



Muriithi v Gathua (Family Appeal 1 of 2023) [2024] KEHC 6734 (KLR) (6 June 2024) (Judgment)

Neutral citation: [2024] KEHC 6734 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
FAMILY APPEAL 1 OF 2023**

FN MUCHEMI, J

JUNE 6, 2024

BETWEEN

JAMES KARIUKI MURIITHI APPELLANT

AND

STANLEY MWANGI GATHUA RESPONDENT

*(Being an Appeal from the Ruling and Orders of Hon. M. W. Wanjala (SRM)
delivered on 8th October 2020 in Thika CM Succession Cause No. 89 of 2019)*

JUDGMENT

Brief facts

1. This appeal arises from the ruling of Thika Senior Resident Magistrate in CM Succession Cause No. 89 of 2019. The court in its ruling dismissed the appellant's Summons for Revocation of Grant dated 30th October 2019.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 7 grounds of appeal summarized as follows:-
 - a. The learned trial magistrate erred in fact and law in determining the matter whose value was stated in the petition and full inventory of all assets and liabilities of the Estate of Muriithi Kariuki to be Kshs. 10,000,000/- well in excess of the court's jurisdiction;
 - b. The learned trial magistrate erred in law and in fact in finding that the Gazette Notice No. 5060 of 7th June 2019 was a mere error that did not go into the substance of the Grant of letters of Administration with written will issued on 8th July 2019;
 - c. The learned trial magistrate erred in law in failing to distinguish between a grant of Probate and Letters of Administration with Will Annexed;
 - d. The learned trial magistrate erred in law by proceeding with a will which was not valid.



3. Parties put in written submissions to dispose of the appeal. Directions were issued that the appeal be canvassed by way of written submissions and the record show that the appellant complied by filing his submissions on 11th March 2024. The respondent on the other hand had not filed his submissions by the time of writing this judgment.

Appellant's Submissions

4. The appellant submits that the deceased had made a will dated 20th September 2010 and as such, the matter ought to have proceeded as testate succession and not intestate as shown in Gazette Notice No. 5061 issued on 7th June 2019. Grant of probate and letters of administration with written will was issued on 8th July 2019. Further the appellant submits that a full inventory was filed on 23rd February 2021 which indicated the value of the estate as Kshs. 10 million and the affidavit in support of the petition for probate of letter of administration with written will annexed estimated the estate at the same value of Kshs. 10 million.
5. The appellant relies on Section 48 of the *Law of Succession Act* and Section 7 of the *Magistrates Act* and the cases of *Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd & 2 Others* [2012] eKLR and *Re Estate of Petro Okumbe Ouko (Deceased)* [2020] eKLR and submits the trial magistrate did not have jurisdiction to determine the matter. The appellant thus urges the court to set aside the ruling made by the trial court dated 8th October 2020.
6. The appellant argues that the procedure for obtaining the grant was defective in substance as Gazette Notice Number 5061 indicated that the application was for a grant of letters of administration instead of grant of probate. The appellant further submits that the magistrate confirmed that the gazette notice which indicated that the respondent had petitioned for grant of letters of administration intestate was erroneous.
7. The appellant further argues that the will itself was in dispute since the signatures were not similar to those in the Land Control Board form. Further, the appellant submits that some of the properties were to be devolved intestate whereas others through the will which led to confusion. Furthermore, the contents of the will and all the beneficiaries named in the written will were not within the knowledge of the appellant.

Issues for determination

8. The main issues for determination are:-
 - a. Whether the trial court had the jurisdiction to determine the claim;
 - b. Whether the appellant satisfied the conditions to warrant the court revoke the grant.

The Law

9. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another v Associated Motor Boat Company Ltd & Others* [1968] 1 EA 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.”

10. In *Gitobu Imanyara & 2 Others v 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.

11. 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.

Whether the trial court had jurisdiction to determine the matter.

12. The law on the question of jurisdiction was enunciated in the case of *Owners of the Motor Vessel “Lilian S” v Caltex Kenya Limited* [1989] KLR 1 where the court held:-

Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.

13. Jurisdiction is a very fundamental issue that it can be raised at any time including on appeal. This principle was stated by the Court of Appeal in *Kenya Ports Authority v Modern Holding [EA] Limited* [2017] eKLR as follows:-

We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage and even on appeal, though it is always prudent to raise it as soon as the occasion arises. It can be raised at any time, in any manner, even for the first time on appeal, or even viva voce and indeed, even by the court itself provided that where the court raises it suo motu parties are to be accorded the opportunity to be heard.

14. From the foregoing, it is evident that the issue of jurisdiction may be raised at the appellate stage as done by the appellant.



15. Jurisdiction of a court was discussed in the case of *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & Others* (2012) eKLR where it was held:-

A court's jurisdiction flows from either the *Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.

16. Initially the jurisdiction of the magistrates in succession matters was provided by Section 48(1) of the *Law of Succession Act* but in 2015, the said section was repealed by Section 23 of the *Magistrates' Court Act No. 26 of 2015* which provides:-

Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of Section 49, a magistrate shall have jurisdiction to entertain any application and to determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed the pecuniary limit prescribed under Section 7(1) of the *Magistrates' Courts Act 2015*.

