

REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
FAMILY APPEAL NO. E011 OF 2023

IN THE ESTATE OF WILLIAM TARUS SAINA - DECEASED

HILLARY TANUI.....APPELLANT
VERSUS
AGNES CHERONO.....1ST RESPONDENT
FAITH JEPKINYOR.....2ND RESPONDENT

JUDGMENT

*(Appeal from the Ruling dated 27/08/2023 delivered in Eldoret Chief Magistrate's Court
Succession Ad Litem Cause No. 291 of 2020 by Hon. C. Menya-PM)*

1. This Appeals arises from a tussle between a son on one hand, and his mother and his sister, on the other, over compensation money paid by the National Land Commission (NLC) in respect to compulsory acquisition of parcels of land said to be registered in the name of the Appellant's late father, for purposes of construction of the Eldoret Bypass Project.
2. The Record of Appeal, in violation of the Rules, does not contain typed transcripts of the proceedings of the Magistrate's Court and even the Ruling challenged is itself is not included therein. I would have struck out the Record on the basis of these omissions (which were not even brought to the Court's attention at the time that the Appeal was admitted) but in the interest of justice, I will not do so since I have come across the typed Ruling in the Magistrate's Court file supplied. As for the proceedings, I have no choice but to embark on the arduous task of struggling to read through the trial Court's handwritten transcripts.
3. The background of the Magistrate's Court proceedings the subject of this Appeal is that the deceased, **William Tarus Saina**, died on 21/09/2001 at the age of 58 years old. By the Application dated 10/08/2020, his son, **Francis Toroitich Maina**, (Appellant herein) through **Messrs Isiaho Sawe & Co. Advocates**, sought to be issued with a Grant of Letters of Administration *ad Litem* over the estate of the deceased, limited to the purposes of receiving compensation of Kshs 10,640, 230/- from the NLC for the compulsory acquisition of a portion of the parcel of land known as **L.R. No. Pioneer/Ngeria/Block 1(EATEC)/1923** as aforesaid.
4. In the Application, no information was disclosed on whether there were other survivors of the deceased. However, the Appellant did attach to his Supporting Affidavit, copies of

minutes of an alleged family meeting held after the death of the deceased. The minutes is indicated to be authored by the area Chief on his official letter-head, and attended by 7 people, including the Appellant and others whom I assume to be close family relatives and/or elders. The minutes indicate that the Appellant was the person nominated as the family representative to be in charge of family property and to oversee the process of Succession. The minutes also indicate that the deceased, apart from the Appellant, left behind one more son (now also dead) and a daughter, and that the wife (the 1st Respondent) to the deceased, mother to their 3 children, had long separated from him. There was also indication that the estranged wife (1st Respondent), whom the deceased had reportedly resettled on a separate 2-acre parcel of land but was not in the meeting, had in recent times been seen around trying to return and lay claims for properties owned by the deceased, an action which was not well received and was frowned upon by the meeting attendees. It was therefore resolved that the estranged wife was not entitled to any share of the estate. Further, the minutes indicate that regarding the then impending compensation payment from the NLC, it was resolved that the money be shared between the Appellant and his said one brother (now dead), being the two sons of the deceased.

5. The Court then allowed the Application and gave the Grant *ad Litem* to the Appellant on 12/08/2020, the same date that the Application was filed.

6. However, by the subsequent Summons dated 9/11/2020, the 1st Respondent, **Agnes Cherono**, claiming as a widow of the deceased, through **Messrs Z.K. Yego & Co. Advocates**, applied for setting aside or rectification of the Grant *ad Litem*, and also for what she described as conservatory orders to restrain the NLC from making the said payment of Kshs 10,640,230/- to the Appellant. In her Affidavit in support thereto, she deponed that she and the deceased were blessed with 3 children, namely, **Hillary Tanui** (Appellant), **Shadrack Kipchumba** (now dead), and **Faith Jepkinyor**. She then averred that the Grant *Ad Litem* was issued solely to the Appellant (her son) excluding her as the widow yet she ranked higher than him in degree of consanguinity, and that the Appellant therefore fraudulently obtained the Grant by non-disclosure of material facts. She urged further that the Appellant also failed to disclose to the Court an additional asset of the estate, namely, compensation by the NLC of a further Kshs 3,109,970/- for compulsory acquisition of the separate parcel of land known as **L.R. No. Pioneer/Ngeria/Block 1(EATEC)/1924D**. She thus deponed that rectification will serve to allow other beneficiaries get their fair share of the estate.

