Murira v Kirera & 3 others (Civil Appeal E033 of 2021)
[2024] KECA 1058 (KLR) (23 February 2024) (Judgment)

Neutral citation: [2024] KECA 1058 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL E033 OF 2021

W KARANJA, LK KIMARU & J MOHAMMED, JJA

FEBRUARY 23, 2024

BETWEEN

HENRY KUBAI MURIRA ..... APPELLANT

AND

JACOB MBAABU KIRERA ..... 1ST RESPONDENT

MICHAEL MUTWIRI M'ICHUNGE ..... 2ND RESPONDENT

DAVID MWIRIGI MURIRA ..... 3RD RESPONDENT

WILSON KIMATHI MURIRA ..... 4TH RESPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya at Meru (Gikonyo, J.) dated and delivered at Meru on 19th December 2018, in H.C. Succession Cause No. 221 of 2004)

JUDGMENT

Judgment of Kimaru, J.A.

1. This appeal relates to distribution of the estate of Murira Karigicha (the deceased), who died on 25th March, 2003. He died intestate. He was survived by 4 wives and 15 children. The deceased's widows were listed as Sabina Karigu Murira (now deceased), Maria Karimi Murira, Silveria Karore Murira and Elizabeth Kainda Murira. The deceased children are namely: Henry Kubai Murira, David Mwirigi Murira, Wilson Kimathi Murira, Robert Miriti Murira, Jackson Muriithi Murira, Tabitha Nkatha Mutuma, Rose Kiburio Murira, Fabian Nderi Murira, Damaris Ntinyari Murira, Jane Gaichugi Kinoti, Naomi Gakii Murira, Eunice Nkirote Murira, Jane Kajuju Murira, Lucy Igoki Murira and Rose Gacheri Murira.

2. The deceased's free property was listed as:

    i. Land Parcel No. Kiaamuri 'A'/1019 - measuring about 2.5 Ha.

ii. Land reference no. Abothuguchi/Gaitu/330 - measuring about 6.86 Ha

iii. Land Reference No. Timau settlement scheme/ Plot No. 1 - measuring 5.8Ha.

3. When the deceased died, letters of administration intestate in respect of his estate were granted to the appellant together with the 3rd and 4th respondents on 29th September 2004 in Succession Cause No.221 of 2004. The grant was however revoked after objection from Sabina Karigu Murira (widow) and protests from the 1st and 2nd respondents. A new grant of letters of administration intestate was issued to Henry Kubai Murira, David Mwirigi Murira, Wilson Kimathi Murira, Maria Karimi Murira and Silveria Karore Murira on 9th November 2009, and subsequently confirmed on 2nd November 2011.

4. The proposed mode of distribution was as follows:Land parcel L.R. No. Timau Settlement Scheme/1 measuring 13.34 acres (5.8 Ha) be shared out as follows:

> 3 acres to Jacob Mbaabu Kirea, and 7 acres to Michael Mutwiri M'Ichunge, both of who had purchased the same;
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> 1 acre to be inherited by the deceased's widow Sabina Karigu Murira; the remaining 2.34 acres to be shared out equally between the deceased's sons namely Henry Kubai Murira, Wilson Kimathi Murira, David Mwirigi Murira, Robert Miriti Murira and Jackson Murithi Murira, with each getting 0.67 acres.

Land parcel L.R. No. Abothuguchi/Gaitu/330 measuring 16.96 acres (6.86 Ha) be shared out between the remaining three widows Martha Karimi Murira, Silveria Karore Murira, Elizabeth Kainda Murira with each getting 1 acre each; and the remaining 13.96 acres be shared out equally between the deceased's sons Henry Kubai Murira, Fabian Nderi Murira (c/o David Mwirigi Murira), Robert Miriti Murira, Jackson Murithi Murira, David Mwirigi Murira and Wilson Kimathi Murira, with each getting 2.33 acres.Land parcel L.R. No. Kiamuri 'A'/1019 measuring 6.18 acres (2.5 Ha) be shared out equally between the deceased's daughters namely Jane Gaichugi Kinoti, Rose Kiburio Murira, Damaris Ntinyari Murira, Naomi Gakii Murira, Tabitha Nkatha Mutuma, Eunice Nkirote Murira, Rose Gacheri Murira, Lucy Igoki Murira and Jane Kajuju Murira.

