In re Estate of Hannah Wanjari Kamuchobe alias Wanjari Kamuchobe (Deceased) (Civil Appeal 50 of 2020) [2023] KEHC 3618 (KLR) (2 May 2023) (Judgment)

Neutral citation: [2023] KEHC 3618 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CIVIL APPEAL 50 OF 2020

MM KASANGO, J

MAY 2, 2023

IN THE MATTER OF THE ESTATE OF HANNAH WANJARI KAMUCHOBE ALIAS WANJARI KAMUCHOBE (DECEASED)

BETWEEN

EDWIN KINYUA MUNGAI ..... 1ST APPELLANT

PATRICK KINYUA MUNGAI ..... 2ND APPELLANT

AND

JOHN WAITHAKA KING'ARA ..... RESPONDENT

(Being an appeal from the judgement of the Chief Magistrate's Court at Kiambu (Hon. S. Atambo, SPM) in Succession Cause No. 580 of 2016 dated 18th February 2020)

JUDGMENT

1. This appeal relates to the estate of Hannah Wanjari Kamuchobe (deceased). The appellants were aggrieved by the decision of the trial court and accordingly filed this appeal.

2. Before embarking on the facts of this appeal, I wish to caution myself of the perimeter within which I can consider this appeal as the first appellant court. Those perimeters have often been cited and were clearly set out in the case of *Selle & Another v Associated Motor Boat Co. Ltd & others* (1968 EA 123, as follows:

> " ...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..."

3. The deceased died on 20th February 1994. All parties agree that she was married but died childless. The uncontested evidence is that she lived with her niece MGM (hereafter M). M lived with the deceased from when she was at the age of 5 years until when she got married and moved out of the deceased's home when she was 18 years. The deceased was the registered owner of the parcel of Land Kiambaa/kihara/xxx. It is confirmed by all parties that in her lifetime the deceased sold a quarter of her afore stated land to John Waithaka King'ara, the respondent in this appeal. The respondent obtained a title of that land being Kiambaa/kihara/xxxx.

4. What the parties do not agree on but is the evidence of the respondent at the trial court, is that the deceased sold to the respondent the remainder of her property registered as Kiambaa/kihara/xxxx. That property xxxx and how the deceased's succession was handled was the subject of the trial before the trial court.

5. The respondent filed before the trial court an application for revocation of the grant of letters of administration issued jointly to Edwin Mwaura Mungai, the 1st appellant and Patrick Kinyua Mungai the 2nd appellant.

6. Both the appellants had on 28th March 1994 petitioned before the Kiambu Chief Magistrate's Court for grant of letters of administration intestate in respect of the deceased's estate. They petitioned as grandsons of the deceased. In filing the petition, they did not file consent of any other persons entitled in the same degree as or in priority to them. See Rule 26 (1) of the *Probate and Administration Rules*.

   The grant was issued to the petitioners on 23rd December 1994.

7. The appellants applied and obtained confirmation of that grant on 7th July 2006 and the Land Parcel No. xxxx was distributed equally between the two appellants.

8. The respondent filed on 11th January 2007 an application under Section 76 of the *Law of Succession Act* Cap 160 for revocation of that grant. The application was premised on the ground that the respondent had purchased the Land Parcel No. 1454 from the deceased in her lifetime and that the Land Control Board on 28th February, 1990 issued consent to that transaction. The respondent adduced evidence that on making the final payment to the deceased and before the transfer of that Land Parcel No. xxxx was effected into his name, he travelled out of the country and was unaware of the petitioning for the grant by the two appellants. It is the respondent's application for revocation of grant that was the subject of hearing resulting in the judgement of 18th February 2020. That is the judgement which is the subject of this appeal.

Analysis And Determination

9. I need to start by stating that having considered this appeal, I am of the considered view that this appeal is incompetent and cannot succeed. That determination, as it will become clear hereafter, is because of the simple reason that the respondent was not the victor in the trial court's judgement, the subject of this appeal. The application for revocation, as stated before, was filed before the trial by the respondent. He sought revocation on the ground the deceased's property parcel No. xxxx had been bought by him during the deceased lifetime and should therefore not be the subject of the succession cause. The trial court after receiving viva voce evidence made a finding that the appellants when petitioning for the grant failed to obtain consent of those entitled to the same degree or in priority to the inheritance of deceased's estate and further that court made a finding that the beneficiary of deceased's estate was M. That court on those grounds revoked the grant issued to the appellants. It becomes obvious from the

