Ngoima v Wambeti & another (Civil Appeal E455 of 2023)
[2025] KECA 1477 (KLR) (12 September 2025) (Judgment)

Neutral citation: [2025] KECA 1477 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E455 OF 2023

W KARANJA, SG KAIRU & P NYAMWEYA, JJA

SEPTEMBER 12, 2025

BETWEEN

NJENGA MWAURA NGOIMA ..... APPELLANT

AND

PHOEBE WAMBETI ..... 1ST RESPONDENT

EDITH MWAURA NGOIMA ..... 2ND RESPONDENT

(Being an appeal against the Judgment of the High Court of Kenya at Nairobi (M.W Muigai, J.) dated 17th September 2018 in HCP & A No. 130 of 2005)

JUDGMENT

1. This appeal arises from the judgment of the High Court, Family Division at Nairobi (M.W. Muigai, J.) delivered on 17th September 2018 revoking the grant of letters of administration in respect of the estate of Geofrey Mwaura Ngoima, (deceased), issued to his sons Njenga Mwaura Ngoima and Geoffrey Kangethe Ngoima on 6th January 1999 and confirmed on 8th December 2000. The High Court ordered a fresh grant to be issued in the joint names of Njenga Mwaura Ngoima, Geoffrey Mwaura Ngoima, Phoebe Wambeti Ngoima and Edith Ngoima and gave directions on the administration of the estate to which we shall advert later in this judgment. The appellant, Njenga Mwaura Ngoima is aggrieved and lodged this appeal.

2. The background in brief is that the deceased died on 21st October 1984. Two of his sons, Njenga Mwaura Ngoima and Geoffrey Kangethe Ngoima petitioned the Magistrates Court at Kiambu for letters of administration intestate of the estate of the deceased. In the petition they stated that the deceased was survived by his wife, Phylis Wangui Mwaura Ngoima, and seven children, namely the two of them, as the petitioners, Ngoima Mwaura, Fredrick Njoroge Mwaura Ngoima, Jean Hutchinson Wanjiku, Phobe Wambeti and Edith Waithira. They provided an inventory of the assets of the deceased as Title Numbers Githunguri/Githiga/1073, 1074, 1075 and 1076 with an

estimated value of Kshs.100,000.00. As already indicated, on 6th January 1999, the court, granted the letters of administration to Njenga Mwaura Ngoima and Geoffrey Kangethe Ngoima (the initial administrators).

3. Based on an application dated 6th July 2000, the grant of representation was confirmed on 8th December 2000. The mode of distribution of the assets of the deceased, namely, Githunguri/Githiga/1073, 1074, 1075 and 1076 as proposed by the initial administrators was sanctioned and confirmed by the court as follows: Ngoima Mwaura 8.7 acres; Njenga Mwaura Ngoima 8.8625 acres; Geoffrey Kangethe Ngoima 10.4 acres; Fredrick Njoroge Mwaura Ngoima 8.8625 acres; Jean Wanjiku Hutchinson 3.075 acres; Phoebe Wambeti 2 acres; and Edith Waithira 2 acres.

4. Subsequently Phoebe Wambeti and Edith Waithira Ngoima moved the High Court by applications dated 21st January 2005 and 21st January 2015 respectively, seeking among other reliefs, an order of revocation of the grant of letters of administration issued to the initial administrators; an order to restrain the initial administrators from trespassing on or evicting them from the land they occupy; and an order for redistribution of the estate. The applications were based on the grounds that the grant of letters of administration and the confirmation were fraudulently obtained by making of false statements and concealment of material facts; that some beneficiaries of the estate were excluded from the succession process and did not get any inheritance from the estate; and that some of the beneficiaries sought to own larger chunks of the estate to the disadvantage and exclusion of other beneficiaries.

5. The two applications were opposed. Viva voce evidence was taken. The witnesses who testified included Phoebe Wambeti Ngoima; Edith Waithera Ngoima; Phyllis Wangui Ngoima; Ngoima Mwaura; Njenga Mwaura Ngoima; and Fredrick Njoroge Mwaura.

6. After reviewing the evidence and submissions, the learned Judge of the High Court identified four issues for determination, namely, whether the deceased had a valid oral will; whether the parties satisfied the grounds for revocation of grant as set out in Section 76 of the *Law of Succession Act* to warrant revocation of grant or not; whether the distribution of the estate of the deceased should be as per confirmed grant or whether it should be done equally/equitably amongst beneficiaries of estate; and finally whether the applicants met the requirements for grant of an injunction.

