



**In re Estate of Monicah Mirae (Deceased) (Family Appeal
24 of 2023) [2024] KEHC 8831 (KLR) (11 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8831 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
FAMILY APPEAL 24 OF 2023
FN MUCHEMI, J
JULY 11, 2024
IN THE MATTER OF THE ESTATE OF MONICAH MIRAE (DECEASED)**

BETWEEN

STEPHEN KIMANI KAMAU 1ST APPELLANT

STEPHEN KIMANI KAMAU 2ND APPELLANT

AND

GABRIEL MBURU KAMAU 1ST RESPONDENT

AUGUSTINE NJOROGE KAMAU 2ND RESPONDENT

*(Being an Appeal from the Ruling and Order of Hon. M. W. Kurumbu (SRM)
delivered on 7th December 2022 in Thika CM Succession Cause No. 270 of 2004)*

JUDGMENT

Brief facts

1. This appeal arises from the ruling of Thika Senior Resident Magistrate in CM Succession Cause No. 270 of 2004 whereas the court stayed its own orders issued on 3rd August 2022 authorising the appellant and the 2nd respondent to proceed with the implementation of the grant pending release of the 1st respondent from prison. The impugned orders were made in the ruling delivered on 7th December 2022.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 2 grounds of appeal summarized as follows:-
 - a. The learned trial magistrate erred in law and in fact by staying the orders issued on 3rd August 2022 suo moto and the confirmed grant issued on 5th October 2005.



3. Parties put in written submissions to dispose of the appeal.

Appellant's Submissions

4. The appellant submits that he and the respondents are children of the deceased and also administrators of her estate. The appellant further submits that on 5th October 2005, the grant in Succession Cause No. 270 of 2004 was confirmed and the estate was distributed equally amongst them. The appellant argues that they have distributed the said estate save for Plot No.3 Gatukuyu Market and Chania/Makwa/789, which measures 10.3 acres and is meant to be shared equally amongst the three parties. Despite the certificate of confirmation of grant, the appellant states that they have never completed the distribution of the estate for 19 years and therefore the beneficiaries continue to be denied their rightful legacies.
5. According to the appellant, the distribution of the estate has been frustrated by the 1st respondent whose intention is to make sure he and the 2nd respondent do not enjoy the legacies bequeathed to them by their late mother. The appellant argues that the 1st respondent has frustrated the process by filing Summons seeking to amend the certificate of confirmation of grant to their detriment. The summons were however dismissed by the trial court and when the 1st respondent appealed to the High Court vide Kiambu Civil Appeal No. 66 of 2018, the court dismissed the same on 29th May 2020.
6. Upon dismissal of the appeal, the appellant states that he moved the court vide summons dated 16th August 2021 seeking the court's intervention in signing the applications for the land consent board and transfer forms necessary to effect transfer of the parties' shares in LR No. Chania/Makwa/789 as the 1st respondent had refused to execute the necessary forms. The appellant submits that on 3rd August 2022, the trial court allowed the application paving way for the parties to embark on subdivision and processing of individual titles.
7. The appellant argues that on 7th December 2022, the trial court stayed its own orders of 3rd August 2022 which had the effect of stopping the execution of the grant.
8. The appellant submits that the grant was confirmed on 5th October 2005 and nineteen (19) years later, the distribution of the estate is still pending owing to the actions of the 1st respondent. The appellant further argues that the trial court erred by staying the execution of the orders made on 3rd August 2022 without involving the parties. It is argued that it is not in order for a court to determine matters suo moto without giving the affected parties a chance to be heard on the issue. Where a party has a right to be heard, that right cannot be taken away by the mere fact that the Court considers that the said party's contribution is unlikely to affect the decision. To support his arguments, the appellant relies on the case of Accounting Officer Kenya Ports Authority (ex parte) vs Public Procurement Administrative Review Board & 3 Others (interested parties) [2019] eKLR and submits that the action suo moto by the court offends the rules of natural justice.
9. The appellant urges the court to interfere with the trial court's discretion in its ruling delivered on 7th December 2022 on the premise that the appellant was condemned unheard. It is further argued that there was no application before the court for varying, discharging or setting aside the orders dated 3rd August 2022. Neither was there any application on record seeking for orders of stay of implementation of the grant. Further, the appellant argues that the trial magistrate misapprehended the facts as the proceedings leading to the ruling of 7th December 2022 whereas there was no objection to the implementation of the certificate of confirmation of grant. For that reason, therefore the learned magistrate misdirected herself in staying the orders of 3rd August 2022 and staying the implementation of the certificate of confirmation of grant. Additionally, the learned magistrate took account of



considerations which should not have been taken into account by taking the evidence of the 1st respondent's wife one Scholastica Mumbi whereas she was not a party to the proceedings.

