



REPUBLIC OF KENYA



KENYA LAW
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**Allan v Mugo & 4 others (Civil Appeal 47 of 2018)
[2023] KEHC 22423 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22423 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL 47 OF 2018
FR OLEL, J
SEPTEMBER 22, 2023**

BETWEEN

EPHANTUS NJERU ALLAN APPELLANT

AND

SALOME MAITHA MUGO 1ST RESPONDENT

LUCY WAWIRA MUGO 2ND RESPONDENT

ANN WANJA 3RD RESPONDENT

PRISCILLA WANDIA NDAMBIRI 4TH RESPONDENT

JEDIDAH GICUGU MUGO 5TH RESPONDENT

(Being an appeal from the Judgement of Hon. A. N. MAKAU- Senior Resident Magistrate delivered on 13th September 2017 in Gichugu Succession cause No. 33 of 2015)

JUDGMENT

1. This appeal arises from the Judgement of the Honourable A.N. MAKAU Senior Resident Magistrate delivered on 13th September 2017 Gichugu Succession cause No. 33 of 2015 where she upheld the respondents protest, and directed that the estate property Baragwe/Thumaitha/594(hereinafter referred to as the suit property) be divided into two equal parts one for the appellants to hold in trust for themselves and the children of Evelyne wanja and the other half to be jointly registered in the names of the respondent's herein. The appellants filed their memorandum of appeal on 7th August 2018, pursuant to leave granted to appeal out of time granted in Kerugoya High court Misc Succession No 7 of 2018 on 31st July 2018.



Background Facts

2. The deceased herein passed on, on 30th April 2015 aged 70 years. He died intestate leaving behind his wife Phides Thara Harun and son Ephantus Njeru Allan. Information provided by the letter of the area chief Thumaita Location dated 13th July 2015 also stated that three children of their deceased sister were beneficiaries to the estate.
3. The deceased, owned land parcel number Baragwe/Thumaita/594 measuring 1.53Ha. The appellants petitioned court and were issued with grant of letters of administration on 26th January 2016. No sooner had they been issued with the said grant, on 2nd February 2016, the appellants applied for confirmation of grant on the basis that they were the only beneficiaries to the estate and that the 2nd appellant was elderly and they could thus not wait for the six months to lapse. The respondents who were the deceased sisters did file a protest vide their affidavit against confirmation of grant dated 3rd August 2016 and further affidavit in protest against confirmation of grant dated 15th August 2016. In response to these affidavits filed by the respondent's the 1st appellant filed a further affidavit dated 29th August 2016.
4. The protest was disposed off by way of viva voce evidence. The 1st respondent Salome Maitha (1st protestor-PW1) testified that the deceased Allan Njeru was their elder brother and he passed away in June 2015. He was the registered owner of the suit property measuring about 4 acres. She stated that the protest was based on the fact that the deceased was given land by Unjiru Wa Mbari ya Gitonga clan in 1958 as he was the only son then and land at that time was never given to women. The deceased was to hold the land in trust for the family including the protestors. They were born and brought up on the said parcel of land and their mother, sister and daughters were buried therein. They had no other land and had nowhere to stay.
5. In cross examination, PW1 stated that their father Epantus Njeru Mugo died in 1958, before land demarcation was undertaken. She was also born in 1958. It was their elder brother who brought them up, schooled them and took care of them until they were of age and got married. She got married in 1982 and had her own family, but insisted that the deceased brother was only a trustee of the family. Before he died, she had asked the deceased to share the suit parcel and he had agreed on the same but died before it was affected.
6. According to the green card seen, she noted that the deceased was registered as the owner of the land in 1958 as Allan Kibicho and rectified in 1970 to read Njeru Ephantus Allan. She confirmed that the two names referred to one and the same person. The issue of sharing the parcel of land had come up several times and they had discussed it with the deceased, who promised to share the said suit property but that never came to fruition. PW1 further agreed that the appellants were the rightful heirs of the estate, but they too were entitled as the deceased was holding it trust for the family.
7. PW2 Pricilla Wandia Ndambiri confirmed that the deceased was their elder brother. The suit parcel was registered in his name but to hold in trust for the family. They were all born and brought up on the suit parcel and they had nowhere else to call home. The whole clan knew they were entitled to a share of the suit parcel. In cross examination she stated that she was born in 1945, while the deceased was born in 1938. Land demarcation was done in 1958 and she did not witness the clan giving her brother land. Their father had died in 1958 and clansmen were called to court to avail details of land owners. She was married in 1964 and had her own home where she lived with her family. From 1964 to 2015, when the deceased died, she was not relying on him