5. After confirmation of the grant on 2nd November, 2011, the appellant filed amended summons for revocation of grant pursuant to Sections 76(b) and (c) of the *Law of Succession Act* and Rule 73 of the Probate and Administration Rules, before the superior court on 23rd January, 2012. The appellant sought a revocation of the grant on grounds that the same had been obtained through concealment of material facts. He stated that land parcel L.R. No. Kiamuri/'A'/1019 was jointly registered in the names of the deceased and Rosalid Gacheri Ndubi (2nd applicant), a fact that the administrators failed to inform the court, hence the same was not considered during the distribution of the said property. The appellant and 2nd applicant contended that the grant was confirmed without their consent and in their absence.

6. In opposing the application, Maria Karimi Murira, a widow to the deceased and a co-administrator, as well as the 1st and 2nd respondents herein stated that they were not opposed to the 2nd applicant being granted her share of L.R. No. Kiamuri/'A'/1019, as her omission from the proposed distribution was an honest oversight, but that the same could be rectified without a revocation of the grant.

7. In his ruling dated 19th December, 2012, Makau, J. allowed the appellant's application and revoked the confirmed grant issued on 2nd November, 2011. The learned Judge found that the appellant and 2nd applicant had not been served with the application for confirmation of the grant, hence were

not present when the same was confirmed in court. The learned Judge further observed that the appellant and 2nd applicant had not signed the consent to the mode of distribution that had earlier been adopted by the court, and that the same had been signed only by 5 out of the 19 listed beneficiaries of the deceased. He held that the grant was obtained by concealment of material facts, albeit through ignorance.

8. Maria Karimi Murira, a co-administrator, filed a fresh summons for confirmation of grant on 10th July, 2013. The proposed mode of distribution remained the same as in the previous grant, save for the fact that half of land parcel L.R. No. Kiamuri/'A'/1019 was to be inherited by the 2nd applicant, Rosalid Gacheri Ndubi, owing to the fact that she jointly owned the parcel together with the deceased. The remaining half (3.9 acres) was to be shared equally among the deceased's daughters as listed in the previous grant.

9. The appellant objected to the proposed mode of distribution on grounds that the 1st respondent, Michael Mutwiri M'ichunge, did not buy 7 acres of land parcel L.R. No. Timau Settlement Scheme/1, as indicated in the proposed mode of distribution. He asserted that he did not sign the alleged sale agreement produced by the 1st respondent, and that the signature appearing on the agreement purportedly executed by him was actually a forgery. He explained that the signature was forged by his brother, Jackson Murithi Murira, who confessed to having done the same before the Land Disputes Tribunal as indicated in the tribunal proceedings produced in court. With regard to the 2nd respondent, Jacob Mbaabu Kirera, who claimed to have bought 3 acres of parcel L.R. No. Timau Settlement Scheme/1 from the deceased, the appellant stated that his sale agreement ceased to exist by operation of law due to lack of consent from the Land Control Board which was required to be procured within the stipulated 6-month period. The appellant urged the superior court to allocate half on the land in Mitunguu, jointly owned by the deceased and another, to Karigu's family, as they had not been provided for in the Kiamuri property.

10. The application was heard by way of viva voce evidence, after a request by the appellant's advocate had been granted by the trial Court, due to the nature of the issues raised by the parties. Several witnesses testified and the matter was reserved for judgment. This court notes that in his judgment, the learned Judge (Gikonyo, J.), based his decision on the application made by the Appellant on 23rd January, 2012, which sought to revoke the initial confirmed grant dated 2nd November, 2011, as opposed to the fresh application for confirmation of grant filed by Maria Karimi Murira dated 10th July, 2013, which was the basis of the hearing before the trial court. The grant dated 2nd November, 2011 had already been revoked by Makau J. in his ruling dated 19th December, 2012, hence the fresh application for confirmation of grant filed by Maria Karimi Murira.

11. The learned Judge (Gikonyo, J.) in the impugned judgment held that the Appellant had not satisfied the threshold for revocation of a grant as provided for under Section 76 of the *Law of Succession Act*, and therefore his application for revocation of grant dated 23rd January, 2012 was dismissed. He found that the 1st and 2nd respondents had sufficiently established that they bought 7 acres and 3 acres respectively of parcel L.R. No. Timau Settlement Scheme/1, and therefore their claim against the estate of the deceased had merit. The learned Judge further made orders for rectification of the confirmed grant issued on 2nd November, 2011 to reflect the correct acreage of the parcels of land, as well as the fact that L.R. No. Kiamuri/'A'/1019 was jointly owned by the deceased and Rosalid Gacheri Ndubi.

