



**Kiriamburi v Kiriamburi (Civil Appeal 56 of 2017)
[2023] KEHC 20539 (KLR) (19 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20539 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL 56 OF 2017
LM NJUGUNA, J
JULY 19, 2023**

BETWEEN

NANCY MBEERE KIRIAMBURI APPELLANT

AND

JANE IKAMBA KIRIAMBURI RESPONDENT

JUDGMENT

1. The appellant filed an appeal *vide* memorandum of appeal dated October 19, 2017 contesting the decision of the court in the Chief Magistrate’s Court at Embu Succession No 408 of 2017 (formerly high court succession cause No 450 of 2009). The appeal was based on the grounds on the face of the memorandum of appeal and the following orders were sought:
 - a. The appeal be allowed;
 - b. The judgment of the trial court be set aside; and
 - c. The costs of the appeal and the trial court be awarded to the appellant.
2. The grant in question was issued on August 14, 1997 and confirmed on March 9, 1998 through Embu Principal Magistrate succession cause No 119 of 1997. *Vide* Chief Magistrate’s Court at Embu Succession No 408 of 2017 (formerly high court succession cause No 450 of 2009) the appellant herein filed summons for revocation of grant which was confirmed March 9, 1998. In the said succession cause, the parties entered a consent as a way to resolve the issues between them. The consent stated that the certificate of confirmation of grant dated March 9, 1998 be set aside and the administrator to apply for fresh summons for confirmation of the grant issued in Embu Principal Magistrate succession cause No 119 of 1997. The appellant herein protested the summons for confirmation of the grant.
3. The trial court in its judgment in Embu Chief Magistrate succession cause No 408 of 2017 (formerly HC Succ 450 of 2009), dismissed the summons for revocation of grant filed by the appellant herein.



In the summons for revocation of the grant together with its supporting affidavit, the applicant sought orders that the grant dated August 14, 1997 issued to the respondent herein be revoked, the court issue prohibitory orders on Ngandori/ Kirigi/1055, Ngandori/ Kirigi/ 3022, Ngandori/ Kangaru/ T.55 And Gaturi/ Weru/ 654 and the costs of the application to the applicant. The grounds in support of the application were that the said grant was obtained fraudulently by making of a false statement and not stating all the beneficiaries of the estate.

4. The parties consented to have the certificate of confirmation set aside and the administrator Jane Ikamba to file fresh summons dated August 20, 2009 for confirmation of the grant including the names of the appellant herein and her siblings. The trial court proceeded to allow the summons for confirmation of the grant and dismiss the summons for revocation of the grant. The decision of the court was based on the evidence that the deceased, who was terminally ill, had already outlined distribution of his wealth before his death and the beneficiaries were aware of this. Further, that the appellant herein and her siblings were aware of this and none of her siblings are in support of her protest to the distribution.
5. The court ordered that this appeal be dispensed with by way of written submissions.
6. The appellant in her submissions averred that the distribution of the estate failed to comply with section 40 of the *Law of succession Act* and that the respondent did not disclose that the deceased was polygamous. On this, she relied on the cases of *In Re Estate of Benson Ndirangu Mathenge (deceased)* Nakuru HCSC No 231 of 1998 and *Stephen Gitonga M'Murithi Vs Faith Ngira Murithi* (2015) eKLR. She relied on the case of *Jacinta Wanja Kamau Vs Rosemary Wanjiru Wanyoike & Another* (2013) eKLR to support her claim that the beneficiaries did not consent to the distribution of the estate by signing affidavits to that effect. She stated that the trial court erred in allowing distribution of the estate based on the wishes of the deceased while there was nothing on record to show that the wishes of the deceased amounted to a valid will. The appellant stated that the trial court lacked jurisdiction to entertain the summons for confirmation of grant dated May 25, 2016 on the basis of *res judicata*.
7. In her submissions, the respondent avers that the appellant cannot purport to appeal on behalf of her siblings who are not contesting the mode of distribution of the estate. It is also her case that some of the beneficiaries had a chance to testify before the court and they did, thus assisting the court to reach a judgment.
8. I have considered the submissions of both parties together with the proceedings and evidence produced in the trial court and I find the issues for determination to be as follows:
 - a. Whether or not the trial court had jurisdiction to handle the summons dated May 25, 2016 for confirmation of grant in light of the proceedings in Embu Principal Magistrate succession cause No 119 of 1997;
 - b. Whether the distribution of the estate was fair and just according to Sections 35, 38 and 40 of the *Law of Succession Act*; and
 - c. Who is to be awarded the costs of this appeal and the trial court?
9. On the issue of whether or not this court lacks jurisdiction on the basis of *res judicata*, I have perused the lower court file in Embu Principal Magistrate Succession Cause No 119 of 1997 and Embu Chief Magistrate Succession Cause No 408 of 2017 (formerly HC Succ 450 of 2009), the latter being the subject of the appeal herein. According to the record, a succession cause was filed for grant of letters of



