Reinhard v Reinhard & Reinhard & 3 others (Civil Appeal E006 of 2023) [2025] KECA 691 (KLR) (11 April 2025) (Judgment)

Neutral citation: [2025] KECA 691 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E006 OF 2023

KI LAIBUTA, LA ACHODE & GWN MACHARIA, JJA

APRIL 11, 2025

BETWEEN

JOYCE REINHARD ALIAS JOYCE JEPLETING REINHARD ..... APPELLANT

AND

DANIEL BERNARD REINHARD & ELISABETH HEFTI REINHARD ..... 1ST RESPONDENT

DAMARIS NTHENYA ..... 2ND RESPONDENT

MAURIZIO MARINO ..... 3RD RESPONDENT

ALFRED KELLER ..... 4TH RESPONDENT

(Being an appeal against the Ruling of the High Court of Kenya at Mombasa (Onyiego, J.) delivered at Mombasa on 23rd November 2022) in Succession Cause No. 26 of 2020 Formerly Malindi P & A Cause No. 47 of 2022)

JUDGMENT

1. Following the death of Daniel Bernard Hefti (the deceased) on 7th February 1999 in Watamu, Daniel Bernard Reinhard and Elisabeth Hefti Reinhard (the 1st respondents), being the deceased's grandson and daughter respectively, filed a petition for grant of letters of administration intestate in the High Court of Kenya at Malindi in Succession Cause No. 47 of 2008 through Joyce Reinhard aka Joyce Jepleting Reinhard (the appellant). The latter who was the deceased's daughter- in-law filed the petition by virtue of a General Power of Attorney dated 23rd July 2008 donated to her by the 1st respondents. The 1st respondents listed the deceased's properties as Plot No. 654 Watamu CR 30961, Plot No. 588 Watamu CR 30959 and Plot No. 589 Watamu CR 30960 (the suit properties). The 1st respondents were then issued with Grant of Letters of Administration intestate dated 25th November 2008.

2. According to the 1st respondents' application for confirmation of the grant of letters of administration dated 21st May 2009, the suit properties devolved to them in equal shares as the persons who survived the deceased. A Certificate of Confirmation of Grant dated 18th June 2009 was accordingly issued to them.

3. The suit properties changed hands. Two of the suit properties being Plot No. 588 Watamu CR 30959 and Plot No. 589 Watamu CR 30960 were transferred to the appellant, while Plot No. 654 Watamu CR 30961 was transferred in the names of the appellant and Daniel Bernard Reinhard in equal undivided shares as tenants in common.

4. The 1st respondents then filed a Notice of Motion dated 17th May 2019 seeking amongst other orders that: the appellant together with Beatrice Surei, Shadrack Koech and other persons acting as their agents in whichever capacity be restrained from dealing with the suit properties in any manner together with the developments thereon, including, but not limited to, the cottages, restaurant known as 'Mawimbi Lodge' pending determination of their application. They also prayed that an order of revocation be issued to revoke the transfer of the suit properties in the name of the appellant, and that the suit properties be transferred back to the names of the 1st respondents.

5. During the pendency of the 1st respondents' application, several other applications followed. Damaris Nthenya (the 2nd respondent) on the one hand and Maurizio Marino (the 3rd respondent) and Amici Miei Limited on the other hand, filed separate applications dated 26th June 2019 and 30th September 2019 respectively asking that the grant of letters of administration issued to the 1st respondents be revoked and/or annulled on the grounds that the grant was obtained fraudulently.

6. Likewise, the appellant, through Moses Kiprugut Rop, her legal attorney, filed an application dated 8th November 2021 whose decision, the subject of this appeal, was rendered on 23rd November 2022. The appellant asked the trial court to strike out/expunge the 1st respondents' supplementary documents dated 2nd November 2021 for having been filed without the leave of court; and an order that the Director, Criminal Investigations or any other designated officer under him and the Regional Head, Interpol National Central Bureau do investigate and prepare a report in respect to the deceased's Will dated 24th April 1977 together with all the documents filed with the Will.

7. The 1st respondents opposed the application vide Grounds of Opposition dated 1st February 2022 stating that:

   "i. The Interested Party is estoped from bringing the present application because in their List of Documents filed on 11th May 2021, Items 3 and 4 are copies of two (2) Powers of Attorney given by the heirs who themselves (sic) has been given the powers by the executor of the deceased's Will;

   ii. The executor derived his authority from the Will dated 24th April 1997 and delegated his authority to the heirs who delegated their Authority to the Interested Party Authority which she used to file pleadings in this Succession Cause;

   ii. The Interested Party herein cannot be opposed to the Will being produced when the Power of Attorney gives her the locus standi to join this Succession **Cause."**

8. In opposing the application, learned counsel Mr. Kinyua for the 3rd respondent filed a replying affidavit dated 31st January 2022. We are unable to trace the replying affidavit as part of the documents on record but, from the submissions dated 11th March 2022 and the summary of it in the High Court's decision, counsel deposed that the appellant was dishonest in opposing the production of the Will while the

administrators who gave her authority to represent them are willing to produce the Will; and that the court, having directed that the Will be produced in the presence of all parties, cannot be asked to vary its orders.

