Muongi & another v Muchiri (Civil Appeal 299 of 2019)
[2025] KECA 312 (KLR) (21 February 2025) (Judgment)

Neutral citation: [2025] KECA 312 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 299 OF 2019

DK MUSINGA, SG KAIRU & LA ACHODE, JJA

FEBRUARY 21, 2025

BETWEEN

LEONARD MWAURA MUONGI ..... 1ST APPELLANT

PATRICK MUNYUI MUONGI ..... 2ND APPELLANT

AND

FREDRIKA MUKONOIRI MUCHIRI ..... RESPONDENT

(Being an appeal from the Ruling of the High Court of Kenya at Nairobi (Musyoka, J.) dated 15th February 2019 in HC. Succ Cause No. 526 of 2006)

JUDGMENT

1. This appeal arises from the Ruling of the High Court at Nairobi (W. Musyoka, J.) dated 29th January 2019 and delivered on 15th February 2019 in Nairobi Succession Cause No. 526 of 2006 relating to the estate of Frasiah Wanjiku Mwangi (deceased). In that Ruling the High Court dismissed, with costs, an application dated 13th March 2017 by the appellants, Leonard Mwaura Muongi and Patrick Munyui Muongi, sons of the deceased, in which they had applied to set aside or review the judgment of the court delivered on 18th November 2016.

2. The background is that the deceased, Frasiah Wanjiku Mwangi, died on October 5, 2003. Her daughter in law, Fredrika Mukonuiri Muchiri (the respondent), a beneficiary named in the contested Will, initiated probate proceedings in Nairobi on March 14, 2006, claiming the deceased died testate. The Will, purportedly made on September 22, 2003, named several beneficiaries, namely: Fredrika Mukonuiri Muchiri, Simon Ngige Kariuki, Grace Gathoni Muongi, Leonard Mwaura Muingi, and Patrick Munyui Njoroge. The deceased was said to have died possessed of four (4) assets, being Kiambaa/Ruaka/1633, 1635, 1636 and 1637. It appointed Wilson Mbugua Mungai as executor. The court issued citations for service on the beneficiaries and executor.

3. Meanwhile, the appellants, Leonard Mwaura Muongi and Patrick Munyui Njoroge, claiming to be children of the deceased, filed separate succession proceedings in Kiambu on the basis of intestacy, stating that the deceased was survived by eight children and listed four assets owned by her. A grant of letters of administration intestate was made to them on 8th October 2007 in Kiambu.

4. The appellants then applied to revoke the grant issued in Nairobi in favour of the respondent, claiming they were not served with citations and therefore the process was secret. They admitted to filing the Kiambu case but claimed the respondent refused to cooperate. The respondent on her part asserted proper service of citations and stated she was not aware of the Kiambu case.

5. The court, by consent, directed that the validity of the Will be determined first, requiring testimony from the drafter of the Will and witnesses. Stephen Wanyoike Kinuthia, the advocate who drafted the Will, testified that he received instructions from the deceased through her daughter, Grace Gathoni Muongi. He prepared the Will, read it to the deceased, and witnessed her thumb print and signature by two witnesses on September 22, 2003.

6. The respondent stated that the deceased informed the family that she would make a Will and had stated so in a meeting at Githurai and directed the family to book a meeting with the Land Control Board. She also testified that she was shown the Will by advocate Mwicigi and was advised to 'take it to court'. One Joseph Kariuki Ndungu, who testified on behalf of the appellants as objectors, testified that he signed the Will as a witness as he trusted his mother-in-law (Grace Gathoni), but he claimed not to have seen the first page of the Will. He stated that the deceased was ill. The appellants did not get an opportunity to testify or call any more witnesses and were deemed to have closed their case.

7. The High Court, in its judgment found that the appellants did not provide sufficient evidence to displace the presumption that the deceased was of sound mind when she made the Will, and concluded that the deceased did make a valid Will on 22nd September 2003, fulfilling the formal requirements of a Will.

