



REPUBLIC OF KENYA



**In re Estate of Josephine Watiri Mbogo (Deceased) (Succession Appeal
4 of 2018) [2024] KEHC 8157 (KLR) (9 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8157 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION APPEAL 4 OF 2018**

SM MOHOCHI, J

JULY 9, 2024

IN THE MATTER OF THE ESTATE OF JOSEPHINE WATIRI MBOGO (DECEASED)

BETWEEN

SAMUEL MWANGI MBOGO APPELLANT

AND

JOHN MWAURA MBOGO RESPONDENT

*(Being an Appeal from the Ruling of the Chief Magistrate's Court at Nakuru delivered
by Hon W. K Kitur in MC Succession Cause No. 128 of 2018 on 10th September, 2018)*

JUDGMENT

1. The deceased Josephine Watiri Mbogo died intestate on 19th June, 2007. Grant of Letters of administration intestate was issued to John Mwaura Mbogo, the Respondent, herein on 28th December, 2017.
2. The Appellant filed Summons for Revocation of Grant dated 11th March, 2018 and a further affidavit dated 20th June, 2018 on the grounds that consent was not sought, there was forgery of signature and that the Respondent left out other beneficiaries and did not list all the properties of the deceased. The Respondent filed a Replying Affidavit sworn on 26th March, 2018 and a Further Affidavit sworn on 30th May, 2018 denying any wrong doing and accused the Appellant of intermeddling.
3. He also stated that only Francis Koigi Mbogo could question the signature on the consent to making of Grant. He accused the Appellant of refusing to take part in sit downs to mediate to being charged in a Criminal Court for causing grievous harm to one of their brothers with a machete. The hearing proceeded orally.
4. The Appellant argued that the Respondent did not inform him when he Petitioned for letters of administration and only became aware when he was threatened with eviction on Plot No 106 Eburru



Settlement Scheme vide a limited grant. That he had leased out the land to third parties. That there was no beneficiary by the name of Samuel Mwaniki Mbogo and that his name was omitted from the list of beneficiaries and Consent form.

5. He also argued that the signature of Francis Koigi Mbogo was a forgery as his whereabouts had been unknown since 1993 and even the chief's letter dated 11th July, 2017 says he was deceased. The consent of the Appellant dated 17th July, 2017 was a forgery. The Appellant also claimed that the family of Francis Koigi had been left out in the process.
6. Counsel for the Respondent disowned Form No. 38 filed by his client on 17th July, 2017 in Court and claimed that not all beneficiaries had signed the consent. It was argued that the Appellant was listed as a beneficiary save that there was a typing error of his name as Samuel Mwaniki Mbogo Instead of Samuel Mwangi Mbogo. That there was no ground for revocation and that all other beneficiaries had consented to him being a beneficiary.
7. The Respondent's counsel also argued that the Appellant had been intermeddling in the estate and declined to participate in the process.
8. The Court in its Ruling of 10th September, 2018 acknowledged that there were forgeries and that the law has no cure for matters of forgery. The Court however, opined that limited grant cannot be used to distribute the estate and that justice will be done to the estate if the matter is allowed to proceed and directed that:
 - a. A list of beneficiaries be filed a fresh in Court
 - b. A list of all properties of the deceased be filed in Court. Parties are free to file a separate list if they cannot agree on a joint list.
 - c. Succession cause to proceed for full hearing in distribution of the properties of the deceased.
9. Dissatisfied with the decision, the Appellant preferred this appeal vide Memorandum of Appeal dated 9th October, 2018 on the following grounds:-
 - a. That the Learned Trial Magistrate erred in law and in fact in finding that the Succession process should proceed for full hearing even after finding fault on the part of the Respondent;
 - b. That the Learned Magistrate erred in law and in fact in finding that the succession process should proceed for full hearing even after finding that the consents were forged;
 - c. That the Learned Magistrate erred in law and in fact in finding that the succession process should proceed to full hearing even after finding that the Respondent had forged the signature and the name of one of the beneficiaries;
 - d. That the Learned Magistrate erred in law and in fact in allowing an illegality to prevail in the circumstances;
 - e. That the Learned Magistrate erred in law and in fact in failing to revoke the limited grant and allowing its continuance despite the criminal illegalities painted all over it;
 - f. That the learned Magistrate erred in law and in fact in failing to revoke the limited grant even after realization that the grant is marred with irregularities and disinheritance of some beneficiaries;



- g. That the Learned Magistrate erred in law and in fact I adjudging this suit in favour of the Respondent in the absence of enough evidence to prove their claim on the balance of probabilities.
10. The Appellant prayed that the judgement of the Court be quashed and the Appeal be allowed with Costs.
11. The Appeal was canvassed by way of written submissions. The Respondent filed his submissions on 3rd April, 2024 whereas the Appellant filed his written submissions on 30th April, 2024.