7. The record is not so clear but the Application appears to have been allowed since there is an amended Grant ***Ad Litem*** indicating 8/12/2020 as the date of the amendment, wherein the 1st Respondent, **Agnes Cheron**, was added as co-Administrator to the Appellant.
8. Upon the Respondents' further Application dated 22/03/2022, by an ***ex parte*** order made on 21/06/2022, the Grant was further amended whereof the Appellant was removed as a co-Administrator all together, and substituted with the 2nd Respondent, **Faith Jepkinyor**.
9. By the Application dated 12/07/2022, the Appellant applied for setting aside of the said ***ex parte*** order contending that he was never served with the subject Application. Regarding the merits of the matter, to show his "strong defence", he attached a draft of his Replying Affidavit. In the draft, he stated that the 1st Respondent (his mother) deserted the deceased in 1992 taking with her the Appellant's younger sister (the 2nd Respondent), leaving the Appellant's late brother, **Shadrack Kipchumba**, in the care of the deceased and the Appellant's paternal grandmother. He urged further that her mother (the 1st Respondent), then remarried or moved on with her life, and thus, she is not a beneficiary of the estate as envisaged under **Section 36(1)** of the **Law of Succession Act**. He however confirmed that the 1st Respondent was allocated 2 acres of her own from the **EATEC** land just like the deceased, but averred that the 1st Respondent stopped depending on the deceased in 1992 when she deserted the matrimonial home. He contended further that there is bad blood between him and the 1st Respondent as a consequence of her abandonment hence her desire to have the Appellant removed as an Administrator. He asserted further that the 1st Respondent's intention is to assume full control of the estate as she currently lives with the 2nd Respondent (his sister) whom the 1st Respondent controls at her own whims. He however agreed that the 2nd Respondent, is indeed entitled to a share of the estate. and stated that he is thus open to agreeing with her on the mode of sharing the estate between himself and the 2nd Respondent.
10. The fate of the above Application dated 22/03/2022 is not clear from the record, but I note that the Appellant's Counsel, **Ms. Isiaho**, at paragraph 10 of her Submissions in this Appeal, has simply stated that "***the Application was disallowed***". I have not however come across any Ruling to that effect, or indication that any Ruling in respect thereto was delivered on any date.
11. Be that as it may, by the Notice of Motion dated 25/11/2022, the 1st Respondent filed another Application seeking restraining of the Appellant from withdrawing or transferring the said sum of Kshs 10,640,230/- that had reportedly already been paid into the Appellant's bank

account by the **NLC**. She also sought orders to restrain the Appellant from also receiving the second impending payment of Kshs 3,109,970/-, arguing that although she had been appointed a co-Administrator, the Appellant had refused to open a bank account in their joint names for purposes of receiving the monies, and that although the Appellant had already been replaced as an Administrator, he nevertheless still caused the **NLC** to pay to him the earlier amount of Kshs 10,640,230/-.

12. In response to this Application, the Appellant swore a Replying Affidavit on 26/06/2023 in which he reiterated that his mother (1st Respondent) abandoned him and his father (the deceased) more than 30 years before. Regarding the second parcel of land, **L.R. No. Pioneer/Ngeria/Block 1(EATEC)/1924** (since renamed **L.R. No. Pioneer/Ngeria/Block 1(EATEC)/13912**), he deponed that the same was transferred to him during the lifetime of the deceased and a title issued in his name, and the same does not therefore form a part of the estate property. Regarding his removal as a co-Administrator, he reiterated that he was never served with the Application that gave rise thereto, and he was also unaware of the order.

13. The Ruling on the Application dated 25/11/2022 was then delivered on 27/08/2023 by **Hon. C. Menya-PM**. In the Ruling, the trial Magistrate directed that the first payment of Kshs 10,640,230/- be shared in the ratio of 80:10:10 among the Appellant, 1st Respondent, and 2nd Respondent, respectively. Regarding the second payment of Kshs 3,109,970/-, the trial Magistrate awarded the same exclusively to the Respondents and excluded the Appellant from any share thereof. It is that Ruling that has been challenged in this Appeal:

14. Aggrieved by the decision, the Appellant lodged this Appeal by way of the Memorandum of Appeal dated 30/10/2023, wherein he listed 5 grounds as follows:

- i) THAT the learned trial Magistrate erred both in law and in fact by failing to find and hold that ownership of L.R. No. Pioneer/Ngeria Block 1 (EATEC)/13912 formerly L.R. No. Pioneer/Ngeria Block 1(EATEC)/1924 is within the jurisdiction of the Environment and Lands Court as opposed to the Succession Court.**
- ii) The learned trial Magistrate erred in both law and fact by purporting to issue orders with regard to L.R. No. Pioneer/Ngeria Block 1 (EATEC)/13912 formerly L.R. No. Pioneer/Ngeria Block 1(EATEC)/1924, a parcel of land belonging to the Appellant hence not falling within her jurisdiction as a Succession Court.**

iii) The learned trial Magistrate erred both in law and fact by failing to find and hold that compensation for L.R. No. Pioneer/Ngeria Block 1(EATEC)/1923 having already been received and applied to other uses, there was nothing capable of distribution as alluded by the impugned ruling. The Orders as per the are therefore incapable of enforcement.

iv) The learned trial Magistrate erred both in law and fact by ignoring the fact that the Appellant had not been properly served before being removed as an Administrator hence leading to a grave injustice.

15. The parties then filed written Submissions. The Appellant's Submissions is dated on 28/07/2024, while the Respondent's is dated 30/09/2025.

Appellant's Submissions

16. **Ms. Isiaho**, the Appellant's Counsel, urged that the trial Magistrate purported to divide the Kshs 3,109,970/-, whose existence has not even been ascertained, between the Appellant and the Respondents, oblivious of the fact that the title deed for the second parcel of land, **L.R. No. Pioneer/Ngeria/Block 1(EATEC)/1924** (since renamed **L.R. No. Pioneer/Ngeria/Block 1(EATEC)/13912**, in respect to which the payment was in relation to, was in the name of the Appellant. She submitted that the title deed was registered in the name of the Appellant on 16/11/2017, during the lifetime of the deceased, and that therefore, issues of registration and privileges thereto, including whether there was a trust, ought to be a subject of the **Environment and Land Court (ELC)**, not the Succession Court. She cited the case of **Re Estate of Mbai Wainaina (Deceased) [2015]**, and also the case of **In re Solomon Mwangi Waweru (Deceased) [2018] eKLR**. She also cited the provisions of **Section 24 and 26(1) of the Land Registration Act, 2012** in respect to the principle of sanctity of a title deed. She submitted further that the Court having found that the amount received by the Appellant had been applied toward purchase and development of an alternative land, there was now nothing to distribute. She also faulted the Court for removing the Appellant as an Administrator without affording him a right to be heard as guaranteed under **Article 50 of the Constitution** since he was never served with the Application that gave rise to that order.

Respondents' Submissions

17. **Mr. Yego**, Counsel for the Respondents, on his part, submitted that in breach of the requirements of **Rule 26(1) of the Probate and Administration Rules**, the Appellant did

not notify the Respondents that he intended to take out the Grant *Ad Litem* and did so in secrecy so that he alone would benefit from the compensation from the NLC. Regarding removal of the Appellant as an Administrator, he defended the order by reiterating that the Appellant was served with the subject Application but he failed to oppose the same. He also reiterated that the Appellant, despite being served with the Amended Grant, still refused to agree to opening of a bank account in the joint names of the co-Administrators for purposes of receiving the funds from NLC, and that this refusal was because the Appellant wanted to exclude other beneficiaries from the payment.

18. He submitted that it is after this action by the Appellant that the 1st Respondent applied for the Appellant's removal, which Application was indeed served upon the Appellant but who did not respond and as a result, the Court allowed it, and that, the Appellant, even after being served with the Amended Grant, still went ahead to receive the compensation of Kshs 10,640,230/-. He also observed that the Appellant, out of embarrassment, avoided exhibiting copies of bank statements which would have incriminated him. Counsel then contended that the Appellant's duty was to hold the money paid to the estate in trust, and had no right to spend the same as he wished. He defended the trial Court's distribution of the money as the Appellant did not submit any proof to show that the money had been utilized, and the presumption is therefore that the money was still in his possession, and that the other beneficiaries are entitled to a full and accurate inventory. He urged further that, in any event, the Appellant received the money illegally as he was not even an Administrator of the estate. He termed the Appellant's actions as unjust enrichment, and also pointed out that the Appellant had in one of his Affidavits, acknowledged that the 2nd Respondent (his sister), was indeed entitled to a share, but still left her out of the compensation.