12. Aggrieved by this decision, the appellant filed an appeal before this Court premised on the following grounds:

a. That the learned Judge erred in law and in fact in failing to consider that the applicant did not sign the consent to the mode of distribution and confirmation of grant.

b. That the learned Judge erred in fact and in law in failure to appreciate the concealment of material facts as regards actual acreage of land, rendering the execution of the judgment impractical.

c. That the learned Judge erred in fact and in law in his failure to appreciate the fact that there was no appeal in Meru LDT NO.26 of 2004 thus rendering him to deviate in his judgment.

d. That the learned Judge erred in fact and in law in failure to consider the evidence on record as regards the appellant.

e. That the learned Judge erred in fact and in law in vesting the failure/misgivings of advocate to innocent client for failure to attend the court.

13. The appeal was canvassed by way of written submissions. The appellant, in his submission, seemingly proffered fresh grounds of appeal, different from those indicated in the memorandum of appeal. He averred that the appellant was aggrieved by the judgment of the superior court on grounds that the learned Judge erred in entertaining an application that was res judicata; that the superior court lacked jurisdiction to entertain the matter; that the respondents have no valid claim to the deceased's estate; and that the effect of the impugned judgment has been highly detrimental to the property and general wellbeing of the appellant.

14. Counsel for the appellant submitted that the question of whether or not the grant confirmed on 2nd November, 2011 ought to be revoked was settled by Makau, J. in his ruling dated 19th December, 2012 in Succession Cause No.221 of 2004, when the learned Judge revoked the said grant. He reiterated that if the respondents were aggrieved by the said decision, their recourse was to appeal the same to this Court. He stated that the subsequent judgment by Gikonyo J. was invalid as the matter was res judicata. Counsel faulted the learned Judge for wrongly invoking Section 74 of the *Law of Succession Act* in rectifying a grant that had already been revoked by orders of the court. He was of the view that the superior court lacked jurisdiction to rectify the revoked grant as there was no legal basis.

15. Counsel for the appellant further submitted that the 1st and 2nd respondents were not dependants of the deceased, and as such cannot be termed as beneficiaries to his estate. He stated that the 1st respondent filed a claim before the Chief Magistrate's Court at Meru in L.D.T. No. 47 of 2004 where the tribunal held that the sale agreement alleging that the 1st respondent bought 7 acres of parcel L.R. No. Timau Settlement Scheme/1 was not valid. He asserted that the 1st respondent claimed to have appealed the decision of the tribunal via a judicial review application to the High Court, but failed to avail the decision of the High Court before the trial Court. He maintained that the 1st and 2nd respondents have no claim to the deceased's property. In the premises, Counsel for the appellant urged this Court to set aside the impugned judgment and the resultant orders thereof.

16. Counsel for the 1st and 2nd respondents, in opposing the appeal, submitted that the appeal as filed was incompetent since the appellant had failed to seek or obtain the leave of court to file the same, and therefore this Court lacked jurisdiction to entertain the appeal. He urged that under the *Law of Succession Act*, there is no automatic right of appeal to the Court of Appeal, and the appellant ought to have sought leave from the superior court or this Court prior to filing the appeal. He relied on several decisions of this Court including Yunes Kerubo Oruta & another vs George Kombo Oruta & Another [2021] eKLR, Rhoda Wairimu Karanja & Another vs Mary Wangui Karanja & Anor [2014]

eKLR, John Mwita Murimi & 2 Others vs Mwikabe Chacha Mwita & Another [2019] eKLR and John Ndungu Wainaina & 2 Others vs Mary Njeri Kimuyu [2015] eKLR, among others.

17. Counsel for the 1st and 2nd respondents further submitted that the appellant had failed to avail critical documents in his record of appeal, which were produced before the trial Court, and which were essential to determine the respondents' claim to the estate of the deceased. He asserted that the 1st and 2nd respondents are creditors of the estate of the deceased on account of having purchased 7 and 3 acres respectively from the estate of the deceased. He contended that other than the appellant, none of the other beneficiaries of the deceased were opposed to the 1st and 2nd respondents being distributed the said property. He submitted that the suit before the superior court was not res judicata and that the appellant had not provided any evidence to substantiate this claim.

