

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**HIGH COURT FAMILY APPEAL NO. E012 OF 2023**

**IN THE MATTER OF THE ESTATE OF MARY AGATA WACHIRA**

**(DECEASED)**

**JUDGEMENT**

1. Before this Court is the Memorandum of Appeal dated **21<sup>st</sup> July 2023** by which the Appellants **ONESMUS MWANGI WACHIRA** (1<sup>st</sup> Appellant) and **JOSEPH KARANJA ICHURA** (2<sup>nd</sup> Appellant) seek the following orders:-

**“(a) The appeal be allowed and the judgment delivered on 29/6/2023 and all orders made therein be set aside.**

**(b) The judgment delivered on 29/6/2023 be substituted with one distributing the estate herein as per the proposals by the appellants.**

**(c) Costs of this appeal.”**

2. The Respondent **POLY NYAGUTHII NJOGU** opposed the appeal. The appeal was canvassed by way of written submissions. The Appellants filed the written submissions dated **1<sup>st</sup> April 2025** whilst the Respondent relied upon their written submissions dated **4<sup>th</sup> May 2025**.

### **BACKGROUND**

3. This succession cause relates to the estate of the late **MARY AGATA WACHIRA** who died intestate on **16<sup>th</sup> May 2012**. A copy of the Death Certificate Serial No. **0009512** was filed in the lower court on **4<sup>th</sup> March 2023**.

4. Following the demise of the Deceased her daughter **Poly Nyaguthi Njogu** (the Respondent in this Appeal) petitioned the Magistrates Court in **Karatina** for letters of Administration Intestate. A grant was issued to the Respondent on **1<sup>st</sup> April 2022**. Thereafter on **6<sup>th</sup> April 2022**, the Respondent filed a Summons seeking confirmation of the Grant which had been issued to her.

5. The Appellants **Onesmus Mwangi Wachira** and **Joseph Ichura Karanja** then filed a Protest dated **21<sup>st</sup> November 2022** opposing the mode of distribution of the estate

proposed by the Respondents and the Appellants particularly took issue with the inclusion of the parcel of land known as land parcel **No. IR 41435 (LR No. 3777/545 OL KALAU)** measuring **9.87 Hectares** (hereinafter the **Suit Land'**) as part of the estate of the Deceased. They opposed any attempt to distribute the suit land on grounds that the Deceased during her lifetime had sold that parcel of land to the 2<sup>nd</sup> Appellant. The 1<sup>st</sup> Appellant claimed to have been a witness to the sale.

6. The protest was heard in the lower court and vide a judgment which was delivered on **29<sup>th</sup> June 2023, Hon. E. KANYIRI Principal Magistrate** dismissed the protest. The court confirmed the Grant which had been issued to the Respondent and directed that the estate be distributed in accordance with the proposal put forward by the Respondent.
7. Being aggrieved by this judgment the Appellants filed this Memorandum of Appeal which is premised upon the following grounds;-

- “1. That the learned trial magistrate erred in law and in fact by in reading into the cause that some property was to be sold to offset debts while no such evidence was led.**
- 2. That the learned trial magistrate erred in law and in fact by ignoring the evidence of the protestors.**
- 3. That the learned trial magistrate erred in law and in stating that no part of the estate had been sold by the deceased during her lifetime in the presence of a written agreement for sale.**
- 4. That the learned trial magistrate erred in law and in fact in finding that the debts owed by the deceased were paid by the petitioner while no proof of such was tendered before the court.**
- 5. That the learned trial magistrate erred in law and in fact by ignoring the evidence of both the petitioner and the protestors that the**

**deceased had put up part of the estate for sale and the petitioner had even offered to buy it.**

- 6. That the learned trial magistrate erred in law and in fact by raising the bar on the burden of proof by requiring the protestors to prove the authenticity of the agreement beyond reasonable doubt while ignoring the existence of such an agreement.**
- 7. That the learned trial magistrate erred in law and in fact in finding that the agreement tendered by the protestors had successfully been challenged by the petitioner while no evidence was led to challenge it.**
- 8. That the learned trial magistrate erred in law and in fact in finding that the deceased's debts were paid but failed to consider how the same were paid.**

**9. That the learned trial magistrate erred in law and in fact in ignoring the submissions by the Appellants.”**

### **ANALYSIS AND DETERMINATION**

8. I have carefully considered this memorandum of appeal as well as the record of Appeal filed in this matter.
9. This is a first appeal. It is settled law that the duty of the first appellate court is to re-evaluate the evidence which was adduced in the subordinate court both on points of law and fact and come up with its own findings and conclusion **[see Peters -vs- Sunday post limited [1958] E. A. 424]**
10. In **SELLE and Another -vs- ASSOCIATED MOTOR BOAT COMPANY LTD & Others [1968] 1 E.A 123** it was stated that
- “An appeal to this court from the High 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 [the fact] 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 that he has clearly failed on some point to take into account particular circumstances or probabilities materially to estimate the evidence."**

11. Likewise in **GITOBU IMANYARA & 2 Others -vs- ATTORNEY GENERAL [2016] eKLR**, the **Court of Appeal** stated as follows:-

**"An appeal to this court is by way of a 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 nor heard the witnesses and should make due allowance in this respect."**

12. The parties do not dispute the fact that the Deceased in this cause died Intestate on **16<sup>th</sup> May 2012**. The names and identities of the beneficiaries is also not in dispute.
13. The Appellants who are not beneficiaries of the estate opposed the mode of distribution proposed by the Respondent in the Summons for confirmation of Grant dated **4<sup>th</sup> April 2022**. In particular the Appellants opposed the inclusion of the parcel of land known as **LR No. 3777/545** as one of the estate assets available for distribution.
14. The 2<sup>nd</sup> Appellant alleges that he purchased the suit property at a price of **Kshs. 250,000** per acre. Therefore the Appellants claim is that the suit property did not form part of the estate of the Deceased and was therefore not available for distribution.
15. It is trite law that he who alleges must prove. **Section 107** of the **Evidence Act, Cap 80 Laws of Kenya** provides as follows:-

**“Burden of Proof”**

**(1) Whoever desires any court to give judgement as to**

**any legal or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

**(2) When a person is bound to prove the existence of**

**any facts it is said that the burden of proof lies on that person.”**

16. The Appellant must therefore adduce evidence sufficient to satisfy this court that the suit land did not belong to the Deceased.

17. It must be remembered that this court is sitting as a **Probate Court** whose duty is to oversee and supervise the transmission of the estate of the Deceased to the rightful beneficiaries.

18. In **RE ESTATE OF JULIUS NDUBI JAVAN (Deceased)** [2018] eKLR the Court stated thus

**“The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified. Thus, where issues**

**of ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed. And that is the very reason why rule 41(3) of the Probate and Administration Rules was enacted so that claims which are prima facie valid should be determined before confirmation.”**

19. Having said that the question then would be whether there was any evidence to show that the land in question belonged to any party other than the Deceased herein.
20. The Appellants sought to rely on an Agreement for sale dated **3<sup>rd</sup> February 2012**. However as pointed out by the learned trial Magistrate the purported agreement was not convincing at all if only for the fact that by the 1<sup>st</sup> Appellants own admission, the Deceased **did not** sign the document. Rather the 1<sup>st</sup> Appellant told the court that it was he who signed it on behalf of the Deceased allegedly because the Deceased had poor eye sight and could not see well. Quite apart from the fact that no medical documents were availed to prove that the Deceased suffered from poor eye sight the

Respondent who is the Deceased's biological daughter vehemently denies that the Deceased had any problem with her eyesight.

21. The Appellants did not produce in the lower court any evidence to show that the Deceased ever transferred the suit land to them. They did not exhibit a Title for the suit land bearing their names.
22. I do agree with the trial court that there exists no evidence to show that the Appellants purchased the land in question from the Deceased.
23. As stated earlier this court is sitting as a probate court. The Appellants are seeking to stake a claim to a parcel of land belonging to the estate. Their claim cannot be entertained in this court.
24. The Appellant are not beneficiaries of the estate of the Deceased and as such have no real locus in this matter. They are claiming ownership of a property which belongs to the estate of the Deceased. The question of whether the parcel of land known as **LR No. 3777/545** belongs to the

Appellants or to the estate is not one which this court sitting as a Probate Court can determine.

25. Matters relating to the ownership use and occupation of land have now under **Article 162** of the **Constitution of Kenya 2010** been mandated to be determined by a specialized court being the **Environment and Land Court ('ELC')**.
26. **Section 13** of the **Environment and Land Court Act** provides for the jurisdiction of that court as follows:-

**13. Jurisdiction of the Court**

**(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.**

**(2) In exercise of its jurisdiction under Article 162 (2) (b) of the Constitution, the Court shall have power to hear and determine disputes -**

- (a) relating to environment planning and protection climate issues, land use planning, title tenure boundaries, rates, rents, valuations, mining, minerals and other natural resources;**
- (b) relating to compulsory acquisition of land;**
- (c) relating to land administration and management;**
- (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and**
- (e) any other dispute relating to environment and land [Rev. 2012] No. 19 of 2011 Environment and Land Court 9 [Issue 1].**

27. Therefore, the correct and proper forum before which the parties ought to ventilate their claim to the suit land is the **ELC**. The **Environment and Land Court** is the only court exclusively mandated by law to determine the question of **'ownership'** of the suit land.

28. In **RE ESTATE OF STONE KATHUBI MUIINDE (Deceased)** [2016] eKLR Hon. Justice William Musyoka held that:-

**"Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit property brought before a civil court in accordance with the provisions of the Civil Procedure Act and Civil Procedure Rules.**

**This could mean filing suit at the magistrate's courts, or at the Civil or Commercial Divisions of the High Court, or at the Environment and Land Court. If a decree is obtained in such suit in favour of the claimant then such decree should be presented to the probate court in the**

**succession cause so that that court can give effect to it.”**

29. Similarly in **RE ESTATE OF MBAI WAINAINA (Deceased)** **[2015] eKLR** the court held that

**“.....The mandate of the probate Court under the law of succession Act is limited. It does not extend to determining issues of ownership of property and determination of trusts. It is not a matter of the probate Court being incompetent to deal with such issues but the provisions of the law of succession and the relevant subsidiary legislation do not provide a convenient mechanism for determination of some issues. A party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land Court. Consequently, and for the reasons above stated, I wish to find and hold has no mandate to resolve the proprietary interest on land based on the alleged trust”. [emphasis my own]**

30. Finally I find no merit in this appeal. The same is hereby dismissed in its entirety. The judgment delivered by the trial court on **29<sup>th</sup> June 2023** is hereby confirmed. Costs to be met by the Appellants.

**Dated in Nyeri this 24<sup>th</sup> day of October 2025.**

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**MAUREEN A. ODERO**  
**JUDGE**