



REPUBLIC OF KENYA



**Andigo v Mudoga & another (Civil Appeal 10 of 2021)
[2023] KEHC 17499 (KLR) (17 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17499 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPSABET
CIVIL APPEAL 10 OF 2021
RN NYAKUNDI, J
MAY 17, 2023**

BETWEEN

BATSON MUDASHI ANDIGO APPELLANT

AND

WILLIAM MUDOGA 1ST RESPONDENT

HENRY ASWANI AGOSA 2ND RESPONDENT

*(Being an appeal from the ruling of Hon. D. ALEGO (SPM) delivered on 25th
March 2019 in KAPSABET SPMCC Succession Cause No. 170 OF 2016)*

JUDGMENT

1. The appeal before this court arises from the ruling on the objection proceedings in Kapsabet Spmcc Succession Cause No. 170 OF 2016 where the objector sought to be included as a beneficiary of the estate as a purchaser of 1 acre out of Nandi/Serem/271 which formed the estate of the deceased.
2. Upon considering the evidence of the witnesses and the documentary evidence, the trial court was satisfied that the objector was a beneficiary to the estate of the deceased as a purchaser.
3. Being aggrieved with the decision of the trial court, the appellant instituted the present appeal vide a memorandum of appeal dated 13th May 2020 premised on the following grounds;
 1. The Learned Magistrate erred in law and in fact and completely misunderstood, wrongly analysed the evidence before her and therefore came to wrong conclusions of law.
 2. The Learned Magistrate erred in law and fact in relying on defective sale agreements which were obtained fraudulently since the deceased was neither a party to the said sale agreements nor did he sign the same.



3. The Learned Magistrate erred in law and in fact by finding and holding that the Objectors have a beneficial interest as purchasers and the succession proceedings should involve them yet they did not adduce clear evidence in support of the same.
 4. The Learned Magistrate erred in law and fact by relying on a chief's letter SUBclaiming that the Objectors had purchased the parcel of land in question from Kiptarus Arusei (Deceased) in the year 2001 and yet the deceased died in 1995.
 5. The Learned Magistrate erred in law and fact by relying on inconsistent evidence of the Objectors.
 6. The Learned Magistrate totally misunderstood and wrongly evaluated the evidence before her and therefore arrived at a wrong conclusion.
4. The parties canvassed the appeal by way of written submissions filed by Omondi Abande & Co Advocates on behalf of the appellant and the firm of S.K Kitur & Co Advocates on behalf of the respondents.

Appellant's Case

5. Learned counsel for the appellant submitted that PW1 did not purchase the land in question. That PW1 stated that he bought a portion of the parcel of land Nandi/Serem/271 in the year 2001 and produced the sale agreement dated 30th June 2002 between Jairo Mavisi and William Mudoga (PW1) adding that it was noteworthy that Noah Kiptarus Arusei (deceased) 4th July 1995 and therefore it is clear that he did not purchase from the deceased. Further, that PW2 testified that she is the widow to Jairo Mavisi who she claimed was deceased at. The time she was giving evidence but she did not adduce any evidence of proof of death. She produced an agreement dated 11th June 1973 that did not bear name nor signature of the deceased claiming to be the agreement that her husband used to purchase the land number Nandi, Serem/271. Counsel submitted that the claim depended on the evidence and proof of purchase by the husband of PW3 which they failed to prove. He urged that they could not sell the parcel of land to PW1 as they did not have said land.
6. Counsel for the appellant urged that the 2nd Interested party (PW4) who claimed he bought the land on behalf of his father's estate but he did not provide any agreement his father used in the purchase. He relied on section 3 of the Law of Contract Act and the case of Daudi Ledama Morintat v Mary Christine Kiarie & 2 others (2017) eKLR in support of this submission. He maintained that the 2nd interested party lacked the capacity to file the objection.
7. Counsel submitted that the court granted orders that were not sought by the parties as the 2nd interested party had not sought to be made a beneficiary of the estate. Further, that he was claiming on behalf of his father but he did not have any letters of administration and did not produce any agreement between his father and the deceased. He stated that it was wrong for the court to grant orders that were not sought and urged the court to allow the appeal with costs.

Respondent's Case

8. Learned counsel for the respondent opposed the appeal and submitted that the Respondents sufficiently proved their interest over the suit parcel Nandi/Serem/271. He stated that the sale agreements that were produced as evidence of beneficial interest satisfy the provisions of section 3(3) of the Contract Act. He submitted that the appellant applied for a grant of letters of administration claiming to be the nephew to the deceased but later told the court that it was a lie as the deceased never had any children and this admission formed the basis of the trial court's decision on the appellant.



