



**Mwaniki & another v Kang'ang'i (Civil Appeal E026 of 2021)
[2024] KEHC 11782 (KLR) (24 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11782 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL E026 OF 2021
AM MUTETI, J
SEPTEMBER 24, 2024**

BETWEEN

JOSEPH KARIUKI MWANIKI 1ST APPELLANT

PAUL NGATIA MWANIKI 2ND APPELLANT

AND

DANIEL MIGWI KANG'ANG'I RESPONDENT

*(Being an appeal against the Judgment of the learned Honourable W,
KAGENDO C.M as she then was) delivered on the 27th November 2020)*

JUDGMENT

Introduction

1. The appellants have moved to this court aggrieved by the decision of the learned Honourable Magistrate on the following grounds:-
 - a) that the Learned Honourable Magistrate erred in law by entertaining a claim based on the sale of and or adverse possession despite there being an objection as to the court's jurisdiction on the same.
 - b) that the Learned Honourable Magistrate erred in law by ignoring the law and giving preference to the doctrines of Equity.
 - c) the learned Honourable Magistrate erred in law in ignoring the law governing transactions in Agricultural land.
 - d) the Learned Honourable Magistrate erred in Law in distributing the net estate to a stranger whose claim should have been determined in a different forum and before the cause had reached the stage of distribution among the beneficiaries.



2. The grounds set out above are specifically dealt with by the Appellants in their submissions filed on the 23rd June 2022 which I shall consider shortly.
3. The Respondent on his part has strenuously opposed this appeal through his written submissions filed in this court on 31st October 2022.

Analysis

4. The two appellants file a petition for letters of Administration intestate on the 20th August 2016.
5. The letters of Administration were granted on the 7th February 2017 in respect of the estate of the deceased Mwaniki Kariuki.
6. The Respondent filed a protest seeking orders that:

“The applicants (Appellants) be restrained from interfering with the protestors portion of land parcel No. Nyeri/Warazo/181”
7. The Respondent’s protest was premised on the ground that:
 - i) Prior to the deceased’s death the Respondent had purchased 4 acres of land from the deceased.
 - ii) That the Respondent took possession of the land after purchase and has been on the land for 25 years and utilizing it.
8. The Appellants were opposed to the protest and maintained that to their knowledge:-
 - a. the deceased did not sell any or part of the land known as Nyeri/Warazo 181 to anyone
 - b. that documents presented by the protester as evidence a sale were all forgeries.
 - c. that the deceased’s family had the exclusive possession and occupation of the land.
 - d. that the deceased only sold 8 acres to the objector which is Nyeri/Waraza 181.
 - e. that the Respondent is just a neighbour.
 - f. That is the narrow dispute giving rise to the Appeal before this court.

The Appellants argue that the court lacked jurisdiction to entertain the protestor’s claim.

9. In determining this issue the court is guided by the erudite pronouncement by the court of Appeal in Owners Of Motor Vessel “lilian S” Vs. Calted Oil (Kenya) LTD (1989) KLR 1 where Nyarangi JA held as follows:-

“I think it is reasonably plain that the question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything, without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence”.

A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.



10. The question therefore is, was the learned Honourable Magistrate within the law in entertaining the protestors claim. It is the view of this court that yes, the trial court had jurisdiction to entertain the protest.
11. The Respondent hinged its claim on a transaction between him and the deceased which had not been completed but had put him in possession of the parcel of land in question.
12. It emerged in his evidence under intense cross examination by Mr. Kebuka for the Appellants that he had a claim of 4 acres originating from an Agreement dated 6th July 1985. The protestor produced quite a number of documents in support of his claim. He went into great detail about purchase and the subdivision.
13. According to the Respondent the process of transfer would have been completed had it not been for the deceased ill health.
14. He testified that he took the possession of the land without any problems with the Appellants until 2015 when he states that the Appellants were influenced by other people.
15. It is clear from the Respondents evidence supported by his witnesses that he had acquired possession of the land through purchase from the deceased.
16. The learned Honourable Magistrate was therefore within the law to entertain the respondents claim over the deceased's estate and I do not agree with the Appellants submission that the Respondent was a stranger to the deceased's estate.
17. The process having commenced during the lifetime of the deceased and the same not having been completed it would have been a grave travesty of justice to declare him a stranger and deny him his rightful share.
18. In *Johnson Muinde Ngunza & Another Vs Michael Gitau Kiarie & 12 other* (2017) KLR the court stated: -

“The *law of succession Act* recognizes the purchaser's rights. The above mentioned law defines a "purchaser" as a purchaser for money or money worth”.
19. The present Respondent therefore falls in this category and, the court in entertaining him did not err in my view.
20. The recognition of purchaser under the law of succession as legitimate beneficiaries of the estate of a deceased person is a reasonable position taken by the courts. It is a matter of public notoriety that land transactions can take unusually long to conclude and more so in the rural villages of this country.
21. Purchasers for value would be greatly disadvantage if every time a person died in the middle of a transaction and yet the seller had already put the purchaser into possession, the seller would have to file a civil suit, obtain judgment and return to make his claim over the estate.
22. The appellants have urged this court to find that to be the proper course but I decline the invitation.
23. I adopt the view taken by Makhandia, J (as he then was) *Warothe & 2 Others Vs. Naomi Wanjiru Wachira Nyeri HSC No. 122 of 2002* where he held:-