8. In the end, the High Court ordered the consolidation of the two cases, revocation of both grants and ordered that letters of administration with the Will annexed be issued to the respondent, Fredrika Mukonuiri Muchiri, and the appellants, Leonard Mwaura Muongi and Patrick Munyui Njoroge. The High Court also ordered the matter to be transferred to the High Court at Kiambu given that the estate assets were situated at Kiambaa, Kiambu.

9. The appellants then moved the High Court by their application dated 13th March 2017, to which we have already referred, seeking to set aside or review that judgment of 18th November 2016. In support of the application, the appellants deponed in their affidavit that they were not aware of the hearing date of 14th July 2015 when the court deemed their case, as objectors, as closed; that they were never served or notified of that hearing date; that they have lived on the disputed property known as Title Number Kiambaa/Ruaka/1633 since birth and have built permanent houses there; that they had been ready and willing to testify how the purported Will of the deceased was forged; that they had a witness who was present and saw "the alleged execution of the Will which was done by having the deceased's finger affixed on the Will while she was unconscious and not aware of the ongoing due to her sickness"; that the Will purported to introduce a person called Simon Ngige Kariuki as a beneficiary who was not a family member and had no relationship with the deceased; that the Will purports to dispossess the 1st appellant, who is the first born son of the deceased, of the ancestral land.

10. The respondent, Fredrika Mukonuiri Muchiri alias Fredrika Mukami Muongi, opposed the application. She deponed in her replying affidavit that she is the widow of the appellants' late brother, Allan Muchiri Muongi with whom they had two children; that the appellants did not recognise her as

such and treated her with contempt; that the hearing of the matter before the High Court was delayed by the appellants and their previous advocates; that contrary to their claim that they were not heard during the hearing, their witness Joseph Kariuki Ndungu testified and was cross examined.

11. The respondent went on to say that there were no grounds for reviewing the judgment as there was no error on the face of the record; that the advocate who drew the Will appeared before the trial court and testified, and the existence and validity of the Will was not seriously challenged; that she was preparing to apply for the confirmation of the grant of probate when the appellants made the application and that the estate should be allowed to proceed with the distribution of the estate in terms of the Will.

12. Having heard the application and having considered the submissions, the learned Judge of the High Court in dismissing the application found that the appellants' advocate was present at previous hearings and participated in the proceedings, cross- examining witnesses; that the appellants even presented a witness of their own; that on 27th April 2015, an adjournment was requested by the appellants' advocate due to a lost file, leading to the hearing being scheduled for 14th July 2015; that on 14th July 2015, only the advocate for the respondent was present and as such, the court deemed the appellants to have closed their case.

13. The Judge also found that the appellants were lax and indolent for failing to follow up on the matter as they did not seek to check the status of the case between 14th July 2015, and the judgment date in November 2016 and only woke up from their slumber after the judgment had been delivered. According to the Judge, the attribution of blame to the appellants' previous advocates was an afterthought as it was not contained or pleaded in the grounds in support of the application or in the affidavit in support.

14. The Judge also found that the application for review based on alleged discovery of new evidence had no merit as the appellants' supporting affidavit did not mention or provide details about this alleged new evidence; further that the appellants failed to explain why they could not present this "new" information at the original trial. In the end, the learned Judge of the High Court dismissed the application to set aside or review the previous judgment. Hence the present appeal.

15. Learned counsel for the appellants, Mr. Chege holding brief for Mr. Maina Muiruri for the appellants, submitted that the learned Judge misapprehended the legal grounds for setting aside and reviewing the judgment; that on the strength of the decision in Richard Ncharpi Leiyagu vs. Independent Electoral Boundaries Commission & 2 Others [2013] eKLR the court has discretion to review a judgement to avoid injustice.

16. It was submitted that the appellants' application for review was based on the discovery of new evidence and important matters; that the judge failed to consider an affidavit from AKM, who was a minor at the time the Will was made, who in their view, was a crucial witness to the Will's preparation as he lived with the deceased's daughter and was aware of the deceased's condition and ability to make a Will. It was urged that the Will was prepared just two weeks before the deceased's death while the deceased was bedridden and incapacitated resulting in the disinheritance of the 1st appellant, the first born son of the deceased, and the purported provision in the Will of a stranger.

