



REPUBLIC OF KENYA



KENYA LAW
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**Ngotho Commercial Agencies Ltd v Mwangi & 3 others (Civil Appeal
137 of 2018) [2023] KECA 26 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KECA 26 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL 137 OF 2018
F SICHALE, LA ACHODE & WK KORIR, JJA
JANUARY 26, 2023**

BETWEEN

NGOTHO COMMERCIAL AGENCIES LTD APPELLANT

AND

ELIZABETH MUCHIRI MWANGI 1ST RESPONDENT

FRANCIS MUCHIRI MWANGI 2ND RESPONDENT

EPHANTUS KIMORI MWANGI 3RD RESPONDENT

TIMOTHY MUGAMBI MWANGI 4TH RESPONDENT

*(An Appeal from the ruling of the High Court of Kenya at Nakuru (A.K.
Ndung'u) dated 12th June, 2018 IN HC SUCCESSION CAUSE NO. 488 OF 2012)*

JUDGMENT

- 1 Ngotho Commercial Agencies Limited, the then objector and the appellant herein filed objection proceedings in the Succession Cause in respect of the Estate of the late Solomon Mwangi Waweru. In the objection, the appellant contended that he was the rightful owner of two properties known as Kiambogo/Kiambogo Block2/17214 and Kiambogo/Kiambogo Block 2/17215, the same having been transferred to him by the deceased; that he paid Kshs 398,000.00 as consideration which sum was used to offset the deceased's debts. However, the deceased died before the two properties were transferred to him.
- 2 The objection proceedings were resisted by Elizabeth Muchiri Mwangi, Francis Muchiri Mwangi, Ephantus Kimori Mwangi & Timothy Mugambi Mwangi, the respondents herein on the basis that the appellant had no *locus standi* to file objection proceedings and secondly, that the High Court lacked jurisdiction to arbitrate on a land dispute.



3 On June 12, 2018, Ndung'u, J dismissed the objection proceedings on the basis that the appellant had not established that the two properties did not constitute part of the deceased's estate and further that any dispute on ownership of land, the jurisdiction thereof is vested in the Environment & Land Court. The Court stated:

“The findings of this Court are not in regard to whether he is the rightful owner or not and the Applicant retains the right to pursue his claim before the relevant Court.”

4 Dissatisfied, the appellant filed the appeal before us setting out 13 grounds of appeal in a Memorandum of appeal dated August 9, 2018. In the Memorandum of Appeal, the learned judge was faulted for not finding that the two parcels of land did not form part of the deceased's estate; for finding that he had no jurisdiction to exclude the two parcels of land from the deceased's list of properties; that the court failed to consider ample evidence that the two parcels of land belonged to the appellant, the deceased having executed a transfer in his favour and that the judge also erred in condemning the appellant to pay costs.

5 On October 12, 2022, the appeal came up before us for plenary hearing with Mr. Waweru Ngotho representing the appellant, Mr. Kimani Karanja for the 1st respondent and Mr. Kiburi for the 2nd, 3rd & 4th respondents. Each of the counsel highlighted their written submissions. Mr. Ngotho highlighted the submissions filed on October 7, 2022, Mr. Karanja highlighted the submissions dated October 11, 2022 whilst Mr. Kiburi highlighted the submissions dated October 5, 2022.

6 It was submitted on behalf of the appellant that the High Court had jurisdiction to “...protect the rights of an interested party”; that the respondents had not filed an application within the prescribed timelines challenging the Notice of Appeal and that the dispute involved the administration of the deceased's estate and hence the High Court was properly seized of the matter.

7 On behalf of the 1st respondent, it was submitted that under article 162(2)(b) of the *Constitution*, a dispute on title is to be referred to the Environment and Land Court and in support of this proposition, reliance was placed on the persuasive decision in the *Estate of Njuguna Igwima*, High Court (Nairobi), Succession Cause No. 1905 of 2012 and in the decision *Estate of Alice Mumbua Mutua*, High Court (Nairobi) Succession Cause No. 3142 of 2003.

