



**In re Estate of Evans Nyutu Muremwa (Deceased) (Civil Appeal E102 of 2022) [2024] KEHC 10598 (KLR) (22 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 10598 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL E102 OF 2022  
CJ KENDAGOR, J  
JULY 22, 2024**

**IN THE MATTER OF THE ESTATE OF EVANS NYUTU MUREMWA (DECEASED)**

**BETWEEN**

**BENARD KAMAU NYUTU ..... 1<sup>ST</sup> APPELLANT  
PATRICK MUREMWA NYUTU ..... 2<sup>ND</sup> APPELLANT  
HANNAH WANJA NYUTU ..... 3<sup>RD</sup> APPELLANT  
JOYCE WAHU NYUTU ..... 4<sup>TH</sup> APPELLANT**

**AND**

**MARY MUMBI NYUTU ..... 1<sup>ST</sup> RESPONDENT  
JOSEPH NJUGUNA NYUTU ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. This judgment relates to the memorandum of appeal dated 20<sup>th</sup> May, 2022. It is an appeal from the ruling delivered on 28<sup>th</sup> April, 2022 by Honourable Mr. W. P. Muholi, Principal Magistrate, in Githunguri Senior Principal Magistrate’s Court Case No 48 of 2010: In the matter of the Estate of Evans Nyutu Muremwa (Deceased). It is based on the grounds that:-
  - i. The honourable learned magistrate erred in law and in fact by dismissing the appellants’ protest against the weight of the evidence.
  - ii. The honourable learned magistrate erred in law and fact by failing to take into account the appellant’s contention that they never consented to the mode of distribution of Land Parcel No Githunguri/ Nyaga/ T. 348 by the court.



- iii. The honourable learned magistrate erred in law and fact by failing to take into account the fact that the appellants' signatures were forged in the consent to the mode of distribution of the deceased's estate and/ or properly pronounce himself on the issue of forged signatures.
- iv. The honourable learned magistrate erred in law and fact by failing to consider and appreciate the fact that the appellants were never involved or were they parties in the protest by the 2<sup>nd</sup> respondent's protest against the 1<sup>st</sup> respondent's summons for rectification of the grant.
- v. The honourable learned magistrate erred in law and fact by holding that the court had already pronounced itself on the issue of the protest in which the appellants were not party to.
- vi. The honourable learned magistrate erred in law and fact in disregarding the appellants' submissions on the issue of res judicata and applying wrong principles of law, that is to say, by failing to consider and take into account the facts presented to the court.

The appellants seek for orders that:

- i. This appeal be allowed.
  - ii. The ruling made by the honourable court dismissing the appellants' protest on 28<sup>th</sup> April, 2022 be set aside and/ or varied.
  - iii. This honourable court do issue its own orders in respect of the facts and evidence in the record of the lower court.
  - iv. Costs of this appeal be awarded to the appellants.
2. The appeal proceeded through written submissions: the appellant's submissions are dated 15<sup>th</sup> July, 2024 and the first respondent's submissions are dated 17<sup>th</sup> May 2024.

**Background:**

3. The respondents are the administrators of the deceased's estate duly appointed pursuant to the grant of letters of administration issued on 12<sup>th</sup> July 2011. The first respondent is the son, and the second respondent is the widow of the deceased. The appellants are the sons and daughters of the deceased. They are all listed as dependants of the deceased in the petition for letters of administration dated 31<sup>st</sup> May, 2010.
4. From the typed proceedings, the court on 22<sup>nd</sup> March 2012, granted leave to the petitioner to amend the schedule on the property to include L. R. Githunguri/ Nyanga/ T. 438, which was inadvertently excluded from the schedule of properties. The application for confirmation of grant dated 30<sup>th</sup> January 2012 was subsequently allowed as prayed on 12<sup>th</sup> April 2012, and further, the property schedule was amended as per paragraph 6 of the further affidavit filed by Mary Mumbi Nyutu, the 2<sup>nd</sup> Respondent.
5. Summons for rectification of grant dated 20<sup>th</sup> February 2013 were thereafter filed by Mary Mumbi Nyutu seeking equal distribution of the deceased's estate amongst all the beneficiaries and heard by way of viva voce evidence. Joseph Njuguna Nyutu was the only beneficiary opposed to this application, and he filed an affidavit of protest dated 18<sup>th</sup> March 2013. His main contention was that he opposed the re-subdivision of the deceased's estate because the deceased had allocated him a portion in 1992 before his death, and he had already constructed on the portion allocated to him.



