Wambigo v Munyiri (Succession Appeal E027 of 2024)
[2025] KEHC 18509 (KLR) (15 December 2025) (Judgment)

Neutral citation: [2025] KEHC 18509 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

SUCCESSION APPEAL E027 OF 2024

DKN MAGARE, J

DECEMBER 15, 2025

BETWEEN

KARUE MUNYIRI WAMBIGO ..... APPELLANT

AND

GITHINJI STEPHEN MUNYIRI ..... RESPONDENT

JUDGMENT

1. This is an appeal from the Ruling and Order of Hon. V.S. Kosgei, Senior Resident Magistrate, dated 25.10.2022, in Karatina PMCSUCC Cause No. 383 of 2018.
2. The Memorandum of Appeal dated 7.11.2024 raised the following grounds of appeal:
    a. The learned magistrate erred in law and fact in overlooking the fact that the Petition was premised on falsehood.
    b. The learned magistrate erred in law and fact in failing to appreciate that the Appellant was not served with the citation nor had renounced his right to inherit.
    c. The learned magistrate erred in law and fact in not considering section 38 of the *Law of Succession Act* that the Appellant ranked at par with the Respondent for equal provision.
    d. The learned magistrate erred in law and fact in failing to appreciate section 76 of the *Law of Succession Act*.

Pleadings

3. By the Summons for Confirmation of Grant dated 29.8.2019 and filed by the Respondent, the Respondent sought a Certificate of Confirmation of Grant in respect of the estate of the deceased.

4. In the Affidavit in support of the Summons for Confirmation of Grant, the Respondent described the beneficiaries and shares as follows:

    a. Mary Nyaikamba Munyiri - widow- Kirimukuyu/Mbogoini/987

    b. Maina Muya Munyiri - son- Kirimukuyu/Mbogoini/982

    c. Mwangi Ngari Munyiri - son- Kirimukuyu/Mbogoini/983

    d. Waritho Irungu Munyiri- son- Kirimukuyu/Mbogoini/985

    e. Githinji Stephen Munyiri- son- Kirimukuyu/Mbogoini/987

5. The Appellant filed Summons for Revocation of Grant dated 31.1.2022. By the said Affidavit, it was deposed as follows:

    a. The deceased directed LR Kirimukuyu/Mbogoini/987 to be inherited by his five sons, including the Appellant and Respondent, and Maina Muya, Chege Munyiri, and Irungu Warithi.

    b. The Appellants were never served with consent or citation.

    c. The Grant was obtained contrary to Section 76 of the *Law of Succession Act*.

Submissions

6. The Appellant filed submissions dated 12.6.2025. It was submitted that the Respondent was in clear breach of Section 76 of the *Law of Succession Act* and Rule 51 of the Probate and Administration Rules. Reliance was placed on Re Estate of Priscah Ongayo Nande (2020) eKLR.

7. It was also submitted that the notice to all beneficiaries was not given as required under Rule 7(7) of the Probate and Administration Rules. Therefore, the Respondent was according to the Appellant guilty of material nondisclosed. Reliance was placed inter alia on the Estate of Julius Ndubi Javan (2018) eKLR.

8. The Respondent on his part filed submissions dated 21.7.2025 by which it was submitted that the Appellant's case was not for revocation of the grant but for a claim over Kirimukuyu/Mbogoini/987 which was not available as it had been transferred to Mary Nyaikamba Munyiri who on 9.1.2020 transferred it to Githinji Stephen Munyiri and Maina Munya Mynyiri.

Analysis

9. The issue before me for determination is whether the appeal is merited.

10. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a subordinate court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

11. This Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong. In the case of Mbogo and Another vs. Shah [1968] EA 93 the court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself

or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

12. The duty of the first appellate court was set out in the case of Selle and another Vs Associated Motor Board Company and Others [1968]EA 123, where the Judges in their usual gusto, held as follows;-

> " .. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-subordinate and the Court of Appeal is not bound to follow the subordinate Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

13. The court is to bear in mind that it had neither seen nor heard the witnesses. It is the subordinate court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

14. This court's the jurisdiction to review the evidence should be exercised with caution. In the cases of Peters vs Sunday Post Limited [1958] EA 424, the court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

15. The burden was on the Appellant to prove grounds for revocation of the grant. In Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, the Court of Appeal held that:

> " As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

16. The Appellant was thus expected to demonstrate on a balance of probabilities that the assertions in his supporting affidavit were such as to shift the scales of justice towards adopting his desired mode of distribution as opposed to the Respondent's suggested mode of distribution that was adopted. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in William Kabogo Gitau –vs- George Thuo & 2 Others [2010] 1 KLE 526 stated that:

> " In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely that not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

17. The Appellant maintained that the deceased directed that LR/Kirimukuyu/Mbogoini/987 be subdivided equally among his 5 sons.

18. The said wishes were documented. The script described affidavit of ownership is indicated to be dated and signed by the Deceased on 10.6.2008. It appears to be anchored on the existence of a written will. Under Section 9 of the *Law of Succession Act* it is provided as doth:

No oral will shall be valid unless:

a. It is made before two or more competent witnesses and

b. The testator dies within a period of three months from the date of making the will.