8 In respect of the appellant's contention that the court failed to consider his evidence, it was submitted that indeed, the court did consider the appellant's evidence and came to the conclusion it was insufficient for purposes of the claim and that the two properties did not constitute part of the estate of the deceased.

9 Finally, on costs, it was the respondent's position that costs follow the event.

10 On behalf of the 2nd respondent, it was submitted that as no leave to appeal was sought and obtained, (this being a succession matter) and hence, the appeal was for dismissal. In support of this proposition, reliance was placed on the decision of *Makhanga -vs- Kibwana* [1995-1988] 1 EA 175.

11 On the issue of ownership of the two properties which are registered in the deceased's name, it was submitted that as there was a dispute as to whether the deceased had sold the two properties to the appellant, such a dispute is to be ventilated in the E & L Court.

12 We have considered the rival oral and written submissions, the authorities relied upon, our mandate as the 1st appellate court and the law.

13 In our view, the issues the subject of this appeal are fairly straight forward. Firstly, the appellant did not seek leave to file an appeal arising out of the dismissal of his objection proceedings in a succession



matter. In this Court's decision of *Rboda Wairimu Karanja & Another vs. Mary Wangui Karanja & another*, CA No. NAI 69 (UR 56) of [2014], the Court held:

“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 merit serious judicial consideration. We think this is a good practice that ought to be retained in order to promote finality and expedition in the determination of probate and administration disputes.”

14 Secondly, there is contestation as to whether the appellant purchased the two properties from the deceased. In his judgment, the judge rendered himself as follows:

“12. The duty of the Probate Court is to oversee the transmission of the estate of the deceased to his beneficiaries. Its jurisdiction is over the net estate of the deceased being that which he was free to deal with during his lifetime and its purpose is to ascertain the assets, liabilities, if any, the beneficiaries and the mode of distribution of the estate. (See *Muriuki Musa Hassan vs. Rose Kanyua Musa & 4 Others*). In *Alexander Mbaka vs. Royford Muriuki Rauni & 7 Others* [2016] eKLR the Court held that:

“It is only where one has an established claim against the estate that has already crystallised that he can litigate it before a family court. The claim is to be considered as a liability to the estate. This Court, in my view, cannot be called upon to ascertain whether or not one has a right to an estate of the deceased where such right has not yet crystallised. The right must be shown to have crystallised before the family court can entertain it.”

13. Therefore, claims by third parties against the estate of the deceased ought to be litigated in separate proceedings. It is imperative that any adverse claims against the estate of a deceased are determined through settlement or where inapplicable through suits against the administrator(s) of the estate and not through an objection like the one before court.”

15 The judge further relied on the persuasive decision of Musyoka, J. in High Court Succession Cause Number, 864 of 1996 [2015] eKLR where it was held:

“Even if there was material establishing that there was such a trust, I doubt that the resolution of this issue would be a matter of the probate court. The mandate of the probate court under the Law of Succession Act is limited. It does not extend to determining issues of ownership of property and declaration of trusts. It is not a matter of the probate court being incompetent to deal with such issues but rather the provisions of the Law of Succession Act and the relevant subsidiary legislation do not provide a convenient mechanism for determination of such issues. A party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land Court.



Consequently, and for the reasons above stated, I must find and hold that this court has no jurisdiction to resolve the proprietary interest on land based on the alleged trust.

In this case therefore, the only path legally open to the applicants is to institute separate proceedings to articulate their claim/rights in the right forum and which is the Environment and Land Court."

16 In our view, the law is clear on whether an Objector as a Claimant can be included as a beneficiary and/or administrator in a succession cause. The appellant's claim is denied by the respondents. The appellant must first and foremost establish his claim against the deceased by filing suit against the administrators. The two properties being land, the proper forum to adjudicate the dispute is the E&LC and not the Succession Cause. The appellant was advised as much by the trial court. He however opted to file an appeal which we find has no basis. The appellant has only himself to blame.

17 On costs, again, the law is that costs follow the event. The consequence of the objection proceedings is that they were dismissed. Following the dismissal, the respondents were entitled to costs. We find no merit in this appeal. It is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAKURU THIS 26TH DAY OF JANUARY, 2023.

F. SICHALE

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

