



**Changilwa v Ambasi (Succession Appeal E001 of 2021)  
[2024] KEHC 11377 (KLR) (24 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11377 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
SUCCESSION APPEAL E001 OF 2021  
JN KAMAU, J  
SEPTEMBER 24, 2024**

**BETWEEN**

**TOM MADAHANA CHANGILWA ..... APPELLANT**

**AND**

**NELSON JOHN AMBASI ..... RESPONDENT**

*(Being an appeal from the Ruling of Hon M. M. Gituma (RM) delivered at Vihiga  
in Principal Magistrate's Court Succession Cause No 64 of 2013 on 7th July 2021)*

**JUDGMENT**

**Introduction**

1. In her decision of 7<sup>th</sup> July 2021, the Learned Trial Magistrate, Hon M. M. Gituma, Resident Magistrate, dismissed the Appellant's Protest dated 11<sup>th</sup> November 2021 which was in opposition to Summons for Confirmation of Grant dated 29<sup>th</sup> March 2021.
2. Being aggrieved by the said decision, on 28<sup>th</sup> July 2021, the Appellant filed a Memorandum of Appeal of even date. He relied on nine (9) grounds of appeal.
3. His Written Submissions were dated 6<sup>th</sup> December 2023 and filed on 4<sup>th</sup> March 2024. The Respondent did not file any Written Submissions. The Judgment herein is therefore based on the said Appellant's Written Submissions only.

**Legal Analysis**

4. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.



5. This was aptly stated in the case of *Selle & Another v Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.
6. Having looked at the Grounds of Appeal and the respective parties' Written Submissions, it appeared to this court that the nine (9) Grounds of Appeal were all related and the only issue that had been placed before it for determination was whether or not the Appellant was a creditor of the estate of the deceased.
7. The Appellant submitted that the estate of Lushiaka Lwangasi (hereinafter referred to as the "deceased") was survived by Jackson Miliza (deceased), Meshak Kidondo (deceased), Philip Chavera (deceased), Florence Kasoha (daughter), Reba Lukaliza (deceased) and Fanis Musimbi (daughter) who shared equally the parcel of land N/Maragoli/Kedoli/168, the only asset left behind by the deceased.
8. He pointed out that prior to their demise Philip Chavera and Jackson Miliza, sold him their respective portions to get financial resources to enable them conduct a traditional ceremony known as "Lovego" for the deceased father as well as to initiate the final steps of succession and final distribution as required by law.
9. He asserted that as at the time the succession process begun, all the deceased's sons had died leaving his daughters. He averred that they felt that it was more appropriate for him to initiate the said succession process as he had the bigger share of the estate. He denied having been an intermeddler as held by the Trial Court.
10. He further contended that the administrators (sic) being residents of the area and having known the law, found it convenient to grace on the transactions in order for the surviving family members to go through the necessary procedures.
11. He invoked Article 22 (3) of *the Constitution* and submitted that the Trial Court did not factor in the issues that faced the estate being disposed off before commencement of the succession process. He urged the court to set aside the Trial Court's Ruling that found him to have been an intermeddler in the deceased's estate to pave way for the administration of the deceased's estate.
12. Notably, the Appellant was an Objector at the Succession Cause in the lower court. It was his evidence that on 7<sup>th</sup> January 2013, he purchased a portion of land parcel No Kakamega/Kedoli/168 (hereinafter referred to as the "subject property") from Philip Chavera Mwangasi at a consideration of Kshs 125,000/= and that later on 30<sup>th</sup> March (sic) he purchased an additional portion of the subject land Kshs 300,000/=. He stated that he further purchased an additional portion of the subject land at a consideration of 70,000/= on 25<sup>th</sup> November (sic).
13. He further stated that on 15<sup>th</sup> September 2017, he purchased the remainder of the subject land from the Respondent who had allegedly bought it earlier from the deceased's children at a consideration of 800,000/=. It was his case that he had bought the entire subject land of the deceased's estate and only him should be entitled to it. He however, did not adduce any Sale Agreement in proof of the above testimony.
14. He filed three (3) witness statements in which the witnesses stated that they witnessed the sales made between the late Philip Chivera, the late Jackson Miliza and himself.



