



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ndegwa v Ndegwa (Family Appeal 5 of 2023)  
[2024] KEHC 12392 (KLR) (11 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12392 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
FAMILY APPEAL 5 OF 2023  
MA ODERO, J  
OCTOBER 11, 2024**

**BETWEEN**

**TITUS GETHI NDEGWA ..... APPELLANT**

**AND**

**JANE NYARUAI NDEGWA ..... RESPONDENT**

**JUDGMENT**

1. Before this Court is the Memorandum of Appeal dated 31<sup>st</sup> March 2023 by which the Appellant Titus Gethi Ndegwa seeks the following orders;-

- “(1) This Appeal be allowed as prayed.
- (2) The Judgement of the subordinate court delivered by Honourable Viola Kosgei (SPM) at Karatina on 21<sup>st</sup> March 2023 in Succession Cause No. 29 of 1998 be set aside in its entirety.
- (3) That the High Court direct that:
  - (a) The property known as Konyu/Ichuga/1674 comprising the estate of the deceased be distributed to the 5 beneficiaries in equal shares;
  - (b) The property known as Konyu/Ichuga/1675 comprising the estate of the deceased be distributed to the 5 beneficiaries in equal shares;
  - (c) The property known as Konyi/Ichuga/1676 comprising the estate of the deceased be distributed to the 5 beneficiaries in equal shares;



- (d) The property known as Konyu/Ichuga/1263 comprising the estate of the deceased be distributed to the 5 beneficiaries in equal shares;
  - (e) The property known as Konyu/Ichuga/1674 shall not be sold to third parties unless otherwise agreed by the beneficiaries;
  - (f) The property known as Konyu/Ichuga/1675 shall not be sold to third parties unless otherwise agreed by the beneficiaries;
  - (g) The property known as Konyu/Ichuga/1676 shall not be sold to third parties unless otherwise agreed by the beneficiaries;
  - (h) The property known as Konyu/Ichuga/1263 shall not be sold to third parties unless otherwise agreed by the beneficiaries;
  - (i) The property known as Konyu/Ichuga/1674 be used by the beneficiaries for income generating activities in the manner agreed by the beneficiaries;
  - (j) The property known as Konyu/Ichuga/1675 be used by the beneficiaries for income generating activities in the manner agreed by the beneficiaries;
  - (k) The property known as Konyu/Ichuga/1676 be used by the beneficiaries for income generating activities in the manner agreed by the beneficiaries; and
  - (l) The property known as Konyu/Ichuga/1263 be used by the beneficiaries for income generating activities in the manner agreed by the beneficiaries.
- (4) That in the alternative to prayer 3 above the Appellant be granted leave to respond to the Affidavit of Protest filed by the Respondent.
  - (5) That this Honourable Court do issue an order directing Karatina Principal Magistrates Court Succession Cause No. 29 of 1998 to be re-opened and be heard by a different Magistrate with the attendance of all the beneficiaries.
  - (6) The Appellant be awarded the costs of this Appeal.

2. The Respondent Jane Nyaruai Ndegwa opposed the Appeal. The matter was canvassed by way of written submissions. The Appellant filed the written submissions dated 8<sup>th</sup> July 2024 whilst the Respondent relied upon her written submissions dated 8<sup>th</sup> May 2024.

### **Background**

- 3. This appeal emanates from Succession Cause No. 29 of 1998 relating to the estate of the late Solomon Ndegwa Nderu (herein after ‘the Deceased’) who died intestate on 16<sup>th</sup> August 1997. A copy of the Death Certificate Serial Number 420134 was filed in the lower court on 9<sup>th</sup> June 1998. The Succession Cause was heard at the Karatina Law Courts.
- 4. According to the chiefs letter dated 9<sup>th</sup> June 1998 the Deceased was said to have been survived by the following persons;-



