



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mutuli v Wasakana (Succession Appeal 15 of 2021)  
[2023] KEHC 18761 (KLR) (12 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18761 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
SUCCESSION APPEAL 15 OF 2021**

**PJO OTIENO, J**

**MAY 12, 2023**

**IN THE MATTER OF THE ESTATE OF PETER RAPANDO SHIKANDA  
(DECEASED)**

**BETWEEN**

**GENEVIEVA NASICHE MUTULI ..... APPELLANT**

**AND**

**JOSEPH NALIANYA WASAKANA ..... RESPONDENT**

*(Being an appeal from the Judgment of Hon. F. Makoyo, PM in Butere  
SPM's Succession Cause No. 462 of 2018 delivered on 1st November 2021)*

**JUDGMENT**

**Background of the Appeal**

1. The respondent herein filed an affidavit of protest before the trial contending that the deceased before his death had sold him part of his land E/Wanga/Isongo/2535 which was one of the subdivisions of and parcel E/Wanga/Isongo/1761. He then presented a will allegedly left behind by the deceased and stated that the petitioner was wrong in selling the land he had already bought from the deceased. On that basis he approached the Resident Magistrate's Court seeking the revocation/annulment of the grant issued to the petitioner.
2. The petitioner when served resisted the request and insisted that the objector/Respondent was a stranger to the deceased estate and that at no time did the deceased sell any portion of his land to anyone and the respondent's claims were acts of land grabbing. She claimed that the alleged will was an item of forgery with various alterations on it which were questionable. The petitioner indicated that the purchase price, Kshs 50,000 contradicted that which was attributed in the Sale Land Agreement in



the sum of Kshs 80,000. He considers that disparity to be a substantial contradiction which make the objector's case unbelievable.

3. The trial magistrate after hearing both sides, was convinced on the grievance by the respondent, granted the application by revocation of the grant to the petitioner. That decision provoked the current appeal which was directed to be canvassed by way of written submissions.

### **Summary of the Appellant's case**

4. The petitioner/appellant herein being dissatisfied with the holding of the trial court has preferred this appeal against the whole judgement on the grounds that the learned magistrate erred in law; in holding that there was a strong proof on a balance of probability in support of the respondent's case; in failing to find that there were grave alterations, contradictions and irregularities in the respondent's evidence and in fact by disregarding the appellant's defence. It is therefore his prayers that the appeal be allowed and the judgement of the trial court with all the consequential orders be set aside.

### **Analysis and Determination**

5. Even though the court directed that the application be canvassed by way of written submissions, only the appellant complied. The respondent despite seeking and having time extended to file submissions did not.
6. Having carefully considered the proceedings at the trial court and the judgement by that court as well as the appellant's submissions, outcome of the appeal must turn on whether the respondents claim before the trial court was in deed an inheritance dispute. Whether or not there was a genuine sale or whether the agreement exhibited were in deed genuine and authentic are matter that go towards proof of transaction concerning sale of land and not as assertion of the right to inherit.
7. After summarizing the pleadings by both sides, the trial court in coming to the conclusion that the respondent had proved its case to the requisite standards rendered himself as follows;-

“The main issue for determination is whether the Objector holds a valid Purchaser's interest in the estate of the deceased.

Section 93 of the *Law of Succession Act* provides as follows:

“93(1) A transfer of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.

(2) A transfer of immovable property by a personal representative to a purchaser shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities, funeral and testamentary or administration expenses, duties, and legacies of the deceased have not been discharged nor provided for.”

In *Jacinta Wanja Kamau vs Rosemary Wanjiru Wanyoike and Another* (2013) eKLR 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. In any case, and as provided by Section



82 (b) (II) of the Act, it would have been illegal for Beatrice Njeri Magondu to sell the land before the confirmation of the grant.”

The Objector’s case is that he and the deceased entered into a sale agreement regarding the purchase of the land E/wanga/isongo/2535 and produced the said sale agreement which contains the terms and conditions of sale of the said property and the contents were not controverted by any credible evidence by the Petitioner. The Objector told the Court that after having purchased the land from the deceased, he took possession for a time, a fact confirmed by the Petitioner but who qualified the same by stating that the Objector was simply a lease. This is in my view, strong proof on a balance of probability that Purchaser’s interest existed in favour of the Objector and the same cannot only be displaced without satisfactory evidence showing some kind of irregularity or illegality on the part of the Objector and not by just a mere denial as is the case here.

The Objector demonstrated a Purchaser’s interest and attached the sale agreement which was accompanied in his testimony and cross-examination by the reasons why the suit property was not transferred during the lifetime of the deceased. The rights of the Objector herein arise from an equitable constructive trust therefore the Petitioner’s contention that the Objector’s claim is time barred does not apply. The Petitioner has not brought any material before this Court to challenge these particular rights that the process through which the Objector obtained his rights was tainted with fraud. The evidence by the Objector has remained unchallenged and he is therefore under succession law entitled to the land he purchased from the deceased, E/WANGA/ISONGO/2535. The same shall be transferred to the Objector.”

8. The trial court clearly proceeded as though it was sitting as a land court by seeking to establish rights acquired by sale and not right to inheritance. But, more importantly, the court proceeded by placing heavy reliance on section 93 of the *Law of Succession act*, and for good effect reproduced the provision.
9. That provision is intended to protect transfers by the administrators yet in the matter there was no allegation that the alleged sale was by the appellant. There was equally no allegation that there had been any transfer by the administrator. That section was thus clearly inapplicable in the matter before the trial court and its invocation was wholly mistaken. The respondents claim having been that of a purchaser from the deceased which was resisted/not acknowledged by the administrator, was not suited to be heard by the succession court but ought to have been taken before the Environment and Land Court. For lack of jurisdiction and clear misapprehension of both the law and the evidence led, the decision was obviously erroneous and must on that account be set aside.
10. Upon reappraisal and re-examination of the material before the the trial court, with a view to coming to own independent conclusions, the court finds that the judgment of November 1, 2021 was made without jurisdiction and grounded on clear erroneous exposition of the law and misapprehension of the evidence. It is set aside, with the consequence that the appeal succeeds and the grant that was revoked is hereby reinstated. Each party shall bear own costs.

**DATED, DELIVERED AND SIGNED AT KAKAMEGA THIS 12<sup>TH</sup> DAY OF MAY 2023.**

**PATRICK J. O. OTIENO**

**JUDGE**

**In the presence of:-**

Mr. Iddi for the Appellant



Mr. Otinga for the Respondent

Court Assistant: Polycap