18. The appeal was also opposed by the 3rd and 4th respondents. Counsel for the 3rd and 4th respondents submitted that the appellant was well aware of the hearing date for the application for confirmation of grant, yet he failed to appear before the court to raise his grievances. He asserted that the issue of the acreage of the parcels of land was addressed by the superior court in the impugned judgment when the same was rectified. He urged that the appellant was misleading the court in stating that no appeal had been preferred by the 1st respondent with regard to the decision of the Land Disputes Tribunal. He submitted that the appellant failed to seek the leave of court before filing his appeal, therefore rendering the appeal incompetent. Counsel urged this Court to disregard the arguments made by the appellant in his written submissions, as the same addressed grounds of appeal not contained in his memorandum of appeal. This was in blatant violation of Rule 104 of the Court of Appeal Rules. In support of this point, he cited the case of R vs Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto & Others [2018] eKLR. He therefore urged this Court to strike out the appeal with costs to the respondents.

19. This being a first appeal, the role of the first appellate court was well settled in the case of Gitobu Imanyara & 2 Others v Attorney General [2016] eKLR where this Court stated that:

> "An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must 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 allowances in this respect."

20. Having evaluated the record of appeal as well as submissions by parties to the Appeal, the issues for determination by this Court are:

    i. Whether the appeal as filed is incompetent for want of grant of leave to appeal as required under the *Law of Succession Act*;

    ii. Whether this Court should disregard the Appellant's written submission for violation of Rule 104 of the Court of Appeal Rules;

    iii. Whether the issues canvassed by the Superior Court in the impugned judgment were res judicata, and whether the said court had jurisdiction to rectify a revoked grant; and

    iv. Whether the mode of distribution of the estate adopted by the Superior Court was fair, equitable and justifiable with regard to the issues raised in the grounds of appeal.

21. Starting with the first issue, the respondents contended that the appeal as filed by the appellant was incompetent as the appellant failed to seek the leave of Court prior to filing the same. It was urged therefore that this Court lacked the requisite jurisdiction to entertain the appeal. The respondents submitted that the right of appeal to the Court of Appeal from a judgment of the High Court in

succession matters was not automatic, and that an aggrieved party ought first to seek the leave of the trial Court before filing an appeal to this Court. The position in law on matters of want of jurisdiction and which this Court fully adopts is, as was succinctly put by the Court in the case of Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd [1989] eKLR. The Court observed thus:

> " Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

22. The debate on whether leave is necessary before filing an appeal to this Court from a decision of the High Court exercising its original jurisdiction in succession cases is alive as can be seen from the varying opinions rendered in decisions emanating from this Court. On the one hand, the view is that in succession matters, it is mandatory for an appellant to seek the leave of Court to appeal a decision of the High Court to the Court of Appeal. This was held in Rhoda Wairimu Karanja & Another -vs- Mary Wangui Karanja & Another [2014] eKLR where this Court stated thus:

> "We think we have said enough to demonstrate that under the *Law of Succession Act*, there is no express automatic right of appeal to the Court of Appeal; that an appeal will lie to the Court of Appeal from the decision of the High Court exercising original jurisdiction with leave of the High Court or where the application for leave is refused, with leave of this court. Leave to appeal will normally be granted where prima facie it appears that there are grounds which merits serious consideration. We think this is good practice that ought to be retained in order to promote finality and expedition in the determination of probate and administration disputes."

23. Similarly, in the case of John Ndungu Wainaina & 2 Others v Mary Njeri Kimuyu [2015] eKLR, this Court held thus:

> " It is the applicants' contention that leave which is a mandatory requirement before lodging an appeal to this Court from the decision of the High Court in Probate and Administration matters has not been obtained and therefore the notice of appeal is incompetent. Apart from the three authorities cited by Mr Aswani which were decided before the promulgation of the 2010 Constitution, this Court in more recent cases has reiterated that appeals arising from the decision of the High Court in probate and administration matters can only be brought with leave of this Court or of the
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> High Court. See In the Matter of the Estate of *Omar Abdalla Taiba (Deceased) Hafswa Omar Taib & others v Swaleh Abdalla Taib Civil Appeal No. Mld22 of 2014* and *Rhoda Wairimu Karanja v Mary Wangui Karanja, Civil Application No. Nai 69 of 2014*."

