

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA AT
KERUGOYA
ELCA NO. E011 OF 2023

ABIGAE MUTHONI WANJIKU
APPELLANT

VERSUS

MARY WANJIKU NJAGI
RESPONDENT

*(Being an appeal against the judgment of Hon. E.O. Wambo,
PM, delivered on 28th February 2023 in Wang'uru MCELC Case
No. 92 of 2018)*

JUDGMENT

1. The appellant lodged this appeal vide a memorandum of appeal dated 8th March 2023, faulting the learned trial magistrate on four (4) grounds, inter alia failing to appreciate that the alleged sale transaction between the respondent and the appellant's late mother, Purity Wanjiru James, was void for want of capacity on the part of the vendor, a fact known to the respondent at the time; failing to find that the appellant was neither a party to the alleged transaction nor a recipient of the purchase price; failing to find that the appellant had never assumed liability to refund the purchase price and was not sued as, nor was she, the legal representative of the estate of the deceased; and for granting reliefs which, on the pleadings

as framed, were incapable of being granted. The appellant therefore seeks for the appeal to be allowed; judgment and orders of the learned trial magistrate to be set aside and substituted with an order dismissing the respondent's case with cost; and costs in the appeal be provided for. The court issued directions for the appeal to be canvassed through written submissions.

The learned counsel for the appellant and respondent filed their submissions dated 4th April 2025 and 30th April 2025 respectively, which the court has considered.

2. The learned counsel for the appellant inter alia submitted that as at 13th April 2017, when the alleged sale agreement was executed, the grant in respect of the estate of James Wamahiu Mburuga had not been confirmed. The said grant was confirmed much later on 19th February 2018.

The counsel pointed out that the respondent had conceded in cross-examination that the alleged family meeting never took place, and that the appellant was not present when the sale agreement was entered into.

Counsel added that the respondent neither paid the appellant any money nor held any letters of administration in respect of the estate of Purity Wanjiku James.

The counsel added that there was no legal basis upon which the appellant could be compelled to refund money she neither received, nor held as the legal representative of the estate of the deceased. That the court erred in ordering the appellant alone to refund the purchase price, while exhibit 5, had a list of fourteen family members of the late Purity Wanjiku James. The learned counsel urged the court to allow the appeal with costs, set aside the judgment of the trial court, and dismiss the suit in the lower court with costs.

3. The learned counsel for the respondent submitted inter alia that upon the death of the appellant's mother, the estate of the deceased became indebted to her in the sum of Kshs. 280,000/=. Counsel submitted that the appellant, as the only survivor and legal representative of the deceased vendor's estate, was obliged to settle that liability before distribution of the remainder of the estate to herself. It was argued that the liability of the estate was either to surrender 0.05 hectares to the respondent or, in the alternative, to refund the purchase price.

Counsel further submitted that the sale agreement entered into between the respondent and the appellant's late mother was binding and enforceable against the appellant, and that the appellant was being less than candid in pleading that she was not the administrator of

the deceased's estate. It was contended that the appellant's mother was the beneficiary of the estate of James Wamahu Mburu, and that the appellant was substituted as a beneficiary upon obtaining letters of administration.

Counsel maintained that the appellant acknowledged the indebtedness of her mother's estate when she executed the agreement dated 7th July 2017, and that the resulting liability properly accrued to the estate and was to be borne by the appellant as its administrator. The respondent therefore urged this Court to uphold the judgment of the trial court with costs of the appeal.

4. From the grounds on the memorandum of appeal and submissions filed, the court finds the issues for determinations are as follows:

a. Whether the trial court was correct in holding the appellant personally liable to refund Kshs.280,000/= to the respondent.

b. Who pays the costs?

5. I have carefully considered the grounds on the memorandum of appeal, record of appeal, the parties' rival submissions filed through their respective learned counsel, and come to the following findings:

- a. The suit before the trial court was commenced by the respondent through a plaint dated 9th August 2018. She sought an order for the transfer of 0.05 hectares out of **Land Parcel No. Kabare/Nyangati/9159**, or in the alternative, a refund of the purchase price paid pursuant to an agreement dated 13th April 2017, together with costs and interest, and any other appropriate relief.

