



EAM v MML (Civil Appeal 196 of 2019) [2023] KECA 377 (KLR) (31 March 2023) (Judgment)

Neutral citation: [2023] KECA 377 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 196 OF 2019
PO KIAGE, F TUIYOTT & JM NGUGI, JJA
MARCH 31, 2023

BETWEEN

EAM APPELLANT

AND

MML RESPONDENT

(Being an appeal from the ruling, order and decree of the High Court of Kenya at Kakamega (Njagi, J.) dated and delivered on 20th February, 2019 in Succession Cause No. 671 of 2010)

JUDGMENT

Judgment Of Joel Ngugi, Ja

1. Gershom Muguheli Manani Alias Gershom Muguheli (hereinafter, “deceased”) died on May 1, 2006. He was survived by a widow, EAM (the appellant herein) and five sons. A sixth son, Kenneth Amugune Manani (Kenneth), had predeceased the deceased. However, Kenneth was himself survived by a wife, MML (the respondent herein) and two children, HM and LM.
2. After the deceased died, the appellant filed for letters of administration intestate and, with the consent of her five surviving sons claimed the entire estate of the deceased. The respondent filed objection proceedings on behalf of her two minor children – HM and LM . The High Court tried the objection proceedings by way of *viva voce* evidence and, first, ruled that the deceased’s grandchildren - HM and LM - were dependants of the deceased and, therefore, beneficiaries to the estate. Further, on October 16, 2014, Chitembwe J delivered a ruling on the distribution of the estate after further hearing.
3. Specifically, in his ruling of October 16, 2014, Chitembwe J determined that HM and LM were to benefit from two specific parcels of land, that is, land parcel LR N Maragoli/Kisatiru/8XX and LR Kakamega/Soy/3XX. The relevant orders of the learned judge were as follows:
 - a)
 - b)



- c)
- d)
- e)
- f) LP North/Maragoli/Kisatiru/8XX – MML to hold in trust for HM & LM .
- g)
- h)
 - (i) LP Kakamega/Soy/3XX – 5 acres to Mable Msinzi Lumula to hold in trust for HM & LM .
 - (ii) LP Kakamega/Soy/3XX – EAM – Remainder.

4. In his ruling, the learned judge, by way of clarification, made further orders couched as follows:

- 1) The petitioner, EAM, shall hold the entire estate in trust for the benefit of the other beneficiaries including LM and HM who shall form one unit as per the ruling of May 9, 2013.
- 2)
- 3) The two properties given to LM and HM , ie Plot 8XX and five acres out of plot 3XX/Soy shall be for their exclusive possession. The two granddaughters shall no longer benefit from plot number 3XX/Soy should the family opt to divide and distribute it.
- 4) The grant shall be confirmed in the above terms and the petitioner shall be the administrator of the deceased estate.
- 5)

5. Neither of the two disputants appealed against the ruling by the learned judge. The appellant, who was the administrator of the estate, proceeded to extract a certificate of confirmation of grant dated November 27, 2014. The itemized schedule of properties and their distribution respecting the two properties distributed to HM and LM in the extracted certificate of confirmation of grant read as follows:

LR No N Maragoli/Kisatiru/8XX

EAMWhole [share] (MML to hold in trust for HM & LM)

.....

LR No Kakamega/Soy/3XX

EAM 5 acres (EAM to hold in trust for HM & LM)

6. The certificate of confirmation of grant reproduced, at the foot of the page, the clarifications made by Chitembwe J in his disposition. Notwithstanding the reproduction of these clarifications, however, by her own admission in the superior court, the appellant used the extracted certificate of confirmation of grant to register the parcel N Maragoli/Kisatiru/8XX in her name to hold in trust for the two minors. She then proceeded to subdivide the parcel known as LR No. Kakamega/Soy/3XX into 6 portions with new titles created for each: they were renamed Kakamega/Soy/2440 – 2445. All but one of these parcels were registered in the names of third parties. The one – being LR No Kakamega/Soy/2442– was solely registered in the appellant’s name – but only ephemeraly so. Shortly thereafter, the appellant



caused that parcel to be further subdivided to produce two portions renamed Kakamega/Soy/2565 and Kakamega/Soy/2566 and then transferred them to third parties.

