



REPUBLIC OF KENYA



**Mungai v Mungai & 2 others; Munina (Interested Party) (Civil Appeal
117 of 2016) [2024] KEHC 8631 (KLR) (12 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8631 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL 117 OF 2016**

**AC BETT, J
JULY 12, 2024**

BETWEEN

MIRIAM NYAMBURA MUNGAI APPELLANT

AND

WILSON NJUGUNA MUNGAI 1ST RESPONDENT

HENRY NGUGI MUNGAI 2ND RESPONDENT

MARY NJERI MAINA 3RD RESPONDENT

AND

PETER MAINA MUNINA INTERESTED PARTY

RULING

1. By a ruling dated 29th January 2020, the Honourable Justice D.S. Majanja directed that Peter Maina Munina, the interested party be joined to this appeal as a respondent and be served with the court process. Pursuant to the said order, the appellant/respondent filed a chamber summons under Rule 73 of the *Probate and Administration Rules* seeking orders that Peter Maina Munina, the interested party/applicant be enjoined as a respondent to this appeal. On 18th May 2021, the appellant's application was allowed.
2. On 12/4/2023, the interested party/applicant who should now be referred to as the 4th respondent/applicant filed a chamber summons under Section 78, 1A, 1B and 3A of *Civil Procedure Act* seeking leave to file additional evidence in support of his case. The grounds for his application which is supported by an affidavit are that he is a purchaser for value of one of the properties of the deceased and although he was named as a beneficiary of all that parcel of land known as LR No Makuyu/Kimorori Block 111/344, he was never a party in the succession case in the lower court and was never accorded the opportunity to be heard. According to the applicant, after transmission, he subdivided the subject



- property and transferred the same to third parties. The applicant annexed three certified true copies of the register in proof of his assertion.
3. The appellant/respondent opposes the application. She filed a replying affidavit sworn on 22nd May 2023. She deponed that if indeed the applicant caused the transfer of the land to third parties, then the transfer is illegal, null and void as there was an order of stay pending appeal. She averred that as one of the administrators, she never signed any transfer documents to transfer the subject property to the applicant and that since the applicant was not a beneficiary of the estate of the deceased, he ought not to have been named as one of the heirs. It is the appellant's averment that any subsequent subdivision, sale or charge and dealings on the land to third parties should be nullified and cancelled. The Appellant urged this court not to allow the application to adduce additional evidence for being immaterial to the appeal as it does not address the real issue which is whether the Applicant is a beneficiary of the deceased herein.
 4. The 1st, 2nd and 3rd respondents did not file any documents in response to the application. They were privy and consented to the inclusion of the applicant as one of the beneficiaries of the estate of the deceased.
 5. The applicant's advocate submitted that it is imperative that the applicant be allowed to adduce additional evidence because he was not a party to the original suit and he therefore needs a chance to prove his case. It is his submissions that LR No Makuyu/kimorori Block 111/344 is no longer available for distribution because it has been subdivided and sold to third parties. He relies on the cases of *S Sharon Mwendu Ndol v Rabab Nyangima John And Another* [2022] eKLR and *Mohammed Abdi Mahamud v Ahmed Abdulabi Mohammed And 3 Others* [2018] eKLR where the Supreme Court set out the governing principles on allowing additional evidence inter alia as follows:-
 - a) The additional evidence must be directly relevant to the matter before the court and in the interest of justice.
 - b) It must be such that if given, it would influence or impact upon the result of the verdict, although it need not be decisive.
 - c) It is shown that it could not have been attained with reasonable diligence for use at the trial and was not within the knowledge of or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence."
 6. The appellant's submissions are that the applicant is not a dependent within the meaning of Section 29 of the *Law of Succession Act* and therefore the subject property ought not to have been awarded to him. It is their submission that Section 78(d) of the *Civil Procedure Act* is only applicable where an applicant was a party in the subordinate court's proceedings. The appellant further submits that she had never signed any transfer forms in respect to the subject property and in any event, any subdivision and transfer was made when the proceedings herein were still on and there were orders of stay issued.
 7. Rule 73 of the *Probate and Administration Rules*, provides as follows: -

"Nothing in these rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the court."
 8. It is not in dispute that the applicant was never a party in the proceedings in the subordinate court. It is not in dispute that although he is not a dependent of the deceased, he was apportioned LR No



Makuyu/Kimorori Block 111/344 in his capacity as a purchaser of the subject property. I have perused the lower court file, the Record of Appeal and the parties' submissions. It is apparent it is the appellant alone who is contesting the decision of the trial magistrate to allow the summons for confirmation of grant that included the applicant as a beneficiary as purchaser to a portion of the estate of the deceased to the applicant.

9. The appellant filed an application for stay of execution of the certificate of confirmation of grant pending hearing of the appeal and orders of stay were granted on 24/7/2015. However, there is nothing in the court file to confirm whether the said order of stay was extracted or served upon the applicant. The appellant claims not to have signed the transmission forms but then she was not the sole administrator. Her contention can be determined once the hearing of the appeal commences.

10. The appellant's second ground of appeal is: -

“That the learned magistrate misdirected himself in law and in fact in awarding Land Parcel Number Makuyu/Kimorori Block 111/344 to a stranger to the estate one Peter Maina Munina.”

11. In view of the said ground of appeal, one would have expected Peter Maina Munina to be enjoined to the appeal. However, the appellant had no intention as is evident from her conduct, to have the applicant enjoined as a party to the proceedings even though she expected the court to make adverse orders against him.

12. In *Elton Homes v Davis And Others* [2019] eKLR, the court recognized that an intended interested party had a right to be heard before any order depriving him of his property can be made against him and stated that:

“...the *Constitution of Kenya* is very clear on the right to protection of one's property and the said property cannot be arbitrary (*sic*) taken away from such an owner without being heard or accorded an opportunity to ventilate his case”

13. Pursuant to a certificate of confirmation of grant issued by the trial court on 18th March 2015, the applicant became the lawful owner of all that parcel of land comprised in title number Makuyu/Kimorori Block 111/344. His right to the said land cannot be taken away without him being accorded an opportunity to be heard. By bringing this application for leave to adduce additional evidence, the applicant is knocking at the door of justice and praying that he be heard. He was never afforded an opportunity to be heard in the subordinate court. But even if he had been heard, justice demands that he be heard in this appeal. Applying the principles set out by the Supreme Court in the *Mohamed Abdi Mahamud case* (*supra*), I find that the additional evidence that the applicant seeks to adduce is directly relevant to the matter before court. I also find that the additional evidence will be in the interest of justice and would influence or impact the result of the verdict. The evidence is credible in that it comprises extracts from the lands register and will assist the court to reach a fair determination of the appeal.

14. I find the application to adduce additional evidence is merited and allow it with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 12TH DAY OF JULY 2024.

A. C. BETT
JUDGE



In the presence of:-

Ms. Wainaina holding brief for Mr. Ngigi for the appellant

No appearance for the respondents

Mr. Ochwa for the interested party

Court Assistant: Polycap Mukabwa