9. The application was heard by Onyiego, J. who, by a ruling dated 23rd November 2022, dismissed the application. He held that the supplementary affidavit filed on 2nd November 2021 was filed pursuant to a court order made on 29th September 2021 in the presence of all parties, and that there had not been a review of, or appeal against, those directions; that the Will and its translated version were properly before court; and that there was no need for the court to issue further leave for purposes of introducing the Will in the proceedings.

10. The Judge further held that there would be no prejudice suffered in introducing the Will; that the appellant should be concerned that the 1st respondents did not disclose the existence of the Will; that, since the 1st respondents had owned up that there was a valid Will, the appellant would have an opportunity to cross-examine them and recall witnesses, if need be, to rebut or controvert the 1st respondents' evidence; and that the validity of the Will would be best determined in a full hearing.

11. On the issue as to investigation of the Will, the Judge held that the appellant had not specified the actual act of criminality with the Will, and that, for want of specificity, the prayer was untenable; that, in any event, the 1st respondents had owned to the fact that the deceased died testate, the ground on which they would seek revocation of the grant; and that, for the same reason, they had filed testate succession proceedings at Malindi high Court.

12. Aggrieved by the ruling, the appellant invoked this Court's jurisdiction by filing the instant appeal commenced by a Notice of Appeal dated 5th December 2022. Apart from the main record of appeal, she also filed a supplementary Record of Appeal dated 28th November 2023. In a Memorandum of Appeal dated 18th January 2023, the appellant challenges the decision of the learned Judge for: declining to expunge/strike out the administrators' supplementary documents dated 2nd November 2021 filed as a supplementary bundle of documents contrary to the court's order of 29th September 2021 directing that the same be introduced by way of a supplementary affidavit; finding that there was no further leave required and that the impugned documents were properly on record before the court; relying on an unproven assumptions and speculation in arriving at a finding that no prejudice would be occasioned by the introduction of the impugned Will after such an inordinate delay; considering unproven extraneous circumstances, particularly making reference to a testate succession case in respect to the subject estate filed at Malindi High Court and dismissing the application; arriving at a finding that the orders sought lacked specificity and were untenable despite doubt being cast over the existence of the Will; and in allowing his discretion to be vitiated by the consideration of the historical background of the matter which was extraneous for purposes of the application before him.

13. The appellant prayed that we allow the appeal; set aside the ruling of the trial court dated 23rd November 2022 with costs; order that the administrators' bundle of documents dated 2nd November 2021 be expunged from the court record; and that the Will in foreign language and the translated copy as contained in the administrators' supplementary bundle of documents dated 2nd November 2021 be submitted to the Directorate of Criminal Investigations for investigations as to its existence.

14. We heard this appeal virtually on 11th November 2024. Present in Court were learned counsel Mr. Songok for the appellant, learned counsel Mr. Steve Kithi for the 1st respondents and learned counsel Mr. Kinyua Kamundi for the 4th respondent and holding brief for Mr. Katsole for the 3rd respondent. The 2nd respondent did not participate in the appeal. Mr Songok highlighted the appellant's written submissions dated 7th November 2024. Mr. Kithi and Mr. Kinyua Kamundi did

not file any submissions, but were allowed by the Court to orally submit pursuant to rule 74 (b) of this Court's Rules, 2022.

15. Mr. Songok submitted that the appellant was disputing the manner in which the Will was introduced, namely through a List of Documents without leave of the court; that, despite the fact that the succession dispute has been in court for 17 years, there was no indication that there was a Will in the offing; that, if there was any document that ought to have been produced, it would be through affidavits so that the appellant would have been in a position to respond and put to test the evidence contained in such an affidavit; and that the learned Judge failed to appreciate this fact. Counsel relied on the case of Independent Electoral and Boundaries Commission vs. Stephen Mutinda Mule & 3 Others (2014) eKLR for the proposition that parties are bound by their pleadings, and that it was unfair that evidence, being the impugned documents, which was not pleaded, was introduced into the matter; that, it was un-procedural to introduce the Will when parties had already testified; and that, in any case, the appellant was acting on behalf of the 1st respondents by virtue of a Power of Attorney, which did not mention the Will.

