



REPUBLIC OF KENYA



**Hosea v Kirigia & 2 others (Civil Appeal E005 of 2023)
[2023] KEHC 23457 (KLR) (12 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23457 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CIVIL APPEAL E005 OF 2023
LW GITARI, J
OCTOBER 12, 2023**

BETWEEN

SILVIA KARIMI HOSEA APPELLANT

AND

HILDA MUKWAIKU KIRIGIA 1ST RESPONDENT

MARGRET KAGWENI 2ND RESPONDENT

FIDES KAARI 3RD RESPONDENT

*(An appeal against the ruling delivered on 14th December, 2022 in
Chuka Chief Magistrate's Court Succession Cause No. E012 of 2020.)*

JUDGMENT

1. This is an appeal against the ruling delivered on 14th December, 2022 in Chuka Chief Magistrate's Court Succession Cause No. E012 of 2020. In the said trial magistrate found That there is prima facie evidence That the deceased did not acquire the land lawfully and therefore the objectors had a beneficial interest in the Land. That the land was not wholly owned by the deceased. She then proceeded and distributed the estate of the deceased to the objectors, the wife of the deceased and the children equally. The Appellant herein being dissatisfied with the said ruling now appeals to this Court based on the following grounds:-
 - i. That the learned trial magistrate erred in both law and fact when she found without sufficient evidence That the deceased did not acquire land parcel no. Mwimbi/S.Mugumango/30 comprising the deceased's estate lawfully and therefor the Protestors (now Respondents) have a beneficial interest and are entitled to a share of the said land.



- ii. That the learned trial magistrate erred both in law and fact by finding That though land parcel no. Mwimbi/S.Mugumango/30 was registered in the name of the deceased Hosea Karimi Joshua, his title was not absolute and the Protestors (now Respondents) were entitled to a share of the said land.
- iii. That the learned trial magistrate erred both in law and fact by totally disinheriting Timothy Mawira, a child of the deceased, by excluding him from the persons entitled to inherit the deceased's estate.
- iv. That the learned trial magistrate erred both in law and fact by finding That the Appellant as the deceased's spouse was entitled to an equal share of her husband's estate with the Respondents who are the deceased's sisters.
- v. That the learned trial magistrate erred in law by distributing the deceased's estate to both the Appellant and the Respondents equally against the law.
- vi. That the learned trial magistrate erred in both law and fact by adopting the mode of distribution of the deceased's estate as proposed by the Protestors (now Respondents) and further finding the said mode of distribution as fair and equitable.
- vii. That the learned trial magistrate erred in law by totally disregarding the written submissions filed on behalf of the Petitioner (now Appellant).

2. Based on the above grounds, the Appellant now prays for the following orders:

- i. That the ruling delivered on 14th December, 2022 in Chuka CM Succession Cause No. E012 of 2020 be set aside.
- ii. That this Appeal be allowed in its entirety and the mode of distribution of deceased's estate adopted by the trial court and the Certificate of Confirmation of Grant issued on 14th December, 2022 be set aside.
- iii. That the Honourable Court do find the Respondents are not beneficiaries of the deceased's estate and are therefore not entitled to a share of the same.
- iv. That the Honourable Court do find to be fair and lawful That it is the Appellant and her 3 children who are the only persons entitled to inherit the estate of the deceased wholly.
- v. That the Honourable Court do award costs of this appeal and costs of the CM Succession Cause No. E012 of 2020 to the Appellant.

3. The appeal was canvassed by way of written submissions which I have summarized hereunder.

The Appellant's Submissions

4. It is the Appellant's submission That the Respondents did not adduce sufficient evidence That the deceased did not acquire the suit land lawfully and therefore the court's finding That the Respondents had a beneficial interest in the estate and are entitled to a share of the estate. Further, That the impugned ruling denied the Appellant of her lawful inheritance without evidence to support the finding. In addition, it was submitted That the exclusion of Timothy Mawira Hosea as a beneficiary by the trial



court is alone sufficient to fault the said ruling as PW1 stated That even if the deceased did not father the said Timothy Hosea, he took him in as his son.

5. The Appellant further submitted That the Respondents, as sisters of the deceased are not dependents of the deceased and are not beneficiaries of the deceased's free estate as per the provisions of Section 29 and 35(1) of the *Law of Succession Act*. Finally, the Appellant submitted That the trial magistrate totally disregarded the written submissions filed on behalf of the Petitioner. The Appellant thus urged this Court to find merit in the Appellant's appeal and set aside the impugned ruling as well as the Certificate of Confirmation of Grant issued on 20th December, 2022.

