KKK v MM (Civil Appeal 483 of 2019) [2025] KECA 1383 (KLR) (25 July 2025) (Judgment)

Neutral citation: [2025] KECA 1383 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 483 OF 2019

DK MUSINGA, M NGUGI & GV ODUNGA, JJA

JULY 25, 2025

BETWEEN

KKK ..... APPELLANT

AND

MM ..... RESPONDENT

(Being an appeal from the ruling and orders of the High Court of Kenya at Nairobi (Achode, J.) delivered on 22nd January 2019 in Succession Cause No. 384 of 2008)

JUDGMENT

1. Disputes regarding distribution of estates of deceased family members often linger in our courts for many years, even in instances where the deceased person left behind a will setting out the mode of distribution of the estate, or where the deceased's wishes regarding distribution were well known to family members before their demise, as the history of this appeal reveals.

2. MNM, hereafter referred to as "the deceased", died intestate on 30th August 1998. On 5th September 2008 a grant of letters of administration intestate in respect of the deceased's estate was issued to LJK and MM (the respondent herein), sons of the deceased. On 30th January 2009 the parties filed an application for confirmation of the grant, having agreed on the mode of distribution of the deceased's estate. However, on 21st April 2010, Leonard JK (the original protestor) filed an affidavit of protest to the summons for confirmation of the grant, challenging the proposed mode of distribution of the only asset of the deceased's estate, namely, a parcel of land known as Dagoretti/Uthiru/xx (the suit land). It had been proposed that the suit land be transferred to his brother (the respondent) absolutely. He stated that the said parcel of land ought to be shared between himself and the respondent in equal shares. Leonard had signed the affidavit in support of the summons for confirmation of the grant but had since changed his mind, alleging that at the time of signing the papers, he was suffering from amnesia and did not know what he was doing and the implications thereof.

3. The original protestor died on 22nd February 2014 and his son, KKK, the appellant herein, substituted his deceased father in the proceedings.

4. When the matter came up for hearing before the High Court, the respondent testified that together with his deceased brother, LJK, they were the only surviving children of the deceased. He, however, contended that it was not proper for the suit land to be shared between himself and the estate of his deceased brother since he was solely entitled to inherit the entire parcel of land.

5. The respondent stated that his late father, JMN, who died in 1963, had two wives, namely: MM and MM (the deceased); that his father had two parcels of land in Gikambura and two parcels of land in Dagoretti, known as Dagoretti Uthiru/xx – the suit land, and Dagoretti/Uthiru/xx, which he apportioned amongst the members of the two families during his lifetime. The property at Gikambura was given to MM, the 1st wife, and the suit land was given to the 2nd wife (the deceased). The respondent's elder brother, LK, was given Dagoretti/Uthiru/xx measuring 1.6 hectares and it was registered in his name on 4th September 1958. His elder brother occupied the parcel given to him and later subdivided it amongst his children. He was therefore solely entitled to the suit land.

6. Regarding the appellant's protest to the proposed distribution on account of the allegation that his father had suffered from mental illness in 1998 and that he did not understand the implications of his consent to the affidavit in support of the proposed distribution of the estate, the respondent denied that his brother suffered from any such illness at the time of signing the consent to the proposed mode of distribution; and that he was of sound mind and wilfully signed the consent.

7. The respondent's evidence was corroborated in all material aspects by RWM, a sister-in-law of the deceased. She denied the allegation that the appellant personally bought Dagoretti/Uthiru/xx, saying that it originally belonged to her late brother, who transferred it to his son, LK.

8. On his part, the appellant told the court that his late father was suffering from amnesia at the time when he signed the affidavit in support of the proposed confirmation of grant, but the appellant did not produce any medical document in support of the aforesaid allegation. The appellant further stated that his late father acquired the property known as Dagoretti/Uthiru/xx and it was registered in his name in 1959, one year before the appellant was born. In his view, his late father was entitled to a share of the suit land since it belonged to his grandfather, and was only transferred to his grandmother upon his grandfather's death.

9. Regarding occupation of the suit land, the appellant conceded that it was the respondent who was in occupation of the same, and no one had objected to his continued use or development of the land.

