



**Lumunyenyi v Lumbasi (Family Appeal E008 of 2023)  
[2024] KEHC 12234 (KLR) (18 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 12234 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
FAMILY APPEAL E008 OF 2023  
S MBUNGI, J  
SEPTEMBER 18, 2024**

**BETWEEN**

**PIUS MASAI LUMUNYENYI ..... APPELLANT**

**AND**

**KEZIAH ELADIA LUMBASI ..... RESPONDENT**

*(Being an appeal from the judgment of the Honourable SPM. Z.J Nyakundi  
delivered on 28th March 2023 in Butali MCSUCC NO. 93 of 2019.)*

**JUDGMENT**

**Introduction**

1. This appeal arises from the judgment of Hon. SPM Z.J Nyakundi at Butali Law Courts delivered on the 28<sup>th</sup> day of March 2023 in a miscellaneous Succession No. 93 of 2019. The parties being Pius Masai Lumunyenyi v Kezia Eladia Lumbasi.
2. In his memorandum of appeal dated 25<sup>th</sup> April, 2023 the appellant herein being dissatisfied with the judgment raised thirteen (13) grounds of appeal as follows:-
  - i. That the learned Magistrate erred in law and fact by finding no value in the two death certificates containing discrepancies.
  - ii. That the learned Magistrate erred in law and fact by failing to appreciate and address himself to the fact that the names of the deceased persons in the death certificates presented were not the same.
  - iii. That the learned Magistrate erred by transferring the proof on a balance of probability to the appellant when in fact it was the respondent to prove kinship.



- iv. That the learned Magistrate erred in law and fact by failing to decide which of the two different death certificates was valid hence aborting the cause of justice.
  - v. That the learned Magistrate erred in law and fact by failing to consider that the age of the deceased person appearing in the two death certificates was different.
  - vi. That the learned Magistrate erred in law and fact by failing to consider that the proof of kinship required to be done by the respondent was not done, prior to the matter being determined.
  - vii. That the learned Magistrate erred in law and fact by failing to consider that there was no chief's letter detailing the respondent as a daughter of the deceased.
  - viii. That the learned Magistrate erred in law and fact by determining the matter without any DNA analysis to prove the respondent is a daughter of the deceased.
  - ix. That the learned Magistrate erred in law and fact by failing to consider that the ownership documents for the suit parcel of land known as South Kabras/Bushu/1401 as well as names of the death certificate bore the names Lumbasi Lumunyenyi as opposed to Joseph Lumbasi Lumunyenyi.
  - x. That the learned Magistrate failed in law and fact by failing to appreciate that Lumbasi Lumunyenyi and Joseph Lumbasi Lumunyenyi as opposed to Lumbasi Lumunyenyi and Joseph Lumbasi Lumunyenyi were totally different persons.
  - xi. That the learned Magistrate failed to follow the law and facts and elected to ignore the appellant's evidence.
  - xii. That the learned Magistrate did not consider the evidence on record.
  - xiii. That the learned Magistrate erred in law and fact by shifting this burden of proof, regarding to whether the respondent was a daughter of the deceased, to the appellant.
3. The court further directed parties to file their written submission. Both parties complied.

### **Appellants Submissions**

4. The appellant's in its submissions raised the following issues:-
- a. Whether the learned Magistrate dealt thoroughly on the issue of the death certificate(s).
  - b. Proof of kinship
  - c. Proof of paternity and DNA
  - d. Subject matter/estate for succession.
  - e. Consanguinity party identification.

### **Whether the learned Magistrate dealt thoroughly on the issue of the death certificate (s)**

5. The appellant stated that the court failed to consider serious discrepancies in the two death certificates produced on record that is the name of the deceased persons, the year of death and the age of the deceased at the time of death. It is therefore the appellant's submissions that these are two different persons which the court ought to have picked up.



## **kinship**

6. The appellant stated and referred to section 101 of the law of evidence which states that “...he who alleges the existence of a fact must prove so...” he stated that the respondent therefore had the burden to prove her relationship to the deceased mentioned in the death certificate produced by the appellant as Lumbasi Lumenyenyi on a balance of probability.
7. The appellant further referred to the [evidence Act](#), Chapter 80 of the laws of Kenya, Sections 107 -109 which provides that:-

“....107

- (1). whoever desires any court to give judgment as to the legal right and liability dependant on the existence of facts which he asserts must prove that those fact exist.
- (2) when a person is bound to prove the existence of any fact it is said that the burden of proof lies with that person....

108. The burden of proof in suit or proceeding lies on that person who would fail if no evidence at all were given on the other side.
109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that proof of that fact lie on any particular person...”

8. The appellant stated that the respondent did not lead sufficient evidence to demonstrate that she is a daughter to the deceased (Lumbasi Lumunyenyi)

## **Paternity and DNA**

9. The appellant stated that the of paternity and DNA was not well considered by the trial court in the judgment, he further stated that a birth certificate alone was not sufficient proof for paternity; he referred to section 3(4) of the [evidence act](#) (cap 80 laws of Kenya) which provides that:-“ ...a fact is not proved when it is neither proved nor disproved...”
10. The appellant further submitted that the appeal be allowed in line with the appellant’s mode of distribution.