24. On the other hand, there is the school of thought that posits that by virtue of the provisions of *the Constitution* of Kenya 2010, all decisions of the High Court are appealable to the Court of Appeal. This was the decision of this court in the case of Peter Wahome Kimotho v Josphine Mwiyeria Mwanu [2014] eKLR. This Court observed thus:

> "There is no provision for appeals from the High Court to the Court of Appeal. What are provided for are appeals from lower courts to the High Court. That is why Mr. Gikonyo argued that it was necessary for the appellant to seek leave of the Court as there was no automatic right of appeal. We must state that this is clearly a grey area as it may also be argued that Section 66 of the *Civil Procedure Act* is not automatically imported into the *Law of Succession Act*. There is also a thin line to be drawn as to whether the order appealed against

was a decree or a mere dismissal order that did not amount to a decree. This is because upon the dismissal of the application for revocation, the grant was confirmed thereby resulting into a decree. Be that as it may, this appeal was filed in 2011 after *the Constitution* of Kenya 2010 that gives the Court of Appeal jurisdiction to hear appeals from the High Court and any other court or tribunal as prescribed by an Act of Parliament was operational. Under *the Constitution*, all matters from the High Court are appealable to the Court of Appeal. We therefore find that this appeal is competently before us."

25. Section 50 of the *Law of Succession Act* stipulates that:

    1. ..."An appeal shall lie to the High Court in respect of any order or decree made by the resident magistrate in respect of any estate and the decision of the High Court thereon shall be final.

    2. An appeal shall lie to the High Court in respect of any order or decree made by a Kadhis' Court of the estate of a deceased Muslim and, with prior leave thereof in respect of any point of Muslim law to the Court of Appeal."

26. From the above section, it is clear that there is no automatic right of appeal from the decision of the High Court when determining a succession cause in its original jurisdiction. I further observe that there is clear conflict of the decisions emanating from this Court as regards whether or not an appellant requires the leave of the High Court before they can mount an appeal against the decision of that Court in a succession dispute.

27. This is one instance where the Supreme Court may be required to render a final opinion on this issue. Such decision will settle the law regarding whether or not leave should be obtained by an aggrieved party in a succession dispute who wishes to appeal to the Court of Appeal. This Court recently certified an appeal on the question for determination by the sSupreme Court. I am sure that sooner rather than later, the conflicting decisions of this Court will be resolved and clarity be brought on this question.

28. As regards this appeal, I agree with this Court's decision in John Ndungu Wainaina & 2 Others v Mary Njeri Kimuyu [2015] eKLR that for an aggrieved party to lodge an appeal before this Court from a decision of the High Court when exercising its original jurisdiction in succession disputes, leave must be sought. I, therefore, agree with the respondents that the appellant's appeal in that regard is incompetent for want of the requisite leave of the High Court to appeal to this Court. I have, nevertheless, decided to render my opinion on the other issues for determination on this appeal so as to bring finality to this long running succession dispute.

29. Turning to the second issue, it is notable that the appellant did not seek the leave of this Court to raise the issues of res judicata and jurisdiction as additional grounds of appeal. The appellant addressed these issues in his written submissions without the leave of Court. This Court while interpreting Rule 104 of the Court of Appeal Rules (now Rule 107 in the new Court of Appeal Rules 2022) in the case of Republic vs Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto & Others ex-parte Tom Mbaluto, [2018] eKLR observed thus:

    " Rule 104 of the Court of Appeal Rules, among others, prohibits an appellant from arguing, without leave of the Court, grounds of appeal other than those set out in the memorandum of appeal. The appellant did not seek leave of the Court to raise the new ground of appeal but rather belatedly, and literally from the blue, raised it in the written submissions. It needs no emphasis that submissions must be founded on the issues before the court and the evidence on record regarding the issue. A party is not at liberty to change the nature of his case surreptitiously at the submissions stage. It is in the discretion of the Court to allow a party

to raise a new point on appeal, depending on the circumstances of the case. (See also *George Owen Nandy v. Ruth Watiri Kibe, CA No. 39 of 2015* and Openda v. Ahn [1983] KLR 165).

