



**Kimatu & another v Mbatha (Family Appeal E003 of 2021)  
[2023] KEHC 24268 (KLR) (16 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24268 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
FAMILY APPEAL E003 OF 2021  
GMA DULU, J  
OCTOBER 16, 2023**

**BETWEEN**

**WAMBUA KIMATU ..... 1<sup>ST</sup> APPELLANT**

**ANNA KALUVU MUKUNZI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**KIMINA MBATHA ..... RESPONDENT**

*(From the ruling in of Succession Cause No. 11 of 2018 in the matter of the Estate of Beth Ng'onde Mukunza a.k.a Mbevi Ngonde Mukunza(Deceased) delivered by Hon. Mayamba C. A (PM) on 20th August 2021 in Kilungu Law Courts)*

**JUDGMENT**

1. In a ruling delivered by the Magistrate on 20<sup>th</sup> August 2021 the learned Magistrate at Kilungu concluded as follows:-

“I do make the following orders:-

- a. The application dated 25<sup>th</sup> January 2021 must fail in its entirety.
  - b. The confirmed grant vide courts judgment dated 16<sup>th</sup> December 2020 is upheld.
  - c. Wambua Kimatu to meet the costs of the application to the respondents.
2. Dissatisfied with the ruling of the Magistrate’s court, Wambua Kimatu and Anna Kaluvu Mukunza have come to this court on appeal through counsel Kivuva Omuga & Company Advocates on the following grounds:-



1. That the trial Magistrate erred in law and fact by failing to evaluate the evidence tendered in this matter judiciously before arriving at his finding.
  2. The trial Magistrate erred in law and facts by finding that the appellants had not established their case to the required standard.
  3. The trial Magistrate erred in law and fact by finding that Order 45 of the Civil Procedure Rules is not one of those domesticated by the [Law of Succession Act](#).
  4. The trial Magistrate erred in law and fact by finding that a succession court has no jurisdiction to grant injunctive reliefs or in other words there are no such provisions as injunctive reliefs in the law of succession.
  5. The Magistrate erred in law and fact by finding that the application dated 27<sup>th</sup> January 2021 amounts to an appeal of the ruling of the court dated 16<sup>th</sup> December 2020.
  6. The trial Magistrate erred in law and in fact by failing to pronounce himself on the protest of Anna Kaluvu Mukunza, or at all.
  7. The trial Magistrate erred in law and fact by finding that one of the applicants WAMBUA KIMATU must meet the costs of the application whereas there were two(2) applicants and without any justification.
  8. The trial Magistrate erred in law and in fact by failing to appreciate the totality of evidence produced and on record in support of and against the application dated 27<sup>th</sup> January 2021 and thereby relied on extrinsic factors in his ruling.
  9. The trial Magistrate failed to appreciate the written submissions of the appellants herein.
3. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by Kivuva Omuga & Company Advocates for the appellants, as well as the submissions filed by Kamolo & Associates Advocates for the respondents. Both sides relied on decided court cases.
  4. This is a first appeal. As a first appellate court I am required to reconsider the evidence on record, re-evaluate it and draw my own conclusions – Selle =Versus= Associated Motor Boat Company Ltd (1968) EA 132.
  5. The respondents counsel has argued that this appeal is incompetent as the appellant did not obtain leave of the trial court before filing this appeal. Counsel has relied on the case of Wanga Ole Oyier & John Kinela Oyie (2022) eKLR.
  6. In my view, the leave required is in relation to an appeal to the Court of Appeal, as there is no provision for an appeal from the High Court in succession proceedings to the Court of Appeal, except for appeals on points of law from appeals arising from decisions in the Kadhis court, under Section 50(2) of the [Law of Succession Act](#) (Cap.160).
  7. However Section 50(1) of the [Law of Succession Act](#) clearly provides for appeals from the Magistrate’s court to the High Court, whose decision is final. I thus dismiss that ground.
  8. The respondent’s counsel has also contended that the application for revocation of grant amounted to an appeal, and not an application for revocation or annulment of grant under Section 76 of the [Law of Succession Act](#), as it related to an oral will.