## **Subject matter/estate in the succession cause**

11. The appellant stated that as the surviving sibling, he instituted a succession cause number 93 of 2019 in the estate of his late brother Lumbasi Lumunyenyi who died in 7<sup>th</sup> June 1992; stating that a petition of letters of administration is found at page 56 of the record of appeal.
12. The appellant on the contrary stated that the respondent filed a different succession cause, number 91 of 2019 in the estate of Joseph Lumbasi Lumunyenyi who died in 1<sup>st</sup> July 1991; details found in page 67 of the record of appeal and that the respondent also filed the suit as a daughter to the deceased; he referred to provision of section 76 of the [law of succession act](#) which provides as follows:-

“...a grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by an interested party or of its own motion-



- a. That the proceedings to obtain the grant were defective in substance;
- b. That the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
- c. That the grant was obtained by means of untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
- d. That the person to whom the grant was made has failed, after due notice and without reasonable cause either-
  - i. To apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or
  - ii. To proceed diligently with the administration of the estate or;
  - iii. To produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs ( e) and (g) of section 83 has produced any such inventory or account which is false in any material particular; or the grant has become useless and inoperative through subsequent circumstances...” He referred to the court of appeal in *Joyce Ngima Njeru & another vrs Ann Wambeti Njue* (2012) eKLR which held that:-

“...the central core of the ingredients required to be established under section 76 of the L.S.A is that it is meant to be used as a vehicle to attack and fault the process of either obtaining the grant or inactive sue of the grant after being lawfully obtained in circumstances where it has become useless. It is not meant to fault the decision on the merits.....’

13. The appellant submitted that the learned Magistrate failed to consider the two are different succession causes with different subject matters.

### **Consanguinity /party identification**

14. The appellant stated that the deceased never married neither did he have children as alleged by the respondent; referring to Section 39 (1) of the laws of succession states as follows

“...where intestate has left no surviving spouse or children; 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 had brothers and half – sisters, in equal shares; or if one
  - e. The relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares....”
15. The appellant submitted that the grant issued to him on 29/12/2019 was in order and the same should have been allowed as confirmed.

### **Respondents Written Submissions**

16. In her submissions, the respondent stated that the appellant was granted 14 days to file and serve both the record of appeal and submissions failure to which the appeal stands dismissed; and that by the time submissions were being filed on 4/7/2024 the time had lapsed and that the appeal stood dismissed on the 18/3/2024.
17. He submitted that parties to a dispute on appeal are bound by their evidence in the lower court. He referred to the case of *Gitobu Imanyara & 2 others v Attorney General* (2016) eKLR where the court held that:
- “This being a first appeal, it is trite law that this court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this court from a trial by the high court is by way of a 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.” He also referred to the case in *Chalicha Farmers Cooperation Society Ltd v George Odhiambo and others* C.A civil application no. 27 of 1986 (1987) eKLR “.... a court is governed by principles of law, not hardship of any individual case....”
18. The respondent submits that the appeal lacks merit and should be dismissed with costs to the respondent for the Appellant failed to adduce enough evidence to dislodge the Appellants case as required by Section 107,108,109 of the *Evidence Act*.
19. The respondent further submitted that it is the Appellant who brought the issue of paternity therefore the onus of proof was on him.
20. I have looked at the evidence adduced in the lower court, I have analysed and evaluated the same it is true there were two conflicting certificates of the deceased, it is also true that the issue of paternity was raised .
21. To me the issue of paternity was the central issue which had to be determined for justice to have been seen and felt to have been done.
22. In succession matters, just like in matters involving children and mentally challenged persons unlike other matters, the courts have a duty to go out of its way to ensure that the proper extent (size) of an estate of a deceased person is fully established and similarly the rightful beneficiaries are identified.
23. Failure to do this leads to unnecessary and murky back and forth litigation witnessed in most of the succession matters.
24. In this matter, the lower court was obliged to determine through evidence the authentic death certificate and paternity of the respondent which was contested by the appellant with a finality.



25. The *Evidence Act* allows the court to summon any person who it thinks might assist it in resolving the issues in controversy in this case, the registrar of births and deaths could have been called and also DNA examination could have been called for.
26. In view of the above gaps, it is my opinion that justice will be seen to have been done if the matter is retried again and therefore order that there be a retrial before another magistrate other than Honorable SPM. Z.J Nyakundi.
27. The matter be mentioned before the head of station Butali Law Courts on 24<sup>th</sup> October,2024 for reallocation/further directions.
28. No orders as to cost for there is no successful party in the real sense.
29. Right of appeal 30 days explained.

**DATED, AND SIGNED AT KAKAMEGA THIS 18<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**JUDGMENT DELIVERED ON 19.09.2024 FOR ON 18.09.2024 THE COURT WAS ENGAGED IN THE BAR-BENCH MEETING.**

**S. N MBUNGI**

**JUDGE**

In the presence/absence of:

Mr. Adeka – present for the appellant

Respondent – absent

Court Assistant – Elizabeth Angong'a

