



**In re Estate of Ibrahim Wekulo Murunga (Deceased) (Civil Appeal
99 of 2023) [2024] KEHC 15575 (KLR) (6 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15575 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL 99 OF 2023
DK KEMEL, J
DECEMBER 6, 2024**

IN THE MATTER OF THE ESTATE OF IBRAHIM WEKULO MURUNGA (DECEASED).

BETWEEN

**RUKIA LUSIKE WEKULO 1ST APPELLANT
NAOMI NEKOYE WEKULO 2ND APPELLANT
SOPHIA NASHIKAWA WEKULO 3RD APPELLANT
ZAINAB MULONGO WEKULO 4TH APPELLANT
HADIJA KHISA WEKULO 5TH APPELLANT
AMIDA MURANGA WEKULO 6TH APPELLANT
SAKINA WEKULO 7TH APPELLANT**

AND

**ISMAEL CHITECHI 1ST RESPONDENT
MWAJUMA WEKULO 2ND RESPONDENT**

*(An Appeal from the Ruling/Order of Hon. Shaban Issa M. (Principal
Kadhi) delivered on 28th August 2023 in Bungoma KCC No. 1 of 2022)*

JUDGMENT

1. The Appeal herein arose from the Ruling/Order of Hon. Shaban Issa M. (Principal Kadhi) delivered on August 28, 2023 in Bungoma KCC No. 1 of 2022. In the said Judgement, the Hon Principal Kadhi made a determination on what constitutes the estate of Ibrahim Wekulo Murunga (“the Deceased”), the heirs and their respective shares.



2. The brief background of this case as can be gleaned from the record is that the 1st Appellant herein is the widow to the deceased and vide an application dated 5th June 2023, she averred inter alia: that she is jointly registered with the deceased as the owner of land parcel number E. Bukusu/s. Kanduyi/19558 measuring 0.075 HA; that on 4th May 2021, her joint registered owner, the deceased, passed away leaving her as the sole surviving joint proprietor in land parcel number E. Bukusu/s. Kanduyi/19558 measuring 0.075 HA; that on or about 4th May 2022, the Respondents herein filed a succession cause with regard to the estate of the deceased and listed land parcel number E. Bukusu/s. Kanduyi/19558 measuring 0.075 HA as forming part of the deceased's estate for distribution to the heirs; that upon the demise of the deceased joint proprietor, subject to the legal principle of survivorship, land parcel number E. Bukusu/s. Kanduyi/19558 measuring 0.075 HA automatically passes to her as the surviving joint proprietor; that land parcel number E. Bukusu/s. Kanduyi/19558 measuring 0.075 HA does not form part of the estate of the deceased and it should be excluded from the list of properties of the deceased subject to distribution. Subsequently, the Respondents herein vide an application filed on 22nd June 2023, sought orders compelling the 1st Appellant to deposit in Court the proceeds of rent collected from the deceased's property known as E. Bukusu/s. Kanduyi/19558 measuring 0.075 HA pending hearing and determination of the succession cause involving the estate of the Deceased. It was averred that the Respondents herein are the Administrators to the estate of the deceased; that the deceased died intestate in the year 2021 and left behind land parcel number E. Bukusu/s. Kanduyi/19558 measuring 0.075 HA which harbours eight tenants; that the 1st Appellant has been collecting rent from the said tenants since the demise of the deceased; that the 1st Appellant has not been accounting for the rent she receives from the tenants; that the 1st Appellant should be compelled to deposit in Court all the rent that she collects pending the determination of the succession cause relating to the estate of the deceased.
3. In response to the Respondents application filed on 22nd June 2023, the 1st Appellant swore a replying affidavit on 1st August 2023, wherein she averred that the land parcel E. Bukusu/s. Kanduyi/19558 measuring 0.075 HA does not form part of the estate of the deceased that cannot be a subject in his succession proceedings; that she is a joint registered owner with the deceased in land parcel E. Bukusu/s. Kanduyi/19558 measuring 0.075 HA and upon his demise she was the sole surviving joint proprietor and subject to the principle of survivorship the said land parcel number E. Bukusu/s. Kanduyi/19558 measuring 0.075 HA automatically passes to her as the surviving joint proprietor; that the Court should hold that land parcel number E. Bukusu/s. Kanduyi/19558 measuring 0.075 HA which is subject to the principle of Jus Accrescendi simply implies that the deceased's interest in the land parcel number E. Bukusu/s. Kanduyi/19558 measuring 0.075 HA be merged with hers as the surviving joint proprietor.
4. In response to the 1st Appellant's application dated 5th June 2023 which was filed in Court on 7th August 2023, the Respondent swore a replying affidavit on 23rd August 2023, wherein they averred that the 1st Appellant got married to the deceased after he had already purchased the land parcel number E. Bukusu/s. Kanduyi/19558 measuring 0.075 HA and that the same was registered under the name of the deceased; that the 1st Appellant failed to prove the alleged joint ownership by availing consent to transfer the suit property to joint ownership by the deceased; that the registration of the joint ownership in land parcel number E. Bukusu/s. Kanduyi/19558 measuring 0.075 HA was fraudulently done as the same occurred during the point the deceased was critically sick; that the issue as presented by the 1st Appellant was already decided by the Court when it noted that the land parcel number E. Bukusu/s. Kanduyi/19558 measuring 0.075 HA form s part of the estate of the deceased and it should be listed for succession.