7. Faced with these realities, the respondent, in a bid to secure her children's inheritance brought an application before the High Court seeking to enforce the orders of Chitembwe J. The application was dated July 3, 2017. It sought the following orders:
 1. That this application be certified urgent in the first instance.
 2. That the petitioner/respondent herein be compelled to sign all the land documents necessary to be filled with the land and her children get their respective shares as ruled and ordered by the court in respect of land parcel LR N Maragoli/Kisatiru/8XX and LR Kakamega/Soy/3XX and further, the respondent should surrender to court the two original title deeds in respect of LR Kakamega/Soy/3XX and LR N Maragoli/Kisatiru/8XX, copies of her passport size photographs and copies of any other documents as shall be required by the land registrar – Kakamega and Vihiga so as to facilitate the registration of all the necessary documents and or forms at the land offices so as to give effect to the judgment of the court and amended confirmed grant issued by the court on April 22, 2015.
 3. That in default of (1) above, the deputy registrar of this honourable court be authorized to sign all the necessary forms and/or documents on behalf of the respondent herein, and the land registrar – Kakamega be authorized to accept and register all documents and forms signed by the deputy registrar of this honourable court on behalf of the respondent so as to give effect to the judgment or amended confirmed grant issued by this honourable court on April 22, 2015.
 4. That the district surveyor – Kakamega be ordered to visit the subject land parcel LR Kakamega/Soy/3XX and subdivide and or demarcate the same as per the amended confirmed grant issued on April 22, 2015, so as to enable the respective beneficiaries get their respective shares.
 5. That parties herein to share survey fees and meet all other expenses to be incurred by the county surveyor – Kakamega in demarcating the subject land LR Kakamega/Soy/3XX as per amended confirmed grant.
 6. That all registration emanating from confirmed grant dated November 27, 2014 on land parcel LR N Maragoli/Kisatiru/8XX and LR Kakamega/Soy/3XX be cancelled to give effect of registration of amended certificate of grant dated April 22, 2015.
8. The application was opposed by the appellant *vide* her replying affidavit deponed on October 2, 2017 and her further affidavit sworn on November 3, 2017.
9. In the application, the respondent argued that the certificate of confirmation of grant dated November 27, 2014 extracted by the appellant was defective. She argued that, Sitati, J issued an amended grant dated April 22, 2015 which amended the initial grant dated November 27, 2014 and showed that the respondent, Mable Musinzi, was to be registered as the proprietor of land parcel LR N Maragoli/Kisatiru/8XX to hold in trust for her two daughters. It also showed that the respondent was to hold five acres curved out of land parcel LR Kakamega/Soy/3XX, in trust for her two daughters.
10. On her part, the appellant contended that the ruling of Chitembwe, J was to the effect that land parcel LR N Maragoli/Kisatiru/8XX was to be registered in her name as a trustee for the respondent's daughters; and as for land parcel LR Kakamega/Soy/3XX, neither the respondent nor her daughters were beneficiaries. The appellant further argued that the title to the latter land parcel ceased to exist after new titles were issued to other owners, and that therefore, the land parcel is not available for



subdivision. She also stated that she was not aware of any amended grant and that if at all there was such an amendment, then it was obtained through misrepresentation.

11. Upon consideration of the matter, the superior court identified the issue for determination as being whether the registration of the two parcels of land complied with the distribution ordered by Chitembwe, J in his ruling dated October 16, 2014.
12. In its decision, the superior court found that the distribution of the estate by Chitembwe, J was categorical that land parcel LR N Maragoli/Kisatiru/8XX was to be registered in the name of MML to hold in trust for her two daughters. Secondly, five acres was to be carved out of land parcel LR Kakamega/Soy/3XX, and registered in the name of Mable Musinzi Lumula to hold in trust for her two daughters. Instead, the court found, the appellant registered land parcel LR N Maragoli/Kisatiru/8XX in her name to hold in trust for the respondent's daughters; and that, further, she did not carve out five acres for the respondent's daughters as ordered. For this reason, the learned judge held that the certificate of confirmation of grant dated November 27, 2014 was incorrect and the registration of the two parcels did not comply with the distribution ordered by Chitembwe, J on October 16, 2014. The learned judge opined that even if it were to be assumed that the extracted grant was correct, the subsequent registration and subdivision of the property did not comply with the grant as the appellant was not registered as a trustee over the property. Additionally, no land was reserved for the respondent's daughters as ordered; instead, the appellant transferred the land to other people.
13. In the result, the learned judge held that where distribution of property is not done in accordance with the orders of the court due to fraud, the court has powers to intervene even where title deeds have been issued to other parties. The learned judge made the following orders: -
 1. The land registrar Vihiga is hereby ordered to cancel the title deed to land parcel LR N Maragoli/Kisatiru/8XX issued in the name of Ericah Azengah Muguheri and issue another one in the name of MML to hold in trust of HM and LM .
 2. All title deeds as a result of subdivision of land parcel LR Kakamega/Soy/3XX are hereby cancelled and it is hereby ordered that the registration of the said land reverts to the deceased herein, Gerishom Muguheri.
 3. That the county surveyor, Kakamega to visit land parcel LR Kakamega/Soy/3XX and subdivide it in accordance with the amended confirmed grant herein dated April 22, 2015.
 4. The parties herein to share survey fees and meet all other expenses to be incurred by the county surveyor, Kakamega in demarcating land parcel LR Kakamega/Soy/3XX in accordance with the amended confirmed grant dated April 22, 2015.
14. Aggrieved by the decision of the superior court, the appellant filed a notice of appeal dated February 25, 2019 and a memorandum of appeal dated September 6, 2019 in which she raised nine (9) grounds of appeal. These are that the learned judge: lacked requisite jurisdiction to order cancellation of title deeds for land parcel LR N Maragoli/Kisatiru/8XX and the resulting titles of the subdivision of LP Kakamega/Soy/3XX; orders over land parcel LR N Maragoli/Kisatiru/8XX and LR Kakamega/Soy/3XX are in violation of article 162(2) and 165(5)(b) of the *Constitution* as the jurisdiction over registered land are exclusively reserved for the Environment and Land Court and the subordinate courts pursuant to section 101 of the *Land Registration Act* No 3 of 2012; acted in gross violation of the rules of natural justice and fair administrative action by ordering cancellation of title deeds issued to the beneficiaries of LP Kakamega/Soy/3XX after subdivision without according them prior opportunity and the right to be heard; erred in law by entertaining litigation over land parcel LR Kakamega/Soy/3XX when the title ceased to exist and from the respondent who lacked the requisite



