Mwangi v Kagera (Civil Appeal 20 of 2018) [2025] KECA 1265 (KLR) (27 June 2025) (Judgment)

Neutral citation: [2025] KECA 1265 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 20 OF 2018

S OLE KANTAI, JW LESSIT & AO MUCHELULE, JJA

JUNE 27, 2025

BETWEEN

KIRAGU MWANGI ..... APPELLANT

AND

JAMES MWANGI KAGERA ..... RESPONDENT

(Being an appeal from the judgment and decree of the High Court at Nyeri (J. Wakiaga, J.) dated 25th November 2011 in Succession Cause No. 535 of 2009)

JUDGMENT

1. The deceased Gathimbu Munyua died intestate in 1966. He left an estate that comprised land parcels Loc.14/Kagumo-ini/616 and Loc.14/Kiru/779. Those he left behind were his family Kiragu Mwangi (the appellant), James Mwangi Kagera (the respondent), Winnie Ngonyo Kahiu, Nancy Nyambura Kariuki, Julius Muriu Gathimbu, James Wachiuri Mwangi and Gerald Macharia Gathimbu. His wife Monica Njeri Wanjohi had died.

2. The applicant and the respondent jointly applied for the grant of letters of administration. The grant was issued on 23rd September 2009. They applied to have the grant confirmed. The application was supported by an affidavit which they jointly signed. The affidavit was with a consent signed by all the beneficiaries. It was proposed that Loc.14/Kagumoini/616 be shared so that the appellant gets 0.875 acres, Julius Muriu Gathimbu gets 0.875 acres and James Wachiuri Mwangi and Gerald Macharia Gathimbu do share 0.250 acres. Loc. 14/Kiru/779 was to be shared so that James Wachiuri Mwangi gets 0.775 acres, Winnie Ngonyo Kahiu gets 0.875 acres, Gerald Macharia Gathimbu gets 0.775 acres, Nancy Nyambura Kariuki gets 0.875 acres and the respondent gets 0.550 acres.

3. On 23rd July 2010 the High Court (J. K. Sergon, J.) confirmed the grant on that basis, and a certificate of confirmation was issued. When the appellant sought to have the respondent to cooperate to have the certificate of confirmation executed, there was reluctance. The appellant filed an application to have the deputy registrar of the court to sign the papers on behalf of the respondent to execute the

certificate. The respondent filed a replying affidavit saying he opposed the distribution; that he was not made aware of the confirmation; and that he was foreign to court procedures. He complained that he had received a portion smaller than he was entitled to.

4. The application was heard by the learned Wakiaga, J. who redistributed the estate by agreeing with the respondent who wanted the two parcels each shared equally among the beneficiaries. The earlier certificate was cancelled. The appellant was aggrieved and filed an application for review. The complaint was that the learned Wakiaga, J. had no jurisdiction, without an application, to interfere with the certificate that had earlier issued; that he was not sitting on appeal against the earlier orders. The application for review went before the learned Kiarie, J. who observed that although the earlier certificate of confirmation had been varied without jurisdiction, he equally had no powers, in the circumstances, to review. Instead he granted to the appellant leave to appeal to this Court, now that he felt dissatisfied.

5. This is how the matter reached this Court. In the grounds of appeal contained in the memorandum of appeal, the appellant complained that -

> " the new distribution was ordered and when it was clear that the respondent had not set out in his papers any application to vary the distribution earlier ordered by the court. This amounted to an injustice on the appellant and on the other beneficiaries of the estate."

6. When the appeal came before us neither party attended, but written submissions had been filed by the appellant. We have considered these submissions.

7. According to the submissions in behalf of the appellant, the terms contained in the application for confirmation had been agreed upon by both the applicant and the respondent, and by the rest of the beneficiaries; that it was wrong for the learned Judge to vary them by redistributing the estate in the absence of a substantive application and without hearing the appellant and the other beneficiaries. It was argued that the reference by the court to Rule 73 of the Probate and Administration Rules, and the purported exercise of the court's inherent powers, were without jurisdiction, there being no application and the affected parties, including the appellant, not having been afforded a hearing.

8. The issue for our determination is whether the learned Wakiaga, J. had the power and jurisdiction, on the application by the appellant, to redistribute the estate of the deceased.

9. Our jurisdiction on first appeal is on grounds of questions of fact and law, or on a mixed question of fact and law. Under Rule 31(1)(a) of the Court of Appeal Rules, 2022, we have power to re-appraise the evidence and to reach our own independent conclusion thereon. In doing this, we have to remember that the trial court had the advantage of seeing and hearing the witnesses as they testified. (See Selle & Another -vs- Associated Motor Board Company & Others [1968] EA 123).

10. We have no hesitation in pointing out that, through the application for the confirmation of the grant signed by both the appellant and the respondent, together with the consent accompanying it that the other beneficiaries had signed, the entire family of the deceased agreed on how the estate of the deceased was going to be distributed. They agreed on what each beneficiary was going to get from the estate. Once the agreement was endorsed by the court and a certificate of confirmation issued, there was a contract, as it were, that bound the beneficiaries. In other words, this was a consent decision that bound all the beneficiaries. Such a consent could only be varied and/or reviewed by the consent of all the parties to it. The law is that a court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between the parties. The grounds for impeaching the consent would include fraud, collusion, or agreement contrary to public policy or where the consent was given without sufficient material facts, or on

misapprehension or ignorance of such facts. (See Adolfo Guzzini & Another -vs- Emmanuel Charo Tinga & Others, Civil Appeal No. E047 of 2021 [2024]KELA 493 (KLR).

11. That being the law that governed the certificate of confirmation that was issued on 23rd July 2010, and there having been no application to vary and/or rescind the certificate that was backed by the consent, the learned Wakiaga, J. had no basis and/or jurisdiction to interfere in any way with the way or mode the family had agreed to share the estate that he had left behind by the deceased.

12. It is for these reasons that we allow the appeal, and set aside the ruling and orders of 25th November 2011. In their place, we reinstate the distribution contained in the certificate of confirmation issued on 23rd July 2010.

13. This is a family dispute, but owing to the conduct of the respondent, we order that he pays the costs of appeal to the appellant.

DATED AND DELIVERED AT NYERI THIS 27TH DAY OF JUNE, 2025

S. OLE KANTAI

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JUDGE OF APPEAL

J. LESIIT

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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