



REPUBLIC OF KENYA



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**Kimenye v Kivila & another (Civil Appeal 125 of 2018)
[2023] KEHC 3863 (KLR) (24 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3863 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 125 OF 2018**

G MUTAI, J

APRIL 24, 2023

BETWEEN

GRACE MWELU KIMENYE APPELLANT

AND

AGNES MUENI KIVILA 1ST RESPONDENT

EVANS MASAI MUTUKU KIVILA 2ND RESPONDENT

(Being an appeal from the judgment of the Honourable CA Ocharo, Resident Magistrate, delivered and read on 29th August 2018 in the Machakos Chief Magistrate Court Succession Cause No. 188 of 2016; In the Matter of the Estate of Benjamin Mutuku Masai Kivila (deceased))

JUDGMENT

1. This appeal arises out of the ruling of the Honourable CA Ocharo delivered on 29th August 2018 in Machakos CMC P&A 188 of 2016. In the said matter the trial magistrate dismissed Summons for Revocation of a grant of representations of the estate of the deceased. At the time the application was made the grant had already been confirmed.
2. Being aggrieved with the decision of the learned magistrate the Appellant filed an appeal against the said decision. The Memorandum of Appeal raised 6 grounds.
3. The genesis of this matter is a land transaction between the Appellant and the deceased. The Appellant was a seller of land to a deceased. When the deceased died his family moved the court for Grant of Letters of Administration Intestate. Upon grant of the letters of representation the Respondents used the same to file Machakos ELC Cause No. 398 of 2017 (hereafter “the ELC Case”).
4. Upon the Appellant learning of the issuance of the Grant of Letters of Administration Intestate to the respondents she moved with alacrity to have the letters set aside. It may be that she was aware that



should the Grant be set aside the ELC case would be dead on arrival. It is the dismissal of the said Summons that necessitated this Appeal.

Duty of the appellate court

5. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
6. In the cases of *Peters v Sunday Post Limited* [1985] EA 424 the court therein rendered itself as follows: -

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”
7. In *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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 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...”
8. The issues raised are issues of law. In *Otieno, Ragot & Company Advocates v National Bank of Kenya Limited* [2020] eKLR the Court stated as follows: -

“This is a second appeal. I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the courts below considered matters, they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. (See: *Stanley N. Muriithi & Another v Bernard Munene Ithiga* [2016] eKLR)”
9. This is the same standard, to my mind, a court ought to apply, when considering an appeal that is purely predicated on points of law.
10. Having considered the Memorandum and the Record of Appeal as well as the rival submissions I have reached the inescapable conclusion that this Appeal is for dismissal as it lacks merit. I take note of the Application dated 25th April 2018. In said application the Appellant, describing herself as an Interested Party, sought an injunction and revocation of letters of administration intestate granted on 26th January 2017. She alleged that the proceedings were defective in substance and that the Applicants therein concealed that the property in question did not belong to that estate. To “conceal” according to Black’s Law Dictionary is “to disguise”.
11. In *Matthew Njega Njogu & another v Rosemary Muthoni Njue* [2021] eKLR the court was of the view that: -

“27. Revocation of grant is provided for under section 76 of the *Law of Succession Act*. The grounds upon which the grant may be revoked are well provided



therein. The said section provides that revocation can either be at the instance of an applicant or can be by the court suo moto. However, it is a prerequisite that the conditions for revocation as set out under section 76 must be proved. In the case of *Jamleck Maina Njoroge –vs- Mary Wanjiru Mwangi* [2015] eKLR the court discussed circumstances when a grant can be revoked. The court observed:

11. The circumstances that can lead to the revocation of grant have been set out in Section 76 Law of Succession. For a grant to be revoked either on the Application of an interested party or on the court’s own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.”

PARA 28. The power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrongdoing for the court to invoke section 76 and order for revocation or annulment of a grant. And when a court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased’s estate and ensure that the action taken will be for the interest of justice. (See *Albert Imbuga Kisigwa v Recho Kawai Kisigwa*, Succession Cause No.158 OF 2000).

12. To my mind the Appellant contests the ownership of a parcel of land forming part of the estate. She avers that she was not fully compensated for it as the deceased did not tender the full purchase price. The said contention is in regard to the title to the land. I am afraid, with due respect, that this is not the court to hear and determine such a claim claim.

13. In *In re Estate of Charles Boi (Deceased)* [2020] eKLR, Justice Musyoka stated as follows: -

“I am also invited to order eviction of all the persons in occupation of Title No. Nyangori/ Kapsotik/25. The cause before me is a probate and administration cause, invoking jurisdiction of the court as set out in the *Law of Succession Act*. The prayer for eviction revolves around ownership and occupation of land. Eviction is, ostensibly, sought on the basis that the occupants are trespassers, or are in unlawful occupation of land, or are otherwise not entitled to occupy the land in question, and it is sought by a person who asserts ownership of or title to the land in question.”

The promulgation of *the Constitution* of Kenya, 2010, changed the law with respect to land matters, so that the High Court no longer has jurisdiction to decide questions relating to title to or ownership of land, as well as the right to occupy and use land. *The Constitution* imagined the creation of a special court to deal with those issues, and directed Parliament to pass a law to establish such a court. *The Constitution* went on to emphatically state that the High Court was to, henceforth, have no jurisdiction to decide those questions reserved for the special court envisaged by *the Constitution*”.



14. The correct forum for the issues raised by the Appellant would be the Environment and Land Court. There is already a suit before the said court, being Machakos ELC Cause No. 398 of 2017. In my opinion that is where all the issues raised herein would be best handled.
15. The Appellant is not and does not claim to be a beneficiary. She does not rank in priority to the Respondents. In any case her interests are adverse to the estate.
16. The claim by the Applicant is civil in nature. I agree with the court below that it is not the duty of the succession courts to determine title to land.
17. The court in a well-reasoned Ruling arrived at a correct decision. I cannot fault in any way.
18. I also note that Appeals in succession cases are not automatic. There is no right of appeal pursuant to the Probate & Administration Rules.
19. The upshot of the foregoing is that Appeal was dead on arrival. All I can do now is to dismiss it with costs.

Determination

20. The Appeal filed herein is dismissed with costs to Kes.80,000.00 to the Respondent. This file is closed.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 24TH DAY OF APRIL 2023.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

GREGORY MUTAI

JUDGE

In the presence of:

Mr. Kiluva holding brief for Mr. Makundi for the Appellant

No appearance for the Respondent.

Winnie Migot – Court Assistant