10. The appellant further argues that the learned magistrate failed to take into account that the application dated 16th August 2021 which was allowed on 3rd August 2022 had been served upon the 1st respondent who did not oppose it and he was not in jail then. The application sought for the Executive Officer of the court to execute the applications for the land consent board and transfer forms necessary to effect the transfer of the parties shares of LR No. Chania/Makwa/789 as per the certificate of confirmation of grant. The appellant states that the honourable magistrate was aware of the 1st respondent's circumstances and she was aware that the forms needed execution. Additionally, the learned magistrate must also have satisfied herself that the forms provided the 1st respondent an equal share as per the certificate of confirmation of grant.

The 1st Respondent's Submissions

11. The 1st respondent submits that he was opposing the summons on the basis that Plot No. 3 Gatukuyu Market did not wholly belong to the deceased and further it has never been registered in the name of the deceased. Thus, the 1st respondent states that it was an error for him and his brothers to have included it as part of the estate of the deceased. The 1st respondent submits that the said property is registered in the name of Michael Kamau, their deceased father. Further, Succession Cause No. 6 of 1980 the Estate of Michael Kamau Nguri, has not been finalized as the file was misplaced or lost for years.
12. The 1st respondent submits that he filed Miscellaneous Application No. 1 of 2018 seeking reconstruction of the file which orders were granted on 24th May 2018 and certificate of succession was certified. The certificate of succession indicated that Plot No. 3 Gatukuyu market was distributed to his mother and brothers namely Monica Mirai, Joseph Nguri (deceased), Augustin Njoroge (the 2nd respondent), Stephen Kimani (appellant), Gabriel Mburu (the 1st respondent) and Ambrose Warui (deceased). As such, the grant for confirmation dated 5th October 2005 is not necessary and the appellant is aware of all the facts as stated.
13. The 1st respondent argues that the court did not stay the implementation of the orders dated 3rd August 2022 on its own motion and neither did it make an error when it stayed the execution of the said orders. Further, the 1st respondent argues that the learned magistrate did not err when she took into account his wife's considerations as the appellant evicted her from the suit property the same date the orders were issued.
14. The 1st respondent relies on Section 79G of the Civil Procedure Act and the case of Muchanga Investments Limited vs Safaris Unlimited (Africa) Ltd & 2 Others (2009) eKLR and submits that the instant appeal is a waste of judicial time and ought to be dismissed. The 1st respondent further submits that despite the stay orders by the trial court on 7th December 2022, the appellant went ahead and demolished the 1st respondent's two story building, destroyed his irrigation project by uprooting intake, delivery pipes and dismantle intake and delivery pipes and tank, uprooted his banana trees, cassava, blue gum trees and yams and evicted his wife from portion D of the quarry and excavating stones from the same portion which is their mother's inheritance.

Issue for determination

15. The main issue for determination is whether the orders issued by the court on 3rd August 2022 were erroneous and whether they ought to be set aside.



The Law

16. 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.”

17. 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.

18. From the above cases, the appropriate standard of review to be established can be stated in three complimentary 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.

