



**In re Estate of Musyimi Ngindu (Deceased) (Succession Appeal
E026 of 2023) [2024] KEHC 12724 (KLR) (23 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12724 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
SUCCESSION APPEAL E026 OF 2023**

**FR OLEL, J
OCTOBER 23, 2024**

BETWEEN

STEPHEN KILONZO MUSYIMI APPELLANT

AND

MUNYAMAI MUSYIMI RESPONDENT

*(Being an appeal from the Ruling of Hon I.Ruhu (SRM) delivered on
27th April 2023 in the Mwingi Chief Magistrate P&A No. 48 of 2017)*

JUDGMENT

1. The Appellant filed this appeal to challenge the ruling of Honourable I Ruhu, Senior Resident Magistrate delivered on 27th April 2023 in Mwingi Chief Magistrate Court P&A No 48 of 2017, where the learned Magistrate did struck out Mwingi Chief Magistrate succession cause Number 48 of 2017 for want of pecuniary jurisdiction.
2. In the said cause, the respondent had filed the application dated 9th September 2022, wherein she sought for orders that the court be pleased to dismiss the Mwingi chief Magistrate succession cause Number 48 of 2017 for want of jurisdiction based on the ground that an inventory of all the assets and liabilities of the deceased's estate, had established that the Estate properties exceeded the pecuniary jurisdiction of the trial court. The cause had previously been filed at Garrisa High Court and transferred to the Principal Magistrate court in error and by inadvertent oversight. The orders sought were thus meant to prevent delay of the suit and if granted, the said orders would not prejudice the appellant.
3. The appellant on his part did file a preliminary objection where he did contend that the application under consideration was bad in law, incurably defective, and constituted an abuse of the court process. The court lacked jurisdiction to review, vary, and set aside the consent recorded at the High Court in September 2017 transferring the suit to Mwingi magistracy court, and if there was a problem with



- the said order, the only competent court that could review the order transferring the suit to Mwingi Magistracy court was the same high court sitting at Garrisa.
4. The trial Magistrate did consider all the evidence tendered and vide his ruling dated 27th April 2023, found that the court lacked pecuniary jurisdiction to entertain the suit and proceeded to strike it out with no orders as to costs.
 5. Being completely dissatisfied by the said ruling the Appellant filed his Memorandum of Appeal, where he raised the following grounds of Appeal;
 - a. That the learned Magistrate erred in law and misdirected himself in failing to analyze and determine the serious points of law raised by the appellant.
 - b. That the learned magistrate erred in law and misdirected himself in fact in issuing an order that is not provided for under the *law of Succession Act*.
 - c. That the learned Magistrate erred in law and misdirected himself in fact and acted in excess of his jurisdiction in entertaining proceedings that were in essence a review of a ruling and order of a superior court.
 - d. That the learned Magistrate erred in law and misdirected himself in fact in striking out a grant of letters of administration issued by the High Court.
 6. The Appellants urged that this court find that this Appeal had merit and proceed to set aside the entire ruling of the trial court and dismiss the notice of motion application dated 9th September 2022. He also urged the court to retransfer the file back to Garrisa High Court for determination of the deceased estate.

B. The Appeal

7. I have considered this appeal, the submissions filed, and the impugned ruling. I have also considered the decisions relied on and perused the trial court's record. This being a first appeal, it is by way of a retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyze and re-consider the evidence afresh and draw its own conclusions on it. The court should however bear in mind that it did not see the witnesses as they testified and give due allowance for that. (See *Selle v Associated Motor Boat Co Ltd & Others* [1968] EA 123) & *Santosh Hazari Vs Purushottam Tiwari (Deceased)* by L.Rs (2001) 3 SCC 179.
8. In *Nkube v Nyamiro* [1983] KLR 403, the court also stated that:

“A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”
9. The trial court majorly dealt with the issue of jurisdiction in its ruling and concluded that he did not have the pecuniary jurisdiction to handle the suit thus struck it out, but made a fundamental error in failing to analyze the appellant's contention as raised in his notice of preliminary objection dated 21st September 2022, that the trial court lacked jurisdiction to review, vary or set aside the consent order recorded at Garissa High court before Hon Justice Dulu transferring the suit to Mwingi chief Magistrate court for determination. Secondly, the Appellant did contend that letters of administration could only be confirmed under Section 71 or revoked under Section 76 of the *law of Succession Act*, Cap 160 laws of Kenya, hence an Application to dismiss the cause was unsupported in law and did not lie.