locus standi in the matter; orders are not supported by the ruling of Chitembwe, J from whose decision the subject certificate of confirmed grant was derived and in effect amounts to the exercise albeit wrongly by the learned judge of appellate jurisdiction over the aforesaid judgment of a fellow judge; misdirected himself in law by seeking to enforce through his ruling and orders, an amended certificate of confirmation of a grant which was invalid and/or incurably and fatally defective; orders arising from the subject ruling are unjust, oppressive and against due administration of justice and outrightly unlawful; failed to act judiciously and justiciably as a result of which the appellant has suffered an injustice and or/injury and continues to suffer; and orders are against the overriding objective principle of the superior court and this honourable court.

15. Consequently, the appellant prayed that the appeal be allowed, ruling, order and/or decree of the superior court be set aside, this court find and deem the respondent herein application before the superior court lacks merit and dismiss the same with costs to the appellant herein, and costs of the appeal and of the superior court be recovered from the respondent.
16. During the virtual hearing of the appeal, learned Counsel Ms Terry Shijenje held brief for Mr Musiega for the appellant and Mr Dennis Otieno held brief for Ms Mwangi for the respondent.

The appellant had filed written submissions and relied entirely on it. The respondent did not file written submissions and counsel confirmed the same. He was however given an opportunity to make oral submissions.
17. In her submissions dated September 29, 2022, the appellant contended that the respondent was no longer in the marital home, having left with her two daughters after her husband (son of the deceased) died. She argued that the learned judge did not have jurisdiction to cancel the title deeds and cited the Supreme Court decision, *Yusuf Gitau Abdallah vs Building Center (K) Ltd 4 Others* (2014) eKLR, for the proposition that article 162(2) and 165(5)(b) of *Constitution* excludes the High Court from determining matters related to the validity of a registered title. Instead, counsel argued, this mandate falls under the exclusive jurisdiction of the Environment and Land Court. Counsel argued that in succession matters, the court does not “administer the property of the living but the dead, save for transferring property from the dead to the living and not beyond.” Thus, she contended that title deeds issued pursuant to *Land Registration Act* No 3 of 2012 can only be cancelled through rectification in accordance with section 80(1) of the Act, by the Environment and Land Court and the subordinate courts.
18. Secondly, the appellant argued that even though the learned judge acknowledged that the titles he cancelled were in the names of third parties, he never accorded them an opportunity to be heard before making the adverse orders, thus, he violated section 80 of the *Land Registration Act*.
19. Thirdly, the appellant contended that no valid litigation can be undertaken on the basis of a title which is non-existent and cited the case of *Mahira Housing Company Ltd vs. Mama Ngina Kenyatta & Another (suing as Trustees of Waunyomu Ngeke Ranch)* (2008) eKLR. She further contended that the respondent was not a direct beneficiary and that she never tendered any grant in respect of the estate of her late husband to prove that she had the capacity to sustain the claim for her daughters.
20. Fourthly, the appellant questioned whether the learned judge, in his decision, was enforcing the ruling of Chitembwe, J or the amended certificate of confirmation of grant. She argued that the court record does not indicate that the respondent moved the court to rectify the grant which she was executing through the impugned ruling. She further argued that the purported rectified grant was not supported by the ruling of Chitembwe, J. from which it was argued to be anchored on. According to her, the respondent never appealed or reviewed the ruling of Chitembwe, J nor did she apply for rectification of the grant or if she applied, such orders were never granted and are not on record. It was her narrative



that if the respondent extracted an amended certificate of confirmation of grant giving absolute title to the respondent's daughters and five acres out of land parcel LR Kakamega/Soy/3XX, then this latter certificate was the one that was defective. In effect, the learned judge overturned the orders of a fellow judge in order to give land to the respondent's children, contrary to the orders of the court.