30. In this appeal, having considered the rival submission made by the appellant and the respondents in this regard, I agree with the respondents that the appellant cannot be allowed to raise issues which are not part of his grounds in the memorandum of appeal when making submissions before this Court. If the Court were to allow the appellant to do so, it would be against an important tenets of the Rules of Procedure that abhors trial by ambush and requires every litigant to put his cards on the table so that the opponent can be in a position to respond to the issue raised in due time before the setting down the appeal for hearing. In the present appeal, it was clear to me that the appellant breached the provisions of Rule 107(a) of the Court of Appeal Rules, 2022 which provides that:

> "(a) no party shall, without the leave of the Court, argue that the decision of the superior court should be reversed or varied except on a ground specified in the memorandum of appeal or a notice of cross-appeal, or support the decision of the superior court on any ground not relied on by that court or specified in a notice given under rule 95 or rule 96;
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> b. a respondent shall not, without the leave of the Court, raise any objection to the competence of the appeal which might have been raised by the application under rule 86;
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> b. the Court shall not allow an appeal or cross-appeal on any ground not set forth or implicit in the memorandum of appeal or notice of cross-appeal without affording the respondent or any person who, in relation to that ground, should have been made a respondent, or the appellant, as the case may be, an opportunity of being heard on that ground; and
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> b. the arguments contained in any statement lodged under the 100 shall receive the same consideration as if they had been advanced orally at the hearing."

31. In the premises therefore, I agree with respondents that this Court cannot consider the said submission made in regard to the issue of res judicata and jurisdiction as it was made outside the grounds of appeal that the appellant filed before this Court. Those submissions were made on issues that were not before this Court.

32. In the instant case, grant of letters of administration was issued to Henry Kubai Murira (appellant), David Mwirigi Murira, Wilson Kimathi Murira, Maria Karimi Murira and Silveria Karore Murira on 9th November 2009, and subsequently confirmed on 2nd November, 2011. After the confirmation, the appellant filed amended summons for revocation of the grant pursuant to Sections 76(b) and (c) of the *Law of Succession Act* and Rule 73 of the Probate and Administration Rules, before the superior court on 23rd January, 2012. Essentially, the appellant sought a revocation of the grant on grounds that the same was obtained through concealment of material facts, and that the grant was confirmed without his and the 2nd applicant's (Rosalid Gacheri Ndubi) consent, and in their absence. The application was opposed by Maria Karimi Murira (co-administrator), and the 1st and 2nd respondents who averred that they were not opposed to the 2nd applicant being granted her share of L.R. No. Kiamuri/'A'/1019, as her omission was an honest oversight, but that the same could be done without revocation of the grant.

33. In his ruling dated 19th December, 2012, Makau J., allowed the appellant's application and revoked the confirmed grant issued on 2nd November, 2011, and directed the parties to file fresh summons for confirmation of the grant of letters of administration. The learned Judge found that the appellant and

2nd applicant had not been served with the application for confirmation of the grant, and were therefore not present when the same was confirmed in court. He further observed that the appellant and the 2nd applicant had not signed the consent to the mode of distribution, and that the same was only signed by 5 out of the 19 listed beneficiaries of the deceased. He further held that the grant was obtained by concealment of material facts, albeit through ignorance.

34. After the ruling by Makau, J., one of the co-administrators, Maria Karimi Murira, filed fresh summons for confirmation of grant dated 10th July, 2013 before the superior court. It is instructive that in the fresh summons for confirmation of grant, Maria Karimi Murira incorporated the concerns of the appellant in the new proposal made on the distribution of the properties that comprise the estate of the deceased to the beneficiaries. The appellant again objected to the proposed mode of distribution now on grounds that the 1st and 2nd respondents did not have a valid claim against the estate of the deceased.

35. The application was heard by way of viva voce evidence. Several witnesses testified and the matter reserved for judgment. The learned Judge (Gikonyo, J.) expressed himself as follows on paragraph 16 of the impugned judgment:

> " This court has carefully considered the evidence, pleadings and submissions of the parties. The issue for determination before this court is whether or not to revoke and annul the grant confirmed on November 2011."