16. On his part, Mr. Kithi submitted that Mr. Songok had not demonstrated the prejudice that his client would suffer by the production of the Will; that the appellant is a holder of a Power of Attorney from where she derived her authority; that the appellant had not denied that there was a Will when she came to Kenya to file the succession proceedings; that there was no need to seek leave of the court for the production of the Will since its production was pursuant to a court order; and that, once an order is issued, the issue of leave becomes superfluous.

17. To Mr. Kithi, the Power of Attorney ceased to have value after the 1st and 2nd respondents became administrators of the estate of the deceased; and that, even after the grant of letters of administration were confirmed to the 1st respondents, the appellant went ahead to act in their names and transfer some of the properties to herself.

18. In response to the submission by Mr. Songok that the Power of Attorney did not mention a Will, Mr. Kithi submitted that the donor who gave the appellant the Power of Attorney was not the registered proprietor of the properties; and that, if Mr. Songok's argument is that there is no nexus between the appellant and the Will, it can only mean that everything that the appellant did was illegal.

19. Finally, Mr. Kithi submitted that the issue was not whether or not the grant of letters of administration were valid or not, but the fact that the appellant held a General Power of Attorney, which did not give her authority to continue acting on behalf of the donor after the grant of letters of administration were issued to the 1st respondents.

20. Mr. Kinyua submitted that the appellant proceeded to register the suit properties in her name after obtaining the grant of administration, yet it was clear that the entire estate of the deceased was bequeathed to the 1st respondents; that there was a consent recorded in the High Court in Eldoret nullifying the letters of administration issued to some of the parties and that, therefore, what would have followed was a revocation of the titles to the suit properties.

21. Mr. Kinyua submitted that his client's interest in the suit properties is the hotel in which he is a tenant, but which the appellant took over; that one of the beneficiaries of the estate is the 3rd respondent; that the intention of suppressing the Will is designed to disinherit the 3rd respondent; that the Court should apply the tenets of Article 10 (2) of *the Constitution* in observing the rule of law, equity, transparency and accountability to do justice in this case; and that there will be no prejudice to the appellant if the Will is produced as she will have an opportunity to challenge any decision that will flow therefrom.

22. As a first appellate court, our mandate is to re-appraise and re-evaluate the entire record of the trial court and come up with our own findings. This mandate is aptly stated in rule 31 (1) (a) of this Court's Rules, 2022 as follows: -

31 (1) On an appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power-

a. to re-appraise the evidence and to draw inferences of fact;

23. In the case of Abok James Odera T/A A.J Odera & Associates vs John Patrick Machira T/A Machira & Co. Advocates (2013) KECA 208 (KLR), this Court said the following with regard to the duty of a first appellate court:

> " This being a first appeal, we are reminded of our primary role as a first appellant 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 Judge4 are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kusthon (Kenya) limited (2009) 2EA 212 wherein the Court of Appeal held, inter alia, that: -
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> 'On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.'"

24. Our role as a first appellate court was further expounded in Makube vs. Nyamuro (1983) KECA 29 (KLR) thus:

> " However, a Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did."

25. We have accordingly considered the record of appeal, the written and oral arguments by the respective counsel and the law. In our view, what falls for our determination is whether the learned Judge erred in directing that the deceased's Will be introduced in the proceedings, and whether its introduction is prejudicial to any party, particularly the appellant.

26. The deceased's estate devolved to the 1st respondents through intestate proceedings. According to the confirmed grant of letters of administration dated 18th June 2009, the 1st respondents acquired the suit properties which made up the deceased's estate in equal shares. We have seen a Power of Attorney dated 13th May 2008 donated to the appellant by the 1st respondents. The specific functions of the appellant in relation to the suit properties was as follows: -

> " Property Management of the properties with titles no. CR. 30959, CR. 30960 CR. 30961 with Land Survey Plan Number 137533, 137534, 154630 issued on February 18, 1999 to Daniel Benard Hefti (deceased) and inherited by Elizabeth Reinhard and Daniel Reinhard as owners to perform all legal acts falling within the scope of authority of a General Power of Attorney – in fact, including the right to appoint substitutes."

27. The General Power of Attorney dated 23rd July 2008 also donated to the appellant by the 1st respondents gave her, amongst other powers, the authority to initiate and/or represent the 1st

respondents in any proceedings before a court of law within Kenya; the authority to demand any monies that may be owing to them; and to buy and sell any movable or immovable property on their behalf and to their advantage as advised.

28. There is nothing to suggest from both Powers of Attorney that the appellant had additional powers and/or delegated authority to transfer the suit properties belonging to the 1st respondents to her name or to any other person's.

29. Assuming that there was a remote suggestion that the appellant was allowed to transfer the suit properties to her name, it is factual that the confirmed Grant of Letters of Administration named the 1st respondents as the sole beneficiaries to the deceased's estate. The transfer of the suit properties was done in the year 2015, some 6 years after the grant was confirmed. There is no evidence that there was a rectification of the grant to include the appellant as a beneficiary.