5. The Principal Kadhi in his Ruling held that the 1st Appellant's application dated 5th June 2023 and filed in Court on 7th August 2023 is res judicata as a Court of competent jurisdiction vide a ruling delivered on 27th April 2022, ruled that the suit property, land parcel number E. Bukusu/s. Kanduyi/19558 measuring 0.075 HA, herein falls under succession of the estate of the deceased and his share in the property should devolve to his legal heirs, and the fact that the 1st Appellant did not successfully appeal the decision of the Court the same still stands. With regard to whether the land parcel number E. Bukusu/s. Kanduyi/19558 measuring 0.075 HA was jointly owned, the Kadhi relying on the availed official certificate of search held that the same was held jointly between the deceased and the 1st Appellant. On whether the 1st Appellant is entitled to a share of the deceased estate, the Kadhi held that the dictates of Sharia Law stipulate that a non-Muslim cannot inherit from the estate of a Muslim deceased person. According to him, there existed no prior agreement between the deceased and the 1st Appellant with regard to her owning his shares in land parcel number E. Bukusu/s. Kanduyi/19558 measuring 0.075 HA upon his demise thus the suit property will be inherited by heirs of the deceased.
6. Aggrieved by the decision of the Principal Kadhi, the Appellants preferred this appeal. The grounds of appeal in summary are that the learned Principal Kadhi erred in law and fact in that he:
 - a. Decided that the issue of ownership of suit land parcel number E. Bukusu/s. Kanduyi/19558 measuring 0.075 HA was res judicata as the same was already determined in Kadhi's Succession Cause No. 3 of 2021 when that was not the case.
 - b. Decided that half of the land parcel number E. Bukusu/s. Kanduyi/19558 measuring 0.075 HA formed part of the estate of the deceased to be inherited by his heirs.
 - c. Refused to be guided by the principle of survivorship/Jus Accrescendi and held that the same does not apply.
 - d. Decided that he was not bound by common law.
 - e. Made substantive orders in relation to suit number Bungoma Kadhi's Court Succession Cause No. 3 of 2021 when no pleadings or rulings/judgement in respect of the same were produced before the Court.
 - f. Allowed the Respondents application dated 21st June 2023 and granted orders that were not prayed for by ordering that the rent collected from the rentals situated on land parcel number E. Bukusu/s. Kanduyi/19558 measuring 0.075 HA be given and divided amongst the heirs of the estate each month pending determination of the succession cause.
7. The Appellants through their respective counsel filed written submissions. The Respondents did not comply with the Court directive.
8. For the Appellants, it was submitted that land parcel number E. Bukusu/s. Kanduyi/19558 measuring 0.075 HA did not form part of the estate of the deceased and the Kadhi's Court was wrong in holding that the same formed part of the estate of the deceased. According to Counsel for the Appellants, the Kadhi ignored the various High Court precedents that were duly binding on him and held contrary to what the law provided as it was clear that land parcel number E. Bukusu/s. Kanduyi/19558 measuring 0.075 HA was jointly registered in the names of the deceased and the 1st Appellant. Counsel relying on Section 2 and 49 of the [Land Act](#) argued that the deceased did not have a separate share so as to bequeath the same to any other person as argued by the Respondents. The Appellants submitted that deceased had this interest formally while he was alive and that he was joint to the hip with the 1st Appellant as far as the rights in the property were concerned. Counsel insisted that land parcel number E. Bukusu/s. Kanduyi/19558 measuring 0.075 HA does not form part of the free estate of the deceased to be



distributed as he willed. Counsel relied on the decisions of *Mwangi Gakuri vs Bernard Kigotho Maina & Another* (2016) eKLR; *Aliya w/o Jaganath Rama Charan Nagia alias Mahmoud Issa vs Hussein Issa Nagia & 2 Others* (2017) eKLR and *In re Estate of M'kiunga (Deceased)* (2021) eKLR. Counsel urged this Court to set aside the decision of the Kadhi's Court and Appellant's appeal be allowed.