9. Learned counsel submitted that the letter to the court by the appellant which was produced as DMFI-5 contained a claim by the appellant that he had purchased the suit land and that there were two other interested parties. Further, that these parties had authorized him to be the administrator. Counsel submitted that this was untrue as the respondents were not aware that he was carrying out succession of the suit land.
10. Learned counsel stated that during the trial, it was established that the appellants' parents were John Andigo (Deceased) and Esnas Mwenya who were residents in the neighbourhood. That he never produced evidence of his relationship to the deceased as an adopted child. Counsel urged that DW2 (Shadrack Kipsum Chebii) admitted that both the Respondents reside on the suit land, with PW2 as their area chief. In his Petition for Letters of Administration, the Appellant did not sign all the succession forms, which was captured during his cross-examination. He also indicated there were two purchasers on the suit land and also told the court that he had served a sentence in jail for malicious damage of the 1st Respondent's property, relating to the ownership dispute in question.
11. He urged that the appeal be dismissed with costs.

Analysis & Determination

12. The duty of this court as an appellate court was set out in *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, where the court stated as follows-

This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

13. It is also the law in our jurisdiction that an appeals court should not interfere with the exercise of the discretion of a trial court unless there is evidence that the specific court in arriving at the impugned decision misdirected itself on application of the evidence with the law to arrive at an erroneous decision. See (*Mbogo Vs Shah* (1968) EA 93 at 96).
14. In absence of cogent evidence shown by the appellant the exercise of discretion being challenged should be upheld by an appeals court. There is a presumption law that the decision by the lower tribunal or court exercised the discretion judiciously. It is a salutary principle in the case of *Patel vs EA Cargo Handling Services Ltd* (1974) EA 75 at 76. The jurisdiction therefore, exercised must meet the critical threshold prescribed as follows;

That if the court does vary the judgement he does so on such terms as may be just. The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wise discretion given to it by the Rules. The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.”

15. The guidelines reference above are to be applied in considering the merits and demerits of an appeal fashioned within the scope of the memorandum of appeal. Generally, an appeals court enjoys wide discretion powers and depending on the nature of the appeal it is at liberty to invoke the provisions of section 78(1) of the Civil Procedure Act. Given this background it is my task to answer the interrogatories in the instant appeal as framed by the appellant.



16. Upon considering the memorandum of appeal, record of appeal and the submissions of the parties, the following issue arises for determination;
- I. Whether the respondent was a beneficiary to the estate as a purchaser

Whether the respondent was a beneficiary to the estate as a purchaser

17. first and foremost, heirship to any intestate or estate succession is clearly provide for under section 29 of the Law of succession Act. My interpretation of the provisions is one which can be construed as ranking dependants within the scheme of consanguinity and affinity. For purposes of this appeal I am constrained to recite the provisions which is at the centre of the grievances raised by the appellants. Thus “dependant” means;
- a. The wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death.
 - b. Such of the deceased’s parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death and
 - c. Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.
18. In the context of this text a purchaser is neither a dependant nor a beneficiary to an estate. The recognition as far as the law is concerned is that of a creditor to the estate whose debt is claimable against the administrator under section 86 of the Act as read conjunctively with section 93. In *Re Estate of Alice Mumbua Mutua (Deceased)* (2017) eKLR it w stated as follows;

(.. “The Law of Succession Act, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be a facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.”

Dispute of course do arise in the process. The provisions of the Law of Succession Act and the Probate and Administration Rules are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning person who are neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the Law of Succession Act and the Probate and Administration Rules. Such have to be resolved through the structures created by the Civil Procedure Act and Rules, which have elaborate rules on suits by and against executors and administrators.

where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share of estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 pf the Act, by order appropriate and set aside the particular share or estate or property comprising it to abide the determination of the question in proceedings under the Civil Procedure Rules.



Clearly, disputes as between the estate and third parties need not be determined within the succession cause. The legal infrastructure in place provides for resolution elsewhere, and upon a determination being made by the civil court, the decree or order is then made available to the probate court or implementation. In the meantime, the property in question is removed from the distribution table. The presumption is that such dispute arises before the distribution of the estate, or the confirmation of the grant. Where they arise after confirmation, then they ought strictly to be determined outside the probate suit for the probate court would in most cases be functus officio so far as the property in question is concerned. The primary mandate of the probate court is distribution of the estate and once an order is made distributing the estate, the court's work would be complete. The proportion therefore, is that not every dispute over property of a dead person ought to be pushed to the probate court. The interventions by that court are limited to what I have stated above."