8. In 2011, together with her sisters, they went to the deceased and asked him to share the suit parcel so that they could get their portion. The deceased promised to share the suit parcel but died before he could do so. PW2 further denied that the suit parcel solely belonged to the deceased and insisted that he held it in trust for the family. Further she stated that their father was called Ephantus Njeru, and Njeru Ephantus Allan was not the deceased but the appellant herein (The deceased Son). In re-examination she confirmed that the 1st appellant herein was born in 1973.
9. DW1 Ephantus Njeru Allan testified that the deceased was his father and they were five siblings but four had died. He was the only survivor together with his mother, the 2nd appellant. He knew the protestors/respondents as his Aunties. He stated that they do not stay together nor were they dependants/beneficiaries of the deceased. He stated that the protest should be dismissed. He also acknowledged that one of his sisters left behind two children and agreed to include them as part of the estate. In cross examination he reiterated that the suit parcel belonged to his father and the respondents had never claimed any share thereof. The suit property was never held in trust at any given point.
10. The trial magistrate did consider the evidence put forth and upheld the respondents protest. She found that the deceased being the eldest son, held the suit parcel as a Muramati, in trust for himself and other heir so the estate. She directed that the estate property Baragwe/Thumaitha/594 be divided into two equal parts one for the appellants to hold in trust for themselves and the children of Evelyne wanja and the other half to be jointly registered in the names of the respondent's herein
11. Being aggrieved by this Judgment, the appellant did file their Memorandum of Appeal on 7th August 2018 and raised the following grounds of appeal;
 - a. That the learned trial Magistrate erred in law and in fact when she heard the protest and made her decision based on a claim on trust, which jurisdiction she lacked,
 - b. That the learned trial magistrate erred in law and fact, in failing to evaluate evidence thus making a decision against the weight of evidence hence occasioning miscarriage of justice.
 - c. The learned trial magistrate erred in law and in fact when she misdirected herself in law relating to dependants of the deceased.
12. The appellant prayed that this appeal be allowed and the judgement/decree of the trial magistrate delivered on 13th September 2017 be set aside and an order do issue that land parcel Baragwe/Thumaitha/594 be jointly registered in the names of the appellant

Appellant submissions

13. The appellant did file his submissions on 31st May 2022 and indicated that the 2nd appellant died before the appeal was filed. The appellant did contend that the issue of trust could not be determined in a succession matter. There was no evidence adduced by the respondents to prove that they were maintained by the deceased for them to qualify to be beneficiaries of the deceased estate.
14. The appellant relied on the citation of Kerugoya HCC Succession No 295 of 2012 *Peris Wanjira Muriithi vs Thomas Ndwiga & 8 others*, Kerugoya HCC Succession No 339 of 2012 *Lucy Muthoni Mucira Vs Pricilla Muthoni, Eunice Ngunyo Wabome Vs Joseph Kihara Theuri* (2015) eklr, Kerugoya HCC Succession No 90 of 2013 *Elijah Gachoki Githinji & Another vrs Stanley Mugo Kariuki & Another* and *Joyce Waithera Kinyua & 2 others Vrs Festus Ndegwa Waititu & 4 others*. In all these cases the courts clearly held that in succession matters the court did not have jurisdiction to deal with claim of land based on trust. Such a claim should be filed heard and determined before a land and environment court.



15. The appellant further submitted that even if the court had jurisdiction, which it did not have, both the respondents witness never presented any evidence to prove the alleged trust. The 1st protestor was born in 1958, the same year demarcation was done and thus had no knowledge of what transpired. PW2 also testified that she did not witness her brother (the deceased) being given land by clan members. PW2 stated that the deceased was born in 1938 and by 1958 was 20 years old and therefor an adult capable of having land registered in his name.
16. Trust was a question of evidence that had to be proved by the person alleging. Such fact was not proved as the protestors did not lead any such evidence and no clan member was called to back their claim. The appellant relied on *Gachanja Gitau & 2 others Vs Mwangi Gitau* (2016) eklr, *Karanja Wanjibia Vs Duncan Wanjibia & 4 others* (2004) eklr and Kerugoya ELC No 107 of 2016, *Purity Karuri & 6 others Vs Nancy Kariuki Ndigwa*.
17. The appellant submitted that this appeal has merit and prayed that it be allowed