36. The learned Judge then went ahead and appreciated the legal dispositions pertaining to revocation of grants, and delved into the merits of the appellant's application for revocation of the grant confirmed on 2nd November, 2011. This application had already been determined by Makau, J. in the same succession matter vide his ruling dated 19th December, 2012, which is on record. The application that was before Gikonyo, J. for determination was actually the fresh summons for confirmation of grant filed by Maria Karimi Murira dated 10th July, 2013. The learned Judge however canvassed issues raised in the former application such as whether the appellant was informed of the hearing date of the application for confirmation of the grant, whether the appellant consented to the proposed mode of distribution, the alleged errors relating to the acreage of the parcels listed in the grant as well as the fact that Rosalid Gacheri held L.R. KIAMURI/'A'/1019 jointly with the deceased. However, I observed that the learned trial Judge dealt with issues regarding whether the 1st and 2nd respondents had purchased the parcels of land that they were claiming and whether they were entitled to the same. The determination was made on the basis of the oral evidence that he heard in court. I am of the considered opinion that although the learned trial Judge referred to the previous application for revocation of grant dated 2nd November, 2011 in actual fact he dealt with the issues that arose regarding the distribution of the estate of the deceased as was proposed in the new application for confirmation of grant dated 10th July, 2013.

37. Turning to the summons for confirmation of grant filed by Maria Karimi Murira dated 10th July, 2013, the appellant's objected to the same mainly on the grounds that the 1st and 2nd respondents had no valid claim to the estate of the deceased, hence they should not have been included in the proposed distribution schedule. He faulted the superior court for finding that the 1st and 2nd respondents were valid purchasers of 7 and 3 acres respectively of L.R. Timau Settlement Scheme/1.

38. The 1st respondent testified before the trial court as OW1. He stated that he bought 7 acres of parcel number L.R. Timau Settlement Scheme/1 from the deceased. From the proceedings before the superior court, the 1st respondent produced two agreements for the sale of the said parcel, a handwritten one and one drawn by an advocate. However, the record of appeal only contains the typed agreement of sale dated 5th March, 1997 (pg 14 of the record). According to the agreement, the deceased sold 7

acres of L.R. Timau Settlement Scheme/1 to the 1st respondent for a consideration of Kshs.490,000. The handwritten agreement produced as O.exhibit 1 as well as the receipts of payment produced as O.exhibits 3, 4 and 5 are not contained in the record, and therefore this Court has not had the opportunity to peruse the same. However, as was observed by the respondents, the appellant filed a record of appeal before this Court that did not contain all the exhibits and documents that were produced before the trial Court. Our re-evaluation of the evidence adduced before the trial Court leads to the irresistible conclusion that the trial Court saw the said exhibits that were produced by the 1st and 2nd respondents and was satisfied that indeed the 1st and 2nd respondents were creditors of the estate of the deceased and therefore deserved to have the said parcels of land distributed to them. It is noteworthy that all the members of the deceased's family except the appellant accepted that indeed the 1st and 2nd respondents are entitled to the said parcels of land. In the circumstances of this appeal, I cannot disagree with the verdict reached by the trial Court.

39. Upon re-evaluation of the evidence, I find no reason to interfere with the decision of the trial Judge since the only issue that was before him for determination was whether the 1st and 2nd respondents should be considered as the beneficiaries of the estate of the deceased on account of their being creditors to the estate of the deceased. The distribution that was proposed by Maria Karimi Murira was not opposed by any beneficiary other than the appellant. The distribution by the trial court in that regard is upheld.

40. It is clear from the reasons stated above that this appeal is for dismissal. I would hereby dismiss it with costs to the respondents.

Concurring Judgment of W. Karanja, J.A.

41. I have read in draft the judgment of L. Kimaru J.A. and I am in agreement, for reasons given therein, that this appeal is for dismissal.

42. As my sister J. Mohammed J.A. agrees, the judgment of L. Kimaru J.A. will be the judgment of the Court. The appeal is accordingly dismissed with costs to the respondents.

Concurring Judgment of Jamila Mohammed, J.A.

43. I have had the benefit of reading in draft, the judgment of my brother, L. Kimaru, J.A. I entirely agree with the reasoning and conclusion arrived thereat and have nothing useful to add.

DATED AND DELIVERED AT NYERI, THIS 23RD DAY OF FEBRUARY 2024.

L. KIMARU

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

signed

DEPUTY REGISTRAR