above that although the grant was revoked as the respondent prayed, the court did not support his argument that he was entitled to get that property as a purchaser as he alleged but rather the trial court on being persuaded that M had priority to the appellants to have the deceased property parcel No. xxxx proceeded to so pronounce itself. The main thrust of this appeal by both appellants is that the trial court erred to make that finding that M had priority to them. M although she was the victor in the trial court's judgment, however as the title of this appeal will show, she is not a party to this appeal yet the prayers sought in this appeal are against the finding of the trial court in her favour. It is that finding which leads me to determine that this appeal is incompetent for the correct party, and the one that will be affected by this Court's judgement, that is M, is not before this Court and will therefore not be heard. Appellant did not apply to amend the Memorandum of Appeal to include M.

10. Even though I have reached the conclusion that this appeal is incompetent as stated above, I will proceed to consider the grounds of appeal presented in this appeal.

11. Having perused the Memorandum of Appeal and the grounds thereof and the parties' written submissions, I find the following issues flow for consideration in this appeal, that is:-

    a. Did the Learned Trial Magistrate err in fact or in Law in reaching a finding based on matters not pleaded?

    b. Did the Learned Trial Magistrate err in entertaining the application under Section 76 of *Cap 160*?

    c. Did the Learned Trial Magistrate err entertain a claim whose jurisdiction lies before the Environment and Land Court (ELC)?

12. In consideration of Issue (a) above, I need in the foremost to appraise myself with the evidence adduced at trial.

13. The respondent stated in evidence that he was referred to the deceased by someone who told him that the deceased wished to sell some of her property. He purchased from the deceased a quarter of the deceased's property and was issued with the title NO. xxxx. The remainder of the deceased's property was registered as property No. xxxx. Thereafter, in 1986, the deceased approached the respondent, in the company of her sister Tabitha who is also now deceased, and inquired from him if he would buy the remainder of her property No. xxxx. After the respondent acquiesced to buy that land the respondent and deceased agreed on the purchase price of Kshs.150,000. The respondent paid the deceased by instalments as and when the deceased requested and on completion of those payment, the respondent and the deceased approached the Land Control Board and were issued with the consent to transfer that land to the respondent. The respondent immediately left the country on a mission and it was on his return into the country that he filed the revocation of grant application. The respondent stated that the documentations relating to that transaction were stolen on the death of the deceased but he was able to get a copy of the Land Control Board Consent which he produced in evidence.

14. M testified informing the court that she was the niece of the deceased and lived with the deceased from the time she was 5 years old until she got married at the age of 18 years. She confirmed that the deceased did not have any children. M was the one who assisted the deceased to write the agreement of sale of property No. xxxx between the deceased and the respondent because the deceased did not know how to read or write. She witnessed and noted the 7instalment payments made by the respondent until the final payment of the purchase price. She further stated that all the documentations evidencing that sale were stolen/lost from the deceased's house following her death and while her body was being taken to the mortuary. M stated that the respondent, after he purchased property No. xxxx, he allowed the deceased to continue residing on that until her death.

15. M also stated that she was a niece of the deceased while the appellants were grandsons of the deceased. She said she was not informed when the appellant petitioned for grant. She thereafter stated:

> " I object to the succession cause. I ought to be the one to file the succession cause as her (the deceased) child. I have her ID."

16. George Kariuki Munyua the Chief of Kihara Location in 1990 to 1997 testified and confirmed that the deceased was known to him. He recalled that the deceased approached him in the company of M and the respondent and informed him that she wished to transfer her parcel of land to the respondent. He advised her to inform two elders of her area and to appear before the Land Control Board to obtain its consent to transfer the property. He also stated about the deceased that:

> " She (the deceased) had no other relative save for her niece [M]. John [the respondent] built her a house."

17. This witness confirmed that the deceased and the respondent appeared before the Board and a consent to transfer the land to the respondent was granted. In 1994 the respondent informed him that the documentation of that sale was lost and he took him to the District Officer's office where he was issued with a duplicate of the consent issued earlier.

18. Peter Gatuagu Njogu testified on behalf of the appellants. He was the assistant chief 1980-2000. He is retired after 20 years' service. He said that he issued the burial permit of the deceased. This witness described the 1st appellant as "step-grandson" of the deceased.

19. The 1st appellant stated in evidence that the deceased was co-wife to his grandmother. Deceased was the fourth wife and she died childless. When she died he and his co-appellant filed a succession cause before the Kiambu Chief Magistrate's Court, Succession Cause No. 150 of 1994. They were issued with a grant and the same was confirmed. They later obtained a title in their joint names of the deceased's property No. xxxx. He denied the respondent's assertion that he purchased that property but maintained that the respondent only purchased property No. xxxx. On being cross examined, 1st appellant stated that he did not include his father when he and his co-appellant petitioned for a grant because he was an old man. He confirmed M was deceased niece.

