



**Theuri v Kimbo (Probate & Administration Appeal 6 of 2019)
[2023] KEHC 20501 (KLR) (21 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20501 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
PROBATE & ADMINISTRATION APPEAL 6 OF 2019**

LM NJUGUNA, J

JULY 21, 2023

BETWEEN

JEREMIAH MUKUA THEURI APPELLANT

AND

JULIA WANJIRU KIMBO RESPONDENT

*(Being an Appeal from the Ruling of Honourable P. Mutua SPM in Nyeri
CMC's Succession Cause No. 156 of 2018 delivered on 26th March 2019)*

JUDGMENT

1. In the proceedings before the trial court, the appellant and the respondent herein were issued with grant of letters of administration intestate over the estate of the deceased Theuri Ngugi Kimbo on November 30, 2017. Each of the parties proceeded to file individual summons for confirmation of grant, The first application is dated September 24, 2018 and though it appears like it was filed by both administrators, the applicant has owned the application as having been filed by him. The second application is dated October 26, 2018 and which was filed by the respondent herein. The two applications proposed different modes of distribution of the estate. On October 16, 2018, the appellant herein fixed the application dated September 24, 2018 for hearing in absence of the respondent but the same did not proceed for hearing on the date it was supposed to (November 13, 2018). On January 18, 2019, the appellant fixed the application dated October 26, 2018 for hearing and on the date fixed, it was heard and the grant was confirmed. The appellant proceeded and filed summons dated February 18, 2019 seeking variation or setting aside of the orders confirming the grant and for orders that the two summons (which had been filed) be struck out and orders be made that fresh summons for confirmation of grant be filed and the matter be heard afresh. His grounds in support of the application were basically that the court allowed the application by the respondent instead of his application.
2. The trial court delivered its ruling on March 26, 2019 and wherein it dismissed the said application with costs.



3. It is this ruling which the appellant seeks reversal of in the instant appeal and in so doing he approached this court vide a memorandum of appeal challenging the trial court's ruling in Nyeri CMC's Succession Cause No 156 of 2018 delivered on March 26, 2019 and wherein the appellant raised five (5) grounds to wit; the learned trial magistrate erred in fact in allowing the application dated October 26, 2018 whereas there was a pending application dated February 18, 2019; the learned trial magistrate erred in law in failing to distribute the land to the surviving wives; the learned trial magistrate erred in law and in fact in failing to treat the application dated February 18, 2019 as a protest and instead allowed the application dated September 24, 2019 in its entirety; the learned trial magistrate erred in law and in fact in condemning the appellant unheard contrary to rules of natural justice; and that the learned trial magistrate erred in law and in fact when he dismissed the application dated February 18, 2019.
4. The appellant thus prayed that the ruling of the trial court be set aside, the appeal to be allowed and the costs of the appeal to be awarded to the appellant.
5. Directions were taken that the appeal be canvassed by way of written submissions.
6. The appellant submitted that in confirming the summons dated October 26, 2018 the trial court held that all the beneficiaries were present and that those who were not present had consented to the distribution of the estate which was an error as the consent was not signed by all the beneficiaries ie Mirriam Wanjugu Theuri. Further that there being two summons for confirmation of grant, one dated October 26, 2018 filed by the respondent and another dated February 18, 2019 filed by the appellant, and which summons had conflicting modes of distribution, the trial court ought to have treated one of them as a protest and as thus it fell into an error by failing to do so. That the trial court failed to distribute the land to the surviving spouses whereas the deceased was polygamous and as thus the court ought to have distributed the estate to the wives so as each of them could distribute the same to her respective children. That the appellant was condemned unheard. That it was the appellant who fixed the application dated October 26, 2018 for hearing but he was mistaken as to the application which was coming up for hearing whereby he thought that it was his application dated September 24, 2018 which was coming up for hearing but he was surprised later that what was confirmed was the respondent's application dated October 26, 2018. That the trial magistrate erred in law and in fact in dismissing the application dated February 18, 2019 whereas the appellant had stated in the said application that the mode of distribution was not read during the confirmation proceedings.
7. In opposing the appeal, the respondent submitted that the court did not err in confirming the summons dated October 26, 2018 as the same was not opposed despite the appellant having been served with the same. Further that all the beneficiaries were in court on the day of the hearing including the appellant and that those who were absent had consented to the proposed mode of distribution. Further that Mirriam Wanjugu was in court on the date of hearing of the application despite her having not signed the consent at the time of filing the application and that the issue as to her having not signed the consent was an afterthought. Further that the appellant was never condemned unheard as he was in court on the date of hearing of the application and when his name was called, he did not say anything or raise any objection to the same. That after the grant was confirmed, the parties went to the registry and they were informed as to the orders of the day and that the hearing date was fixed by the appellant and as such, he cannot claim that he thought that it was his application which was coming up for hearing as he knows how to read and write. That the appellant having not filed any protest or response, the court had not otherwise but to comply with rule 40(8) of the *Probate and Administration Rules*. That one Esther Wairimu Kimbo one of the beneficiaries was deceased and thus the certificate of confirmation of grant ought to be amended by removing her names and replacing the same with Jeremiah Theuri.