Her claim was anchored on a written sale agreement dated 13th April 2017, by which the appellant's late mother, Purity Wanjiru James, allegedly sold to her a portion measuring 0.05 hectares out of her entitlement in **Land Parcel No. Kabare/Nyangati/8207**, for a consideration of Kshs.380,000/=.

The respondent pleaded that the transaction was intended to raise funds to facilitate succession proceedings relating to the estate of the deceased's father, arising from a subdivision of **Land Parcel No. Kabare/Nyangati/2858**, reflected in a mutation dated 11th October 2016, which subdivision was later abandoned. It was pleaded that at the time of executing the agreement, the deceased acknowledged receipt of Kshs.250,000/=, and subsequently a further Kshs.30,000/=, leaving a balance of Kshs.100,000/= payable upon transfer.

The respondent averred that the deceased passed away in July 2017, prompting a family agreement dated 4th July 2017 on the fate of the purchased portion. According to the respondent, the family resolved that the portion attributable to the deceased be surrendered to the appellant, who would, upon conclusion of **Wang'uru Succession Cause No. 298 of 2016**, transfer the purchased portion to her.

She further pleaded that following the succession proceedings, the appellant was awarded 0.904 acres, which allegedly included the respondent's purchased portion. Upon subdivision, the appellant's share was registered as **Kabare/Nyangati/9159**, and a title deed issued to her on 24th July 2018.

The respondent contended that when she approached the appellant to effect transfer of the purchased portion, the appellant declined, necessitating the institution of the suit.

- b. In response, the appellant filed a statement of defence dated 23rd October 2018, in which she denied the respondent's claim in its entirety. She asserted that her late mother acquired her land through a completed succession process that had been fully funded by her deceased father. She maintained that her mother passed away in 2017 and

that no family meeting or agreement, as alleged by the respondent, ever took place.

The appellant further averred that **Succession Cause No. 296 of 2016** was concluded, titles were issued to the respective beneficiaries, and at no time did the family agree to transfer 0.05 hectares to the respondent. She maintained that the 0.904 hectares awarded to her constituted her lawful inheritance and did not include any portion belonging to the respondent. She denied any prior dealings with the respondent, whom she described as a stranger, and prayed that the suit be dismissed with costs.

- c. The matter proceeded to a hearing on 20th July 2022, when the respondent tendered her evidence. The appellant did not testify. Thereafter, the parties were directed to file written submissions, upon which the trial court rendered the impugned judgment.
- d. As this is a first appeal, the duty of this Court is to re-evaluate the evidence afresh and draw its own conclusions, while bearing in mind that it did not see or hear the witnesses. This principle was stated in **Selle & Another versus Associated Motor Boat Co. Ltd & Others [1968] EA 123**, where the Court of Appeal held:

“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 retrial... 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.”

- e. This appeal arises from the judgment of **Hon. E. O. Wambo, Principal Magistrate**, delivered on **28th February 2023** in **MCELC No. 92 of 2018**, by which the learned trial magistrate upheld the respondent’s alternative claim and ordered a refund of the purchase price of Kshs. 280,000/=, together with costs.

This appeal turns on well-settled principles of succession law in Kenya. Under the **Law of Succession Act chapter 160 of Laws of Kenya**, property and liabilities of a deceased person vest, not in the deceased's heirs or beneficiaries, but in the deceased's personal representative. **Section 79** of the said **Act** provides that:

“Property of deceased to vest in personal representative.

The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.”

Once vested, the estate, through the personal representative, has the power to enforce and defend causes of action that survived the deceased. **Section 82(a)** of the **Act** expressly empowers the personal representative to enforce by suit all causes of action, which by law survive the deceased.