20. The trial court with the above evidence before it determined that the primary duty of the probate court is to distribute the estate of a deceased to the rightful beneficiaries then held as follows:

> " The deceased died on 20th February 1994 intestate. According to the petitioner, they listed in the affidavit support of petition for letters of administration intestate, P & A 5, that they were the only surviving beneficiaries of the deceased's estate as her grandsons. However, it was during the hearing that one MGM, AW2, was the deceased's niece as the deceased was the sister to her father whom she lived with from the age of 5 years till she got married at the age of 18 years. This was confirmed by RW3, the 1ts respondent (appellant) that indeed AW2 was the deceased's niece. In determining this issue, this court is enjoined to look at the law as regards the preference on priority in seeking for grant of letters of administration of a deceased's estate intestate.
>
> Section 66 of *Law of Succession Act* provides preference to be given to certain persons to administer deceased's estate where the deceased died intestine and provides that the court shall, save as otherwise expressly provided, have final discretion as to the person or person to whom a grant of letters of administration shall in the best interest of all concerned, be made,

but shall without prejudice to that discretion, except as a general rule the order of preference as set out in the aforesaid Section 66 (a-d)...

As noted above, there is no dispute whatsoever that deceased was not survived by any spouse and had no children but one MGM, AW2, being the deceased's niece. It was the 1st respondent's evidence that at the time he filed the succession cause, his father was alive but too old. Nonetheless, he excluded his own father who ranked higher than him as a beneficiary.

I therefore find that by virtue of Section 66 of the *Law of Succession Act* and Rule 26 (1) and (2) of the *Probate and Administration Rules*, AW2, MGM had ranked in priority to the respondents in seeking grant of letters of her co-wives clearly excluded her in the succession cause. I further find that the respondents were dishonest and concealed important information form the court in filing the succession cause and clearly did defraud the bona fide beneficiary AW2 from her rightful inheritance.

It is for the above reasons that I invoke the inherent powers of this Court granted under Article 159 of the *Constitution*, Section 76 of the *Law of Succession Act* and Section 73 of the *Probate and Administration Rules* and make the following:-

1. The grant of probate of letters of administration issued of Edwin Mwaura Mungai and Patrick Kinyua Mungai on 23rd December 1994 and confirmed to the respondents on 7th July 2006 were defective as the same were obtained fraudulently and by concealment from court of material facts owing to the exclusion of MGM. The said granted is hereby revoked and annulled.
2. A declaration is hereby made that the beneficiary MGM is the rightful beneficiary of the deceased's estate.
3. That a proper distribution of the estate of Hannah Wanjari Kamuchobe alias Wanjari Kamuchobe who died on 20th February 1994 be done.
4. Costs of the application shall be paid by the respondents.'"

21. With the above analysis of the evidence, how should the court respond to the Issue (a)? Did the trial court err to consider matters not pleaded? It ought to be noted that *Cap 160* affords the court with discretion to determine the matter before it as it may be expedient. That discretionary power is set out in Section 47 of the *Law of Succession* Cap.160 which provides:

> "The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient:-
>
> Provided that the High Court may for the purpose of this Section be represented by Resident Magistrates appointed by the Chief Justice." (emphasis is mine).

22. Rule 73 of the *Probate and Administration Rules* provides saving of the inherent power of the court. It provides:

> "Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

23. Bearing in mind, as was well recognized by the Learned trial Magistrate, the primary duty of the probate court is to distribute the estate if the deceased to the rightful beneficiaries. The trial court did not err to consider matters that were placed before the court by the parties.

24. It will be recalled that the 1st appellant acknowledged that M was a niece of the deceased while the appellants themselves were grandchildren, once removed, of the deceased. That fact places M in priority of the appellant to inherit the deceased's property. This is what Section 39 (1) of *Cap 160* provides. It is in the following terms:

> " 39.
>
> (1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority:-
>
> Father; or if dead
>
> Mother; or if dead
>
> Brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none:-
>
> Half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none:-
>
> The relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares."