9. In my view, even if the application had the major ground as the existence of an oral will, and was heard viva voce, it would still be a proper application for revocation or annulment of grant as it relates to information which should have been disclosed and considered before confirmation of grant. I thus also dismiss that ground.
10. With regard to the evidence on record, the protestor Anna Kaluvu Mukunza called one witness Joel Muli Mbatha who testified about the children of the deceased herein Beth Ng'onde Mukunza who was his grandmother. He stated that he initially petitioned for letters of administration, but they had family disagreements. It was his evidence that some survivors were selling parcels of land before conclusion of succession proceedings. He said that they had agreed to distribute the property between their fathers in equal shares.
11. In cross-examination, he stated that he was removed as an administrator. He also stated that Anna and Rebecca were not to be given any share of the property because they were married and had their own homes.
12. DW1 was Rebecca Munyiva Kyenze a daughter of the deceased. It was her evidence that the deceased had 5 children, 3 deceased leaving behind the witness and Anna Kaluvu Mwalevi. She said that the deceased gave verbal instructions before she died, and that the land thus belongs to Wambua Kimatu Peter, and Julius Daudi Wambua.
13. In cross-examination, she said that she came to court to confirm the instructions of the deceased, and that she was not claiming any land.
14. DW2 was Stephen Matheka Mukunza a step child of the deceased. It was his evidence that the deceased gave verbal instructions on her Kiu Cooperation shares being tuned into land.
15. In cross-examination, he stated that the land shares were to be divided into two. He stated that a purchaser of land had already built on the land.
16. The contention of the appellants herein, is that the Magistrate erred in finding that injunctive orders cannot be issued in succession proceedings. Indeed, the Magistrate found that the provisions of Order 45 of the Civil Procedure Rules do not apply. However, in my view, even if Order 45 of the Civil Procedure Rules does not apply, the succession court has wide powers to issue orders that serve the best interests of justice in any particular case, including injunctive or restraining orders.
17. However, as the jurisdiction of the succession court ends with confirmation of grant and distribution of assets, and enforcement orders for distribution and winding up of the estate, any injunctive orders issued will be limited to facilitating the process of distribution of assets and winding up of the estate. Thus the succession court cannot issue permanent injunctive orders.
18. However, the injunctive orders pending determination of the summons herein could be issued.
19. With regard to the request for annulment, revocation or rectification or review or variation of the confirmed grant of letters of administration, my view is that the *Law of Succession Act* (Cap.160) only deals with annulment, revocation or rectification of grant of letters of administration. The court thus did not have jurisdiction to vary or review the letters of administration, as is known in civil law.
20. From the evidence on record, the objector did not establish through evidence, sufficient reasons for annulment, revocation of or rectification of the confirmed grant of letters of administration. The oral will was not proved, nor was any mistake or omission committed by either the petitioner or the court proved. I thus agree with the Magistrate that the confirmed grant of letters of administration be and is upheld.



21. With regard to costs, usually costs follow the event thus the winner is awarded the costs. However, in most of these family related matters, because of the interrelation of the parties, courts have in the majority of cases ordered parties to bear their respective costs of the proceedings. In the present case, I am of the view that parties should have been ordered to bear their respective costs.
22. For the above reasons, I order as follows:-
- i. The appeal is dismissed on the ground that the appellant did not establish a basis for annulment, revocation, or rectification of the confirmed grant of letters of administration.
  - ii. Parties will bear their respective costs of this appeal, as well as the proceedings before the Magistrate's court.

**DATED, SIGNED AND DELIVERED THIS 16<sup>TH</sup> DAY OF OCTOBER 2023 VIRTUALLY AT VOI.**

**GEORGE DULU**

**JUDGE**

In the presence of:-

Alfred – Court Assistant

Ms. Nzilani holding brief for Mr. Kamolo for respondent

No appearance for appellants