“In the instant case the applicants are purchases for value of a portion of the deceased's estate comprised in the grant. There is uncontested and unchallenged evidence that before the deceased passed on he had sold various portions of his land to the applicants and



had been fully paid and had indeed put each one of the applicants in possession of their respective portions that they had purchased. The applicants have to date been in continuous uninterrupted occupation of those portions and have extremely developed them".

The learned Honourable Judge went further to find and hold that:"

"As it is therefore, the grant was obtained fraudulently by the making of a false statement and concealment from the court of something material to the cause. The Respondents had interest in the estate of the deceased yet the petitioner chose to ignore them completely when she applied for a grant".

24. I note just like in the matter cited above, the Appellants here sought to obtain a grant in order to distribute the estate of the deceased. They too ignored the Respondent's claim. The Honourable Magistrate was therefore right in confirming the grant subject to the Respondent receiving his rightful share from Nyeri/Warizo/181.
25. It is clear from the record that the Appellants knew of the Respondent's, presence on the land and the improvements made thereon.
26. The Appellants attempt to discredit the sale to the Respondent failed for they did not call expert testimony to establish forgeries, that they alleged against the Respondent.
27. To accept sweeping claims of forgeries to defeat a purchase claim in flood succession would open a flood gate of such claims by untruthful litigants driven by greed to disentitle lawful purchasers of their property in the distribution of estates.
28. The court in Joseph Mutua Munguti (deceased) [2018] eKLR Credible held that where there was credible evidence on record showing that the deceased indeed intended to sale a portion of his land, the interest of the objector and creditors would be upheld. I do not therefore agree with the Appellants that the learned Honourable Magistrate did not have jurisdiction to entertain the Respondents claim.
Further, contrary to what the appellant's allege the record does not show that there was any issue raised and canvassed concerning jurisdiction in limine that the magistrate declined to deliver a ruling on.
29. The learned Honourable Magistrate was correct in law in determining the issue of sale first before proceeding to consider the confirmation of grant.
30. In Priscilla Ndubi & Zipporah Mutiga Vs. Gerishon Gatobu Mbui Meru Succession Cause NO. 720 OF 2023 the Court held: -

"The primary duty of the probate court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity the estate property must be identified. Thus, where issues of ownership of property of the estate are raised in the succession cause, they must be resolved before such property is distributed. And that is the very reason why Rule 41 (3) of the probate and Administration Rules was enacted so that claims which are prima facie valid should be determined before confirmation".
31. The learned Honourable magistrate in this case was therefore right in determining the claim of the Respondent first before she proceeded to confirm the grant.
32. The appellants contends that the Respondent was a stranger to the estate. I do not think so considering his evidence and that of his witnesses. He had been working on the land with the knowledge of the Appellants. The Respondent cannot therefore pass for a stranger to the estate for he was all along



known to the Appellants and his interest on the parcel of land that the court eventually ordered him to get.

33. The appellants have urged the court to find that the trial court ignored the law and placed reliance on equity. I have not found any express provision of the law violated by the court or ignored by the court in arriving at its decision.
34. Equity developed to provide legal remedies where common law was found to be inflexible and could not be utilized to fairly resolve disputes.
It would thus not be wrong to revert to equitable remedies where the rigidity of law is likely to result in an injustice to a party.
35. The Appellants assertion that the Respondents claim ought to have been reserved for another forum, the land and Environment Court, is in my considered view a misguided position.
36. The Respondent was simply asserting his right over a portion of the estate. The evidence available was incontrovertible that he was in possession and had been developing the land for more than 12 years and had all along enjoyed quiet possession.
37. To disregard his claim in distributing the estate of the deceased would be to cause injustice.
38. The days of justice by technicalities are long gone. The Appellants cannot seek to defeat the Respondents claim by seeking to hide behind legal technicalities.
39. The string of authorities cited that recognize rights of purchasers and creditors to an estate leave no doubt that a party such as the Respondent must be protected by the court.
40. The deceased having died before completing the transaction the interest already acquired by the Respondent would certainly have had to be taken care of during the distribution of the estate.

Determination

41. It is this court's finding therefore that the learned Honourable magistrate acted within the law and that the Respondent was entitled to the portion of the estate that he got.

The appeal is lacking in merit and is therefore dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF SEPTEMBER, 2024.

A. M. MUTETI

JUDGE

In the presence of:

Court Assistant: Kiptoo

Oreng'e for the Appellant

Nyanduro & Co. for the Respondent Absent