17. Section 7(1) of the *Magistrates Courts Act 2015* provides that the magistrates court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter in dispute does not exceed:-

- a. Kshs. 20 million for a Chief Magistrate;
- b. Kshs. 15 million for a Senior Principal Magistrate;
- c. Kshs. 10 million for a Principal Magistrate;
- d. Kshs. 7 million for a Senior Resident Magistrate;
- e. Kshs. 5 million for a Resident Magistrate.

18. The petition for probate of written will filed by the respondent on 15th March 2019 indicates the total value of the estate as approximately Kshs. 10 million. The word "approximately" connotes that the value of the estate would have been more or less than KShs.10,000,000/=. How would the value of the estate be assessed? The only way is by getting a valuation report which was not produced by any of the parties before the succession court. The appellant had raised the issue on appeal which is permissible based on the principle laid down in the Court of Appeal case of *Kenya Ports Authority (supra)*. However, it is noted that no evidence was adduced on the value of the estate before the magistrate for the simple reason that the issue of jurisdiction did not arise. In that regard, the appellant who is the only person among the beneficiaries disputing jurisdiction on appeal, was obligated to apply to this court for leave to adduce additional evidence under order Rule of the *Civil Procedure Rules*. The appellant failed to do this and cannot expect this court to decide on pecuniary jurisdiction of the magistrate's court without evidence. According to Section 107 of the *Evidence Act*, any party who alleges must prove. In my view, the fact that the figure of KShs.10 million was cited in the petition and in the inventory, does not support the fact that the deceased's estate was so valued.

19. It is noted that after writing the will, the deceased transferred some parcels of land directly to the beneficiaries which greatly reduced the value of the estate. The jurisdiction of the Senior Resident Magistrate who determined the distribution was KShs.7,000,000. The appellant has failed to prove that the deceased's estate that was available for distribution was valued over KShs,7,000/=. In my considered view, the appellant has failed to establish that the court below lacked jurisdiction.



20. The appellant alleged that the deceased was not possessed of the mental and physical capacity to make the will on grounds that he had been sick and hospitalized shortly before making the will. The discharge of the deceased from Kenyatta National Hospital dated 3/09/2010 indicated that the deceased had been admitted for only two days due to diarrhea, that is from 4/10/2010 to 6/10/10. The appellant presented no evidence to the contrary and as such the magistrate rightly found that the will was valid.
21. As regards the Gazette Notice No.5061 dated 7th June 2019 the appellant revoking the said notice, the said notice was to the effect that the respondent herein had filed a Succession Cause in respect of the estate of the deceased at Thika Chief Magistrate Court and that any objections to the issue of grant of letters of administration intestate should be filed within 30 days. I have looked at the petition filed by the respondent in Form 78 for a Probate of written Will. In the petition, the respondent stated that he was the executor of the Will as named therein. The District Registrar prepared the index card and requisite notices to the Principle registrar on 20th March 2019 which indicated by error that the respondent had applied for letters of administration intestate. The error is the one that led to the issue of the said gazette notice. The magistrate said the said gazette notice had been spent because letters of administration intestate had already been issued to the respondent on 8th July 2019 with the will annexed thereto.
22. In that regard, the magistrate could not reverse the process of the Succession Cause that was nearing conclusion. However, in the record of the court, it was very clear that the respondent had filed for grant of Probate and annexed the Will of the deceased. The case then proceeded as testate Succession. In my considered, view the error was not sufficient to defeat the testate proceedings.
23. It is not in dispute that one asset LR LOC 1/Kiunyu/360 had not been included in the Will. It was a resultant parcel upon subdivision of LR Loc 1/Kiunyu/117. The deceased transferred the other two parcels to the beneficiaries during his lifetime and left LR LOC 1/Kiunyu/1360 undistributed. The magistrate distributed this asset in equal shares to the appellant and the respondent. Under the law of Succession, only one succession cause can be filed in respect of a deceased person. The magistrate in her wisdom distributed the asset to the parties herein. My take is that the act of distribution of the said asset was not in violation of any law and did not cause any prejudice or injustice to any of the beneficiaries. The appellant has not pointed out error on that part of the magistrate. I uphold the said finding of the honourable magistrate which in my view served the interests of justice given the facts of the case between the parties.
24. It is imperative to note that in this appeal, the appellant does not complain that he was not given his rightful share in regard to LR LOC 1/Kiunyu/1360. The court treated him equally with his brother Geoffrey Kariuki. This same observation was given by the court below in its ruling on the distribution per the Will and on intestacy.
25. Having found that the appellant has failed to establish any of the grounds herein, this appeal must fail.
26. I find no merit in this appeal and it is hereby dismissed.
27. Being a family matter, there will be no order as to costs.
28. It is hereby so ordered.

JUDGMENT DELIVERED, DATED AND SIGNED AT THIKA THIS 6TH DAY OF JUNE 2024.

F. MUCHEMI

JUDGE