6. On 26<sup>th</sup> June 2013, the court delivered a ruling on the application for rectification of the grant to wit,
- “...The *Law of Succession Act* does not allow rectification as errors on mode of distribution of deceased’s estate in confirmed grant. The errors correctable vide Section 24 of the Act have been stated. In this ruling, the findings of this court are that the summons for rectification of grant dated 20<sup>th</sup> February, 2013 is not merited. The grounds adduced therein are not supported by the *Law of Succession Act* and therefore I will dismiss it with costs. The certificate of confirmation of grant dated 17<sup>th</sup> April, 2012 shall remain as it is. Orders accordingly.”
7. The affidavit of protest dated 2<sup>nd</sup> March, 2021 and filed by all the beneficiaries except Joseph Njuguna Nyutu was thereafter filed. Its ruling, delivered on 28<sup>th</sup> April, 2022, is the subject of the instant appeal.

#### **Analysis and Determination:**

8. I have carefully considered the grounds of appeal, the record of appeal, and the rival submissions by the parties before this court.
9. In *Mursal & another v Manese (suing as the legal administrator of Dalphine Kanini Manesa)* (Civil Appeal E20 of 2021) [2022] KEHC 282 (KLR) (6 April 2022) (Judgment) the court stated as follows:
- “2. A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in *Selle & another v Associated Motor Boat Co. Ltd. & others* and in *Peters v Sunday Post Limited*.”
10. The impugned ruling decided as follows:
- “... It is therefore my finding after careful analysis that the affidavit of protest is not merited for two reasons that it has been filed late in the day and secondly, that the court has already pronounced itself for the same. It is therefore dismissed. Each party to bear their own cost.”
11. The issues for determination are;
- Whether the affidavit of protest was properly before the court
  - Whether the issue raised in the affidavit of protest is res-judicata
12. The parties herein have been embroiled in a succession dispute that has lasted about 14 years. The back and forth has been around distribution. There is a valid grant and certificate of confirmation of grant that has never been revoked or annulled. The ruling of 26<sup>th</sup> June 2013 dismissed the application on the ground that the orders sought in the summons for rectification of grant could not be obtained through rectification. The ruling of 28<sup>th</sup> April 2022 also found that the affidavit of protest could not be entertained as it was related to distribution, yet coming in late in the day after the avenue to engage it has been closed via the certificate of confirmation of grant on record.
13. The *Law of Succession Act* is a specialized piece of legislation complete with its own rules of procedure. The Act regulates all proceedings and provides for procedures to be followed. The process and



procedures in probate and administration cases are crucial because of the expected outcomes of each stage. Once set in motion, the petitioners/administrators are expected to involve all interested parties, and they, in return, are expected to participate and be keen to ensure that their interests are well taken care of and that there is no miscarriage of justice.

14. Under Rule 41 of the *Probate and Administration Rules*, written protests are heard during the hearing of the application for confirmation. The appellants filed their affidavit of protest dated 2<sup>nd</sup> March 2021 against the already confirmed grant. I agree with the trial court's findings that the Affidavit of Protest was not lodged within the period stipulated in the Probate and Administration Rules.
15. When the summons dated 20<sup>th</sup> February 2013 came up in court on 18<sup>th</sup> March 2013, the appellants and the respondents were all present and the subject matter still revolved around the parcel Githunguri/Nyaga/T.438. The Grant had already been confirmed then, and the parcel had been included in the schedule. Whereas the appellants were not part of the witnesses who testified, they are recorded as present and expected, thus, they understood the proceedings and may have opted to have their interests taken care of by one of the parties to the application. They supported the 2<sup>nd</sup> respondent's application, which was disallowed. The file was inactive until the protest was filed in 2021. The delay is not explained.
16. In my view, the introduction of the protest was one more way of bringing the issue back to court through a new process. Whereas concluded probate cases can be reactivated, parties should strive to abide by the provisions of the *Law of Succession Act* and the Probate and Administration Rules. It is best to address the issues in the required procedure and expeditiously without prolonged litigation.
17. The rulings of 26 June, 2013 and 28 April, 2022 both found that the application and protest, respectively, had been brought under the wrong provisions of the law and that the orders sought could not be obtained from the pleadings as presented. This was in order.
18. As the issue raised by the appellants in the protest dated 2<sup>nd</sup> March 2021 is that the administrators/respondents distributed an additional property (Githunguri/Nyaga/T.438) without their knowledge. The additional property was apportioned to the administrators only, in the ratio contained in the amended Certificate of Confirmation of Grant dated 7<sup>th</sup> October 2014. If the grounds advanced in the protest are that the grant was obtained fraudulently by making a false statement or concealing something material to the case or by means of an untrue allegation of a fact, then they should have moved the court pursuant to Section 76 of the *Law of Succession Act*.
19. The upshot of the above is that the instant appeal is not merited and is dismissed.
20. Each party will bear its own costs.
21. It is so ordered.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 22<sup>ND</sup> DAY OF JULY, 2024.**

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**C. KENDAGOR**

**JUDGE**

Judgment delivered through the Microsoft Teams Online Platform.

In the presence of:

Court Assistant – Hellen

Advocate for Appellants – Mitiambo (Present)



Advocate for Respondents –Ikuu (Present)