- f. In the case of **Machika versus Okal & 3 Others (Civil Appeal E044 of 2021) [2023] KEHC 18301 (KLR)**, the High Court underscored that a person does not become the personal representative merely by virtue of being a relative or beneficiary of a deceased person, but through holding a grant of representation.

Equally, a surviving child or spouse does not automatically become a representative by mere relationship. Equally in the case of **In Re the Estate of Christom Kinyua Wainaina - (Deceased)**

[2014] eKLR, Succession Cause 2916 'A' of 2005, the court stated that only the personal representative, and not beneficiaries, holds legal title to estate property and is entitled to deal with estate's assets, including instituting actions or defending suits involving the estate.

g. In the present case, it is common ground that the sale agreement was entered into between the respondent and Purity Wanjiku James. At the time of that agreement, Purity . was not the registered proprietor of the subject land, or put differently, had no independent title to the land that ultimately became part of her daughter's inheritance from her father, James Wamahiu Mburu. Until Purity's share in James' estate crystallized through succession, she lacked the capacity to sell what she did not own outrightly. This aligns with the overarching principle that succession law controls vesting and capacity to deal with estate property.

When Purity died, her estate remained liable for any obligations she had incurred. That liability, however, did not dissolve into her children's personal capacities. It remained a claim against her estate, enforceable only through the administrator or executor appointed in accordance with the law to represent that estate.

h. The appellant inherited her mother's entitlement in James' estate, amounting to 0.904 hectares, in her personal capacity as a beneficiary. That inheritance vested in her as beneficiary of her grandfather's estate, not as a representative of her deceased mother. There is no evidence that she ever assumed personal liability for her mother's obligations or that she was sued in her capacity as a representative of her mother's estate. In the absence of a grant of representation in respect of Purity's estate, and without any evidence that the appellant personally undertook to assume her mother's liabilities, the trial court lacked a legal basis to impose personal liability on her.

The law is clear that once a deceased's estate property vests in the personal representative, only the personal representative may defend or prosecute claims emanating from obligations of the deceased. The beneficiaries do not step into the shoes of the deceased merely by inheritance.

i. For these reasons, the trial court's finding that the appellant should refund the Kshs.280,000/= was legally untenable. The respondent sued the wrong party, as she should have sued Purity's estate through its legal representative. In the

circumstances, the appellant cannot be held personally liable for obligations that properly belonged to her mother's estate. It follows that the appeal is merited, and the court finds the trial court erred in law in ordering the appellant to refund the purchase price to the respondent.

The proper party, the legal representative of the deceased's estate was not before the trial court, and it was wrong to place liability that was meant for the estate upon the appellant, merely because she was a beneficiary of the said estate, without presenting evidence that she was also the appointed legal representative of the said estate.

- j. **Section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya** provides that costs shall follow the event unless where the court, for good reason, orders otherwise.

The court in the case of **re Estate of Monica Wanjiru Macharia (Deceased) (Family Appeal 15 of 2023) [2024] KEHC 14780 (KLR)** held that:

“Section 27 of the Act is clear that it lies in the discretion of the court to award costs in a suit. This discretion must be exercised judiciously.”

In the circumstances of this appeal, the court finds no reasons to deviate from the edict in the above legal provision on costs. The appellant having succeeded in the appeal, is entitled to costs in this appeal and the trial court.

6. Flowing from the determinations set out above in this appeal, the court finds and orders as follows:

- a. That the appeal has merit and is hereby allowed.**
- b. That the judgement and orders of the learned trial magistrate of 28th February 2023 in Kerugoya MELC Case No. 92 of 2018, is set aside, and substituted with an order dismissing the respondent’s case.**
- c. The appellant to have costs in the appeal and the trial court.**

Orders accordingly.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON
THIS 18TH DAY OF FEBRUARY 2026.**

S. M.

Kibunja

ELC

JUDGE

In the Presence of:

Appellant

Respondent

Kinyua - Court Assistant.

S. M.

Kibunja

ELC

JUDGE