The Respondents Submissions

6. It is the Respondents' submission That the impugned ruling was sound, legal, equitable and not soiled with any injustice or illegality. The Respondent thus urge this Court to uphold the ruling rendered by the subordinate court on 14th December, 2022. That the trial court was right to find and hold That the late Hosea Kirimi Johona did not acquire the suit land procedurally. That his acquisition of the said land was nothing but fraudulent and dishonest. Further, That the original registered owner of the suit land was Johana Kirigia, the late father of the deceased and the Respondents herein. That the said Johana Kirigia died around 1962 and That although Johana Kirigia was deceased, he was registered as the proprietor of the suit land on 18th November, 1970 meaning That he never lived to have the title deed in respect of the suit land issued to him according to the copy of the register.
7. In addition, the Respondents stated That regardless of when Johana Kirigia died, there was no way That the deceased herein could have been registered with the suit land without first filing a succession cause. Further, That it is not indicated That the deceased paid any consideration for the transfer of the suit land in his name and as such, the land was family/ancestral land and That the Respondents are entitled to share of their father's estate irrespective of whether or not their marital status.
8. It was further the Respondents' submission That the mode of distribution of the suit land as adopted by the trial court disinherited one Timothy Mawira who is a son of the deceased herein. Further, That the distribution of estate of Johana Kiiigia did not have to be shared among the children of the deceased. That the interest of Timothy Mawira Hosea and the other children of the deceased ought to have fallen in the portion given to the Appellant as she is their foster mother. According to the Respondents, the trial court was correct to find That the Appellant was entitled to an equal share of the suit land as the Respondents since she was the widow of the deceased.
9. As a probate court, this trial court was called upon to determine whether the suit land was beneficially held and therefore not subject to distribution or whether it was family land and subject to trust or whether the deceased owned it wholly. This was the holding of the Court of Appeal in the case of Zipporah Wanjiru Mwangi – versus- Zipporah Wanjiru Njoroge That was cited by the Respondents herein.
10. Finally, it was the Respondents' submission That the trial court did consider the submissions by the Appellant and That the trial court did not need to quote verbatim what each litigant had submitted on. In concluding their submissions, the Respondents urged this court to disallow the present appeal for want of merits and with cost to the Respondents.

Analysis

11. This is a first appeal. The duty of this Court as a first appellate court is to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to



a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind That it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in *Selle & another v Associated Motor Boat Co. Ltd. & others* [1968] E.A. 123 and in *Peters v Sunday Post Limited* [1958] E.A.

12. The 1st Respondent herein testified before the trial court as PW1. She relied on her affidavit sworn on 14th March, 2022 as her testimony in chief. It was her testimony That the late Hosea Kirimi was her brother and That the Respondents herein were the deceased's sisters. Further, That their father was one Johana Kirigia and That the Appellant was the widow to the deceased. The 1st Respondent testified That the parcel No. L.R. Mwimbi/South Mugumango/30 is the suit land That is in dispute in this cause. That the said suit land belonged to their father as per the green card (P. Exhibit 1) and That the same was registered in the name of the deceased herein without the knowledge of the Respondents. Further, That the deceased did not acquire the land by way of succession and so he got it illegally. The 1st Respondent thus alleged That the Respondents, as sisters to the deceased, were entitled to the said land. According to her, the deceased never got a child with the Appellant but had children namely Pamela Nkirote Kirimi, and Pamela Gatakaa Hosea from another relationship.
13. On the other hand, the Appellant testified as DW1. She stated That the deceased whose estate this cause relates to belongs to her husband. That they got married in 1984 and got three (3) children before the deceased died on 31st May, 2020. That the three children included Pamela Nkirote Kirimi, Timothy Mawira Hosea, and Pamela Gatakaa Hosea. It was her testimony That she was the administrator of the estate of the deceased and the estate included farm no. Mwimbi/South Mugumango/30 which is approximately 3 acres. Further, That the Respondents are her sisters in law and are married and therefore not entitled to the suit land. In addition, it was her testimony That she did not know whether the suit land was ancestral land but only knew That the land was in the name of her late husband. She maintained That the Respondents are not entitled to a share of the suit land as they never raised any objection while the deceased was still alive. On cross examination, it was DW1's testimony That her father-in-law, Johana Kirigia was the original owner of the suit land and That she did not know how her late husband got the suit land.
14. In the impugned ruling, it was held That from the green card produced in evidence, it shows That the deceased (Hosea) acquired the land on 29th April, 2010 after his father. That it was not clear how the deceased herein acquired the suit land as there are no succession proceedings That were commenced in respect to the estate of the deceased's father. Further, That the Petitioner (now Appellant) could not explain how the deceased acquired ownership of the land. The trial court thus found That there was a prima facie evidence That the deceased did not acquire the suit land lawfully and thus the objectors (now Respondents) had a beneficial interest in the suit land and therefore were entitled to a share of the same. The learned magistrate further found That the deceased did not own the suit land wholly alone to the exclusion of the objectors (now Respondents). Having found so, the learned magistrate adopted the distribution of the estate as proposed by the Respondents herein as follows:
 - i. Silvia Karimi – 0.75 Acres to hold in trust for herself and That of P.G. and P.N.
 - ii. Hilda Mukwairu – 0.75 Acres
 - iii. Margaret Kagweni – 0.75 Acres
 - iv. Fides Kaari – 0.75 Acres
15. This succession cause relates to the estate of Hosea Kirimi Johana who was the husband to the Appellant herein and the brother to the Respondents. The deceased died intestate and was survived