1st to 5th Respondents submissions

18. The 1st to 5th Respondent did file their submissions on 24th January 2023 and stated that the trial magistrate did not make any determination on the issue of trust. All she did was to distributed the estate based on evidence and further that the children of Evaline Wanjiru too were entitled to a share. This did not mean that she based her judgment on trust.
19. They further submitted that the learned trial magistrate fully appreciated the evidence presented and evaluated the same before arriving at a correct and fair decision on who were the rightful beneficiaries . The appeal as field was thus unfounded and prayed that this appeal be dismissed with costs.

Analysis and Determination

20. I have considered the pleadings, evidence presented and submissions of the parties in this appeal, this court first and foremost is enjoined to subject the whole proceedings to fresh scrutiny and make its own conclusions.
21. As held in *Selle & Another vs Associated Motor Boat Co Ltd & others* (1968) EA 123 where it was stated that;

“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the high court Is by way of retrial and the principals 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 conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally. (Abduk Hammed saif V Ali Mohammed Sholan(1955), 22 E.A.C.A 270.

22. In *Cogblan v Cumberland* (1898) 1 Ch, 704 , the court of appeal of England stated as follows;

“ Even where, as in this case, the appeal turns on a question of fact, the court of appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the material



before the judge with such other material as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong..... when the question arises, which witness is to be believed rather than the other and that question turns on manner and demeanour, the court of appeal always, is and must be guided by the impression made on the judge who saw the witness. But there may obviously be other circumstance's quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court had not seen.

23. Also it has been held by the court of appeal in *Ephantus Mwangi and Another Vs Duncan Mwangi* Civil Appeal No 77 of 1982{ 1982 -1988}1KAR 278 that;

“A member of an appellate court is not bound to accept the learned judge’s findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstance’s or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

24. Therefore, this court has a solemn duty to delve at some length into factual details and revisit the evidence as presented in the trial court, analyse the same, evaluate it and arrive at its own independent conclusion, but always remembering and giving allowance for it, that the trial court had the advantage of hearing the parties.

25. The appellant raised three grounds of appeal, which could be condensed and determined as follows;

- a. Did the trial magistrate have jurisdiction to hear and determine a claim alleged based on land alleged to be held on customary trust on behalf of and for the benefit of the family in a succession matter.
- b. If the finding in (a) above is negative, did the protesters/respondent’s discharge the burden of proof, to indeed prove that the deceased held the suit property in trust for their family as the eldest son of the family.

Whether the trial court had jurisdiction to hear and determine the protest on the basis that the suit parcel of land was held in trust for the family.

26. The there is no doubt that the protestors claim was wholly based on trust. It was their case that the deceased was their elder brother and their father had died in 1958. During demarcation, the suit parcel was given to the deceased by Unjiru wa Mbari ya Gitongo clan since he was the only son, and land by then was not given to women. The deceased was to hold the said suit property in trust for the family.

27. The Trial magistrate too in her considered judgment did find that under kikuyu customary law, land was vested in the eldest son who inherited it as Muramati to hold it in trust for himself and other heirs. As a muramati, the eldest son had a duty to distribute such land to other heirs. The deceased died after promulgation of the new constitution and the said constitution barred discrimination on grounds of sex and provided for equal treatment of all persons. The court proceeded to divide the suit parcel equally based on section 38 of the *law of succession Act*.

28. In the Court of Appeal case Nakuru Civil Appeal No. 119 of 2017 *Public Service Commission & 2 Others vs. Eric Cheruiyot & 16 Others* consolidated with Civil Appeal No. 139 of 2017 *County*



Government of Embu & Another vs. Eric Cheruiyot & 15 Others (unreported) in a decision rendered on 8th February, 2022 on the doctrine of jurisdiction in general as follows: -

Jurisdiction is everything, it is what gives a court or a tribunal the power, authority and legitimacy to entertain a matter before it. John Beecroft Saunders in “Words and Phrases Legally Defined”, Volume 3 at Page 113 defines court jurisdiction as follows:

By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of the matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.

