



REPUBLIC OF KENYA



**Muchina v Kariuki (Civil Appeal E007 of 2020)
[2023] KEHC 24030 (KLR) (24 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24030 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL E007 OF 2020
FN MUCHEMI, J
OCTOBER 24, 2023**

BETWEEN

JOYCE MABUTI MUCHINA APPELLANT

AND

NANCY WANGITHI KARIUKI RESPONDENT

*(Being an Appeal from the Judgment of Hon. E. O. Wambo (PM)
delivered on 30th April 2020 in Kerugoya CM Succession Cause No.
422 of 2016 In the Matter of the Estate of Douglas Mugo Magondu)*

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Kerugoya Principal Magistrate in CM Succession Cause No. 422 of 2016 where the court allowed the protest and distributed the estate of the deceased comprising of L.R No. Inoi/Thaita/969 to the respondent absolutely. The appellant herein is a sister in-law to the deceased Douglas Mugo Magondu while the respondent is a sister to the deceased.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 13 grounds summarized as follows:-
 - a. The learned magistrate erred in law and fact in distributing land parcel number Inoi/Thaita/969 to the respondent without considering that there was an agreement to exchange L.R No. Inoi/Thaita/364 with L.R No. Inoi/Thaita/175.
 - b. The learned trial magistrate erred in law and in fact in distributing the estate of the deceased to the respondent solely yet there were other surviving siblings of the deceased who ought to have been considered.



Appellant's Submissions

3. The appellant submits that she is the wife of Geoffrey Muchina Magondu, a brother to the deceased, and they were blessed with eight (8) children. The appellant further states that her family and herself occupied L.R No. Inoi/Thaita/364 which originally belonged to the deceased's father, Magondu Muriu.
4. The appellant further submits that the respondent was not entitled to inherit land parcel number Inoi/Thaita/175 measuring approximately 6.2 acres as the suit land was registered in the name of Geoffrey Muchina Magondu. She further states that her husband was given the said land by the clan whereas Magondu Muriu was given land parcel number Inoi/Thaita/367 measuring 5 acres, by the same clan. Consequently, the family of Magondu Muriu settled on L.R No. Inoi/Thaita/175 whereas the family of Geoffrey Muchina Magondu settled on L.R No. Inoi/Thaita/367.
5. The appellant states that the family decided to exchange the land so that each family could get registered in the portion they occupied, that is she wanted 4 acres out of land parcel Inoi/Thaita/367 in exchange for the 6.2 acres she had in L.R No. Inoi/Thaita/175. It was further stated that the exchange happened after her husband died and she became the owner of land parcel number Inoi/Thaita/175. The appellant stated that she filed the succession cause of her husband's estate whereas the grant was issued and confirmed in her favour. L.R No. Inoi/Thaita/175 measuring 6.2 acres was in the appellant's name. The family of Magondu Muriu went through succession proceedings and the estate was distributed to four brothers and one sister of her husband. Her own husband who had his land Inoi/Thaita/175 was excluded. L.R No. Inoi/Thaita/364 was divided into five portions as follows:-
 - a. Inoi/Thaita/968 – Monica Wanjira Magondu
 - b. Inoi/Thaita/969 – Douglas Mugo Magondu
 - c. Inoi/Thaita/970 – Johnson Njogu Magondu
 - d. Inoi/Thaita/971 – Jamleck Muriu Magondu
 - e. Inoi/Thaita/972 – James Gichuki Magondu
6. The appellant further submits that Jamleck Muriu Magondu, James Gichuki Magondu and Johnson Njogu Magondu transferred their respective pieces of land but Douglas Mugo died before he transferred his parcel. She further states that by the time she transferred her land parcel number Inoi/Thaita/175 to her brother-in-laws, Douglas Mugo had died and she therefore argues that it was upon his siblings to share out his portion or decide what to do with it. The appellant further argues that since the deceased died before transferring his portion to her, she filed a succession cause to inherit his parcel of land so that she could get the total four (4) acres that she occupied and was entitled to fulfilment of the exchange agreement.
7. The appellant argues that by the trial court holding that land parcel number Inoi/Thaita/969 be inherited by the respondent, she will be in possession of 3 acres which was clearly not the intention of the parties. It is further stated that the deceased was not buried on his piece of land but on land parcel number Inoi/Thaita/175 which he occupied based on the exchange arrangement.
8. The appellant submits that Monica Muchina her sister-in-law was not involved in the exchange process as she had occupied 1 acre on the land parcel number Inoi/Thaita/367 unlike the rest of her siblings who occupied land parcel number Inoi/Thaita/175. Thus, the appellant argues that the trial court failed to analyse the evidence properly by finding that since Monica Muchina was not involved in the exchange, the deceased's parcel of land ought to be allocated to the respondent. Furthermore, the



appellant argues that the trial court erred by finding that she wanted the deceased to exchange his parcel of land for hers yet she was only to transfer land parcel number Inoi/Thaita/175 as a whole in exchange for the 4 acres of land parcel number Inoi/Thaita/367.

9. The appellant further submits that it is peculiar that the respondent, a daughter of the deceased, was not included in the succession cause of her father's estate and was therefore disinherited by her brothers. Thus, she was not involved in the exchange process as she had no land to exchange. The respondent to date has not challenged the outcome of her father's succession. As such, the appellant states that the respondent was not entitled to be given the deceased's parcel of land as she did not inherit from her father's estate to begin with.
10. The appellant states that the deceased had no wife or children and the respondent was not the only surviving sibling of the deceased. The other siblings of the deceased are still alive and are not interested in the estate of the deceased. Since the respondent conducted these succession proceedings in secret, there is no evidence that the other siblings were notified of the succession cause. Moreover, the appellant argues that the succession cause ought not to have been excluded in these proceedings from inception because she had a tangible interest. The appellant states that in her court papers in this cause, she had indicated that L.R. Inoi/Thaita/969 be registered in the names of her daughters. She further submits that she did not bring her claim in the deceased's succession cause as a beneficiary of the deceased.

The Respondent's Submissions

11. The respondent submits that the appellant failed to include the decree and/or certificate of grant that was issued pursuant to the judgment issued by Hon E. O. Wambo on 30th April 2020 as required by Section 79 of the [Civil Procedure Act](#) and Order 42 Rule 13(4)(f) of the [Civil Procedure Rules](#). As such, the respondent argues that that is fatal to the appeal and urges the court to strike out the appeal. To support her contention, the respondent relies on the case of [Lucas Otieno Masaye vs Lucia Olewe Kidi](#) (2022) eKLR.
12. The respondent states that the deceased died intestate on 8th October 2000 and was survived by her and Jamleck Muriu Magondu, his brother. The respondent further states that her other siblings are also deceased that is Geoffrey Muchina Magondu, Johnson Njogu Magondu, Makera Magondu and James Gichuki Magondu. She further states that the deceased had no wife or children.
13. The respondent submits that the appellant is a wife to Geoffrey Muchina Magondu, a brother to the deceased and he was given land parcel number Inoi/Thaita/175 by the clan whereas land parcel number Inoi/Thaita/367 was owned by Magondu Muriu, the respondent's father. The respondent further states that after the conclusion of the succession cause in respect to her father's estate, her brothers, Johnson Njogu Magondu, Jamleck Muriu Magondu and James Gichuki Magondu transferred their respective parcels of land namely Inoi/Thaita/970, 971 and 972 respectively to the appellant. As a result of the arrangement, the appellant transferred land parcel number Inoi/Thaita/175 as compensation to Jamleck Muriu Magondu, James Gichuki Magondu, Johnson Njogu Magondu and Lydia Wangui Magondu. The respondent thus submits that the appellant did not transfer any share of land parcel number Inoi/Thaita/175 to the deceased and therefore there was no exchange transaction that was demonstrated between them. Furthermore, there was no evidence to show that there was an agreement for transfer of land parcel number Inoi/Thaita/969 to the appellant and her daughters. As such, the respondent argues that land parcel number Inoi/Thaita/969 is free property as defined under Section 3 of the [Law of Succession Act](#).



14. The respondent further submits that the claim by the appellant in respect to the exchange of the suit land is a claim on recovery of land or claim on title to land which ought to be resolved through a civil process by filing a suit magistrate's court pursuant to Section 26(4) of the *Environment and Land Act* or in the Environment and Land Court pursuant to Section 13 of the *Environment and Land Act*. As such, the respondent argues that the court does not have jurisdiction to determine the issues raised by the appellant. To support her contentions, the respondent relies on the cases of *Antony Murimi Ciuma vs Julius Maina Mwangi* Succession Cause No. 354 of 2013, *In Re Estate of Alice Mumbua Mutua (Deceased)* (2017) eKLR and *Owners of the Motor Vessel "Lilians" vs Caltex Oil Ltd* (1989) KLR.
15. The respondent relies on Section 39 of the *Law of Succession Act* and the case of *Immaculate Wangari Munyaga vs Zachary Waweru Ileri* (2016) eKLR and submits that since the deceased had no wife or children, a sister takes priority over a sister in law and thus she is the nearest by blood to the deceased as their brother is not interested in the estate.

Issue for determination

16. The main issue for determination is whether the appeal has merit.

The Law

17. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another vs Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:

“.....this court must reconsider the evidence, evaluate it itself and draw its own conclusions 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 into account of particular circumstances or probabilities materially to estimate the evidence.”
18. It was also held in *Mwangi vs Wambugu* [1984] KLR 453 that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence.
19. Dealing with the same point, the Court of Appeal in *Kiruga vs Kiruga & Another* [1988] KLR 348, observed that:-

“An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand.”
20. Therefore this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering and giving allowance for it, that the trial court had the advantage of hearing the parties.
21. The respondent raised the issue of jurisdiction in their submissions which were not raised before the court below. It was wrong to bring in a new issue on appeal by way of submissions. However, this is a succession cause and this court is empowered by Article 165 of the *Constitution* and Section 47 of the



Law of Succession Act to deal with this matter. The main issue herein is the distribution of the estate of the deceased which is contested between the appellant and the respondent.

Whether the appeal has merit.

22. The respondent has raised a point of law in respect to the competence of the appeal. The respondent argues that the appellant has failed to attach a decree or certificate of grant issued pursuant to the judgment dated 30th April 2020 contrary to Section 79 of the Civil Procedure Act and Order 42 Rule 13 (4)(f) of the Civil Procedure Rules and therefore the appeal ought to be struck out. I have perused the court record and noted that the appellant filed a Supplementary Record on 3rd August 2023 which has an extracted order on page 5 issued by the court below on 31st July 2023. Although the respondent argued that the Supplementary Record was filed without the leave of the court, this court has the discretion pursuant to Section 1A & 1B of the Civil Procedure Act, to hereby deem the supplementary record to as properly filed. As such the record of appeal as well as the supplementary record are in compliance with Order 42 of the Civil Procedure Rules. In the interests of justice for the parties herein, I hereby admit the supplementary record of appeal as properly filed.
23. The deceased herein died on 8/10/2000. He was a son to Magondu Muriu and Lydia Wangui and had no wife or children. He had the following brothers and sisters:-
- a. Geoffrey Muchina Magondu – deceased
 - b. Johnson Njogu Magondu – deceased
 - c. Jamleck Muriu Magondu
 - d. James Gichui Magondu - deceased
 - e. Nancy Wangithi Kariuki-respondent
24. Magondu Muriu was the registered owner of land parcel number Inoi/Thaita/364 measuring 5 acres whereas the appellant’s husband, Geoffrey Muchina Magondu was the registered owner of land parcel number Inoi/Thaita/175. After the death of the appellant’s husband, she filed succession proceedings in respect of her husband’s estate L.R No. Inoi/Thaita/175 and inherited land absolutely and a title deed was issued in her name on 8/5/2002. The family of appellant’s father in-law Magondu Muriu also filed succession proceedings after the death of their father in respect of their father’s estate L.R No. Inoi/Thaita/364 where the beneficiaries being four sons of the deceased shred the land in five (5) equal portions as follows:-
- a. Inoi/Thaita/968 – Monica Wanjira Magondu
 - b. Inoi/Thaita/969 – the deceased
 - c. Inoi/Thaita/970 – Johnson Njogu Magondu
 - d. Inoi/Thaita/971 – Jamleck Muriu Magondu
 - e. Inoi/Thaita/972 – James Gichuki Magondu.
25. Through an exchange agreement within the families of the two deceased persons who were father and son, Johnson Njogu, Jamleck Muriu and James Gichuki transferred their portions of land to the appellant and she obtained the respective certificates of title issued on 18/12/2012 and 7/1/2013 in respect of parcel numbers Inoi/Thaita/970 and 972. In the same exchange arrangement, the appellant transferred L.R No. Inoi/Thaita/175 to Jamleck Muriu, James Gichuki, Johnson Njogu and Lydia



Wangui Magondu on 8/5/2002 as indicated in the copy of green card. The parcel of land measured 6.8 acres.

26. The appellant argues that there was an agreement to exchange the respective land parcels to be consistent with the occupation of the parcels of land belonging to the two families. She argues that the deceased Douglas Mugo died before he could effect the transfer and thus she ought to be allocated land parcel number Inoi/Thaita/969 as per their exchange agreement. The respondent argues that she is the sister of the deceased and has been in exclusive possession of the said land parcel when the deceased was alive till date. She further argues that after their father's succession cause, her brothers Johnson Njogu, Jamleck Muriu and James Gichuki transferred their individual shares to the appellant. I have perused the trial record and noted that one of the brothers, Jamleck Muriu who was present as the exchange process was ongoing testified as PW2 to the effect that his two brothers and himself transferred their parcels of land with the appellant in accordance with the families exchange agreement, but the deceased died before exchanging his parcel. He further testified that after the deceased died, the appellant transferred her whole parcel of land to the children of Magondu Muriu who included PW2 three of his brothers aforementioned and their mother Lydia Wangui.
27. The bone of contention before the magistrate was whether there existed an agreement between the family of late Magondu and his son Geoffrey Muchina Magondu to exchange the two parcels of land to rectify the mistake that had occurred in each family occupying the wrong parcel of land. Further, the court was to decide who between the appellant and the respondent was the rightful beneficiary. The appellant testified to the existence of such an agreement which was not in writing while the respondent denied there was such an agreement. In her statement of evidence, the respondent vehemently denied that there was any such agreement between her and the appellant. In cross-examination, the respondent admitted the existence of the agreement but said that it did not involve the deceased's parcel of land L.R No. Inoi/Thaita/969. The respondent's witness PW2 who said he was her brother kind of admitted the existence of the exchange agreement between the two families. However, he said the respondent is the one who ought to inherit the estate of the deceased because she lived on the land after the deceased left it for her.
28. The evidence from the appellant was that the deceased was to fulfil the exchange agreement but he died before doing so. His three brothers had already transferred their respective parcels but deceased died before performing his part of the agreement. The appellant had already inherited L.R Inoi/Thaita/175 from her late husband fulfilled her part of the agreement by transferring the land to the sons and widow of the deceased. The appellant explained that at the time she effected the transfer, the deceased her father in-law had passed on and his estate distributed. For that reason she transferred the land to his heirs. The copies of official searches produced by the appellant show that transfers between the two families were done progressively and not at the same time or in the same year. For example, LR No. Inoi/Thaita/175 was transferred by the appellant to Jamleck Muriu, James Gichuki, Johnson Njogu and Lydia Magondu on 8/05/2007. These are the three sons of the deceased and their mother. LR No. Inoi/Thaita/972 was transferred to the appellant by James Gichuki Magondu on 18/12/2012 while LR. NO. INOI/THUITA/971 was transferred to the appellant on 7/01/2013 by Jamleck Muriu Magondu. Justin Wachira transferred L.R No. INOI/THUITA/970 to the appellant. The dates of transfer were between the years 2007 and 2013 which was six (6) years apart and which, in my view, explains that the deceased died before he effected his part of the families' agreement. It goes without saying that the registered owners of the original parcels of land having settled on the wrong parcels of land may have been slow in moving out due to the expenses involved in putting up new homes in the parcels of land registered in their names.



29. The parties admitted that due to the exchange agreement which was anticipated even before the death of their father Magondu Muriu who died in 1982, the two families had kind of agreed that the graves of the family members of Magondu Muriu ought to be on parcel of land L.R. Inoi/Thaita/175 registered in his name and which was occupied by his son Geoffrey Muchina Magondu awaiting the execution of the exchange agreement. The graves of Magondu Muriu and his deceased children including the deceased in this case are on L.R Inoi/Thaita/175 which the appellant later transferred to her brother in-laws and her mother in-law respectively. That issue arose during cross-examination of the witnesses and was not in dispute.
30. Looking at the mistakes in the registration in wrong names and land references numbers the family of the appellant husband did not own L.R Inoi/Thaita/367 which was their land. However, the family of the appellant's father in law who was registered owner of the said land by mistake took up occupation of the land with his family. It was after the patriarch's death and following distribution of his estate that three of his sons returned their inheritance parcels to the appellant L.R 970,971 and 972 each measuring one acre to the rightful owner, the appellant. The appellant in turn transferred the land registered in her name following succession proceedings of her late husband to the sons of her deceased father in-law. The land the appellant got after the transfer in her favour of the three parcels was a total of three acres. The land of her family measured five (5) acres. However, the appellant acknowledges that one acre was given to her sister in law Monica Magondu and as such, the appellant only needed the one acre of the deceased Douglas Mugo herein to make up her four (4) acres for the exchange arrangement to be complete.
31. The magistrate in his judgement found that there was no proof by the appellant of existence of an exchange agreement. The court proceeded to find that the respondent was a sister to the deceased and under provisions of Section 39(1) of the *Law of succession Act*, she was the right, heir of the estate of her deceased brother who died without a wife and children. In my considered view, the magistrate erred in his finding for several reasons. Firstly, I find that the analysis of the evidence herein point to a long standing oral exchange agreement between the two families, that of Magondu Muriu and his son Geoffrey Muchina Magondu who were the original registered owners of L.R NOO'S Inoi/Thuita/367 and Inoi/Thuita/175 respectively. The agreement was a mutual one between the two families and had been executed almost fully through the transfers between the appellant on one hand and three sons of the deceased and their mother Lydia Magondu on the other hand. The only parcel that was not transferred to the appellant was L.R Inoi/Thuita/969 for the reason that the deceased died before executing his part of the oral agreement. Thirdly, the land which is the only asset of the deceased resulted from the partition of L.R. Inoi/Thuita/367 which rightfully belonged to the appellant's husband. The respondent in my view was not an heir of the late Geoffrey Muchina Magondu so as to inherit from him. Fourthly, the respondent ought to have inherited from the estate of her late father Magondu Muriu but not from her late brothers estate, Geoffrey Muchina. Fifthly, the titles that had passed to the deceased and his four (4) sons resulted from a mistake during land registration. This mistake that also affected the land registered in the name of the appellant's husband was to be rectified by the mutual exchange agreement between the two families. From the evidence on record, the deceased was a part of the mutual exchange agreement during his lifetime but died before executing his part. The deceased was part and parcel of the mutual exchange agreement of the two families and cannot be separated from it. Sixthly, the respondent was said to be married during the material time of the agreement and had no interest in her late father's estate from which she was excluded in distribution by her brothers. It is notable that she has not challenged the succession proceedings for many years. Neither did the respondent show any interest in the estate of the appellant's husband's estate which was concluded many years ago. The respondent was not able to explain how she came in to claim the deceased's land. Her evidence was that she was a dependant of the deceased in this case and that she



was closer to him than the appellant in degree of consanguinity. If the estate of the deceased had free property for distribution, the respondent would be treated on equal footing with her brothers and sister who laid no claim on the land L.R.Inoi/Thaita/969.

32. The appellant said the respondent's claim that she lives on the land and cultivates therein was untrue. This was confirmed by the respondent in cross-examination when she said that the deceased's land is all bush. The appellant said she had been cultivating the land after it was surrendered to her by the deceased. However, the respondent came in 2017 and uprooted the napier grass. This was about seven (7) years after the death of the deceased. The respondent witness PW2 did not explain why he transferred his parcel No. Inoi/Thuita/971 to the appellant in execution of the exchange arrangement and then claim that the respondent ought to be given the land of the deceased, which he knows very well that it ought to go to the appellant under the family exchange agreement.
33. I have carefully analysed the evidence adduced in the court below and come to the conclusion that the land L.R. No. Inoi/Thuita/969 is not free land for distribution to the respondent and should be distributed to the appellant in completion of the exchange agreement of the two families. It is my considered view that the trial court erred in its finding that the respondent was a dependant of the deceased under Section 29 of the Act without any legal or factual basis.
34. Consequently, I find this appeal merited and allow it in the following terms:-
- a. That the judgment of the honourable magistrate delivered on 30th April 2022 is hereby set aside.
 - b. That the land L.R Inoi/Thuita/969 should be distributed solely to the appellant.
 - c. That the appellant is hereby appointed the administrator of the estate of the deceased.
 - d. That a certificate of grant to issue in the terms of the orders herein.
35. This being an appeal involving members of closely related families, each party will bear their own costs.
36. It is hereby so ordered.

DATED AND SIGNED AT KERUGOYA THIS 24TH DAY OF OCTOBER, 2023.

F. MUCHEMI

JUDGE

Judgement delivered through video link this 24th day of October, 2023

