



**In re Estate of Joel Koome Kaberia (Deceased) (Civil Appeal 41 of 2021)
[2023] KEHC 22527 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22527 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL 41 OF 2021
TW CHERERE, J
SEPTEMBER 21, 2023
IN THE MATTER OF THE ESTATE OF JOEL KOOME KABERIA (DECEASED)**

BETWEEN

JOSEPHINE NGUGI MBURUGU 1ST APPELLANT

CATHERINE KATHURE MBURUGU 2ND APPELLANT

AND

LUCY KANANU KABERIA 1ST RESPONDENT

SAMSON MUNGANIA 2ND RESPONDENT

*(Being an appeal from the ruling and order in Maua Succession Cause
No. 101 of 2020 by Hon. C.K.Obara (PM) on 15th February, 2021)*

JUDGMENT

1. Joel Koome Kaberia (Deceased) died sometimes on January 15, 2016. On October 19, 2020, letter of administration intestate were issued to Josephine Ngugi Mburugu and Catherine Kathure Mburugu (1st and 2nd Appellants) respectively in their capacity as widow and mother of the deceased.
2. In the cause, the Appellants listed deceased's assets to include the following:
 1. Plot No 7 Gilgil Town
 2. Uns Commercial Plot No 72 Gilgil Town
 3. Plot No 201 Teachers B Gilgil Town
3. Appellants' chambers summons dated November 23, 2020 seeking orders that Respondents be restrained from collecting rent and Appellants be allowed to collect rent from Plot No 201 Teachers B Gilgil Town was by a ruling dated February 15, 2021 declined on the two grounds. First that there



was no evidence that the plot formed part of deceased's estate and secondly that the estate was situated in Gilgil which was not within the jurisdiction of Maua court.

4. Appellants were aggrieved by the ruling and have appealed on the grounds among others that the trial magistrate misapprehended the facts and the law for the reason that deceased was a resident of Nyambene within the jurisdiction of the court and that the issue of prove of ownership of the plot in issue was not pleaded by any of the parties.

Analysis and Determination

5. I have considered the appeal in the light of the evidence on record. As a general proposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(1) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. (See *Evans Nyakwana vs Cleophas Bwana Ongaro* (2015) eKLR).

6. In *Palace Investment Ltd vs Geoffrey Kariuki Mwenda & Another* (2015) eKLR, the Court of Appeal held that:

“Denning J in *Miller Vs Minister of Pensions* (1947) 2 ALL ER 372 discussing the burden of proof had this to say; -

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained.”

7. Applying the law to the facts in this case, I find the trial court erred in holding that it had no jurisdiction to hear the matter whereas the certificate of death revealed that deceased was a resident of Nyambene which is within the jurisdiction of the court.
8. However, I find that the magistrate rightly applied her mind to the facts and the law when she ruled that it had not been demonstrated that Plot No 201 Teachers B Gilgil Town belonged to the deceased.
9. In the final analysis, the court makes the following orders:
 1. The order dated February 15, 2021 dismissing the Appellants' chambers summons dated November 23, 2020 seeking orders that Respondents be restrained from collecting rent and Appellants be allowed to collect rent from Plot No 201 Teachers B Gilgil Town was well merited and it is upheld
 2. The trial court's order dated February 15, 2021 that it had no jurisdiction to hear the cause was made on the basis of misapprehension of the law and it is set aside in its entirety.
 3. Maua Succession Cause No 101 of 2020 shall be heard by another magistrate other than Hon Obara (SPM)

DATED AT MERU THIS 21ST DAY OF SEPTEMBER 2023

WAMAE. T. W. CHERERE



JUDGE

Appearances

Court Assistant - Morris Kinoti

For Appellants - Mr. Mutuma for G.M.Wanjohi, Mutuma & Co. Advocates

For Respondents - N/A