Appellant's Submissions

12. The Appellant submitted and reiterated the duty of the Court in a first appeal while relying on the case of *Selle and Another v Associated Motor Boat Company Limited and Others* [1968] EA 123 and [*Abok James A.J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advoates*](#) [1013] eLKR.
13. It was submitted that the Trial Court's failure to address the evidence of forgery and its consequences under the law was an error that ought to be intervened by the Court. That the process of acquiring the grant was flawed and continuation of the limited grant as is violates the principles of equity, fairness and justice under [*the Constitution*](#) and the [*Law of Succession Act*](#).

Respondent's Submissions

14. The Respondent on the other hand submitted on 2 issues. As to whether the appeal was merited, he submitted that it was not due to the fact that the Appellant declined to take part in the succession proceedings and further had a window to object to the issuance of the grant within the legal provisions but failed to. That the Appellant is current occupant of the beneficial estate which he intends to occupy unjustly.
15. It was also submitted that the grounds of appeal raised had already been dealt with by the Trial Court to conclusion. He made refence to the decision in *Mbogo and another vs Shah* [1968] EA 93 where the Court pronounced itself on when an Appellate Court can interfere with the discretion a of a Trial Court.
16. As regards the second issue, he submitted that the succession proceedings were lawful to wit the Petition included all the beneficiaries, everyone save of the Appellant attested to the consent and other documents and that there is only one parcel up for distribution and the Appellant only seeks to complicate the process. He relied on the case of [*Regina Nyambura Waitathu v Tarcisio Kagunda Waitathu & Others*](#) [2016] eKLR where the Court in dismissing the protest opined that Section 35 of the [*Law of Succession Act*](#) is in mandatory terms and envisages equal distribution and not equitable distribution.

Duty of the Court.

17. This Court as a first appellate Court has a duty to re-evaluate the evidence and infer its own conclusions while bearing in mind that it did not have the advantage of hearing the witnesses. This position was held in *Selle and Another v Associated Motor Boat Co. Limited and Others* (1968) EA 123 where the Court of Appeal stated inter alia that:

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanor of a



witness is inconsistent with the evidence generally...Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions...”

Analysis and Determination

18. The Court has carefully considered the grounds of appeal and the evidence adduced, the written submissions as well as the authorities relied on. I find that the sole issue for determination is whether the Appeal presents basis to overturn the ruling in Succession Cause No. 128 of 2018 dated 10th September, 2018?
19. The Proceedings of the 9th July 2018 whereby the Appellant raised all manner of allegations and lamentation with the Court reserving ruling for the 13th August 2018.
20. The Court delivered the Ruling giving directions and clarity as to how the Appellant’s Application dated 13th March 2018 shall be heard and disposed-off with.
21. The Appellant elected to file an Appeal against a decision by the Trial Magistrate that was administrative and in exercise of his discretion.
22. The Appellant has failed to persuade the Court that, the Trial Court erred in law and in fact in finding that the Succession process should proceed for full hearing even after finding fault on the part of the Respondent.
23. The Appellant has failed to persuade the Court that the Trial Court erred in law and in fact, in finding that, the succession process should proceed for full hearing even after finding that the consents were forged.
24. The Appellant has failed to persuade the Court that the Trial Court erred in law and in fact, in finding that the succession process should proceed to full hearing even after finding that the Respondent had forged the signature and the name of one of the beneficiaries;
25. The Appellant has failed to persuade the Court that the trial Court erred in law and in fact, in allowing an illegality to prevail in the circumstances;
26. The Appellant has failed to persuade the Court that the trial Court erred in law and in fact in failing to revoke the limited grant and allowing its continuance despite the criminal illegalities painted all over it;
27. That the learned Magistrate erred in law and in fact in failing to revoke the limited grant even after realization that the grant is marred with irregularities and disinheritance of some beneficiaries;
28. The Appellant has failed to persuade the Court that the trial Court erred in law and in fact, in adjudging this suit in favour of the Respondent in the absence of enough evidence to prove their claim on the balance of probabilities.
29. All in all the Appeal has not laid out any legal basis attacking the impugned order and I accordingly find the same to be without merit.
30. The Appeal is accordingly dismissed with costs to the Respondent.
31. This Court Equally directs that Nakuru Chief Magistrate’s Court Succession Cause No. 128 of 2018 forthwith be mentioned before the Trial Court to proceed on priority basis.

It is so Ordered.

DATED, SIGNED AND DELIVERED AT NAKURU ON THIS 9TH DAY OF JULY 2024.

MOHOCHI S.M.



JUDGE.

