



In re Estate of the Late Julia Wanjiku Wachiuri (Deceased) (Succession Cause E005 of 2022) [2023] KEHC 20301 (KLR) (13 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20301 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
SUCCESSION CAUSE E005 OF 2022
CM KARIUKI, J
JULY 13, 2023**

BETWEEN

ELIZABETH WANGUI KARANGA PETITIONER

AND

EUNICE WAMBUI WITU PROTESTOR

(Appeal from the Ruling of Hon. Charles Obulutsa, Chief Magistrate in Nyahururu CMC Succ No. 261 of 2018, delivered on 29th September 2022)

JUDGMENT

1. Before this court is an appeal filed by way of a Memorandum of Appeal dated October 5, 2022 by Elizabeth Wangui Karanga, the Appellant herein against the Ruling of Hon Charles Obulutsa, Chief Magistrate in Nyahururu CMC Succ No 261 of 2018, delivered on September 29, 2022. The Memorandum of Appeal sets forth the following grounds of appeal:-
 - I. The learned magistrate erred in law and fact by failing to find that it lacked the jurisdiction in a succession cause to determine the issues touching on a disputed sale agreement dated October 28, 2008.
 - II. The learned magistrate erred in law and in fact, in failing to find that the authenticity of the sale agreement dated October 28, 2008 could only be determined by a land court.
 - III. The learned magistrate erred in law and fact in finding that the deceased executed the sale agreement dated October 28, 2008.
 - IV. The learned magistrate erred in law and fact by failing to find that the sale agreement dated October 28, 2008 was admissible, valid and enforceable as against the estate of the deceased.
 - V. The learned magistrate erred in law and fact by holding that a portion of $\frac{1}{4}$ acre was hived off by the deceased after the execution of the sale agreement dated October 28, 2008.



- VI. The learned magistrate erred in law and fact in finding that the acknowledgment dated November 4, 2008 was a valid document.
- VII. The learned magistrate erred in law and fact in finding that the family meeting held on 2nd June 2013 had the legal capacity of reviving a time barred sale agreement of October 28, 2008.
- VIII. The learned magistrate erred in law and fact by failing to find that it lacked jurisdiction to enforce a time barred sale agreement dated October 28, 2008.
- IX. The learned magistrate erred in law and fact by finding that the Respondent had proved her protest and as such entitled to a portion of ¼ acre from the deceased's estate.
- X. The learned magistrate erred in law and fact by failing to dismiss the protest with costs.
- XI. Reasons wherefore the Appellant prays for:-
- XII. The appeal be allowed and the ruling delivered on September 29, 2022 in Nyahururu CMC Succ No 261 of 2018 be set aside.
- V XIII. The Respondents protest contained in the affidavit of protest dated 8th October 2018 and filed on 9th October 2018 be dismissed.
- XIV. The deceased's estate compromising L.R. Nyandarua/Ol Joro Orok Salient/16850 be distributed in equal shares to Elizabeth Wangui Karanga and Mary Waithira Wachiuri.
- XV. The Respondent be ordered to pay the costs of this appeal and Nyahururu CMC Succ No 261 of 2018.

Appellant's Submissions

2. The Appellant submitted that the trial court lacked jurisdiction in a succession cause to determine the issues on a disputed sale agreement dated October 28, 2008. That the Respondent agitated a cause of action based on a land sale agreement dated October 28, 2008, and her evidence was geared towards advancing a narrative that the said James Wanganga Witu had purchased a portion of land from the deceased. In essence, the Respondent enforced a land sale agreement against the estate, and the estate administrator disputed the land claim.
3. Reliance was placed on *re Estate of Kinogu Mukiria (deceased)* [2022] eKLR, *re Estate of Alice Mumbua Mutua (deceased)* [2017] eKLR
4. It was argued that the trial court arrogated to itself jurisdiction exceeding that which is conferred upon by law. The Law of Limitation caught up the said sale agreement since its claim was filed 10 years after and thus unenforceable and cannot be relied upon to enforce any rights or acquire any interest. The authority of the sale agreement can only be determined by a land court.
5. Reliance was placed on *re Estate of Teresa Wangui Muruga (deceased)* [2021] eKLR
6. Lastly, the Appellant asserted that the Respondent had not proved their protest, and thus she is not entitled to the said portion of land. They also relied on their submissions filed before the trial court and prayed for the appeal to be allowed as prayed in the Memorandum of Appeal dated October 5, 2022.

Respondent's Submissions

7. The Respondent submitted that it is worth noting that the Appellant did not file any affidavit in opposition of the protest and thus the facts deponed in the protest remained uncontroverted. That



when directions were issued on hearing of the protest, the trial magistrate had no reason to believe that the fact of the sale would be questioned by the petitioners.