administration, the same was granted and confirmed. Per Section 7 of the Civil Procedure Rules 2010, res judicata is provided for as follows:

“7. *Res judicata*

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

10. In the instant case, the trial court adopted the consent recorded by the parties. This consent stated that the certificate of confirmation of grant issued in Embu Principal Magistrate Succession Cause No 119 of 1997 be set aside and the administrator proceed to file fresh summons for confirmation of grant to include the beneficiaries who had been left out. This consent was adopted by the court and issued as an order.
11. In my considered view, the decision of the court to order the administrator to file fresh summons for confirmation of grant and subsequent issuance of certificate of confirmation of grant was not res judicata. This is because the previous certificate of confirmation had been set aside by a court order hence it ceased to exist. On this I am guided by the following case which laid out the parameters of res judicata: The Independent Electoral and Boundaries Commission Vs Maina Kiai & 5 others, [2017] eKLR), where it was held that:

“For the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

- a. The suit or issue was directly and substantially in issue in the former suit.
- b. That former suit was between the same parties or parties under whom they or any of them claim.
- c. Those parties were litigating under the same title.
- d. The issue was heard and finally determined in the former suit.
- e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”
 1. The subsequent action in Embu Chief Magistrate succession cause No 408 of 2017 (formerly HC Succ. 450 of 2009) is not therefore impeded by res judicata. I therefore find that the court had proper jurisdiction to handle the matter before it.
 2. On the issue of distribution of the estate, the Law of Succession Act was commenced on July 1, 1981. The deceased died on March 30, 1997, after commencement of the act. This means the customary law on distribution of the estate of the deceased cannot apply as it contradicts provisions of the statute. The appellant argued that the chief magistrate erred by awarding parcel No Gaturi/Weru/654 jointly to all the daughters and that the same is not sufficient. I find that the trial court was right in allowing distribution of the estate according to the Law of Succession Act and I find the same to have been done in accordance with Sections 35, 38 and 40 of the Law of Succession Act.



3. The trial magistrate based his judgment on the wishes of the deceased. However, from my perusal of the lower court file, there is no proof that the deceased left a valid oral or written will. The law is settled on application and validity of wills. Sections 8, 9 and 10 of the *Law of Succession Act* provides for oral wills and that where the alleged oral will is contested, the same shall be held as invalid unless proved by a competent independent witness. In the present case, the wishes of the deceased were not recorded nor proven to meet the standard of a valid oral will.
4. Given the analysis in my previous paragraphs, a question is asked: is distribution of the estate as allowed by the court offensive to the provisions of the *Law of Succession Act*? The answer is no, the distribution is fair within the purpose of the act. Even though the lower court took a different route leading to distribution of the intestate estate of the deceased, I see no reason to interfere with the same.
5. In light of the above, and keeping in mind the provisions of the law, I find that the appeal lacks merit. For the avoidance of doubt I do order as follows;
 - i. The appeal is hereby dismissed;
 - ii. That the judgment in Embu Chief Magistrate Succession Cause No 408 of 2017 (formerly HC Succ. 450 of 2009) is hereby upheld.

17. Each party shall bear her own costs considering that they are members of the same family.

18. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 19TH DAY OF JULY, 2023.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondents

