



REPUBLIC OF KENYA



In re Estate of David Mwangi Guandaru alias Mwangi Guandaru (Deceased) (Probate & Administration Appeal 15 of 2022) [2024] KEHC 14701 (KLR) (21 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14701 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
PROBATE & ADMINISTRATION APPEAL 15 OF 2022
CW GITHUA, J
NOVEMBER 21, 2024**

BETWEEN

ROSEMARY WANGARI MWANGI APPELLANT

AND

JOSEPH MWANGI GITHINJI 1ST RESPONDENT

EMELDA WACHUHI MUTHIGA 2ND RESPONDENT

(Being an appeal from the Judgement of Hon. E.M. Nyagah (SPM) in Murang'a Chief Magistrate Succession Cause 85 of 2019 delivered on the 27th of September, 2022)

JUDGMENT

1. This appeal emanates from the Judgment of the lower court in which the learned trial magistrate upheld the affidavits of protest filed by the respondents contesting the summons for confirmation of grant filed by the appellant, Rosemary Wangari Mwangi who was the widow and administrator of the deceased's Estate.
2. In the summons for confirmation of grant dated 7th September 2020, the appellant had proposed that the four parcels of land comprising the deceased's Estate, namely; Loc.13/ Gitugi/ 2063; Loc 13 / Gitugi /1145; Loc 13/ Gitugi/ 2143 and Loc. 13/ Gitugi/ 2144 be shared between herself and the deceased's six beneficiaries.
3. In their affidavits of protest, the protestors (hereinafter the respondents) averred that they had bought portions of land in parcel No. LOC.13/GITUGI/2063 (hereinafter the suit land) from the deceased in his lifetime. The 1st respondent claimed that he had bought two plots measuring 40 by 80 ft and the 2nd respondent one plot of similar size which were to be excised from the suit land ; that soon after purchase, they took possession of their respective portions and started cultivating; that the appellant was aware of their beneficial interest in the suit land but deliberately failed to disclose it to the trial



court with the intention of denying them their right to ownership of their respective plots; that this is why she left them out of the proposed distribution of the deceased's Estate.

4. The court record reveals that the protested summons were prosecuted by way of viva voce evidence. After conclusion of the hearing, the learned trial magistrate delivered his judgement on 27th August 2020 in favour of the protestors and made a finding that they were beneficial owners of part of land parcel LOC.13/GITUGI/2063 and ought to be allocated their respective shares as creditors to the Estate.
5. Being aggrieved by the aforesaid decision, the appellant moved this court vide a Memorandum of Appeal dated 25th October 2022 citing six (6) grounds of appeal. The appellant mainly complained that the learned trial magistrate erred in law and fact by: finding that the respondents had proved their protests on grounds of sale agreements without any decree to that effect; finding that the respondents were creditors to the Estate without any evidence; and, presiding over matters which were a preserve of the Environment and Land court.
6. On the above grounds, the appellant beseeched this court to partially set aside orders made by the trial court in respect of land parcel LOC.13/GITUGI/2063 and substitute them with an order allowing the summons for confirmation of grant in terms of paragraph 7(1) of the supporting affidavit sworn on 7th September 2020.
7. The appeal was prosecuted by way of written submissions. The appellant's submissions were filed on 20th May 2024 by Ms. R. M Kimani & Company Advocates while those of the respondents dated 4th June 2024 were filed by Ms. Murira Winnie & Company Advocates.
8. This being a first appeal to this court, I am well cognizant of my duty as a first appellate court which is to re-consider, re-evaluate and re-analyse the evidence tendered before the trial court in order to draw my own independent conclusion on whether or not the trial court's impugned decision should stand. In doing so, I should remember that unlike the trial court, I did not have the advantage of hearing and seeing the witnesses and make due allowance for that disadvantage.
9. The duty of the first appellate court has been the subject of discussion in many authorities but citing one of them which elaborately captures the said duty will suffice for purposes of this judgement. I have in mind the authority of *Selle & Another V Associated Motor Boat Co. Ltd & Others* [1968] EA 123, in which the Court of Appeal stated as follows:

“.....An appeal to this court is by way of retrial and the principles 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 conclusions though it should always bear in mind that it has neither seen or heard the witnesses and should make due allowance in this respect.”
10. With the above duty in mind, I have carefully considered the grounds of appeal, the rival submissions filed by both parties together with the authorities cited and the record of the trial court. Having done so, I find that the key issue arising for my determination is whether the learned trial magistrate erred in his decision to uphold the protests filed by the respondents.
11. From the depositions made in the affidavits of protest and the evidence adduced during hearing of the protested summons for confirmation of grant, it is very clear that the protestors were asserting their right to ownership of parcels of land they had allegedly bought from the deceased in his lifetime and on that basis claiming a share of the suit land while the appellant denied that they had such right. She denied being aware of sale of any parcel of land to the respondents by the deceased claiming that the



respondents had been cultivating the parcels of land in question as licensees and that's why they left after she asked them to.

12. What was before the trial court therefore was an ownership dispute between the deceased's estate represented by the appellant and the protestors. This is a dispute that the trial court should not have entertained leave alone determined because sitting as a probate court, the trial court's mandate was limited to distribution of the deceased's net intestate estate to his rightful beneficiaries.
13. It was not the duty of the trial court to adjudicate on claims of ownership to land belonging to the Estate made by third parties. I entirely agree with the holding of Musyoka J in *Re Estate of Alice Mumbua Mutua (Deceased)* eKLR(2017) when he held that ;

“ The provisions of the *Law of Succession Act* and the Probate and Administration Rules are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.”

14. What the above means is that the duty or jurisdiction of a probate court was limited to identification of assets belonging to a deceased's Estate; identification of the deceased's beneficiaries and eventually distribution of the Estate to the deceased's beneficiaries. Any claims to ownership of the assets subject to distribution by a 3rd party cannot be heard and determined in the same court. It must be ventilated in a different forum and it was only after the 3rd party had established his or her claim by having, for example, a decree issued in his or her favour that a family court can give effect to it.
15. This is why Rule 41 (3) of the Probate and Administration Rules (P&A Rules) requires that if a dispute arose regarding the shares of a person claiming to be beneficially entitled to an Estate or regarding ownership of assets subject to distribution in a deceased's Estate, distribution of the property in dispute should be held in abeyance pending resolution of that dispute.

For clarity on this point, I think it is useful to reproduce Rule 41 (3) of the P& A Rules. The provision is in the following terms;

“Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition of qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of Section 82 of the Act, by order appropriate and set aside the particular share or estate of the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rule and may thereupon, subject to the proviso to Section 71(2) of the Act, proceed to confirm the grant.”

16. From the material before the trial court, it was clear that the respondents' protests amounted to claims of ownership of part of one of the Estate's properties, namely, land parcel LOC.13/GITUGI/2063 and as demonstrated above, these claims ought to have been determined outside the succession court in the Environment and Land Court which was the court constitutionally and statutorily conferred with jurisdiction to adjudicate on matters touching on title to land.
17. The learned trial magistrate ought to have applied Rule 41 (3) of the P&A Rules and postponed distribution of the land subject matter of the ownership dispute pending resolution of the dispute in



the appropriate court. In addition, the learned trial magistrate ought to have distributed the rest of the Estate to the deceased's beneficiaries in accordance with the proposal made in the summons for confirmation of grant dated 7th September 2024 since the same was not contested.

18. For the above reasons, I agree with the appellant's submissions that the learned trial magistrate erred by adjudicating on and determining matters for which he did not have jurisdiction as they fell outside the mandate of a succession court. The orders made by the learned trial magistrate's in the impugned judgement therefore lacked any legal validity and must be set aside.
19. In view of the foregoing, I find merit in this appeal and it is hereby allowed. The orders made in the trial court's Judgement dated 27th September 2022 are hereby set aside. They are substituted with the following orders;
 - i. The grant issued to the appellant on 9th January 2020 is hereby partially confirmed as proposed in paragraph 7 of the affidavit sworn in support of the summons for confirmation of grant dated 7th September 2020 in respect of the three properties whose proposed mode of distribution is not contested.
 - ii. Distribution of the suit land is hereby stayed pending filing of a suit by the respondents in the Environment and Land Court for a determination of their entitlement to a share of the said property.
 - iii. The aforesaid suit to be filed within the next 120 days in default of which distribution of the suit land shall be confirmed as proposed in the summons for confirmation of grant dated 7th September 2020.
20. Costs follow the event but are awarded at the discretion of the court. Given the circumstances necessitating filing of this appeal, the order that best commends itself to me on costs is that each party shall bear its own costs of the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 21ST DAY OF NOVEMBER 2024.

HON. C. W. GITHUA

JUDGE

In the Presence of:

Ms. Kimani for the appellant

Ms. Murila for the Respondents

Ms. Susan Waiganjo, Court Assistant

TABLE

MURANG'A HCFA E015 OF 2022 JUDGEMENT Page 3 of 3