- (i) Tabitha Wanjira Ndegwa - Widow.
  - (ii) Andrew Mugu Ndegwa - Son
  - (iii) Titus Gethi Ndegwa - Son
  - (iv) Esther Wambui - Daughter
  - (v) Grace Gathoni - Daughter
  - (vi) Jane Nyaruai - Daughter
5. The estate of the Deceased was said to comprise of the following assets.
- (i) Land Parcel No. Konyu/Ichuga/1675 approx 1.050 Hectares.
  - (ii) Land Parcel No. Konyu/Ichuga/1676 approx 1.080 Hectares
  - (iii) Land Parcel No. Konyu/Ichuga/1674 approx 1.080 Hectares
6. Following the demise of the Deceased the widow Tabitha Wanjira Ndegwa petitioned the SRM's Court in Karatina for Grant of Letters of Administration Intestate. A Grant was duly issued to the widow on 28<sup>th</sup> October, 1998.
7. The widow/Administrator subsequently passed away on 17<sup>th</sup> December 1998 as per Death Certificate No. 495403. Thereafter vide a Summons for confirmation of Grant dated 27<sup>th</sup> January 1999 Andrew Mugo Ndegwa and Titus Gethi Ndegwa both sons of the Deceased sought to be appointed as substitute Administrators of the estate and sought to include land Parcel No. Konyu/Ichuga/1263 as one of the assets belonging to the estate which asset they averred had been inadvertently omitted by their mother.
8. A fresh Grant was issued to the two petitioners on 3<sup>rd</sup> March 1999. Thereafter one of the Deceased's daughters Jane Nyaruai filed an Affidavit of Protest dated 9<sup>th</sup> December 2022 in which she opposed the mode of distribution of the estate proposed by the two Administrators.
9. That Protest was never heard and the Grant remained unconfirmed until 10<sup>th</sup> June 2022 when Jane Nyaruai sought to have the matter referred to mediation. This was done but parties were not able to reach any settlement.
10. The matter then came up before the Senior Resident Magistrate on 2<sup>nd</sup> August, 2023 for hearing of the Protest dated 9<sup>th</sup> December, 2022. On that date only the Protestor was in court. The Petitioner and the other beneficiaries did not attend court. The learned trial magistrate vide a judgment delivered on 21<sup>st</sup> March 2023 found that the Protest had not been objected to and allowed the same as prayed.
11. Being aggrieved by this judgement one of the Administrators filed this memorandum of Appeal which Appeal was premised upon the following grounds;-
- “ 1. The Learned Magistrate erred in law and in fact in failing to acknowledge that the Appellant as a beneficiary to the estate of his late father is entitled to a share in the property known as Land Title No. Konyu/Ichuga/1263 contrary to Section 38 of the *Law of Succession Act*, Cap. 160 (the *Law of Succession Act*).
  2. The Learned Magistrate erred in law and in fact in stating that the Application dated 17<sup>th</sup> March 2023 filed under Certificate of Urgency by the Appellant was purportedly overtaken by events and could not be considered before



the Ruling date of 21<sup>st</sup> March 2023 contrary to Rule 67 of the *Probate and Administration Rules*, 1980 (the Probate and Administration Rules) and Order 50, Rule 6 of the *Civil Procedure Rules*, 2010 (the Civil procedure Rules).

3. The learned Magistrate erred in law and in fact in failing to consider the Application dated 17<sup>th</sup> March 2023 filed by the Appellant seeking leave to file his response to the Respondent's Affidavit of Protest dated 9<sup>th</sup> December 2022 and further seeking to vacate the Ruling date of 21<sup>st</sup> March 2023 contrary to Rule 67 and Rule 73 of the *Probate of Administration Rules*, and Order 50, Rule 6 of the *Civil Procedure Rules* which allow for enlargement of time.
4. The Learned Magistrate erred in law and in fact in stating that the Ruling date of 21<sup>st</sup> March 2023 could not be vacated to enable the Appellant exercise his constitutional right to present and argue his case on merit which right is safeguarded in Articles 25, 50 and 159 of the *Constitution* of Kenya, 2010.
5. The Learned Magistrate erred in law and in fact in allowing the Affidavit of Protest despite the same severely lacking proof of the 5 beneficiaries' consensus or agreement to the proposed mode of distribution therein.
6. The Learned Magistrate erred in law and in fact by unilaterally confirming the mode of distribution of the estate proposed by the Respondent without satisfaction that the 4 other beneficiaries entitled to the estate were agreeable to the shares proposed for them contrary to section 71(2) of the *Law of Succession Act*.
7. The Learned Magistrate erred in law and in fact in disregarding that the consent of all the beneficiaries was required for the proposed mode of distribution by the Respondent to validly take effect in accordance with section 71(2) of the *Law of Succession Act*.
8. The Learned Magistrate erred in law and in fact in expressing that the reason for determining the petition in the absence of the 4 beneficiaries was that the matter was old having been filed in 1998 and presently causing backlog in the court station.
9. The Learned Magistrate erred in law and in fact in expressing that the reason for determining the petition in the absence of the 4 beneficiaries was due to the fact that the 4 beneficiaries had been contacted on their mobile numbers and had not responded contrary to Order 5 (Issue of Service of Summons) of the *Civil Procedure Rules*.
10. The Learned Magistrate erred in law and in fact in finding that the Protester served all the beneficiaries with the Affidavit of Protest, a mention notice and a hearing notice despite there being no proof of service filed in Court by the Protester to prove that indeed all the beneficiaries of the estate were aware of this matter contrary to Order 5 Rules 8, 12, 14, 22B and 22C of the *Civil Procedure Rules* 2010.
11. The Learned Magistrate erred in law and in fact in identifying and distributing the estate to 3 beneficiaries (being the person listed in (a), (b) and (c) below



despite the court record clearly showing that there are 5 beneficiaries who are entitled to equal shares of the estate of the deceased being:

- a. Titus Gethi Ndegwa (son of the deceased);
  - b. Andrew Mugo Ndegwa (son of the deceased);
  - c. Jane Nyaruai Ndegwa (daughter of the deceased);
  - d. Grace Gathoni Ndegwa (daughter of the deceased); and
  - e. Esther Wambui Ndegwa (daughter of the deceased).
- (the 5 beneficiaries)

12. The Learned Magistrate erred in law and in fact by totally failing to consider that the effect of allowing the Affidavit of Protest would essentially lead to the complete disinheritance of the 2 beneficiaries and sisters of the Appellant known as Grace Gathoni Ndegwa and Esther Wambui Ndegwa from the estate of their late father in which they are entitled to a share in accordance with Section 38 of the [Law of Succession Act](#).
13. The Learned Magistrate erred in law and in fact in entering Judgment in favour of the Respondent, noting the lack of evidence supporting the protest, and without having heard the succession cause on merit and despite having the occasion to allow the Appellant his right to be heard.”
12. As stated earlier the Appeal was opposed.

#### **Analysis and Determination**

13. I have considered this Appeal, the record of the proceedings before the Lower Court as well as the submissions filed by both parties.
14. This is a first appeal, thus it is the duty of this court to re-evaluate and review the evidence adduced in the lower court and to draw its own conclusions on the same. In *Selle & Anotehr -vs- Associated Motor Boat Company Limited & Otehrs* [1968] EA 123, the court of Appeal held that:-

“An appeal to this court from trial by the High Court is by way of 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 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.....”
15. The only issue for determination is whether the trial court erred in allowing the Protest dated 9<sup>th</sup> December 2022 as prayed.
16. I have carefully perused the record of proceedings before the lower court. It is true that no reply to the Protest had been filed however the Protest had been set down for hearing. On the hearing date only the protestor was in court. It was indicated that the other parties had been informed of the hearing date through their mobile phones. However no Affidavit of Service was presented to the court. The court merely indicated that the Petitioners ‘were aware’ of the hearing date. How could this be when the Petitioners were not in court on 14<sup>th</sup> February 2023 when the hearing date was set.
17. It is my view that the trial magistrate erred in proceeding with the hearing without satisfying herself that the petitioners had knowledge of the hearing date. This was tantamount to denying the petitioners their right to be heard.



18. This was not a liquidated claim where in the absence of a reply the Court may proceed to allow the claim as prayed. The Respondent had filed a Protest objecting to the proposed mode of distribution of the estate. No prayers were sought in the Protest as it was merely an objection to the mode of distribution. I fail to understand how a Protest can be allowed as prayed. The learned trial magistrate did not specify in her judgment what prayers she was granting.
19. It is pertinent to note that the Respondent herein (who was the Protestor in the lower court) one Jane Nyaruai had on 26<sup>th</sup> January 1999 signed ‘Renunciation of right to inherit.’ – How then was she through the protest demanding an equal share of the estate. This matter was not interrogated by the trial court.
20. Finally notwithstanding the court allowing the Protest the trial magistrate ought to have set out with clarity how the estate was to be distributed. A fresh summons for confirmation of Grant ought to have been filed and a fresh consent obtained from all the beneficiaries.
21. In my view the trial magistrate erred in disposing of the Protest in such a, casual Manner. Even if the other parties failed to attend court, the trial magistrate ought to have conducted a formal proof hearing at which the protestor would prove her claim to the estate and explain why she has abandoned the Renunciation of right to inherit which she had signed.
22. I therefore find merit in this appeal and allow the same. The Protest dated 9<sup>th</sup> December 2022 to be set down for hearing at the Karatina Law Courts before a different magistrate. In the event of non-participation by the Appellant then the court should conduct a formal proof hearing at which the Respondent will be required to prove her claims.
23. Finally this appeal is allowed. The judgment delivered on 21<sup>st</sup> March, 2023 is hereby set aside.
24. This being a family matter each side will bear its own costs.

**DATED IN NYERI THIS 11<sup>TH</sup> DAY OF OCTOBER, 2024**

**MAUREEN A. ODERO**

**JUDGE**