29. Jurisdiction in a matter is everything and it is trite that where a court has no jurisdiction it cannot make one more step but must down its tools. In the case of *Owners of the Motor vessel Lillian(S) Vs Caltex Oil Kenya Limited* (1989) 1 KLR , which is the locus classicus on the issue of jurisdiction Nyarangi JA ;

“Jurisdiction is everything. Without it, a court has no power to make one more step, a court of law downs tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction.”

30. The Supreme Court in *In the Matter of Interim Independent Electoral Commission* [2011] eKLR, Constitutional Application No. 2 of 2011 held that jurisdiction of courts in Kenya is regulated by *the Constitution*, statute, and principles laid out in judicial precedent. The Supreme Court at paragraph 30 of its decision held in part as follows:

...a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of Legislation is clear and there is no ambiguity.

31. In *Samuel Kamau Macharia and Another v. Kenya Commercial Bank Limited & 2 others* [2012] eKLR, Application No. 2 of 2011, the Supreme Court reiterated its holding on a court’s jurisdiction. In the matter of the Interim Independent Electoral Commission (supra) at paragraph 68 of its ruling, the Supreme Court held as follows:

(68). A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law.

32. A decision thus made by a court of law without proper jurisdiction amounts to nullity ab initio, and such a decision is amenable to setting aside ex debito justitiae.



33. The dispute before this court is under the *law of succession Act* (cap 160) laws of Kenya which in its preamble states that it is an Act of parliament to amend, define and consolidate the law relating to intestate and testamentary succession and the administration of estates of deceased persons and for purposes connected therewith and incidental thereto
34. The issue before the trial court was that the deceased was holding the suit parcel in trust for the protestors. *In Estate of Njuguna Igwima* succession cause No 1905 of 2012 the court held that;

“ the issue of customary trust raised by the protestor must be heard and determined in another forum so as to inform on whether the net estate of the deceased is available for distribution to the beneficiaries includes the two suit property or half of the said property, determination can only be within the preview of the Environment and land court to decide whether the said trust does not exist while looking into the substantive claim by the claimants.”
35. In Nakuru HCC Succession cause No 432 of 2009 *In the Estate of Peter Igambe Njoroge (deceased)* it was also held that the issue a person claiming land on the basis of trust was not in the domain of probate and administration court, whose role is well established under the *law of succession Act* to specifically deal with intestate and testamentary succession. Disputes based on trust are the preserve of the Environment and land court.
36. The claim over the suit parcel based on trust, by the protestors should have been addressed in the proper forum with jurisdiction which is certainly not before the trial court. A determination of their claim, was thus of non-consequence as the trial court could not make any other orders other than those it is empowered to do so under the *law of succession Act*.
37. The respondents also did not allege any dependency on the deceased estate nor are they beneficiaries thereof and thus had no other basis of claiming the deceased property.

Disposition

1. The upshot is that the trial court clearly lacked jurisdiction to entertain the protest which was on land based on a claim of customary trust. Having so found there will be no need to determine the second ground of appeal
2. This appeal therefore has merit. The judgment of Hon A.N. Makau (SRM) dated 13th September 2017 is therefore wholly set aside and the protest filed by the respondents is hereby dismissed with no orders as to costs as the parties herein are siblings.
3. The primary matter being Gichugu Pmcc Succession Cause No 33 of 2015 Estate of Allan Njeru Alias Njeru Ephantus Allan- Deceased will be placed before the Senior principal magistrate in charge of Gichugu court, who will assign a different magistrate to hear and determine fresh summons for rectification of grant of letters of administration, given that the 2nd administrator is deceased and summons for confirmation of grant. The three (3) children of the appellants deceased sister (Eveline Wanja Jemimah) mentioned as dependants in the chief's letter dated 13th July 2015 too will be summoned to attend the said proceedings and their portion specifically assigned to them during this process.
4. Each party too shall bear their own costs of this appeal given that the parties are siblings belonging to one family.
5. It is so ordered.



JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 22ND DAY OF SEPTEMBER, 2023.

FRANCIS RAYOLA OLEL

JUDGE_

Delivered on the virtual platform, Teams this 22nd day of September, 2023.

In the presence of;

.....for Appellant

.....for Respondent

.....Court Assistant

