



**Kariuki v Mburu & another (Civil Appeal 407 of 2019)
[2025] KECA 304 (KLR) (21 February 2025) (Judgment)**

Neutral citation: [2025] KECA 304 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 407 OF 2019
SG KAIRU, LA ACHODE & AO MUCHELULE, JJA
FEBRUARY 21, 2025**

BETWEEN

GEOFFREY MURUA KARIUKI APPELLANT

AND

NANCY MUMBI MBURU 1ST RESPONDENT

GEORGE MUCHUHA KARIUKI 2ND RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Muigai, J.) dated 12th June, 2015 in HC. Succ. Cause No. 3719 of 2004)

JUDGMENT

1. The appellant, Geoffrey Murua Kariuki, is appealing the judgment of the High Court at Nairobi (M. Muigai, J.) delivered on 12th June 2015 in Succession Cause No. 3719 of 2004 in relation to the estate of the late Ben Kariuki Mukungu, deceased who died on 21st April 1993. The dispute specifically concerns a parcel of land identified as Ruaka/2A/69 (also referred to as Kiambaa/Ruaka/2A/69/2) which the appellant claims belongs to his mother, Janet Wambui Kariuki, and not to the deceased's estate. The respondents on the other hand maintain, as the learned Judge found, that the said property is part of the estate of the deceased available for distribution amongst the beneficiaries.
2. The background in brief is that the deceased, Ben Kariuki Mukungu, died in 1993, leaving two widows, namely Janet Wambui Ben Kariuki (1st house) and Loise Wairimu Kariuki (2nd house) and sixteen children. Succession Cause No. 3719 was filed in 2004, and a Grant of Letters of Administration was issued and later revoked and reissued.
3. An application for confirmation of the grant was made in which it was proposed that the deceased's properties be shared equally according to the number of children in each house including the surviving widow in accordance with the Law of Succession Act. The only contention, as already indicated, was over



the property Kiambaa/Ruaka/2A/69/2, which had apparently not been included in the list of assets of the deceased and which the appellant maintained belongs to his mother, Janet Wambui Kariuki, not the deceased's estate.

4. Although there was no formal protest against the proposed mode of distribution of the estate, the Judge invoked Article 159 of *the Constitution* in entertaining the protest and conducted an oral hearing. Nancy Mumbi Mburu (PW1), a daughter in law of the deceased who was married to the deceased's son, Michael Mburu Kariuki, who had since passed on, stated in her testimony that she objected to the confirmation of grant because the property Kiambaa/Ruaka/2A/69/2 was omitted from the list of the deceased's assets, and it should have been. Reference was made to a letter dated 13th July 2004 from the Assistant Chief's Office, Ruaka sub-location, Karuri to the effect that the Assistant Chief had made a decision to revoke Janet Wambui Ben Kariuki's ownership of that property based on a search certificate showing that it belonged to the deceased and one Kimani Kironyo.
5. George Muchuha Kariuki (PW2), a son of Loise Wairimu Kariuki similarly asserted that the property Kiambaa/Ruaka/2A/69/2 did not belong to Janet Wambui Ben Kariuki but to his late father.
6. The appellant Geoffrey Murua Kariuki (PW3) on the other hand testified on the strength of correspondence from Kiambu County Council that the deceased had transferred the said property to Janet Wambui Ben Kariuki. He asserted that it was therefore not part of the estate of the deceased.
7. Based on the record, the evidence of all three witnesses was taken on 4th March 2015. After the appellant (PW3) had testified on 4th March 2015, the record captures that there was to be "further mention on 11th March 2015 for details of the office with the file rectifying Plot 2A/69".
8. On 11th March 2015 the record of proceedings indicates that there was "no appearance". The matter was then, "stood over general (sic)". Then later on the same date, the record captures this:

"Later

Nancy Mumbi Mburu. I have documents from Kiambaa County that show on map of the property.

- a. Letter of allocation.
- b. Application for change of ownership.
- c. Copy of ID Card Kimani Kihonge Munyui.
- d. The letter of allocation.
- e. Extracts of minutes."

9. Judgment was then reserved and was delivered on 12th June 2015 in which the trial court determined that the property Kiambaa/Ruaka/2A/69/2 was part of the estate of the deceased and available for distribution. In doing so, the learned Judge referred to the documents produced, including those produced later by PW1 and expressed as follows:

"In the instant case the documents produced by the three

- (3) witnesses depict the transfer of the suit property to Janet Wambui the widow of the 1st house in 1988. However, in 2004 the ownership reverted back to the deceased. It was the property that should have been included in the list of assets of the deceased and shared equally between the two (2) houses."



10. The court proceeded to confirm the grant in terms of the mode of distribution proposed and the inclusion of the property Kiambaa/Ruaka/2A/69/2 as part of the assets of the estate available for distribution.
11. The appellant has challenged the judgment on grounds that the learned Judge erred in entertaining an objection without a formal filing, thereby prejudicing the appellant; holding that the property belonged to the deceased despite evidence of transfer to Janet Wambui Kariuki; failing to consider the appellant's evidence; not allowing the appellant to cross-examine witnesses or rebut evidence, and violating his right to a fair hearing under Article 50(1) of *the Constitution*.
12. Learned counsel for the appellant Miss. B. Kamau in highlighting the appellant's written submissions urged that the finding that the property was part of the assets of the estate is erroneous; that the property had passed to Janet Wambui Kariuki in 1988 prior to the death of the deceased and there was documentation to support this including minutes of Kiambu Municipal Council; that the appellant was not given a fair hearing as PW1 was recalled and produced documents without affording the appellant an opportunity to test that evidence in cross examination or to rebut it.
13. Learned counsel Ms. Mwaura for the 1st respondent on the other hand submitted that the decision of the trial court cannot be faulted; that the purported gift of the property to Janet Wambui Kariuki by the deceased was not registered and neither was the property transferred to her; that the complaint that the appellant's right to fair hearing was violated as no merit as the documents produced by PW1 were not new; that the appellant was given sufficient time to present his case and testified as PW3 and his right to fair hearing was not infringed.
14. We have considered the appeal and the submissions by learned counsel. The critical question in our view is whether the appellant's right to fair trial was violated. As already demonstrated above, the viva voce hearing took place before the learned Judge on 4th March 2015 when all three witnesses, including the appellant, testified. The matter was then fixed for mention on 11th March 2015, for what was indicated as "for details of the office with the file rectifying Plot 2A/69". PW1 appears to have appeared before the Judge later that day, seemingly alone, and produced the documents already mentioned. As already stated, earlier that morning, the record indicated that there was no appearance, and the matter was stood over generally. It is patently clear that the appellant was absent when PW1 somewhat appeared after the matter had been adjourned generally and produced documents which ultimately influenced the decision of the trial court.
15. There is merit therefore in the complaint by the appellant that he did not have an opportunity to either interrogate PW1 on those documents or to rebut the same. We need not belabour the point that the appellant's right to fair hearing was breached and we accordingly uphold ground 4 of the Memorandum of Appeal that the learned Judge erred in failing to allow the appellant "to reply after the court recalled [PW1] to produce further documents after the close of the trial." On that ground alone, this appeal succeeds.
16. We allow the appeal and set aside the judgment of the High Court delivered on 12th June 2015. The matter is remitted back to the High Court before a judge other than Muigai, J. for the hearing and determination of the question whether the property Kiambaa/Ruaka/2A/69/2 is part of the estate of the deceased Ben Kariuki Mukugu.
17. Each party will bear their own costs.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF FEBRUARY, 2025.

S. GATEMBU KAIRU, FCIArb



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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

A. O. MUCHELULE

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.