19. He asserted that the second payment of Kshs 3,109,970/- had not yet been paid out at the time that the 1st Respondent approached the Court, and submitted that although the Appellant alleges that he is the registered owner of the second parcel of land, the Court should not ignore the fact that he had already squandered the first payment of Kshs 10,640,230/-. He defended the trial Court and averred that it had powers under **Rule 73** of the **Probate and Administration Rules**, and also **Section 47** of the **Law of Succession Act**, to grant or issue the orders that it did. He also pointed out a supposed irregularity in the title deed produced by the Appellant in respect to the second parcel of land, arguing that the title deed does not, in the Proprietorship Section, as is the requirement, even show the name of the deceased as the previous or initial owner thereof, and whom the Appellant claims to have been the transferor. Counsel thus termed the title deed a forgery. Regarding the issue of jurisdiction of

the trial Court sitting as a Succession Court, he contended that the second payment award having been issued in the name of the deceased, it is the Appellant, if indeed he was the transferee and owner of the second parcel of land, who ought to have sought orders from the **ELC** to direct the **NLC** to alter the award to read his name, and thus pay the money directly to him as owner, rather than to the estate. He thus averred that the Appellant's claims of ownership of the property were matters for the **ELC**, and could not have therefore been entertained by the Succession Court, which rightfully confined its duties to distributing the estate.

Determination

20. This being a first Appeal, this Court has the duty to analyze and re-examine the arguments and submissions made before the lower Court and reach its own conclusions. This has been restated by the Court of Appeal in many cases, including for instance, the case **Abok James Odera t/a A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR**, in which the following was stated:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

21. Consolidating the matters raised herein, I summarize the same into one broad issue for determination in the following terms:

“Whether the trial Court was correct in distributing amongst the Appellant and the Respondents, and in its choice of the manner and/or formula of distribution, the payments received from the National Lands Commission (NLC) in the name of the estate of the deceased, being compulsory acquisition of portions of two parcels of land said to be owned by the deceased, despite the Appellant's assertion that he was the sole registered owner of one of the two parcels of land.”

22. In answering the above question, it is necessary to recall that Limited Grants such as the one in issue herein, are issued under **Section 54** of the **Law of Succession Act**, which provides as follows:

54. Limited grants

A court may, according to the circumstances of each case, limit any grant of representation which it has jurisdiction to make, in any of the forms described in the Fifth Schedule to this Act.

23. Before I proceed further, I may state that the proceedings before the trial Court, being one seeking Grant of Letters of Administration *ad Litem* for purposes of receiving a hefty amount of money on behalf of the estate, the Magistrate's Court, before issuing the Grant to the Appellant, ought to have first demanded for clear and full disclosure and particulars on whether there were other survivors, and if so, whether such other survivors had consented to, or were in support of the Application, and if not, to order that such survivors be served or summoned to appear in Court to state their reasons for not so consenting. By the time a Court is issuing such Grant and allowing one family member to receive payment on behalf of the estate, it should have fully satisfied itself that it is giving that authority to the correct and fit person. In a matter such as this one, it may even be necessary for the Court to control or regulate how the recipient will deal with the money once paid, and even require him to render accounts by periodically filing statements of expenditure. Where there is no agreement within the family on how the money is to be disbursed, it may even be necessary to order for the money to be kept untouched in safe custody in a bank account until a full Succession Cause is filed and determined. In this case, the trial Court seems to have easily and readily issued the Grant to the Appellant before or without satisfying itself on the material facts. The Appellant does not seem to have been given any obligation to return to Court and account for the money. He seems to have obtained a blank cheque to spend the money, with no control or limitation of any kind. No wonder he treated the money as his own and immediately proceeded, as he admitted, to spend it as he wished, ignoring the fact that he was merely a family representative entrusted with only the role of simply receiving the payment on behalf of all other beneficiaries, and to keep it in safe custody until directed on how to disburse it. It is this issuance of the Grant with no conditions that, in essence, led to the Respondents to challenge issuance of the Grant to the Appellant, and thus opened up the matter to the kind of protracted litigation that ensued thereafter. Disputes on which family member should be nominated to receive the money on behalf of their parents' estate, and how the same, once received, should be spent or disbursed, are matters that the trial Court should ideally have left to be determined in a full Succession Cause over the estate of the deceased, and not in the Grant *ad Litem* proceedings, which is not envisaged as a proper forum for canvassing such matters.

24. Regarding the expenditure of the money by the Appellant, **Section 54** of the **Law of Succession Act** provides as follows:

55. No distribution of capital before confirmation of grant

(1) No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets constituting a net estate, or to make any division of property, unless and until the grant has been confirmed as provided by section 71.

(2) The restriction on distribution under subsection (1) does not apply to the distribution or application before the grant of representation is confirmed of any income arising from the estate and received after the date of death whether the income arises in respect of a period wholly or partly before or after the date of death.

25. The Limited Grant never therefore authorized or conferred on the Appellant the powers to unilaterally disburse or spend the money they way he admits to have done before the Grant had been confirmed in a full Succession Cause. To be fair to the trial Court, the Limited Grant extracted was expressed to be limited to only ***“the purpose of receiving compensation for and on behalf of the late William Tarus Saina (Deceased) and until further representation be granted and render true and just account thereof whenever required by law to do so”***. The Appellant may thus still be called upon to account for the money and should he fall short, he may be liable to refund the full amount he received.