10. At the close of the hearing, and upon consideration of the parties' testimonies and submissions as filed by their respective counsel, the trial court formulated two issues for determination, being; (i) whether the deceased held the suit land in trust for the respondent and it does not therefore form part of the deceased's estate, and (ii) whether Leonard Kimani bought or inherited the property known as Dagoretti/Uthiru/xx from his father inter vivos.

11. On the first issue, the learned judge held that although the deceased was the registered owner of the suit land, before her death, there existed a constructive trust in favour of the respondent. She made reference to the respondent's evidence that his late brother had been given Dagoretti/Uthiru/xx; that it was his late father's wish that he should live on the suit land with his mother; that he had developed the suit land by putting up three permanent houses, 8 temporary houses, permanent cowsheds and had rehabilitated a borehole on the suit land. Furthermore, when the government compulsorily acquired part of the suit land in 1980, it was the respondent and the deceased who were compensated, his late

brother did not make any claim for compensation or a share thereof. The trial court further noted that the respondent had all along enjoyed quiet possession of the suit land, and at no time did the deceased or his late brother object to his use or development of the suit land. The appellant had confirmed that the respondent had exclusively developed the suit property since his return from the United States in 1969.

12. The trial court rejected the appellant's contention that the appellant's father was suffering from amnesia at the time of signing the consent to the distribution of the deceased's estate, holding that it is trite law that "he who alleges must prove," and that all persons of lawful age are presumed to be sane, unless evidence to the contrary is adduced.

13. On the second issue, the trial court held that LK inherited Dagoretti /Uthiru/xx inter vivos from his father as his share of inheritance. That was the reason that made his father hive off three (3) acres from the ten acres of Dagoretti/Uthiru/xx to compensate Dagoretti/Uthiru/xx, which fact was not disputed by the appellant.

14. In view of those findings, the trial court dismissed the protest in its entirety and confirmed the grant of letters of administration intestate in favour of MM. In essence, Dagoretti/Uthiru/xx was vested in M M absolutely.

15. Being aggrieved by that decision, the appellant preferred this appeal. The memorandum of appeal raises 15 grounds, many of which are repetitive. The grounds of appeal may be summarised as follows: That the learned judge erred in law and fact by finding: that the respondent enjoyed quiet possession of the suit land; that the appellant did not adduce any medical records to prove that his father was suffering from amnesia at the time of signing the documents regarding confirmation of the grant and thus understood the contents thereof; that it was the respondent who was compensated for the land acquisition and the developments on the acquired property and not LK; by failing to appreciate that the deceased was survived by her two sons who were equally entitled to ownership of the suit land; by imposing constructive trust over the suit land in favour of the respondent; by finding that the suit land and Dagoretti/Uthiru/xx belonged to the late JMN; and by holding that LK inherited Dagoretti/Uthiru/xx from his father as his share of inheritance.

16. The appellant urged this Court to allow the appeal, set aside the trial court's judgment and order that the suit land be shared equally between the estate of LJK and the respondent.

17. This being a first appeal, we are mandated to re-evaluate the evidence that was presented before the trial court and form our own conclusion, but bearing in mind that we did not have the benefit of seeing and hearing the witnesses as the trial court did. We should therefore make due allowance for that. See Selle & Another v Associated Motor Boat Company Ltd & Others [1968] EA 123. We must also remind ourselves of the holding by the predecessor of this Court in Peters v. Sunday Post [1958] E.A. 424 that:

> "It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses."

18. We have perused the submissions made by both the appellant and the respondent's counsel and we need not rehash them. We shall proceed to determine the relevant issues raised in this appeal on the basis of the evidence on record as well as the submissions.

19. As to whether the learned judge erred in law by finding that the respondent enjoyed quiet possession of the suit land, we do not think that there is any serious controversy that the respondent's mother as well as the respondent were in exclusive and undisturbed occupation of the same up to the time

of the demise of the appellant's father. The appellant himself testified that his late father occupied Dagoretti/Uthiru/xx and confirmed that no one raised any objection about the respondent's use and development of the suit land. That testimony was in line with the respondent's contention that he had all along enjoyed quiet possession of the suit land. That evidence was also corroborated by RWM, a sister-in-law of the deceased.

20. When the Government of Kenya compulsorily acquired a part of the suit land, it was the respondent who filed a claim for compensation on 18th February 1988. Prior to that, all the family members of the deceased, including the appellant's father, had discussed the issue and agreed in writing that it was the respondent and his mother who were entitled to compensation for the land and developments that were on the portion that had been compulsorily acquired. That record was produced before the trial court. In the circumstances, we cannot fault the learned judge's finding that the respondent had quiet and undisturbed possession of the suit land.