by the Appellant and 3 adult children namely Pamela Nkirote Kirimi, Timothy Mawira Hosea, and Pamela Gatakaa Hosea. According to the Appellant, the deceased estate comprised of the suit land which measures 3 acres. On the other hand, the Respondents contend That the deceased was holding the suit land in trust for himself and the three (3) Respondents and That the deceased had not discharged his fiduciary duty as a trustee over the said land by the time he died.

16. I have considered the evidence tendered before the trial court, the Appellant’s grounds of Appeal as well as the respective submissions by the parties. In my view, the main issues for determination are whether land parcel no. Mwimbi/S.Mugumango/30 belonged to the estate of the deceased and whether the mode of distribution adopted by the trial court was fair and reasonable in the circumstances.

This matter relates to the estate of the deceased Hosea Kirimi Joana (deceased). When the court has to determine the distribution of the estate of the deceased, the first consideration is whether the property belongs to the deceased.

Under Section 3 of the [Law of Succession Act](#) (cap 160 Laws of Kenya) to be referred to as the Act defines “estate” as follows: Means the property of a deceased person”

On the other hand, the Act defines free property as follows:

“In relation to a deceased person means the property of which That person was legally competent freely to dispose during his lifetime and in respect of which his interest has not been terminated by his death.”

As per the green card which was produced in evidence, the deceased was the registered proprietor of the suit land on 29/4/2010. He became the absolute owner who could deal with the land without any hindrance. Free property refers to the property which a person was legally competent freely to dispose during his lifetime and in respect of which his interest has not been terminated by his death.

In the case of the Administrators of the Estate of Maxwell Maurice Ombogo –v- Standard Chartered Bank Kenya Limited & Another (2000) eKLR.

The Court of Appeal defined free estate as follows:-

“Coming back to the definition of free property in view of what we have stated above, it is quite clear That the phrase connotes not only the personal property of a deceased person, but also, all the property which was in his possession or control or under power and the disposal of which would have legally required his authority, but for his death. Money held in deceased advocates “client account” falls into That category. It then follows That the late Ombogo’s two bank accounts were part of this free property and therefore subject to the [law of Succession Act](#).”

In this case the trial magistrate held That the copy of the green card shows That deceased acquired the property after his father died. She further stated That – “It is not clear how he acquired land on 29/4/2020 after his father. “That it was not clear how he acquired the same as it is said no succession proceedings were commenced in his father’s estate.”

The deceased was registered on 29/4/2010. The deceased died on 31/5/2020. He who alleges must proof. The respondents had the legal and evidential burden to prove That the deceased was not lawfully



registered as the proprietor of the said property. Section 107, 108 and 109 of the Evidence Act provides as follows:-

107.

Burden
of
proof

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove That those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said That the burden of proof lies on That person.

108. The burden of proof in a suit or proceeding lies on That person who would fail if no evidence at all were given on either side.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law That the proof of That fact shall lie on any particular person.”

I find that the finding by the trial magistrate was erroneous as it was not based on sufficient evidence. There was no evidence tendered to prove That no succession was filed in the estate of the father of the deceased and respondents. Secondly the respondents did not call the Land Registrar to come and shed light on how the land was registered in the name of the deceased. Furthermore there was no evidence presented before the trial magistrate to prove the date That Johana Kirigia died so as to demonstrate That he could not transfer the Land Parcel No. Mwimbi/Mugumango/30 to his son who is the deceased herein during his lifetime.