10. It was a fact admitted by all parties that the respondent did file the initial Succession cause at Mwingi law court. The grant of letters of administration of the deceased estate was issued to her on 8th January 2010 and confirmed on 21st February 2013. Subsequently, the Appellant's mother (the late Beatrice Kithumba Musyimi) filed Succession Cause Number 9 of 2013 at Garissa High Court seeking to revoke the grant of letters of administration issued by the subordinate court on grounds that it had been fraudulently obtained without involving all family members. The said application was heard on merit and vide a ruling delivered on 30th October 2014, the said grant was revoked and parties directed to file a new inventory of all estate assets and liabilities.
11. The parties herein did subsequently agree by consent to retransfer the cause back to Mwingi chief Magistrate court for determination and upon preparation of the estate asset list, the respondent filed the summons dated 9th September 2022 where she averred that they discovered that the Estate property exceed the court's pecuniary jurisdiction, and asked the trial court to strike out the succession cause for want of pecuniary jurisdiction.
12. The trial magistrate's approach while handling this application failed to appreciate this background, specifically the fact that it was the parties themselves who had consented to transfer the matter from Garissa High Court to Mwingi Law Court. If at some point they discovered that the estate property exceeded the said court's jurisdiction, the natural cause of action would have been for the respondent to re-apply to the High Court to re-transfer the suit back to Garissa High court and not to dismiss the suit. The respondent in short could not in equity be allowed to run away from a problem she created rather than provide a solution that would not move the matter forward.
13. Secondly the respondent did move court under Order 51 Rule 1 of the Civil Procedure Rules, Section 1A, 1B & 89 of the Civil Procedure Act. As correctly pointed out by the Appellant, probate and administration proceedings are sui generis proceedings that are not subject to the civil procedure Rules, unless as allowed under Rule 63 of the Probate and Administration Rules. See Re; Estate of the late Kaburachi Peter (Deceased), (2021) eKLR.
14. The respondent countered the appellant's argument by stating that Section 47 of the Law of Succession Act, as read with Rule 73 of the Probate and Succession Rules granted the court jurisdiction to entertain and determine any dispute under the Act, as well as making any expedient Orders as the circumstance of the case may dictate. This maybe so but the court also had to consider that the initial Succession cause was filed at Mwingi Magistrate court by the respondent in 2008, transferred to Garissa High Court and later re transferred back to Mwingi Law court. The parties had been in the court corridors for over fourteen (14) years haggling over how to share the Estate.
15. The appropriate orders under the circumstances, considering that it was a high court consent order that referred the matter back to Mwingi Law court, was for the trial court to take a path that would sustain the matter and have it conclusively determined rather than dismiss the same and stare at a situation where the parties would still have to come back to court, either through this Appeal and/or refile a fresh matter.

C. Disposition

16. The upshot having made the above analysis on the evidence adduced, I do find that this appeal is merited and do allow the same on the following terms
 - a. That the Ruling/Order issued by the learned trial Magistrate (Mr I.G Ruhu, SRM) dated 27th April 2023 dismissing Mwingi Succession Cause No 48 of 2018 for want of pecuniary



jurisdiction is hereby set aside and the Application dated 9th September 2022 is dismissed with costs.

- b. Pursuant to provisions of Section 47 of the *Law of Succession Act* and Rule 73 of the Probate and Administration rules I do transfer this matter to Kitui High Court for hearing and determination.
- c. Both parties are hereby granted 30 days to file their proposed mode of distribution and the matter be mentioned before the Deputy Registrar -Kitui High court to confirm compliance.
- d. The parties herein are family members and in the spirit of reconciliation, each party will bear their own costs of this Appeal.

17. It is so ordered.

JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 23RD DAY OF OCTOBER, 2024.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 23RD DAY OF OCTOBER, 2024.

In the presence of:

Mr. Muigai for Appellant

Ms Gathoni for Respondent

Susan Court Assistant

