



Wambui v Wambui (Civil Appeal 272 of 2019) [2024] KECA 474 (KLR) (9 May 2024) (Judgment)

Neutral citation: [2024] KECA 474 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 272 OF 2019
MA WARSAME, K M'INOTI & KI LAIBUTA, JJA**

MAY 9, 2024

BETWEEN

LUCY NYOKABI WAMBUI APPELLANT

AND

HELLEN WANGARI WAMBUI RESPONDENT

*(Being an appeal from the Judgement and Decree of the High Court at Nairobi
(Muchelule, J.) dated 19th November, 2018 in HC Succession Cause No. 877 of 2007)*

JUDGMENT

1. Jane Gatonye died on 28th December 2006 having executed a will in favour of her four children. The favoured two were Lucy Nyokabi Wambui who is the sole executrix of the will and Joseph Ngugi who had predeceased the testatrix and was married to one Jane Wanjiku Ngugi.
2. The appellant, Lucy Nyokabi promptly filed a petition for grant of probate testate on 5th April 2007 and this ignited a family row. The respondent, Hellen Wangari Wambui, filed an objection on 19th June 2007 and a petition for grant by cross application dated 24th October 2007 on the grounds that the will was fraudulent, the deceased died intestate and that there were other beneficiaries in existence. In addition, the respondent also filed a motion dated 1st July 2011 accusing the appellant of intermeddling, sought protection of the deceased's assets and an order that any income from the estate exclusively held by the appellant be apportioned to all dependants listed in the cross petition.
3. In a Ruling dated 16th May 2013, Musyoka, J. issued the following orders, inter alia:
 - i. That I appoint Lucy Nyokabi Wairimu and Helen Wangare Wairimu administrators of the estate of the deceased, Jane Wairimu Gatonye, pending the hearing and determination of the objection proceedings herein.
 - ii. The grant of letters of administration pendente lite shall issue to them forthwith.



- iii. That Lucy Nyokabi Wairimu shall prepare and lodge in court within (30) days, an inventory of the assets and liabilities of the estate and an account of her administration of the estate of the deceased from the date of the deceased's death to the date of her appointment as joint administrator pendente lite.
 - iv. That the objector fix the objection proceedings for hearing within 45 days, failing which the same shall stand dismissed and the grant of probate shall be processed in favour of Lucy Nyokabi Wairimu.
4. Apparently, the respondent did not fix the objection proceedings for hearing as directed by the Court and in a Ruling delivered on 11th December 2014, the Court (Musyoka, J.) inter alia, activated the default clause and dismissed the objection proceedings initiated by the respondent, revoked the grant of letters of administration pendent lite made to both parties and issued a grant of probate in favour of the appellant.
5. Undeterred, the respondent filed a summons for revocation of the grant dated 14th July 2015 which sought the following orders:
 - i. That the grant of probate made to Lucy Nyokabi Wambui on 11th December 2014 be and is hereby revoke/annulled.
 - ii. That pursuant to the annulment above, the grant of letters of administration pendente lite made to Hellen Wangari Wambui on 16th May 2013 be and are hereby reinstated.
 - iii. That the objection proceedings instituted by Hellen Wangari Wambui on 16th May 2013 be and are hereby reinstated.
 - iv. That this Honourable Court be pleased to enlarge time within which to list the objection proceedings for directions.
6. In response the appellant, in a replying affidavit sworn on 20th January 2016 maintained that the matter was res judicata and
the respondent was trying to re-open matters that the court had made a Ruling on, without preferring an appeal.
7. In a ruling dated 19th November 2018 the Learned Judge, Muchelule, J. (as he then was), after considering the arguments put forth by the parties, allowed the respondent's application by setting aside and varying the ruling by Musyoka, J. and reinstating the respondent's objection proceedings. The Court found that even though the respondent was guilty of delay and had not complied with the orders of the court, she had raised pertinent issues in her objection, including that her and her sister (Susan Wanjiku) had not been provided for in the will and that the will was a forgery.
8. It is this decision that is the subject of the appeal before us which is anchored on the grounds that the Learned Judge erred by-
 - i. exercising jurisdiction which he lacked and setting aside orders by a judge of concurrent jurisdiction which was never appealed from;
 - ii. purporting to grant an erroneous appeal against the decision of his fellow judge but not appealed from;
 - iii. exercising his discretion wrongly;



- iv. misapprehending the facts of the case and the law, and taking account of considerations which he should not have taken account of;
 - v. granting orders that were not pleaded; and
 - vi. making a decision that is unlawful and contrary to defined legal principles.
9. When the matter came up before us for hearing, both parties were not in court and only the appellant had filed her submissions. The appellant, represented by Messrs. Janet G. Mathiu & Co. Advocates submitted that the learned Judge lacked jurisdiction to vary or set aside the earlier ruling of Musyoka, J. who was a judge of concurrent jurisdiction and that the same amounted to sitting on appeal, which is legally and procedurally wrong. It was contended that the respondent was trying to re-open matters that had been settled by the court and the only option available to the appellant was to appeal the decision or apply to set aside the earlier orders issued. The appellant cited *Narok County Council vs. Trans Mara County Council & Another*, Civil Appeal No. 25 of 2000 and submitted that the proceedings were a nullity as the court acted without jurisdiction.
10. The question in the appeal is not an issue of discretion, but whether Muchelule J. had jurisdiction in the circumstances of the case to overturn the Ruling of Musyoka J. If Muchelule J. had no jurisdiction to upset the earlier decision, it does not matter how appealing the reasons for his intervention. In our view, a court of equal and concurrent jurisdiction cannot overrule or overturn another, because it believes the earlier court did not consider material and pertinent issues.
11. In *Bellevue Development Company Ltd vs. Gikonyo & 3 others; Kenya Commercial Bank & 3 others (Interested Parties) (Civil Appeal 239 of 2018)* [2018] KECA 330 (KLR) (21 September 2018), Kiage J. expressed himself on the issue of Jurisdiction as follows:
- This position is so well established that it would be a strange aberration for a judge to embark on what is essentially an examination of the judicial conduct and pronouncements of judges of the same status as himself, a task that is left to courts and judges of higher status in the hierarchy, by way of appeals.”
12. Simply put, Muchelule J. had no power and authority to purport to interfere with the earlier decision of Musyoka J, no matter what the Court thinks or believes. If such a scenario is allowed, parties and their Advocates will move from one court to another in a bid to achieve a desired goal or result. And of course and indeed, this Court will stamp out or sanction an abuse of the court process and an endless litigation circle. In our view, such a route will endanger the administration of justice, in particular courts of equal and concurrent jurisdiction competing in upsetting one another, resulting in disharmony and bad blood between judicial officers. Consequently, the appeal is allowed with costs.

Dated and delivered at Nairobi this 9th day of May 2024

M. WARSAME

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true Copy of the original

Signed

DEPUTY REGISTRAR