30. It is trite that, when a party wishes to transfer a deceased's properties to their own name, they must have a confirmed grant of letters of administration which names them as beneficiaries. We are unable to fathom how the appellant was able to meticulously carry out the transfer of the suit properties to her name whereas she was not, firstly, a holder of any grant of letters of administration, or an executor of a Will and secondly, a beneficiary of the deceased's estate. The events leading to the transfer of the properties to the appellant's name smacks of fraud and/or collusion with some third party or parties, which no doubt is tantamount to intermeddling with the deceased's estate. It is for this reason we call to mind the provisions of section 45 of the *Law of Succession Act* that:

    1. Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, the free property of a deceased person.

    2. Any person who contravenes the provisions of the section shall-

        a. be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

        b. be answerable to the rightful executor and administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.

31. Turning to the issue as to the existence of a Will, the discovery thereof was made after the intestate proceedings were concluded. The appellant's complaint is that the Will was being introduced by way of a bundle of documents dated 2nd November 2021 as opposed to a supplementary affidavit as per the court's direction of 29th September 2021. Indeed, the directions of 29th September 2021 allowed the 1st respondent's counsel to introduce the Will by consent by all counsel present. In allowing Mr. Kithi's application to introduce the Will in the proceedings, the learned Judge stated:

> " I have considered Mr. Kithi's request to introduce the deceased Will before the case proceeds. Mr. Kinyua and Birir are opposed to adjournment of the hearing. However, they are all agreeable that if the Will is there, the same can be produced in its entirety without deducing (sic). This matter was filed as an intestate estate since there is (sic) to show that the deceased left a Will. It will be fair and in the interest of all parties that the Will be tendered in through an affidavit. Accordingly, Mr. Kithi's application for adjournment is allowed. He is allowed to introduce the deceased's Will through a supplementary affidavit to be filed and served within 14 days. The rest of the parties shall be at liberty to respond to the said supplementary

affidavit within 7 days after service. Hearing to proceed on 3.11.29021. Mr. Kithi to avail his witnesses either online or physically in court."

32. We have perused the Will which is on record. It shows that the deceased wished to leave all his properties to his four daughters. However, as per the intestate proceedings, the 1st respondents who are the deceased's grandson and daughter respectively inherited the properties. As to whether this was proper or not, is a question to be determined at the hearing of the succession proceedings which will no doubt test the validity of the Will. If we look at it in another way, it is to the detriment of the 1st respondents that the Will is being introduced since it may as well be that they will be disinherited. However, it is in good faith, through their counsel Mr. Kithi, that they brought to the court's attention the existence of the Will.

33. We cannot then fathom what interest the appellant would have in the deceased's estate as a daughter in law. She does not even form part of the three categories of frontline dependants listed under section 26 of the *Law of Succession Act*, so much so that she feels disadvantaged by the introduction of the Will.

34. The only prejudice the appellant alleges that she will suffer if the Will is produced touches on the formality of its production. To insist that the Will can only be admitted in an affidavit would be desecrating the altar of justice. Article 159(2) (d) of *the Constitution* reckons that, in exercising judicial authority, courts and tribunals shall administer justice without undue regard to procedural technicalities. Thus, courts are called upon to ensure that, in doing justice, they should focus on the substance and not the form. The appellant in this case is focussing on the form in which the Will was introduced in court and not its substance. She does not contest the fact that the Will exists. Had she been focussed on the substance of the Will, the time spent in this appeal would have benefitted all the parties in the trial, which would most likely have long concluded this long-pending succession dispute.

35. We hasten to add that the maxims that 'he who seeks equity must do equity' and 'he who comes to equity must do so with clean hands' comes into play. We think that, given the foregoing analogy, the appellant has not approached this Court in good faith well knowing that she transferred the suit properties to herself to the detriment of the deceased's rightful beneficiaries who are living abroad and not in touch with reality. The authority that was donated to her by the Power of Attorney ended after the Grant of Letters of Administration were issued to the 1st respondents.

36. We conclude by stating that, it is only by the production of the deceased's Will that the underlying dispute in the deceased's estate shall be determined. We say so because, all through, the estate was being administered on the false impression that there was no Will in existence while the appellant knew of the existence of the Will. As to the validity of the Will, it is the obligation of the trial court to determine after examining the evidence to be adduced before it. That is all we can say at this juncture.

37. In the premises, we find and hold that the appellant's appeal is devoid of merit. It is hereby dismissed with costs to the respondents excluding the 2nd respondent, who did not participate in this appeal.

DATED AND DELIVERED AT MOMBASA THIS 11TH DAY OF APRIL, 2025.

DR. K. I. LAIBUTA CArb, FCIArb.

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

signed

DEPUTY REGISTRAR