



**Edward v Mbura & 3 others (Civil Appeal E051 of 2021)
[2024] KECA 575 (KLR) (24 May 2024) (Judgment)**

Neutral citation: [2024] KECA 575 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPEAL E051 OF 2021
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA
MAY 24, 2024**

BETWEEN

MBURA EDWARD APPELLANT

AND

PHILIP TUNGU MBURA 1ST RESPONDENT

LIWALI NDOLE MWAKIDUDU 2ND RESPONDENT

SHARIFF NDOLE MWAKIDUDU 3RD RESPONDENT

KAZUNGU NDOLE MWAKIDUDU 4TH RESPONDENT

*(Being an Appeal from the ruling of the High Court at Malindi
(R. Nyakundi, J.) delivered on the 21st December, 2020 in Citation
No. 2 of 2019 In the matter of the Estate of Ndole Mwachidudu)*

JUDGMENT

1. On 19th July 2019, Philip Tungu Mbura, the 1st respondent, filed an application for citation dated 19th July 2019 to accept or refuse letters of administration under rules 21 and 22 of the [Probate and Administration Rules](#) against Sharrif Ndole Mwakidudu, Luwali Ndole Mwakidudu and Kazungu Ndole Mwakidudu, the beneficiaries of the estate of Ndole Mwakidudu (deceased).
2. The 1st respondent contended that he had entered into an agreement with the beneficiaries of the deceased for the purchase of 6 acres of Gede/Dabaso/138 (the suit property) on 14th May 1983. He claimed to have lived on the land for 25 years during which time he had buried his wife, Gladys Mercy Kabibi on the property; that he developed it with his sons and went on to construct his retirement home thereon. However, during the succession proceedings, the beneficiaries of Ndole Mwakidudu failed to disclose to the court that he (the 1st respondent) had purchased the suit property and was therefore a bona fide purchaser. Subsequently thereto, the grant was revoked, prompting the 1st



respondent to lodge the Citation seeking to have the beneficiaries accept the letters of administration, failure of which he be appointed as the personal representative.

3. The 2nd to 4th respondents opposed the Citation in an affidavit sworn on 19th August 2019 where they deposed that the heirs and beneficiaries of the estate of the deceased had before filing of the Citation given Consent to the Public Trustee to Petition for a Grant of Letters of Administration intestate; that the Public Trustee was in the process of petitioning for a grant of Letters of Administration intestate and had already obtained the necessary particulars with regard to the beneficiaries entitled and the assets of the estate of the deceased and that, therefore, the 1st respondent should not be allowed to petition the Court for letters of administration as the beneficiaries have already taken steps to petition the Court for the grant.
4. While the Citation was pending hearing, Mbura Edward, the appellant, filed an application dated 4th March 2020 under order 1 rule 10 (2), 14 and 25 of the *Civil Procedure Rules* 2010, and section 1A, 1B and 3A of the *Civil Procedure Act* seeking orders to be included as an interested party to the proceedings.
5. The appellant's case was that he was a son of Gladys Mercy Kabibi Mbura (deceased) and the 1st respondent; that the widow of Ndole Mwakidudu and his late mother were present during the purchase of the suit property, and that the men were only brought in to assist on the legal aspect. It was his contention that something changed at the advocates' office; that, after his mother died, the 1st respondent remarried, and that he included his wife's name as the next of kin in the properties of the late Gladys Mercy Kibibi Mbura; that there was apprehension that, if the 1st respondent was the sole beneficiary of the suit property, he would evict the children from the property, and that he was likely to suffer immensely if adverse orders are issued in respect to the suit property.
6. In a replying affidavit sworn on 9th March 2020, the 1st respondent opposed the application and deposed that the applicant and his siblings were his children with the deceased, Gladys Mercy Kibibi Mbura, and that they were the beneficiaries to his property. It was his case that the appellant is his son from his first marriage with the deceased. He claimed to have bought the suit property from the beneficiaries of Ndole Mwakidudu on 14th May 1983; that he and his late wife agreed to build their retirement home on the suit property and that, when his wife passed away, his family agreed to bury his wife there.
7. The 1st respondent stated that he provided for his children educating them to tertiary level and had even bought rental houses in Mombasa with his children with his late wife's pension. Further, he allowed his children with his deceased wife to construct their personal houses on the suit property and had never denied them access to it. He contended that the applicant failed to prove his locus standi and in what capacity he was making the application as the estate in question concerned the late Ndole Mwakidudu.
8. Upon considering the application, the trial Judge delivered a ruling dated 21st December 2020 dismissing it for want of merit on the basis that there was no evidence that the 1st respondent's late wife took part in the purchase of the suit property; that the appellant's claim was based on mere speculation, and that joinder of the appellant would not assist the court in settling all questions in contention in the citation application by the respondent against the beneficiaries of Ndole Mwakidudu; that the decision of the court was not likely to affect him, and that the appellant had no locus standi in this matter as it appertained to the legal interest of the estate of Ndole Mwakidudu.
9. The appellant was aggrieved by the ruling of the trial Judge and filed an appeal to this Court on the grounds that the learned Judge was in error in holding that the appellant lacked locus standi in the matter; that no evidence had been adduced to show that the 1st respondent was intent on evicting him despite observing that he resided on the land; in finding that the application by the appellant as



interested party was not merited; in holding that the deceased had not contributed to the acquisition of the property without evidence; in denying the appellant a chance to be heard; and in relying solely on the respondents' evidence.