9. I have considered the Record of Appeal, as well as the submission by counsel for the Appellants. The issue for determination is whether the Hon. Kadhi erred in finding that the Property land parcel number E. Bukusu/s. Kanduyi/19558 measuring 0.075 HA formed part of the estate of the deceased. It is the duty of this Court as a first appellate Court to reconsider the evidence, reevaluate it and make its own conclusions. A Court of appeal will not normally interfere with a finding of fact by the trial Court unless it was based on no evidence or it was based on a misapprehension of the evidence or it is shown that the Court acted on wrong principles in reaching the finding that it did.
10. By dint of article 170 (5) of *the Constitution* of Kenya (2010) and Section 2 and 48 (2) of the Laws of Succession Act, cap 160 Laws of Kenya, Islamic laws of inheritance and not the Laws of succession Act apply to succession of estates of deceased Muslims.
11. It is clear that the backbone of this particular appeal lies on whether the land parcel number E. Bukusu/s. Kanduyi/19558 was registered as a joint ownership to enable the 1st Appellant herein to benefit from the doctrine of survivorship. I have perused a copy of the attached Certificate of Official Search and noted that the property was indeed registered in the names of the deceased and the 1st Appellant as joint proprietors. Section 2 of the *Land Act* 2012 defines joint tenancy in the following terms:

“joint tenancy” means a form of concurrent ownership of land where two or more persons each possess the land simultaneously and have undivided interest in the land under which upon the death of one owner it is transferred to the surviving owner or owners.

12. The Act goes on to provide at Section 49:

“49. Transmission on death of joint proprietor

If one of two or more joint proprietors of any land, lease or charge dies, the Registrar shall, on proof of the death, delete the name of the deceased from the register by registration of the death certificate”.

13. A joint tenancy such as the one between the deceased and the 1st Appellant carries with it the right of survivorship. By the principle of survivorship, the property herein passed automatically to the Appellant upon the demise of the deceased. On the principle of survivorship in joint tenancy, I am further guided by the Court of Appeal in *Peter Mburu Echaria v Priscilla Njeri Echaria* [2007] eKLR, where the Court expressed itself thus:

“The first statement of the law by Gachuhi JA, that in a joint tenancy each party owns an undivided equal share therein is not, with respect, entirely correct. It is in a tenancy in common in equal shares where each tenant owns an undivided equal share in the property. On the contrary, one characteristic of a joint tenancy is that the joint tenants have a unity of interest, that is to say, that, although they have separate rights, the interest of each joint tenant is the same in extent and duration and in reality, they are in the position of a single owner. A second characteristic of a joint tenancy is a right of survivorship. On the death of one joint tenant his interest accrues to the other joint tenant(s) by right of survivorship (jus Accrescendi)”.



14. With respect, I do find that, having rightly found that the deceased and the 1st Appellant held the property as joint proprietors, the Hon. Principal Kadhi misdirected himself in reaching the holding that “half of the shares in the suit property to be listed as part of the estate of the deceased”. There was no basis in law to come to such a finding. In a joint tenancy as stated in the Echaria case (supra) “joint tenants have a unity of interest, that is to say, that, although they have separate rights, the interest of each joint tenant is the same in extent and duration and in reality, they are in the position of a single owner”. The interest of each joint tenant is the same in extent and duration.
15. I do agree with the Hon. Principal Kadhi that all property of a deceased person whether moveable or immovable forms the estate of such deceased person. However, in the instant case, the suit property, land parcel number E. Bukusu/s. Kanduyi/19558, being jointly owned by the deceased and the 1st Appellant was not available for distribution as it does not form part of the estate of the deceased. Upon the demise of the Deceased, based on the legal principle of survivorship, the property automatically passed to the 1st Appellant, the surviving joint proprietor. Joint tenancy or proprietorship by its very nature excludes property held jointly from the estate of a joint proprietor as the property accrues to the surviving joint proprietor. In this regard therefore the finding by the Hon. Principal Kadhi was in error and must be reversed.
16. On the aspect of issuing an order that was not part of the prayers of the Respondents, having concluded that the said suit property, land parcel number E. Bukusu/s. Kanduyi/19558, being jointly owned by the deceased and the 1st Appellant was not available for distribution as it does not form part of the estate of the deceased, there is no need for this Court to venture into this debate. In any event, the property having reverted back wholly to the 1st Appellant, the said 1st Appellant was under no obligation to surrender rent or account for the same as the property does not form part of the estate of the deceased.
17. In the premises and from the totality of my evaluation of the evidence and the law relevant in this matter, my finding is that the Appeal has merit. The same is allowed and that the following orders are hereby issued :-
 - i. Land parcel number E. Bukusu/s. Kanduyi/19558, is hereby declared not to form part of the estate of the deceased;
 - ii. The Appellant’s application dated 5th June 2023 is allowed with no order as to costs.
 - iii. The Respondents application dated 21st June 2023 is dismissed with no order as to costs.
 - iv. Each party to bear their own costs of this appeal.

Order accordingly.

DATED AND DELIVERED AT SIAYA THIS 6TH DAY OF DECEMBER, 2024.

D. KEMEI

JUDGE

In the presence of:

Nabibwa..... for Appellants

Nechesa.....for Respondents

Kizito/Ogendo.....Court Assistant