8. It is now well settled that the role of this court, as a first appellate court is to revisit the evidence on record, re-evaluate it and reach its own conclusion in the matter. (See the case of *Selle & Ano vs Associated Motor Boat Co Ltd* (1968) EA 123). However, this court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings {See *Mwanasokoni – versus- Kenya Bus Service Ltd* (1982-88) 1 KAR 278 and *Kiruga –versus- Kiruga & Another* (1988) KLR 348}.
9. I have certainly perused the memorandum of appeal filed herein, the rival submissions and the trial court record and it is my finding that the main issue for determination is whether the appeal has merits.
10. However, before I proceed to look at the merits of the appeal, I must note that though the appellant is appealing against the ruling of the trial court which was delivered on March 26, 2019, there is no ground on the memorandum of appeal challenging the said ruling. It is clear that the grounds challenge the decision by the trial court in confirming the grant and in not considering the two applications and not distributing the estate as amongst the spouses. There is no ground which touches on the ruling the appellant seeks to appeal against. The ruling the appellant is challenging concerned an application for review of the orders confirming the grant. The applicant ought to have framed the grounds of appeal in such a manner as to challenge the said ruling not the issues to do with confirmation of the grant. There is no ground which deals with the finding of the court in the said ruling or faults the court's decision in the said ruling but all the grounds deal with the confirmation of grant. Even in his submissions, the appellant did not submit at all in regards to the said ruling but only on the issue as to him having fixed a date but not being aware that it was not his application which he had fixed for hearing. There is nothing which shows the court erred in the said ruling.
11. In my view, the appellant herein is just but trying to appeal against the orders confirming the grant (orders of February 12, 2019) through the back door and in so doing avoid the requirement for leave to appeal out of time (the memorandum of appeal was filed on 25.04.2019 which is beyond the 30 days required by the law). I decline such an invite as this court does not have jurisdiction to determine an appeal filed out of time without leave.
12. Further, I note that the appellant herein had applied for review of the orders of the trial court and wherein the court declined the application. As a rule, a party cannot appeal against a ruling or an order after an unsuccessful attempt to review the said order. (See *HA -vs- LB* [2022] eKLR paragraph 13 and *The Chairman Board of Governors Highway Secondary School Vs William Mmosi Moi* Civil Application No 277 of 2005).
13. I am aware as I have noted above that the duties of this court is to revisit the evidence on record, re-evaluate it and reach its own conclusion. But in the instant case, it becomes hard to do where the court is not guided as to where the trial court went wrong. Such guidance ought to come from the grounds of appeal and the submissions and the appellant has not done so.
14. Considering all the above, therefore, I find the appeal herein is misconceived and indeed an abuse of the court process. The same is hereby dismissed. However this being a succession matter involving siblings, each party to bear its own costs of the appeal.
15. It's so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 21ST DAY OF JULY, 2023.

L. NJUGUNA

JUDGE



.....for the Appellant

.....for the Respondent