19. While discussing the requirements of a valid oral will, Musyoka J in Re Estate of Evanson Mbugua Thong'ote (Deceased) [2016] eKLR stated thus:

> An oral will is made simply by the making of utterances orally relating to disposal of property. In asserting whether the deceased had made a valid oral will, it needs to be considered first whether there was an utterance of the will. The question being whether there was an oral utterance of the terms of the will. The other consideration is that the utterance ought to be made in the presence of two or more persons.

20. To this court, the allegations of the Appellant do not justify a conclusion that there was a valid will. There was no evidence of a will.

21. It was not in disputed that the deceased had a total of 7 properties which had been distributed and the Appellant's contest was only on LR No. Kirimukuyu/ Mbogoini/987. It was also common position of the parties that the said parcel was initially distributed to Mary Nyakaimba Munyiri, the widow of the deceased and mother to the Appellant and Respondent.

22. Needless to say, Mary Nyakaimba Munyiri was a beneficiary by virtue of being a wife of the deceased. On dependants, the *Law of Succession Act* (Cap 160 Act defines who is a dependant at Section 29 as follows:-

> "(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
>
> (b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and
>
> (c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.

23. According to the Summons for Confirmation of Grant dated 28.8.2019, the Appellant is not named as a beneficiary. The Respondent's case was that the deceased had already allocated LR No. Kirimukuyu/ Mbogoini/984 to the Appellant and title had passed to the Appellant. The Appellant did not dispute this assertion.

24. While the Appellant did not dispute having been allocated land by the deceased, he equally did not state whether the reason he wished to be provided for when he had already inherited from the estate. Under Section 28 of the *Law of Succession Act* it is provided as follows, it is provided as follows:

> In considering whether any order should be made under this Part, and if so what order, the court shall have regard to—

a) the nature and amount of the deceased's property;

b) any past, present or future capital or income from any source of the dependant;

c) the existing and future means and needs of the dependant;

d) whether the deceased had made any advancement or other gift to the dependent during his lifetime;

e) the conduct of the dependant in relation to the deceased;

f) the situation and circumstances of the deceased's other dependants and the beneficiaries under any will;

g) the general circumstances of the case, including, so far as can be ascertained, the testator's reasons for not making provision for the dependant.

25. I therefore do not find basis for the Appellant's case that he was not involved in the succession. His clear claim is a share of the portion that was bequeathed to his mother. The court is not told whether his mother is deceased. The Respondent's undisputed case is that Mary Nyaikamba Munyiri transferred the LR No. Kirimukuyu/Mbogoini/987 which is claimed by the Appellant to one Githinji Stephen Munyiri and Maina Muya Munyiri. The same is therefore unavailable.

26. I find no fault in the finding by the lower court. It was not in dispute that the contested property was bequeathed to the Appellant's mother. The Appellant had his own LR No. Kirimukuyu/Mbogoini/984 whose title had passed from the deceased to the Appellant during the deceased's lifetime. This amounted to a gift inter vivos, and the lower court properly took it into consideration. The Court in Re Estate of The Late Gedion Manthi Nzioka (Deceased)[2015]eKLR stated that:

> " For gifts inter vivos, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trusts. Gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts inter vivos must be complete for the same to be valid. In this regard it is not necessary for the donee to give express acceptance, and acceptance of a gift is presumed until or unless dissent or disclaimer is signified by the donee."

27. In Naomi Wanjiru Njoroge & 2 others v Winston Benson Thiru [2018] eKLR, the court stated as follows:

> In law, gifts are of two types. There are the gifts made between living persons (gifts inter vivos), and gifts made in contemplation of death (gifts mortis causa). The assets that are the subject of a gift do not form part of the estate and such assets pass directly to the donee as provided for by Section 31 of the *Law of Succession Act* as follows;
>
> " A gift made in contemplation of death shall be valid, notwithstanding that there has been no complete transfer of legal title, if-
>
> (a) the person making the gift is at the time contemplating the possibility of death, whether or not expecting death, as the result of a present illness or present or imminent danger; and

(b) a person gives movable property (which includes any debt secured upon movable or immovable property) which he could otherwise dispose of by will; and

(c) there is delivery to the intended beneficiary of possession or the means of possession of the property or of the documents or other evidence of title thereto; and

(d) a person makes a gift in such circumstances as to show that he intended it to revert to him should he survive that illness or danger; and

(e) the person making that gift dies from any cause without having survived that illness or danger; and

(f) the intended beneficiary survives the person who made the gift to him:

Provided that-

i. no gift made in contemplation of death shall be valid if the death is caused by suicide;

ii. the person making the gift may, at any time before his death, lawfully request its return. The person making the gift may, at any time before his death, lawfully request its return.

28. Therefore, I consider that the deceased duly gifted the Appellant LR. Kirimukuyu/Mbogoini/984 as a gift inter vivos, and the Appellant's claim on his mother's share of the estate was unfounded, as he did not demonstrate the manner in which he was disinherited or deemed a child of a lesser god. He received a share just like did the rest of his brothers and he had no higher ground than the rest to claim a share from his mother's portion. If the Appellant had a claim on his mother's estate, the same would not be tenable under this succession as it could be a case pertaining to the estate of his mother.

29. Consequently, I find no ground upon which to revoke the grant as none was proved. I equally find no fault in the decision of the lower court and dismiss the appeal.

Determination

30. In the upshot, I make the following orders:

a. The appeal is unmerited and is dismissed.

b. Each party to bear their own costs.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 15TH DAY OF DECEMBER, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Muthigani for the Appellant

Mr. Maina for the Respondent

Court Assistant – Michael