7. As to whether the deceased had a valid oral will, the learned Judge found that there were no independent witnesses who testified on the same; that in any event the initial administrators did not disclose the existence of the alleged will in the petition for grant of letters of administration but rather applied for a grant intestate. The Judge found that the estate being intestate, under Section 38 of the *Law of Succession Act*, the estate should be equally distributed amongst the deceased's children.

8. The Judge found further that in accordance with Section 51 of the *Law of Succession Act* and Rule 26 of the *Probate and Administration Rules* "disclosure of all surviving children of the deceased" was not complied with and that five daughters of the deceased were left out and disinherited and to the extent that the initial administrators failed to comply with the legal requirements of obtaining a grant, the anomalies confirm that "the process was defective in substance and they concealed material facts as provided by Section 76 of the *Law of Succession Act* as some of the grounds for revoking a grant." Moreover, the Judge held that leaving out the daughters of the deceased whether married or not amounts to discrimination and is contrary to Article 27 and 60 of *the Constitution* of Kenya."

9. As regard the prayer for injunction, the trial Judge found that:

> "...since the suit properties were in the name of the deceased and were transferred to beneficiaries and buyers through the defective grant; the suit properties despite titles remain

the original property of the deceased and hence ought to be preserved and status quo maintained until the irregularity, illegality and invalidity are regularized".

10. Ultimately, in allowing the applications for revocation of the grant of letters of administration, the learned Judge made the following elaborate orders:

    1. The grant issued on 8th January 1999 and confirmed on 11th December 2000 is revoked under Section 76 of *Law of Succession Act*.

    2. A new /fresh grant is to be issued forthwith in the names of the following beneficiaries.

        a. Njenga Mwaura Ngoima

        b. Geoffrey Mwaura Ngoima (for continuity and convenience of Purchasers; innocent 3rd Parties who are bonafide purchasers for value and without notice of defective title)

        c. Phoebe Wambeti Ngoima

        d. Edith Waithera Ngoima

        As joint administrators of the deceased's estate who will inform, consult and engage all beneficiaries (except those who renounced their interest) with a view to equitable redistribution of the deceased's estate; (not equal distribution because 30 years later; there are irreversible changes on use of land; gift inter vivos, permanent developments, sale of land etc) and obtain consents when filing summons for confirmation of grant. If any party is aggrieved to file protest (s) to be determined by Court.

    3. The redistribution shall include following portions of original Githunguri/Githiga 1073,1074, 1075 &1076 where undeveloped, cultivated and unsold portions and Plot No 30/74 Kahuhu Market Githiga and exclude;

        a. Jean Wanjiku Hutchinson's gift from deceased 3 or so acres

        b. Permanent structures built by Kangethe and Phoebe as had been shown by deceased

        c. Permanent structures by Edith (house built after she vacated Kangethe's house)

        d. Their parents' home

        e. Fredrick Njoroge's house

        f. Njenga Mwaura's house

        g. Ngoima Mwaura's house

        h. All portions of land in the suit property validly sold to 3rd Parties.

    4. The redistribution shall take into account of each beneficiary's gift, part of land one has sold, part of the land one has developed, cultivated or settled in the equitable distribution.

    5. Upon agreement or settlement; the subject title documents shall be surrendered to Land Registrar Kiambu and each beneficiary's cost after confirmation of grant process at own cost the issuance of new title.

    6. The status quo shall be maintained; there shall be no eviction, change or movement of boundaries, demolitions or any form of scuffle or damage to property until grant is confirmed.

    7. OCPD Kiambu Police Station to supervise compliance of the above orders.

8. Any aggrieved party may apply to Court or lodge appeal.

9. Each party to bear own costs.

11. The appellant has challenged that judgment on seventeen grounds set out in his memorandum of appeal. Learned counsel Mr. Njeru Nyaga amplified those grounds in his written submissions dated 30th September 2024 which he highlighted during the hearing before us on 18th March 2025.

12. It was urged on behalf of the appellant that the learned Judge exhibited latent bias and failed to disclose that counsel appearing for the respondents was a class mate. It was submitted that the respondents fully participated in the succession proceedings and were estopped from challenging the same; that the respondents were guilty of indolence in that many years passed before belatedly challenging the confirmed grant of letters of administration. It was urged that the Judge erred in concluding that the deceased's oral will, which formed the basis of distribution of his estate, was not proved absent independent witnesses, when in fact the will was admitted.

13. It was submitted further that the Judge erred in finding that the *Law of Succession Act*, as opposed to customary law, was applicable and wrongly concluded that there was discrimination to the extent that some beneficiaries did not benefit equally from the estate.