26. The trial Magistrate, in the Ruling found that the Appellant has come out as a dishonest and selfish individual who does not have the best interest of the co-beneficiaries at heart.

27. Considering the state to which the proceedings had degenerated, particularly, the Grant ***ad Litem*** proceedings having seemingly, for all intents and purposes, metamorphosized into full Succession distribution proceedings, I find no reason to fault the trial Magistrate for finding and ruling as she did. The 1st Respondent, though estranged and separated from the deceased for a long period of time, there is no evidence of her being formally divorced or her getting into any remarriage. Further, only herself, her daughter and the Appellant (her son), being the remaining survivors, there is no evidence that the 1st Respondent fully severed her marital ties to the deceased. She could not therefore be simply wished away that easily. The Appellant however presented himself as the only eligible beneficiary and never even expressly disclosed the existence of other survivors. Upon receiving the payment in excess of Kshs 10,000,000/-, from the NLC, strictly as a trustee, on behalf of the estate, in breach of

the limitations stated in the Grant, he unilaterally proceeded on a spending spree without sharing the money with any other beneficiary, and has never to date, rendered any account of such expenditure.

28. It is therefore clear that the Appellant's conduct painted him in bad light, and did not at all endear him to the trial Court. He was the author of his own misfortune, as his conduct made him come out as selfish and greedy. From my computation, the aggregate amount of money paid or to be paid by NLC (for the two properties) was Kshs 13,750,200/-, applying the 80:10:10 ratio formula directed by the trial Court, my understanding is that out of the total amount of Kshs 13,750,200/-, the trial Court allowed the Appellant to keep about Kshs 8,512,184/-, still about 62% thereof, and thus still the lion's share, as the Respondents were to share the remaining balance of about 38%.

29. The Appellant argues that the second payment, the one for Kshs 3,109,970/-, paid for the second property, ought to have been exclusively for himself as he had, during the lifetime of the deceased, become the registered owner thereof. Even if this were true, still he never shared the first payment of Kshs 10,640,230/- that he received in respect to the first property, which property he admits was still registered in the name of the deceased. He thus ought to have returned all that money to the estate. Since he never did so, the trial Court's decision that the second payment be released to the Respondents was a fair one as it amounted to ordering the Appellant to refund the proceeds of the first payment back to the estate. The sharing out of the money amongst the 3 beneficiaries thus ensured that equity had been restored. The Appellant cannot therefore complain as he cannot look at the same law that he so blatantly and knowingly breached to come to his rescue since "***those who come to equity must do so with clean hands***". A person seeking a remedy from a Court of law cannot obtain relief if he has acted unscrupulously, deceitfully, fraudulently, or in any such other unethical manner in respect to the same matter in which he seeks relief. I thus agree with **Mr. Yego** that allowing the Appellant to, alone, also retain the second payment, even after receiving and keeping to himself the full payment for the first payment, would have amounted to enriching him unjustly, and would have been wholly unfair to the other beneficiaries as it would have been akin to stripping them of their rightful share of the estate. No Court of law can countenance such injustice.

30. The Appellant is even lucky that despite admitting that he spent the money received without any authority from the Court, in clear breach of his hallowed role as a trustee for the other

beneficiaries, and also in violation of the limitations imposed in the Grant *ad Litem*, the trial Court did not order him to render an account of the payments, or to refund the same to the estate.

31. Regarding the Appellant's complaint that he was removed from his appointment as an Administrator in *ex parte* proceedings without being afforded an opportunity to be heard, as aforesaid, her Counsel submitted that his Application seeking the setting aside of the order on the ground that he was never served "*was disallowed*". If so, did the Appellant exercise his right to appeal against the dismissal? If he never did so, how can he now sneak in that decision and convert it into an issue to be determined in this Appeal? That he cannot do as this Appeal is specifically against the Ruling rendered by the trial Court on 27/10/2023, not any other?

Final Orders

32. For the reasons above, this Appeal fails. Accordingly, the same is dismissed but as this is a family matter, being, as aforesaid, a dispute between a son, on one hand, and his own mother and sister, on the other, I order that each party bears his/her costs.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 30TH DAY OF JANUARY 2026

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WANANDA JOHN R. ANURO
JUDGE

Delivered in the presence of:

Mr. Masinde h/b for Ms. Isiaho for the Appellant

Ms. Nasongo h/b for Mr. Yego for the Respondents

Court Assistant: Brian Kimathi