25. M is also recognized as having priority over the appellants in the table under the second schedule 'Table of Consanguinity' of the Probate and Administration Rules. The trial court in its judgment followed the logic of the facts presented in evidence. That is, the deceased died childless, her husband and brothers predeceased her and M, her niece, had priority of inheritance over the appellants. If the trial court had not delivered itself as it did by its judgment that court would have failed in its primary duty, that is of identifying the beneficiary and distribution of the estate of the deceased.

26. My response to Issue (a) is that the trial court did not err either in law or fact in determining, as per the evidence of both the appellants and, that M was a niece and the appellants were grandsons, once removed, of the deceased. Using that evidence, the court was exactly correct in determining M as per *Cap 160* and its *Rules*, was the beneficiary of the deceased's estate.

27. Issue (b) calls on this Court to determine whether the trial court erred to reach its determination under Section 76 of *Cap 160*. That Section provides:-

> " A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion:-
>
> (a) That the proceedings to obtain the grant were defective in substance;
>
> (b) That the grant was obtained fraudulently by making of a false statement or by concealment from the court of something material to the case;

(c) That the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently:"

28. The above section invites the court to either invoke the powers thereof, when moved by an applicant, any interested party or the court may invoke the powers of that section on its own motion. In this case, the trial court had been moved by the respondent but determined the issues thereof on its own motion.

29. It was not denied by the appellants that in petitioning for the grant, they stated they were the only surviving beneficiaries of the deceased's estate. This, as their own evidence and that of M and even of the Chief of Kihara Location revealed, M had priority to both appellants. Her consent to petition for grant had not been obtained. That failure contravened Rule 26 (1) of the *Probate and Administration Rules* that Rule provides:-

> "Letters of Administration shall not be granted to any applicant without notice to any other person entitled in the same degree as or in priority of the applicant.
>
> 2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of communication, or written consent in Form 38 or 39, by all persons so entitled in equality or priority be supported by an affidavit of the applicant and such other evidence as the court may require."

30. The appellants in what apparently is a lie deposed in his affidavit sworn December 1994, (no specific date is stated) and which was filed in court in the Kiambu Magistrate's Court Succession Cause No.150 of 1994 as follows:

> " That all persons entitled to apply for grant in equality with us have duly consented to our petition and to the best of our respective personal knowledge, no objection to the making of the grant has been filed in Court."

31. That affidavit was filed in support of the appellant's prayer that a grant of the deceased's estate be issued to both appellants.

32. It is such deposition that brought the matter within the purview of Section 76 *Cap 160*. That statement was obviously false because the 1st appellant acknowledged in evidence that M was a niece of the deceased.

33. Further, when the appellants applied for confirmation of grant, and which grant was confirmed on 7th July 2006 they did not obtain the consent of M. The need for such consent was discussed in the case *Beatrice Mbeere Njiru –v- Alexander Nyaga Njiru* (2022) eKLR, thus:-

> "28. In Succession Cause No. 172 of 2008, *Estate Ibrahim Likabo Miheso (Deceased)* [2020] eKLR the court while addressing the issue on failure to file Form 37 stated as follows:-
>
> > 'I have looked at the record, ... the administrator did not file a consent on distribution, in Form 37, as contemplated by Rule 40(8), duly signed by all the survivors. Rule 40(8) is in mandatory terms. The filing of Form 37, duly executed by survivors guides the court as to whether the survivors are aware of the application for confirmation of grant, and if they are, it gives an indication of those who support the application, and who do not. It is from the contents of Form 37 that the court

is able to pick out the survivors who it may have to direct to file affidavits of protest. The administrator did not comply with Rule 40(8).'"

34. The Court of Appeal held in the case of *Cosimo Polcino –v- Tony Kent* (2014) eKLR that where there is non-disclosure of beneficiary it is sufficient to have a grant annulled. That holding of that case is as follows:-

> "As the superior court observed, had the court been made aware of the existence of the 1st respondent and Gina Kent, the court would have sought their consent or otherwise before resealing the grant. It is our view that the fact that the appellant failed to disclose the existence of his two siblings, is sufficient ground to annul the grant resealed in Malindi Court on 17th November, 2009." (Underlining mine

35. I also note that the petitioners did not provide a letter of their Chief when petitioning whose importance was underscored by Justice Gikonyo in the case of *In Re Estate of Ambutu Mbogoru* (2018) eKLR thus:

> "The Petitioner committed other sins; he initiated these proceedings without a letter of introduction from the chief. This letter serves an important purpose in the ascertainment of the deceased, the dependants as well as properties of the deceased".

36. I therefore find and hold the trial magistrate did not err to entertain the application under Section 76 *Cap 160*, for the reasons set out above.