14. Opposing the appeal, learned counsel for the respondents Mr. Steve Kimathi relied on his written submissions dated 31st January 2025 filed on 6th February 2025 which he also highlighted during the hearing.

15. As regards the complaint regarding the Judge's impartiality and bias, it was submitted that the mere fact of being classmates does not imply bias; that in any event, the complaint was not raised before the learned Judge and the matter cannot be raised for the first time on appeal; that the appellant is only seeking to introduce a new claim of bias at the appeal stage with the aim of making a fresh case on appeal and filling up omissions in their case.

16. As to the contention that the deceased left a valid oral will, counsel submitted that the Judge was right that it was neither proven nor confirmed by independent witnesses; it was submitted that the assertion that the deceased left an oral will allegedly made during a meeting held sometime in 1984 after which the deceased is said to have died shortly thereafter was unsubstantiated; that beyond showing beneficiaries where they would build, the deceased did not distribute his estate. It was urged that the purported oral will was not valid under Section 10 of the *Law of Succession Act*, which requires independent witnesses for an oral will made in contemplation of death; that in any event, if indeed there was an oral will, the petition for the grant should have included the names and addresses of all the alleged witnesses before whom the will was made, which was not done.

17. Counsel for the respondents submitted further that the grant of Letters of Administration Intestate was obtained fraudulently and defectively; that the proceedings to obtain the grant were defective in substance; that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case and that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.

18. It was submitted that several of the deceased's beneficiaries, more particularly daughters of the deceased, namely, Hilda Gathoni, Mary Nyambura, Virginia Woki, Phyllis Wambui Wagacha, and Mercy Njeri Ngoima, were excluded in the Petition for Letters of Administration Intestate; that the deceased's wife was left out during the confirmation of the Grant of Letters of Administration Intestate and consequently no property was given to her from the deceased's estate.

19. It was submitted that the contention by the appellant that the respondents were indolent is not well founded, that the *Limitation of Actions Act* does not prescribe a time limit within which applications under the Law of Succession may be made.

20. The respondents maintain that the deceased died intestate and that his estate should be devolved under the *Intestacy Rules* in accordance with Section 38 of the *Law of Succession Act*, rather than through the alleged unproven oral will; and that contrary to claims by the appellant, customary law is not applicable by dint of Section 2(1), as that provision ousted the application of customary law to estates of person dying after July 1, 1981 and the distribution should therefore follow statutory law rather than any customary practices.

21. We have considered the appeal and the submissions in keeping with our mandate under Rule 31(1)(a) of the *Court of Appeal Rules*, which as expounded in the decision in *Selle and Another vs. Associated Motor Boat Company Limited & Others* [1968] EA 123 is to reconsider the evidence,evaluate it, and draw our own conclusions and will only depart from the findings by the trial Court if they were not based on evidence on record; or where the trial Court is shown to have acted on the wrong principles of law or where its discretion was exercised injudiciously. See *Mbogo & Another vs. Shah* [1968] EA 93.

22. The essence of the appellant's grievance with the judgment of the High Court is that the learned Judge erred in revoking the confirmed grant of letters of administration and in failing to find that the deceased left a valid oral will that formed the basis of the distribution of his estate. The respondents' case on the other hand is that the judgment of the High Court is sound and should not be interfered with as the grant of Letters of Administration was obtained through fraudulent means and significant irregularities, including the exclusion of legitimate beneficiaries and the failure to properly distribute the estate; and that the alleged oral will was never proven and that the deceased's estate should be distributed according to the *Law of Succession Act* as decreed by the learned Judge.

23. Based on the foregoing, two issues call for our determination in this appeal. The first is whether the learned Judge erred in revoking the grant. The second is whether the learned Judge was right in concluding that there was no evidence to support the appellant's claim that the deceased left a valid oral will that should form the basis of the distribution of the estate.

24. Beginning with the question whether the learned Judge erred in ordering the revocation of the grant, Section 76 of the *Law of Succession Act* empowers the High Court, on its own motion or through an application, to at any time revoke or annul a grant of representation, whether or not confirmed. The relevant part of Section 76 provides that:

> " A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—
>
> a. that the proceedings to obtain the grant were defective in substance;
>
> b. that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
>
> c. that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently; ..." [Emphasis added]

25. As already stated in this judgment, in their petition for letters of administration, the initial administrators in their affidavit in support of the petition deposed that the deceased was survived by eight (8) persons, namely the wife of the deceased, Phylis Wangui Mwaura Ngoima, and seven children,

namely the two of them, as the petitioners, Ngoima Mwaura, Fredrick Njoroge Mwaura Ngoima, Jean Hutchinson Wanjiku, Phobe Wambeti and Edith Waithira.

26. It is common ground that that list did not include all the deceased's children. Excluded, were the names of five (5) of the deceased's children, namely, Hilda Gathoni, Mary Nyambura, Virginia Woki, Phyllis Wambui Wagacha, and Mercy Njeri Ngoima, all daughters of the deceased.

27. As the learned trial Judge correctly stated, it is a statutory requirement under Section 51 of the *Law of Succession Act* that the application for a grant of representation shall include the names of "all surviving... children...of the deceased"and the deliberate omission to include them in the list of surviving beneficiaries, is tantamount to "concealment from the court of something material to the case" that could not be justified on the basis that as married women, they could not under Kikuyu customary law inherit their father.

28. In that regard, the circumstances here are not, in that respect, different from those in the case of *Mwongera Mugambi Rinturi & Anor vs. Josephine Kaarika & 2 Others* [2015] eKLR where it had been asserted that under Meru Customary law, daughters do not receive a share of the parents estate. Frowning on the assertion, the Court expressed:

> "With the greatest respect, such full throttled patriarchy that flies in the face of current conceptions of what is fair and reasonable cannot stand scrutiny; not least because it is plainly discriminatory of itself and in its effect. It is anachronistic and misplaced notwithstanding that it was the norm for a vast majority Kenyas' communities. This Court has long accepted that a child is a child none being lesser on account of gender or the circumstance of his or her birth. Each has a share without shame or fear in the parents' inheritance and may boldly approach to claim it."

29. We respectfully agree. Further, we are fully in agreement with the learned trial Judge when she concluded in her judgment that the initial administrators:

> "...have admitted to omitting the daughters in the list of beneficiaries in the petition and confirmation of grant. This I find is tantamount to making of a false statement or by concealment from the court of something material to the case."

30. We, therefore, conclude that the learned Judge did not err or misdirect herself in revoking the grant in favour of the initial administrators.

31. We turn to the second issue, namely, whether the learned Judge erred in concluding that there was no evidence to support the appellant's claim that the deceased left a valid oral will that should form the basis of the distribution of the estate. In addressing this issue, it is noteworthy, at the outset, that in their petition for the grant of representation, the initial administrators applied for letters of administration intestate. Thereby tacitly acknowledging that the deceased died without a will. They did not assert in the petition that the deceased had a will.

32. Moreover, under Section 51(3)(b) of the *Law of Succession Act*, where it is alleged that the deceased left a valid oral will "the names and addresses of all alleged witnesses shall be stated in the application." No such information was provided.

33. Furthermore, Section 9(1) of the *Law of Succession Act* provides that no oral will shall be valid unless it is made before two or more competent witnesses; and the testator dies within a period of three months from the date of making the will. To buttress the importance of proof with respect to oral wills, it is provided in Section 10 of the Act that if there is any conflict in evidence of witnesses as to what was

said by the deceased in making an oral will, the oral will shall not be valid except so far as its contents are proved by a competent independent witness. In that regard, no independent witnesses were called. As the learned Judge correctly stated the initial administrators did not call independent witnesses to testify on the said oral will and "in the absence of competent independent witnesses (not beneficiaries) who testified, this Court cannot confirm the existence of such Will and its validity."

34. The Judge went on to state, correctly in our view, that:

> " Although the (initial administrators) alleged they relied on the deceased's wishes; it was not proved through evidence that the deceased made his wishes on distribution of his estate save for the gifts inter vivos that are not contested and if he did it was not proved that it amounted to a valid oral will. Therefore, the estate is to be administered and distributed under intestacy laws."

35. We, therefore, conclude that the learned Judge did not err or misdirect herself in holding that the estate of the deceased would be administered and distributed equally amongst the children of the deceased in accordance with Section 38 of the *Law of Succession Act*.

36. The claim that the learned Judge was biased on account of having been a classmate of the respondents' counsel is not supported by any evidence, and neither was objection in that regard raised before the trial court and cannot be belatedly taken on appeal.

37. The result is that we uphold the judgment of the trial court.

The appeal is devoid of merit. It is dismissed in its entirety.

38. As the parties are all siblings, we make no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF SEPTEMBER 2025.

W. KARANJA

JUDGE OF APPEAL

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S. GATEMBU KAIRU, C.Arb, FCIArb.

JUDGE OF APPEAL

.....

P. NYAMWEYA

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.