19. The creditors to an estate are recognised at the tail end of survivorship. It is also the position in common law the occurrence of the act of death automatically divests the deceased his or her chose in action. The reason in law is in tandem with the maxim that the dead have no rights in their possession capable of being transmitted. In death their rights are vested with the administrator or executor. The question being pursued in this appeal in my considered opinion is justiciable under section 13 (1) (2) of the Environmental and Land Court Act. Taking this argument further based on evaluation of the evidence before the trial court issues to do with the provisions of the limitation of Actions Act and the Land Control Act were never canvassed on the merit. The court of appeal in the case of David Sirongo Ole Tukai Vs Francis Arap Muge & 2 others (2014) eKLR had this to say that under section 6 of that Act, without consent of the relevant land control board, a truncation involving agricultural land is void for all purposes.
20. The basis of the respondent's objection was that as a purchaser of the land from the deceased, he was entitled to benefit from the estate as a beneficiary. Section 3(3) of the Law of Contract Act provides that no suit based on a contract of disposition of interest in land can be entertained unless the contract is in writing, executed by the parties and attested.
21. The 1st respondent, testifying as PW1 in the trial court, stated that he was a purchaser of the land in dispute and produced a search as exhibit 1. He also produced a sale agreement as exhibit 2. There are three sale agreements on record marked as Pex 1(a), (b) and (c) all pertaining to the estate land. They were dated 30th August 1995, 4th May 1994 and 1st June 1994. In all three agreements it is clear that the land was being sold to one Herman Agosa Muyoma. The deceased passed away in 1996.
22. I note that the 1st respondent relied on the chief's letter as evidence of the three purchasers of the suit land. I am concerned that the sale agreements that were produced as evidence indicated Haruni Siayi Kemboi and Kichwen A Koech as the vendors of the land. The deceased was not a party to the agreements that were produced. It is clearly evident that the respondents failed to prove purchaser's interest in the estate.
23. In *Jacinta Wanja Kamau vs Rosemary Wanjiru Wanyoike and Another* (2013) e KLR where the appellant therein unsuccessfully sought protection under Section 93, the Court of Appeal sitting in Nyeri stated: -

Before the appellant could seek protection as a purchaser under Section 93 of the Act, she had first to prove that she is a purchaser. In this case, there was no prima facie evidence that she was a purchaser



24. Applying the same principle, before claiming purchaser's interest the objectors were under a duty to prove that there was a sale agreement between themselves and the deceased. A chief's letter is not evidence of purchase and the trial magistrate erred in relying on the same as conclusive evidence. The finding that there was evidence that the property was purchased by their kin is erroneous as there was no evidence adduced that the purchasers in the agreements were the objectors' kin, or, if indeed they were, that they had obtained letters of administration to represent the estates of their kin in their claim for a share of this intestate estate.
25. In this regard, it is difficult to understand why the threshold for showing that the respondent had a legal right to land against the estate of the deceased was never considered by the trial court as a matter amenable to the provisions of the Land Control Act of Limitation of Actions Act. I do not hold the view that the framers of our constitution and the enactment of the enabling statutes on land transactions by parliament became disabled hitherto, so as to give way for voidable sale agreements litigated under the Law of Succession Act be sanitized by the probate court. It is not uninteresting to note that the provisions of this Act unless otherwise expressed shall as so far as they concerned apply to beneficiaries by birth as first ranking dependants of the deceased and in the second limb those who exhaustively demonstrate dependency as known in law. The concept of creditor is no doubt broad but the distinction made by the Law of Succession Act section 93 shows that it cannot extend to any or everything which would be desirable for the claimant to have against an intestate estate. It must import provisions from the Land Control Act and Limitation of Actions Act to meet the legal threshold of a purchaser. The level at which creditors may be provided for under the Succession Act is clearly not flexible and falls to be assessed on the facts of each case. It is not limited to the existence of an agreement or facts of occupation. It is not the purpose of the Act to provide legacies or rewards to unsubstantiated sale agreements to land. There must as it seems to me be established some sort of legal compliance with the law by the objector or creditor within the factual matrix of his or her claim. It has become conventional in our probate forums to treat every writing on sale agreements as authentic and legal to give rise to a remedy to a claimant. There is need in some cases to separate these questions by the court to simply address the interlocking legal provisions as a whole before any right to the sale of land is passed to the creditor or claimant. In my judgement the trial court misapprehended the law on the capitalized on wrong principles resulting in an injustice and prejudice to the survivorship of the deceased's estate. This fundamental error by the trial court cannot be left to subsist.
26. It is therefore my considered view that the appeal succeeds as there was no evidence led to prove that the objectors were purchasers of the estate land. I hereby set aside the ruling of the trial court. Each party shall bear its own costs.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 17TH DAY OF MAY 2023

.....
R. NYAKUNDI

JUDGE

Info@omondiabandeadvocates.co.ke

In the presence:

