

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT THIKA**

**FAMILY APPEAL NO. E003 OF 2025**

**IN THE MATTER OF THE ESTATE OF NDUNGU WAMWEA**

**alias NDUNGU WAMWEYA (DECEASED)**

**STEPHEN WAMWEYA WAITHAKA  
NDUNGU.....APPELLANT**

**VERSUS**

**JOHN KINUTHIA WAITHAKA.....1<sup>ST</sup>  
RESPONDENT  
MARY WAMBUI NDUNGU.....2<sup>ND</sup>  
RESPONDENT  
DANIEL MWANGI NDUNGU.....3<sup>RD</sup>  
RESPONDENT**

**(Being an Appeal from the Ruling of Hon. V. Asiyo (PM)  
delivered on 23<sup>rd</sup> July 2024 in Thika CM Succession  
Cause No. 204 of 2017)**

**JUDGMENT**

**Brief facts**

1. This appeal arises from the ruling of Thika Principal Magistrate in CM Succession Cause No. 204 of 2017 whereas the court dismissed the respondents' application seeking revocation of grant. However, the court made final orders that aggrieved the appellant thus leading to

the lodging of this appeal relying on 3 grounds summarized thus: -

- a) The learned trial magistrate erred in fact and law in ordering that land parcel title number LOC.5/KANGUNDUINI/1294 revert to the name of deceased for redistribution among the three households even after stating that the respondents were estopped by their actions from claiming that the asset was wrongly distributed.
- b) The learned trial magistrate erred in fact and in law by dismissing the summons for revocation of grant dated 2<sup>nd</sup> June 2023 and at the same time ordering that the property LOC.5/KAGUNDUINI/1294 do revert to the name of deceased.

2. Parties put in written submissions.

### **Appellant's Submissions**

3. The appellant submits that there is a contradiction in the ruling by the trial court as the learned magistrate dismissed the respondents' application for revocation but directed that property LOC.5/KAGUNDUINI/1294 do revert to the deceased's name for distribution among the three households. The learned magistrate explicitly found that the respondents were estopped by their conduct from challenging the distribution of the estate as they were

served but they elected not to attend court. To support the said contentions, the appellant refers to two cases: **Sita Steel Rolling Mills Ltd vs Jubilee Insurance Company Ltd [2007] eKLR** and **Serah Njeri Mwobi vs John Kimani Njoroge (2013) eKLR**.

4. The appellant argues that the learned trial magistrate erred in law by effectively granting a relief that was not legally available to the respondents as they had not sought the same through the appropriate statutory channel which would have been an application for review. Thus in the absence of a formal application for review, the learned trial magistrate acted without jurisdiction and in contravention of the law governing succession and civil procedures.
5. The appellant further argues that the ruling is incoherent and legally inconsistent with the finding that the respondents were estopped from their claim and with the dismissal of the revocation of summons. The said misdirection has created immense confusion and uncertainty regarding the legal status of the distribution of the estate.

### **The Respondents' Submissions.**

6. The respondents submit that the learned trial magistrate found clear evidence that the suit property was irregularly distributed and some beneficiaries were omitted and also directed that the estate property to revert to the

deceased's name so that the distribution can be done afresh and in accordance with **Section 40 of the Law of Succession Act**. The respondents refer to the case of **Re Estate of G.K.K (Deceased) [2017] eKLR** in support of their arguments.

7. The respondents argue that the court was guided by the powers enshrined in Order 45 Rule 63 of the Civil Procedure Rules and was

within its right to review the distribution of the estate. The respondents in their arguments rely on the decision in **Re Estate of Mwaura Mutero (Deceased) [2019] eKLR**.

#### **Issue for determination**

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

#### **The Law**

9. 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.”**

10. In **Gitobu Imanyara & 2 Others vs Attorney General [2016] eKLR** the Court of Appeal stated that:-

**An appeal to this court from a trial by 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 that it has**

**neither seen nor heard the witnesses and should make due allowance in this respect.**

11. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-

a) That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

b) That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and

c) That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

**Whether the appeal has merit.**

12. It is noted from the record that the respondents filed summons for revocation of grant dated 2<sup>nd</sup> June 2023 seeking for revocation of the grant issued on 8<sup>th</sup> January 2018 and confirmed on 9<sup>th</sup> November 2021. The second prayer was that the title for L.R. No. LOC.5/KAGUNDUINI/1294 be revoked and do revert to the name of the deceased. The said summons proceeded by way of *viva voce* evidence and the trial magistrate rendered his ruling on 23<sup>rd</sup> July 2024. The learned trial magistrate found that the respondents were

served with the pleadings but failed to attend court on the day of confirmation of grant. He stated that the respondents were served with the requisite hearing notices but they opted not to attend court or file an affidavit of protest in respect of the application for confirmation of grant. Thus, the trial court proceeded to say that by voluntarily failing to attend court, the respondents were estopped from claiming that the grant and certificate of confirmation of grant were obtained fraudulently.

13. An order was sought for the redistribution of the estate, so that the portion given to the appellant could revert to the deceased's name to facilitate redistribution amongst the three households of the deceased. The magistrate held that the respondents ought to have filed an application for review on the confirmation of grant orders made on 9<sup>th</sup> November 2021. The trial magistrate further stated that the respondents were estopped at that stage to claim that the suit land was wrongly distributed for the reason that they were served and failed to attend court. The learned trial magistrate then directed that the land parcel LOC.5/KAGUNDUINI/1294 do revert to the name of the deceased for redistribution amongst the three households. The ruling of the court kind of intimated that the respondents did not prove fraud during the proceedings of obtaining the grant. The learned trial magistrate further observed that the respondents ought to have filed an application for review in regard to the distribution of the estate. The trial magistrate further concluded by dismissing the summons for revocation.

14. To this extent, the magistrate, in my view agreed with the challenge on distribution by the respondents. However, the court held that the grant in favour of the appellant should not be disturbed but distribution should be done afresh. The re-distribution was meant to include the three houses of the deceased in sharing in the only asset of the deceased that was available for distribution. This was in my view, the reason for ordering of the title to revert to

the name of the deceased in order to facilitate distribution of the estate afresh in respect of L.R. No. LOC..5/KAGUNDUINI/1294 which was the bone of contention by the respondents in their Summons for Revocation of grant dated 2<sup>nd</sup> June 2023. The finding of the honourable Magistrate is further affirmed by his observation in the 3<sup>rd</sup> last paragraph of the ruling in which he stated: -

**“From the above, it is clear that the applicants should have filed an application for review of the confirmation orders made on 9<sup>th</sup> November 2021.”**

15. The Magistrate made another observation: -

**“They (meaning the respondents herein) are therefore, estopped at this stage to claim that the deceased’s asset was wrongly distributed.”**

16. However, the sentence that follows reads:

**“Taking into consideration all the above, I do ..... that L.R. LOC. 5/KAGUNDUINI/1294 can be reverted back to the**

**deceased’s name for redistribution among the three households due to the foretastated reasons.”**

17. The first sentence herein on the respondents being estopped from claiming that the grant and certificate of confirmation were fraudulently obtained was a misdirection on the part of the magistrate that service of the petition in this cause and that of the Summons for Revocation as well as the hearing date of the Summons on the respondents had not been established. I have perused the affidavits of service filed by the appellant in the original file, and I am of the view that the issue of service on the respondents leaves a lot to be desired. For example, the affidavit of service by Samson Mutiso dated 28<sup>th</sup> October 2021 states that thirteen (13) beneficiaries were served on that one day. Looking at the contents of the document, only five (5) were served but the location of their residences and the place of service as well as how service was effected was not stated in the affidavit. This estate has about three (3) houses and eighteen beneficiaries. Another example is the service of the same document which was rejected by Hon. M. Wanjala for being wanting as borne by the proceedings of 28<sup>th</sup> September 2021. This leads this court to conclude that service on the respondents and other beneficiaries in this cause by the appellant was wanting and should not have been taken as sufficient. For the Magistrate who heard the Summons to pronounce estoppel on the respondents on grounds of service was not supported by the record.

18. I have further perused the record and noted that the certificate of confirmation of grant dated 9<sup>th</sup> November 2021 distributed L.R. No. LOC. 5/KAGUDUINI/1294 measuring 3.24, ha. to beneficiaries according to the three houses in equal shares and a fourth portion was given to the appellant alone. The respondents seem not to have been in the picture as the grant was confirmed. However, this grant was never executed by the appellant who was the administrator. The record shows that the whole land later transmitted to the appellant solely as shown by the Certificate of Official Search produced by the respondents. The land was registered in the name of the deceased on 7<sup>th</sup> February 1977 and purportedly transmitted to the appellant through grant in this Succession Cause on 11<sup>th</sup> January 2023. I have perused the file and noted that there exists no certificate of grant bequeathing the said land to the appellant solely. The certificate in the file bearing the same date distributes the land to the three houses of the deceased and to the appellant in in equal portions of 2.125 acres. The total number of beneficiaries in the certificates are nineteen in number.

19. During the hearing of the Summons to revoke the grant in the year 2024 the appellant's evidence was that he was given the land by his grandmother Mary Wambui through an oral will in presence of the deceased who was the registered owner and who had allowed Mary Wambui (mother to deceased) to cultivate the land. The said evidence did not convince the magistrate to rule in the appellant's favour. It is important to note that Mary

Wambui did not own the land and as such, she lacked the capacity to pass legal ownership of

the land to the appellant or any other person. How the appellant came to be registered the sole proprietor of the land without a grant to that effect did not feature anywhere in the evidence and neither did the appellant find it important to explain. In my considered view, this was fraud of the highest order which the trial Magistrate ought to have brought out in his ruling delivered on 24<sup>th</sup> July 2024. It has a very serious impact on the inheritance rights of the other beneficiaries. The respondents told the court that during the lifetime of the deceased his land was subdivided into four (4) parcels and each house was given their own land leaving the 4<sup>th</sup> parcel L.R. NO. LOC. 5/KAGUNDUINI/1294 in the name of the deceased. This is the only asset that was available for distribution at the time this cause was filed and which has mysteriously landed in the hands of the appellant as his property in exclusion of all the other beneficiaries.

20. Taking into consideration the grounds of appeal and the evidence on the record of appeal, I find that the magistrate did not err in his finding and order that the title L.R. No. LOC. 5/KAGUNDUINI/1294 do revert to the names of the deceased for distribution among the three houses. The Magistrate may not have pronounced himself clearly in his final orders but I find no fault in the said order since it was aimed at correcting the distribution of the estate. It

is also my finding that the Magistrate did not misdirect himself with the orders he made in his ruling.

21. However, this court has power on appeal to address issues left out by the court below and to fill any gaps or clear any ambiguity in existence in the judgment of the court below. In this regard, I find no merit in this appeal and make orders as follows: -

- a. That the title of L.R. LOC. 5/KAGUNDUINI/1294 in the name of Samuel Wamweya Waithaka Ndungu and any subsequent titles are hereby cancelled to revert to the name of the deceased Ndungu Wamwea.
- b. That the grant confirmed in favour of the appellant Stephen Wamweya Waithaka Ndungu is hereby revoked.
- c. That the respondents John Kinuthia Waithaka, Mary Wambui Ndungu and Daniel Mwangi Ndungu who represent the three houses of the deceased are hereby appointed administrators of the deceased's estate to carry out fresh distribution of the estate of the deceased in respect of LOC. 5/KANGUDUINI/1294.
- d. That the administrators shall jointly or separately file Summons for Confirmation of grant before the Chief Magistrate Court Thika within forty five (45) days.

22. That this appeal has no merit and is hereby dismissed with no orders as to costs being a family matter.

23. It is hereby so ordered.

***JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 11<sup>TH</sup> DAY OF DECEMBER 2025.***

**F. MUCHEMI  
JUDGE**