10. It was stated that throughout the trial, the petitioners never raised the question of the authenticity or otherwise of the land sale agreement. That the jurisdiction of the trial court was never called into question either. It is only in the submissions that these issues came up and therefore it is late in the day to raise the issues.
9. The Respondent averred that the sale agreement was authentic and could only be authenticated by those who were present when it was executed and the same had been proved on a balance of probabilities based on the evidence of PW2 and Rosemary Witu.
10. On jurisdiction, the Respondent stated that most probate courts in Kenya deal with land as a matter of course. The jurisdiction of probate courts to deal with the properties (including land) of a deceased person is provided for under Section 2 (1) & 47 of the Law of Succession Act. further reliance was placed on re Estate of George Gikundi (Deceased) [2019] eKLR, Floris Pierro & Another v Giancarlo Falasconi [2014] eKLR
11. It was asserted that the trial magistrate has jurisdiction to determine the protest placed before him pursuant to the provisions of Section 47 of the Law of Succession Act as read together with Rule 73 of the Probate and Administration Rules. That the subject property belongs in a probate court as it is registered in the name of the deceased person. That inevitably the probate court had to decide whether the subject land parcel was property free for distribution to the children of the deceased. That the deceased entered into a binding transaction with the protestor's husband, and her death did not discharge her from liability and/or her obligations under the contract, which is now attached to her estate.

Analysis and determination

12. After careful consideration, the main issue for determination herein is whether the trial court had jurisdiction to hear and determine the issues raised in the protest dated October 8, 2018.
13. The Appellant herein filed for the summons of confirmation of grant dated January 9, 2017 in Nyahururu CMC No 261 of 2018 (formerly Nakuru Succ No 344 of 2015). Consequently, the Respondent filed an affidavit of protest sworn on 8th October 2018, protesting against the proposed mode of distribution of the deceased's estate. The grounds for the protest were as follows: -Her late husband has interest over a portion of ¼ acre of L.R. Nyandarua/Ol Joro Orok Salient/16850 as a purchaser vide an agreement dated October 28, 2008. That in 2012, her late husband sold the said portion to one Joy Mukami. That the Respondent is entitled to be added as a beneficiary of the said portion.
14. The matter was heard, and on September 29, 2022, the trial court allowed the protest with costs and proceeded to include the protestor in the distribution schedule for L.R. Nyandarua/Ol Joro Orok Salient/16850. It is these findings that prompted the filing of this appeal.
15. At the heart of the Appellant's grievances is that the trial court lacked the jurisdiction in a succession cause to determine the issues touching on a disputed sale agreement dated October 28, 2008. In response, the Respondent asserted that throughout the trial, the petitioners never raised the question of the authenticity or otherwise of the land sale agreement. That the jurisdiction of the trial court was never called into question, and therefore it is late in the day to raise the issues.
16. It is evident that the bone of contention goes to the ownership of a portion of ¼ acre of L.R. Nyandarua/Ol Joro Orok Salient/16850. The protestor claimed that his husband was a purchaser for



value, and sale transactions took place before the deceased's death, but the land was not transferred to them by the deceased in her lifetime. The protestor asserted that by virtue of the sale agreement dated October 28, 2008 and subsequent acknowledgments presented before the trial court her deceased husband had bought the land.

17. It is my view that the trial court was called upon to determine the validity of the sale agreement and the ownership of a ¼ of an acre out of Title No Nyandarua/ Ol Joro' Orok Salient/ 16850 which is a preserve of the Environment and Land Court. The deceased was still the registered owner of Title No Nyandarua/ Ol Joro' Orok Salient/ 16850. The disputed sale centered on the ownership of the ¼ acre that the protestor claimed that her deceased husband bought. The same was never transferred to him, and he was, therefore never registered as the owner of that ¼ acre.
18. Accordingly, the crux of the matter was whether there was a valid sale transaction that the estate of the deceased is bound to honor. Evidently, the aforementioned matters are governed by the Land Registration Act, No 3 of 2012, and the Land Act, No 6 of 2012, but not the Law of Succession Act, and the Environment and Land Court is the appropriate avenue to address the same. I, therefore, find that the trial court lacked jurisdiction to determine matters of ownership, use, and occupation of land as set forth in the protest.
 - I. Consequently, I hold that as empowered by Rule 41(3) of the Probate and Administration Rules, the contested portion of land should be set aside at confirmation by removing it from the schedule of assets to be distributed to allow the parties to move the Environment and Land Court, appropriately, for determination of the validity of the sale transaction, and the ownership and/or entitlement of the portion of land that is disputed, i.e. ¼ acre of Nyandarua/ Ol Joro' Orok Salient/ 16850, in a suit as between the parties.
 - II. The suit in prayer (i) above to be filed and served within 90 days in default distribution of the ¼ acres.
 - III. Parties to bear their costs.

DATED, SIGNED, AND DELIVERED AT NYAHURURU ON THIS 13TH DAY OF JULY 2023.

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CHARLES KARIUKI

JUDGE