15. On his part, the Respondent's evidence was that he was aware that Philip Chivera (deceased) had sold a portion of the inheritance to the Objector before the succession cause commenced. He stated that he had also sold a portion of the subject land to the Objector in the year 2017. However, he denied the Appellant's allegation that Jackson Miliza had sold a portion of the subject land to the objector. It was his case that the Appellant could not lay claim to the whole deceased's estate to the detriment of the beneficiaries.
16. From the perusal of the record herein, it was clear that the Appellant was not one of the heirs or survivors of the deceased. His interests in the estate of the deceased herein arose from a purported sale agreement between him and the sons to the deceased. As such, he averred that his interest is that of a creditor.
17. A creditor generally is a person to whom a debt is owing by another person, called the "debtor." It means one who has a legal right to demand and recover from another a sum of money on any account whatever.
18. It is settled principle of law that he who alleges must prove. Although the Appellant claimed that he had bought the entire subject land which was the only estate of the deceased, his evidence was not watertight enough to prove his allegations. He did not adduce evidence of the partial sales that led to the purchase of the entire estate. He did not adduce any Sale Agreement, even though the Respondent had agreed with part of his impugned sales.
19. Be that as it may, he had allegedly acquired the alleged interests from a survivor of the deceased and after the demise of the deceased since the deceased died in 1995 and the said sales allegedly took place in 2013 and 2017. The Respondent was clear in his evidence that the alleged sales were done before the commencement of the succession cause.
20. As the deceased sons had no capacity to sell the said portions of the subject land to the Appellant, their actions amounted to intermeddling. It is clearly provided in law that a person who sells estate assets which do not vest in him would be an intermeddler in terms of Section 45 of the Law of Succession Act, as the assets of the estate would not have vested in him. Intermeddling, under section 45(1), amounts to criminality, and an interest acquired in furtherance of a criminal enterprise cannot possibly confer a valid title. That has to be read, however, together with Section 82 of the Act, which provides that immovable property, such as land, cannot be sold before confirmation of grant.
21. Notably, as at the time of the said sale transactions, the said Philip Chivera and Jackson Miliza (both deceased) and the Respondent herein did not have the capacity to sell the subject land. The Appellant did not demonstrate that they had obtained a confirmed grant of letters of administration intestate issued to them to enable them sell the deceased's subject property.
22. That being the case, the Appellant could not be said to be a creditor of the deceased's estate. His interest could only be against the estates of the said beneficiaries.
23. Turning to the issue of locus standi, Section 76 of the Law of Succession Act Cap 160 (Laws of Kenya) provides that:-

"A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party (emphasis court) or of its own motion..."
24. From the evidence of record, the Respondent admitted that the Appellant bought portions of the subject land from the deceased's estate. He could be treated as an interested party for purposes of



Section 76 of the Law of Succession Act. He was, therefore, within his right to protest. Whether his case had merit or not was a different issue.

25. Having said so, this court was not persuaded to find that the Trial Court erred in ruling that the Appellant was an intermeddler as he had no right to initiate succession proceedings when he was not a beneficiary of the deceased as provided in Section 66 of the Law of Succession.
26. The said Section 66 of the Law of Succession states that:-

“When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference:-

- a. surviving spouse or spouses, with or without association of other beneficiaries;
- b. other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;
- c. the Public Trustee; and
- d. creditors:

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.”

27. The priority referred to in Part V hereinabove was set out in Section 39(1) of the Law of the Succession as follows:-

“Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority:-

- a. father; or if dead
- b. mother; or if dead
- c. brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none
- d. half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none
- e. the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.”

### **Disposition**

28. For the foregoing reasons, the upshot of this decision was that the Appellant’s Appeal dated and filed on 28<sup>th</sup> July 2021 was not merited and the same be and is hereby dismissed. As the Respondent had admitted that the Appellant had been sold land by the deceased’s beneficiaries, the court will deviate from the general principle that costs follow the event and direct that each party will bear its own costs of the Appeal herein.
29. It is so ordered.

**DATED AND DELIVERED AT VIHIGA THIS 24<sup>TH</sup> DAY OF SEPTEMBER 2024**



**J. KAMAU**  
**JUDGE**