17. In the affidavit of the 1st respondent sworn on 14/3/2022 it is contended That they had a lien over the land and That the deceased held the land in trust for her benefit and That of her sister. The land in dispute is registered in the name of the deceased. It forms the free property of the deceased. The respondents allege That the deceased was registered on the land illegally and fraudulently.

Fraud is defined as –

“wrongful or criminal deception intended to result in financial or personal gain. A person or thing intended to deceive others...”

On the other hand, the illegality is defined in the Oxford Dictionary as follows:-

“The state of being contrary to or forbidden by law. “proceedings will be required to establish the illegality of the act.”

It is trite That an action undertaken illegally or fraudulently cannot benefit any person. A court cannot protect title to land if it has been obtained illegally or fraudulently merely because a person is entered in the register as a proprietor. However, the court is not supposed to assume fraud or illegality, it is upon the person so alleging to prove That there was some illegality. In the case of Railal Goldhanbhai –v- Lalji Makeji (1957) E.A 314. The court stated That allegations of fraud must be strictly proved although the standard of proof may not be so heavy to require proof beyond any reasonable doubt, it can be something more than a mere balance of probabilities. The respondents did not adduce any evidence to probe the allege illegality or fraud.



A claim That the deceased allegedly transferred the land to himself illegally is a transaction stemming from fraud and illegalities which cannot be sanctioned by a court of law for the reason That such a transaction if indeed it was, was null and void ab initio and could therefore not bestow any right to any party either directly or indirectly. It follows That the respondent cannot themselves ride on such an illegality to claim the land.

The respondents merely claimed That the estate of deceased was held in trust for them by their late brother. I find That the respondent did not adduce any evidence to prove That the deceased was registered illegally or through fraud.

On the other hand the claim by the respondent That the deceased was registered in trust was not a matter which the Probate and Administration Court could determine. The question of trust is a matter of fact and law. It was upon the respondents to establish That such trust did exist. The applicant did not adduce any evidence before the learned trial magistrate to prove the existence of trust. The mandate of the probate court is limited and does not extend to determine issues of ownership of property and declarations of trusts. Issues relating to environment, use and occupation of land are a preserve of the Land Act. The preamble to the Land Court states:-

“ An Act of Parliament to establish a Superior Court to hear and determine disputes relating to the environment and the use and the occupation of, and the titles to, land and to make provisions for its jurisdiction functions and powers and for connected purposes.”

The appellant had referred the learned trial magistrate to the case of In Re Estate of Mbai Wainana, where Judge William Musyoka held That the Probate and Administration Court had no jurisdiction to determine issues of trust. However the trial magistrate went ahead and determined the issue without jurisdiction and when sufficient evidence was not laid before her. A Judgment given by a court without jurisdiction is a nullity. All in all I find That the appellant provided enough material to prove That the Land Parcel No. LR. Marimba/S.Mugumango/30 was a free estate of the deceased which was available for distribution to his beneficiaries.

Whether the distribution of the estate was reasonable and fair

18. The deceased died intestate. The Act defines dependants under Section 29 of the Law of Succession Act.

It provides as follows:

29. For the purposes of this Part, “dependant” means—
- Meaning of dependant
- (a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
 - (b) such of the deceased’s parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and (c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”



Brothers and sisters are not recognized as dependants for the purposes of the *Law of Succession Act*. They only come in where the deceased is not survived by a wife or wives and children. See Section 39 of the Act.

In this Cause, it is not in dispute That the deceased was survived by a wife and three children. Section 39 of the Act provides:-

“39.

- 1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority-
 - (a) father; or if dead
 - (b) mother; or if dead
 - (c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none.
 - (d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none
 - (e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.
- (2) Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1), the net intestate estate shall devolve upon the State, and be paid into the Consolidated Fund.”

The trial magistrate erred by distributing the estate of the deceased to the respondents who are not recognized as dependants of the deceased.

Conclusion:

19. For the reasons stated, I find That the respondents did not prove That the deceased did not acquire the Land Parcel No. Mwimbi/S. Mugumango/30 lawfully. I find That the land forms the free estate of the deceased.
20. The respondents were not dependants of the deceased. The learned trial magistrate therefore erred in distributing the estate of the deceased to them.
21. I therefore find That this appeal has merits. I allow the appeal and order That:
 1. The ruling of the learned trial magistrate is hereby set aside.
 2. The estate of the deceased shall be distributed to his wife and children who are the dependants of the deceased.



I make no orders as to costs.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 12TH DAY OF OCTOBER 2023.

L.W. GITARI

JUDGE