19. The deceased died on 15th October 1999 and grant of letters of administration were issued to the parties herein on 29th December 2004 and confirmed on 5th October 2005. The deceased’s estate comprised of LR. No. Chania/Makwa/789, Ngenda/Mangu/586 and Plot No. 3 Gatukuyu Market which parcels were to be shared each equally amongst the three brothers. LR. No. Chania/Makwa/789 was initially owned by the deceased and the three brothers through Succession No. 6 of 1980 which was in respect to the parties’ father Michael Kamau Nguri. On perusal of the court record, it is evident that after distribution of the estate there has been a contention on the actual distribution of LR. No. Chania/Makwa/789 with the 1st respondent wanting the parcel of land to be distributed according to a sketch map drawn by Geo-spatial Systems Ltd. According to the 1st respondent only 25% of LR. No. Chania/Makwa/789 belonged to the deceased and was available for distribution. The trial court rendered its ruling on 31st May 2018 after conducting a site visit and dismissed the application. The learned trial magistrate observed that the entire parcel of land was occupied by the three brothers and there was no separate portion for the deceased. Additionally, the deceased was a joint tenant of the said land parcel and when she died, the beneficiaries registered her death by filing her death certificate and a certificate of title issued in their names.

20. The 1st respondent thereafter placed a caution on the said land and the appellant filed an application dated 3rd September 2020 seeking to have the caution removed. On 22nd April 2021, the trial court



rendered its decision and ordered the removal of the caution and that the said property be sub divided and distributed in line with the certificate of confirmation dated 5th October 2005. The appellant and the 2nd respondent then sought to have the Executive Officer of Thika Law Courts to execute the transmission forms on behalf of the 1st respondent and effect the transfer of the suit property as the 1st respondent had declined to execute the documents. On 3rd August 2022, the court allowed the application. By that time, the 1st respondent was in prison and although several production orders were issued, he did not respond.

21. From the record, it is evident that the grant confirmed in 2005 for distribution of the estate has never been executed nineteen (19) years down the line. Although the parties agreed that the properties be shared equally, the 1st respondent argues that only 25% of LR. No. Chania/Makwa/789 ought to be shared equally amongst them. From the foregoing, that issue was resolved by the court when it conducted a site visit and observed that all the three brothers occupied the whole parcel of the said land. On perusal of the record, it is noted that the 1st respondent has been in prison since 30th November 2021 and his sentence of four years is almost fully served. However, it is on record that after the confirmation of the grant on 5/10/2005 in Kiambu HCCA No. 66 of 2018 the 1st respondent filed an appeal seeking for orders of rectification of grant. Judgment in that appeal was delivered on 29/05/2020 dismissing the appeal for lack of merit. Thereafter, the 1st respondent refused to execute his part in the grant until Hon. Kurumbu gave an order authorizing the administrators and other beneficiaries to implement the grant execute excluding the 1st respondent.
22. It is against the said background summarized herein that the wife of the 1st respondent approached the court that had given the orders for execution of the grant to put on hold the said orders pending the 1st respondent to be released from prison for the reason that their family would be disadvantaged the grant was implemented in the absence of the 1st respondent. The magistrate granted the orders suo moto in that the other beneficiaries were not hard.
23. Article 50 of the Constitution provides that every person in any civil or criminal proceedings has a right to be heard before a court of law. The appellant and the 2nd respondent had a right to be heard on the issue raised by the respondent's wife. I have perused the sentiments expressed by the honourable magistrate and noted that she acted on the premise of an attempt to protect the 1st respondent's rights to be present during the intended survey and subdivision of the parcels of land to facilitate the beneficiaries to have their shares be transmitted to them. The magistrate act was that of mercy for the 1st respondent's wife who was crying in court and whose husband was in prison.
24. The grant distributed the assets of the deceased equally among the three sons of the deceased who include the appellant and the respondents. This being the status of the distribution, the three children were treated equally in accordance with the law. Section 38 of the Law of Succession Act was applied by the court. The 1st respondent sought for rectification which was refused for lack of merit. In my considered view, the grant stands for no one appealed against it and it is not likely to change due to the fact that distribution was done in accordance with the law.
25. I come to the conclusion that the orders made by the honourable magistrate on 7th December 2022 were erroneous for non- compliance with Article 50 of the Constitution.
26. I find the appeal successful and hereby set aside the ruling of the Magistrate delivered on 7th December 2022.
27. Being a family matter, there shall be no order as to costs.
28. It is hereby so ordered.



JUDGMENT DELIVERED, DATED AND SIGNED AT THIKA THIS 11TH DAY OF JULY 2024.

F. MUCHEMI

JUDGE

