the bank will sell his land. He told the Court that he tried making payments in efforts to salvage his land. He testified that he knew the 1<sup>st</sup> and 2<sup>nd</sup> Defendants (now 2<sup>nd</sup> and 3<sup>rd</sup> Respondents) as the administrators to the estate of the deceased and relied on PEXH2, which was a limited grant for purposes of filing a suit.
11. On re-examination, he told the Court that he sued the 1<sup>st</sup> and 2<sup>nd</sup> Defendants (now 2<sup>nd</sup> and 3<sup>rd</sup> Respondents) as the administrators of the estate of the deceased and that he used his personal title deed to secure a loan on behalf of the deceased.
12. On the other hand, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants (now 2<sup>nd</sup> and 3<sup>rd</sup> Respondents) case was also based on one witness. According to the 2<sup>nd</sup> Defendant, the deceased was his father while the 1<sup>st</sup> Defendant (now 2<sup>nd</sup> Respondent) is his mother. He relied on the recorded witness statements dated 4<sup>th</sup> December 2020 and adopted them as his evidence in chief. According to him, the deceased died in November 2018 and that they did not take out any grant. He told the Court that the limited grant was only taken out for purposes of filing a suit against a person who owed his late father money but they did not file the same.
13. On cross-examination, he told the Court that the deceased never informed them that he owed the 1<sup>st</sup> Respondent any money and that he was not aware that the 1<sup>st</sup> Respondent used his title deed to secure a loan for his late father. He agreed that his late father and the Plaintiff (now (now 1<sup>st</sup> Respondent) were friends. He reiterated that the limited grant was for purposes of filing a suit against a person that owed his late father money and that at his demise his father did not leave them with anything. He told the Court that prior to his demise his father owned a petrol station in Webuye.
14. In its judgement, the Court held that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants (now 2<sup>nd</sup> and 3<sup>rd</sup> Respondents) had the capacity to be sued and defend the suit before it on behalf of the deceased's estate. She further held that the Plaintiff proved his case on a balance of probabilities and produced documentation to that effect. The mere denial of knowledge of the said debt was not evidence enough to controvert what was on record. The trial magistrate entered judgement for the Plaintiff for Kshs. 400,000/= plus costs and interest.
15. In his bid to recover the decretal amount and taxed costs, the 1<sup>st</sup> Respondent commenced execution proceedings against the judgment debtor that resulted in the attachment of the attached goods on 21<sup>st</sup> November 2021, through Agunja Traders Auctioneers. The application for execution by the 1<sup>st</sup>



- Respondent before the lower Court is in the record of appeal and that the auctioneers proclaimed the attached goods in November 2021.
16. The costs were taxed and certified at Kshs. 108,530.00 and a certificate of costs dated 3<sup>rd</sup> November 2021 issued. The date of the decree is recorded as 3<sup>rd</sup> November 2021 prior to assessment.
  17. I have considered the appeal and the submissions by learned counsel for the Appellant. Although the Appellant set out eight grounds of appeal in her memorandum of appeal, the principal question on which the appeal turns is whether the Appellant has the locus standi to file this appeal.
  18. It is imperative to note that the Appellant was not a party to in the lower Court suit. This begs the question whether the Appellant is competent to approach this Court in the manner that she has done. By extension, it begs the question whether, this Court has jurisdiction to entertain an appeal of the lower Court judgment, by a person who was never a party to the proceedings that culminated in the said judgment.
  19. In *Law Society of Kenya v Communications Authority of Kenya SC Petition No 8 of 2020 [2023] eKLR*, the Supreme Court Judges held as follows on the significance of a party having locus standi in a matter:

“Therefore, flowing from the constitutional provisions on the jurisdiction of this court, the definition of ‘a person’ seeking to file an appeal only extends to a party who is aggrieved by a decision issued against him by the Court of Appeal and wishes to prefer an appeal to the Supreme Court. The definition does not open the door for any passer-by who is disgruntled with a decision delivered by the appellate court to approach this court. This also extends to matters relating to public interest. Furthermore, there is difficulty in granting relief at the appellate stage to a party who did not litigate those issues before the superior courts. A person in this context should therefore be a party with locus standi in the matter.”
  20. This court derives its jurisdiction from Article 165 of *the Constitution* and subsequently from legislation. It is therefore bound by its rules and procedure. Thus, a party moving the Court under Article 165 must be competent to do so in the first place.
  21. From the foregoing, it is evident that this Court has no jurisdiction to sit on this appeal and that the Appellant lacks the requisite locus standi to appear before it on appeal.
  22. In the upshot, this Appeal fails and is dismissed with costs to the 1<sup>st</sup> Respondent.

It is so ordered.

**DATED AND DELIVERED AT BUNGOMA THIS 19<sup>TH</sup> DAY OF APRIL 2024.**

**D. KEMEI**

**JUDGE**

**In the presence of:**

Maloba For Ngangache for Appellant

No appearance Nekesa for 1<sup>st</sup> Respondent

No appearance for 2<sup>nd</sup> and 3<sup>rd</sup> Respondents

Kizito Court Assistant