37. Issue (c) requires an answer whether the trial court entertained a claim that lies within the jurisdiction of ELC.

38. The framing of the grounds of appeal from whence I got Issue (c) was in error. The trial court declined to entertain the respondent's claim to ownership of property No. xxxx, very correctly in my view, because the jurisdiction of that issue lied in the ELC court. This truism was discussed in the case of *In Re Estate of Paul Muhanda Agonya (deceased)* (2020) eKLR thus:-

> "16. I understand these provisions, in the context of the application before me, to mean that any disputes or questions or issues that require court intervention, which revolve around sale, registration and transfer of land, fall within the jurisdiction of the Environment and Land Court. The *Land Registration Act* and the *Land Act*, therefore, confer jurisdiction on the Environment and Land Court with regard to all the processes that are subject to the two statutes, and, therefore, any reference, in the two statutes, to court is to the Environment and Land Court, and any subordinate court that has been conferred with jurisdiction over the processes the subject of the two statutes.
>
> 17. The plain effect of these provisions is that the High Court has no jurisdiction to address itself to matters that fall under the jurisdiction of the Environment and Land Court. The issue that is raised in the instant application relates to sale of land, which is regulated by the *Land Registration Act* and the *Land Act*. Contracts relating to sale of land are about title, for the agreement concerns conveyance of the title in the land from the vendor to the purchaser. After sale transfer should follow. All these processes are regulated and governed by the *Land Act* and the *Land Registration Act*, and any dispute arising from the same ought to be a matter for resolution by the Environment and Land Court, as envisaged by the *Land Act* and the *Land Registration Act*. Similarly, the applicant claims that he took possession of the land after he had allegedly bought it and developed it. These issues turn around occupation and use of the land. All these are matters covered under the *Land Registration Act* and the *Land Act*, and, going

by what I have stated above, the High Court has no jurisdiction over disputes that arise with respect to matters provided for under both statutes.'

39. The trial Magistrate had this to say on the respondent's allegation that he was owner of the property No. xxxx by virtue of being a purchase:-

> I am aware that this court does not have jurisdiction to determine the validity or enforceability of the said agreement, the environment and Land Court does as it is the court which is constitutionally mandated to determine such matter."

40. The answer to issue (c) therefor, is that the trial court did not entertain a matter which falls under the jurisdiction of ELC Court.

Disposition

41. Following the above discussion, I hereby uphold the judgement of the trial court save that as provide under Order 42 rule 31 and 32 of the *Civil Procedure Rules*, I shall vary the said order and make additional orders in order to conclude this long-drawn out succession. It follows that the judgement of this court is that :-

    a. The grant of probate or letters of administration issued to Edwin Mwaura Mungai And Patrick Kinyua Mungai on 23rd December 1994 and confirmed on 7th July 2006 were defective as the same were obtained fraudulently and by concealment from court material facts that is the exclusion of MGM and accordingly the said grant is hereby revoked and annulled.

    b. A declaration is hereby made that MGM is the beneficiary with priority of the deceased's estate.

    c. A grant shall hereof be issued to MGM and the said grant is hereby confirmed and the deceased's property Kiambaa/kihara/xxxx shall go to MGM (Whole).

    d. The transfer and title of property Kiambaa/kihara/xxxx in the names of Edwin Mwaura Mungai and Patrick Kinyua Mungai are hereby cancelled and that title shall go back into the name of the deceased Hannah Wanjari Kamuchobe alias Wanjira Kamuchobe (Deceased).

    e. Edwin Mwaura Mungai and Patrick Kinyua Mungai, their servants or agents or anyone claiming under them shall within 30 days from this date hereof vacate the property Kiambaa/kihara/xxxx and in default of such vacation MGM is hereby granted leave to evict them at their own costs. The police station close to that property and the Chief of Kihara Location shall ensure maintenance of Law and Order during such eviction.

    f. Edwin Mwaura Mungai and Patrick Kinyua Mungai shall bear the costs of this appeal of John Waithaka Kingara.

42. The trial court's judgment subject to the above variation is upheld.

43. Orders accordingly.

JUDGEMENT DATED, SIGNED AND DELIVERED AT KIAMBU THIS 2NDDAY OF MAY, 2023.

MARY KASANGO

JUDGE

In the presence of:

Coram:

Mourice/Julia - Court Assistants

Gatitu Wang'oo & Co. Advocates for Appellants:- N/A

R. M. Mutiso & Co. Advocates for Respondents:- Ms. Njoroge

Court

Judgment delivered virtually.

MARY KASANGO

JUDGE