17. It was submitted that appellants' previous advocate did not inform them of the hearing date; that this resulted in them not attending court and being unable to present their evidence; and that this mistake by the advocates should not be held against them. The case of Edney Adaka Ismail vs. Equity Bank Limited [2014] eKLR and that of Belinda Murai & Others vs. Amoi Wainaina [1978] LLR 2782 were cited for the argument that mistakes of advocates should not be visited on litigants.

18. It was urged that the appellants were effectively denied the right to be heard; they were not given a chance to challenge the evidence and cross-examine witnesses; and that their rights and principles of natural justice were violated. The case of Mbaki & Others vs. Macharia & Another (2005) 2 EA 206 was cited.

19. Miss. Irungu, learned counsel holding brief for Mr. Ngata Kamau for the respondent, submitted that the appellants have not presented sufficient grounds for appeal; that the grounds of appeal are frivolous and lack merit; that the appellants' actions have been designed to delay the case and ultimately deprive the respondent of her inheritance; that it took the appellants over four months after delivery of the judgment to make the application to set aside/review the judgment; and that the judge was right that the appellants have been indolent in prosecuting their case.

20. It was submitted that the issues raised by the appellants in their submissions before the High Court in support of their application to set aside and/or review the judgment were never pleaded in the application and there is no proper basis for setting aside that judgment. It was submitted that the judge properly guided himself both in making the judgment, and also in dismissing the application to set aside and/or review the judgment, and this Court should not interfere with his decision.

21. Counsel for the respondent submitted that reopening the case after 14 years would be an injustice; that the delays have already caused the respondent significant prejudice and that her inheritance has been appropriated by the appellants; that the appeal is an unjustified attempt to delay a case that has already been decided fairly by the High Court and the appeal should be dismissed with costs.

22. We have considered the appeal and the submissions. We are mindful that the impugned decision involved exercise of discretion by the learned Judge. The circumstances in which this Court may interfere with the decision of a judge made in exercise of discretion are limited. As stated by the Court in United India Insurance Company Limited Kenindia Insurance Company Limited & Oriental Fire & General Insurance Company Limited vs. East African Underwriters (Kenya) Limited [1985] eKLR:

> " The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case.
>
> The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

23. With that in perspective, the main issue in this appeal is whether in dismissing the appellants' application to set aside/review his judgment, the learned judge took account of considerations of which he should not have taken account or failed to take account of considerations of which he should have taken account or misdirected himself in law or whether his decision is plainly wrong. How then did the appellants find themselves saddled with the judgment not having presented their entire case? In other words, under what circumstances was the trial court constrained to declare the appellants' case closed in their absence?

24. The record of proceedings show that although the matter had come up for hearing on several occasions before, the hearing finally commenced on 7th May 2013. Both parties were represented by their respective advocates. Stephen Wanyoike Kinuthia, the advocate who prepared the contested Will of

the deceased, and the respondent testified and were cross examined by the advocate for the appellants after which the respondent's case was closed. On the same day, Joseph Kamau Ndungu took the stand and testified for the appellants and was cross examined. The matter was then adjourned and the Judge ordered that "further hearing to be on a date to be fixed at the registry on priority basis."

25. Subsequently on 28th October 2013 when the matter was scheduled for hearing, the advocates for both parties were present. The court noted that the "matter cannot be reached". On 18th February 2015, representatives of the advocates for the parties fixed the application for hearing on 27th April 2015. On 27th April 2015, the advocates appeared before the learned Judge when the advocate for the appellants indicated his inability to proceed with the hearing on account of having lost his file, and the court ordered further hearing on 14th July 2015.

26. Come 14th July 2015, the advocate for the respondent was present. There was no appearance for either the appellants or their advocate. The advocate for the respondent is recorded as having informed the court that the respondent had closed her case, that the appellants had called one witness, and that the matter was for further hearing, the date having been fixed for hearing by consent, and that as neither the appellants nor their advocate was in court, the case should be closed. The court then ordered that as neither the appellants nor their advocate had attended court, the appellants are "hereby declared to have closed their case after calling one witness" and that the "matter shall proceed for mention of submissions." Further directions were given that "the parties to file written submissions within ten (10) days" and a mention date fixed for 6th October 2015.