10. During virtual hearing, the appellant, who appeared in person, stated that he would rely on his written submissions where, in a nutshell, he submitted that there was no valid or existing limited grant and that, therefore, the trial judge was wrong in dismissing his application.
11. On his part, learned counsel for the respondents, Mr. Shujaa, submitted that there was no valid appeal as the Citation had since been determined, and that, therefore, this appeal was overtaken by events.
12. The mandate of this Court on a first appeal as set out in rule 31(1) (a) of the rules of this Court is to reappraise the evidence and draw its own independent conclusions. In the case of *Peters v Sunday Post Limited* [1958] EA 424, the predecessor of this Court, the Court of Appeal for Eastern Africa, stated that:

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide.”

13. Given these parameters, the issue for consideration is whether the trial Judge rightly dismissed the appellant's application to be joined as a party to the Citation. In order to determine this issue, we bear in mind that, in arriving at the decision to dismiss the applicant's motion, the learned Judge was undertaking an exercise of discretion. This being the case, we are guided by the decision of the Supreme Court in the case of *Apungu Arthur Kibira v Independent Electoral & Boundaries Commission & 3 Others* [2019] eKLR where the court held:

“We reiterate that in an appeal from a decision based on an exercise of discretionary powers, an Appellant has to show that the decision was based on a whim, was prejudicial or was capricious.”

14. As a consequence, the jurisdiction of this court to interfere with the exercise of discretionary jurisdiction by a lower court as succinctly stated by Sir Clement De Lestang, V.P, in the often-cited case of *Mbogo v Shab* [1968] EA 93, thus:

“I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters which it should not have acted or it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

15. So was the learned judge wrong in the exercise of his discretion to dismiss the appellant's application and to warrant the interference by this Court with that decision? The answer to this question lies in considering the appellant's grounds of appeal against the judge's decision.
16. The appellant's complaints are that the court was in error in holding that the appellant lacked locus standi in the matter; that no evidence had been adduced to show that the 1st respondent was intent on evicting him despite observing that he resided on the land; in finding that the deceased had not contributed to the acquisition of the property, and that the appellant's to join as an interested party was not merited.



17. We begin by observing that, in addressing these issues, we have considered the appellant's submissions and find them to be scanty and of no assistance to this Court, as nothing was said in answer to or in opposition to the contentions raised against the ruling.
18. Having said that, our consideration of the ruling discloses that, indeed, the learned judge took into account all the matters placed before him, including the sale agreement between the 1st respondent and the beneficiaries of Ndole Mwakiddu dated 14th May 1983. As did the learned Judge, we find that nothing in the agreement disclosed that the deceased, the appellant's mother, participated in the purchase of the suit property, either as a signatory or as a contributor to the purchase price. Secondly, with regard to his claim to have an interest in the land, we have reviewed the appellant's pleadings and, as rightly observed by the learned Judge, nothing showed that he had a legal interest in the land, or that the 1st respondent intended to evict him from the property. In point of fact, based on the evidence of both the appellant and the 1st respondent, the Judge rightly concluded that the 1st respondent at all times encouraged and supported all his children, including the appellant, to construct their homes on the land.
19. Thirdly, regarding the complaint that the Judge wrongly found that he had no locus standi in the Citation, once again we have considered the appellant's pleadings and there is nothing to show that he had any basis at all on which to join the Citation as an interested party. Much as he complains that his interest in the property stemmed from his home constructed on the suit property, what the appellant failed to appreciate is that any interest he may have in the suit property could only be derived or accrue from the 1st respondent's legal interest without which he remained a stranger to the suit property.
20. Having arrived at the foregoing conclusions, we are satisfied that the learned judge took into account matters that he ought to have taken into account and, by so doing, arrived at the right decision that the appellant's application to be joined as an interested party was without merit. Accordingly, we have no basis upon which to interfere with this decision.
21. Our foregoing conclusions notwithstanding, we note from the respondents' counsel Mr. Shujaa that the Citation and the proceedings to which the appellant seeks to be joined were determined and dismissed by a ruling dated 22nd November 2021.
22. In view of the foregoing, the appeal is without merit and is accordingly dismissed.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 24TH DAY OF MAY, 2024

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA C.Arb, FCI Arb.

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JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original



Signed

DEPUTY REGISTRAR