21. Did the learned judge err in law by finding that the appellant did not produce any medical records to support the claim that his father was suffering from amnesia at the time of signing the documents in question, and did not therefore understand the implications thereof? Section 107(1) of the *Evidence Act* states as follows:

> "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

22. The appellant's father signed the consent to the mode of distribution of the deceased's estate on 30th January 2009. The appellant stated in his submissions that he annexed a medical report of his late father by Dr. Gatere dated 28th May 2012 to his affidavit in support of the application for substitution, which showed that his father had been diagnosed with early dementia, a disease that affects memory and is progressive in nature, which had set in at the time of signing the consent documents. He faulted the learned judge for disregarding that evidence.

23. The record shows that on 12th July 2012, the appellant filed an application seeking to substitute his father as the protestor. At that time, the appellant's father was 80 years old and was said to be suffering from early dementia. In support of that application was an affidavit sworn by the appellant to which he annexed a medical report done by Dr. W. Anduuru, a Consultant Psychiatrist at Dr. Gatere Medical Clinic. The doctor made a diagnosis of early dementia but there was no indication as to when the condition may have started manifesting itself.

24. Whereas the learned trial judge did not make reference to that medical report, which in any case was not produced before her at the trial, there was no evidence that on 30th January 2009 when the consent was signed, the appellant's father's mental condition was impaired to the extent that he did not know what he was doing. In Grace Wanjiru Munyinyi & Another v Gedion Waweru Githunguri & 5 others [2011] eKLR it was held that:

> "There is always a presumption that every person is of sound mind until the contrary is proved, and the onus of proof was on the person who alleges the contrary."

25. We align ourselves with that holding. We hold and find that it was not demonstrated before the trial court that at the time of signing the consent documents, the appellant's father was of unsound mind and did not comprehend what he was doing.

26. We now turn to consider whether the learned judge erred in law by finding that there existed a constructive trust for the benefit of the respondent in respect of the suit land.

27. The evidence on record demonstrates that the respondent's mother legitimately inherited the suit land from her husband in 1964, and she was in ownership of the same until her death in 1998. We have already alluded to the fact that during the lifetime of the appellant's father, he had been given Dagoretti/Uthiru/xx.

28. During the lifetime of the respondent's mother, the respondent sought and obtained consent of the Kikuyu Land Control Board to transfer the suit land from his mother to himself as a gift, and the consent was granted on 21st July 1992. No objection was raised by the appellant's father. However, the respondent's mother died on 30th August 1998 before the respondent could transfer the suit land to himself, hence the filing of the petition for grant of Letters of Administration intestate, and the subsequent consent to distribution of the deceased's estate that was agreed upon by the entire family, including the appellant's father.

29. In the above scenario, we cannot fault the learned judge for finding that there existed a constructive trust in favour of the respondent. Halsbury Laws of England, 4th edition volume 48 paragraph 690 states as follows:

> "A constructive trust will arise in connection with the legal title to property whenever one party has so conducted himself that it would be inequitable to allow him to deny to the other party a beneficial interest in the property acquired."

30. In this case, it can rightly be said that a constructive trust existed as between the deceased and the respondent. The appellant's father having been given his part of the inheritance during the life time of their father, the deceased was, during her life time, holding the suit land in constructive trust for the respondent.

31. In this country constructive trust is an equitable remedy and arises by operation of law. In Willy Kimutai Kitilit v Michael Kibet [2018] eKLR, this Court held that:

> "Thus, since the current Constitution has by virtue of Article 10(2) (b) elevated equity as a principle of justice to a constitutional principle and requires the courts in exercising judicial authority to protect and promote that principle, amongst others, it follows that the equitable doctrines of constructive trust and proprietary estoppel are applicable."

32. All in all, having carefully considered the record of appeal and all the submissions by the parties, we find no reason to disturb the learned judge's findings on all the substantive issues relating to the suit land. We dismiss this appeal and affirm the trial court's judgment.

33. This being a family dispute, we order that each party bears own costs of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JULY 2025.

D. K. MUSINGA (PRESIDENT)

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.