27. The record further shows that on 6th October 2015, Mr. Mitiando and Mr. Kamau appeared before the Judge for the respondent while Mr. Murimi for Mr. Ogoso appeared for the appellants. Mr. Murimi is indicated as having stated that "we have agreed not to proceed today". A further mention date was fixed for 18th January 2016. On that date the record indicates that Mr. Gisemba appeared for Mr. Kamau and informed the court that the "petitioner has filed their written submissions" and a date for 'ruling' fixed for 4th March 2016. Judgment was ultimately delivered on 18th November 2016. Slightly under four months later, the appellants presented the application dated 13th March 2017 to set aside/review that judgment culminating with the impugned ruling dated 29th January 2019 delivered on 15th February 2019.

28. In declining to set aside the judgment, the learned Judge found that there was laxity or indolence on the part of the appellants. The Judge stated that although the appellant had sought to explain their absence from court on 14th July 2015 on the basis that the matter was not listed on the cause list of that date, they had not attached a copy of the pertinent cause list to support that allegation. Further, that the appellants had not demonstrated the efforts they made between 14th July 2015 and November 2016 to "find out what had transpired on 14th July 2015 and the steps they took to ameliorate the position."

29. The learned Judge further stated that although the appellants in their submissions blamed their predicament on advocates who were acting for them, the mistake of the advocates was not pleaded in the application or in the affidavit.

30. Based on our review of the record as captured above, we are unable to say that the decision of the judge in that regard constituted a wrong exercise of discretion. Whereas in the body of the application, the appellants stated that they "were aware of the hearing date of 14th July 2015 but when they attended court on the said date the matter was not listed..." in their joint supporting affidavit they deponed that "we were unaware of the hearing date and we were never served or notified of the hearing date." Clearly inconsistent statements.

31. However, in relation to the appellants' prayer for review of the judgment on the grounds that the appellants had discovered a new witness and facts which were not within their knowledge at the time of the hearing, the learned Judge stated in the impugned ruling that the appellants had curiously made no mention of the alleged discovery in their affidavit in support of the application; that there was no basis for the submission in that regard "when the same is not averred to by the applicants in their affidavit." In that regard, the learned Judge appears to have overlooked that in addition to the appellants' joint affidavit, the application was also supported by an affidavit that was sworn by Anthony Kinyanjui Munyui.

32. Moreover, one of the grounds set out on the face of the application was the averment that it had come to the attention of the appellants that "one AKM, who was a minor then, used to reside in the home of Grace Gathoni Muongi at the time the purported Will was made and witnessed the alleged Will preparation and is a crucial witness to the objector case and has important and new information relevant to this matter." Anthony Kinyanjui Munyui had indeed sworn an affidavit on 13th March 2017 in which he deposed on matters concerning the deceased's state of health at the time she is said to have made the contentious Will.

33. Those matters appear to have escaped the attention of the learned Judge, and it seems to us therefore that the statement by the learned Judge that there was no mention of alleged discovery of a new witness in the affidavit was a misdirection. The circumstances under which the Will was prepared and executed and the state or capacity of the deceased appear to have been so central to the resolution of the matter that as early as 8th June 2009, Rawal J. (as she then was) had ordered witness summons to issue to the advocates who prepared the Will "to give evidence on a Will dated 22nd September 2003 by the deceased Frasiah Wanjiku Mwangi."

34. In those circumstances, we are entitled to interfere with the learned Judge's exercise of discretion. We accordingly allow the appeal. We hereby set aside the ruling of the High Court dated 29th January 2019 and delivered on 15th February 2019. We substitute therefor an order allowing the appellants application dated 13th March 2017 to the extent that the judgment of the High Court delivered on 18th November 2016 is hereby reviewed and set aside.

35. The matter is remitted back to the High Court at Kiambu for the purpose only of re-opening the appellants' case from where it had reached to enable the appellants, and such of their witnesses as they may wish to call, to adduce evidence, be cross examined, and thereafter the High Court to render judgment.

36. This being a family matter, we order that each party shall bear their own costs of this appeal and of the proceedings before the High Court..

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

D. K. MUSINGA, (PRESIDENT)

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.