21. Lastly, the appellant argued that the respondent filed the application before the superior court, two and a half years late and the ruling therein was delivered about two years after the application was lodged; and that by which time the succession matter had been concluded. She contended that with regard to land parcel LR N Maragoli/Kisatiru/8XX, the learned judge should not have ordered for cancellation of the title; but rather, he should have opted for an order that would be more practical by directing the land registrar to include the word "in trust for LM and HM " in the register. Further, with regard to land parcel LR Kakamega/Soy/3XX, the learned judge should have directed the respondent to identify to the surveyor, which portion the five acres lay, so that the same would be isolated and attached instead of making an order that all the titles be cancelled and reverted to the deceased; and the entire land be surveyed afresh at a cost to be shared between the parties.
22. On his part, counsel for the respondent submitted that the superior court had jurisdiction to cancel the title deeds pursuant to its inherent and unlimited jurisdiction under the Constitution.
23. As regards the third parties who were said would supposedly be prejudiced, counsel submitted that they were not parties to the suit. According to him, the suit only involves the appellant and if she would have adhered to the orders of the court, both parties would have gained proprietary rights as had been ordered.
24. Having considered the pleadings in the record of appeal, the ruling of the superior court, the appellant's grounds of appeal and submissions and the oral submissions of the respondent, three issues present themselves for determination on this appeal:
 - a. First, whether the probate court had jurisdiction to entertain the application dated July 3, 2017 and grant the reliefs that it did.
 - b. Second, whether it was un-procedural for the superior court to hear the application dated July 3, 2017 and grant the reliefs that it did in the absence of the third parties who had been registered as proprietors of land formerly owned by the deceased following the ostensibly defective transmission process.
 - c. Third, if the application dated July 3, 2017 survived the jurisdictional and procedural challenges, whether it was one for granting on its merits. Differently put, whether the transmission of the deceased's estate was faithful to the ruling of Chitembwe J dated October 16, 2014.
25. Before analyzing these three issues, I wish to summarily deal with two points raised by the appellant seemingly for the first time on appeal. The first one is her rather curious argument that the respondent and her children no longer live on one of the parcel of lands bequeathed to them by the order of the High Court and that, therefore, had no legal right to insist on inheriting it from the deceased. This is a curious argument because whether the respondent's family is in possession of the parcel or not is an irrelevant factor in a probate cause. If the appellant meant to convey the "african" meaning that the respondent "divorced" the appellant's family upon the demise of the respondent's husband, that argument would still not fare any better. The bottom line is that the High Court has already pronounced itself on distribution of the deceased's estate; and the presence of the respondent in the homestead is irrelevant for enforcement of the court's orders.



26. Secondly, the appellant suggested that the respondent's claim was defeated by laches – the fact that she waited for more than two and half years to bring the application; and that by that time execution had already happened. First, I am unable to agree with the appellant that the respondent is guilty of inordinate delay in this case. The truth of the matter is that the respondent had earlier brought an ill-fated application aimed at enforcing her daughter's inheritance but it was, unfortunately, dismissed. In any event, as early as April, 2015, the respondent had moved the court to rectify the certificate of confirmation of grant that had been issued in November, 2014. This resulted in the rectified certificate of confirmation of grant dated April 22, 2015. In the circumstances of this case, one cannot accuse the respondent of being guilty of prejudicial delay. In any event, there is no limitation of time within which a party who is dissatisfied with the way an administrator of an estate has distributed the estate must bring their claim for adjudication.
27. I will now turn to the three main issues raised by this appeal. Regarding jurisdiction, the appellant makes two arguments.
- First, she argues that the dispute before the court was one respecting land and that, by dint of article 162(2) of the *Constitution* and that, therefore, it should have been heard by the Environment and Land Court. Second, the appellant argues that since the title to the parcel known as LR Kakamega/Soy/3XX had already been cancelled and new titles issued, the court had no jurisdiction to entertain any dispute respecting the former title.
28. The learned judge of the superior court dismissed both arguments, and rightly so in my view. Contrary to the appellant's argument, section 47 of the *Law of Succession Act* gives the High Court jurisdiction to entertain any application and to determine any dispute under the *Law of Succession Act*, and make such orders as may be expedient and just. The dispute that was before the judge was not one over title to or use of land; it was a dispute over distribution of the deceased's estate which brought it squarely within the jurisdiction of the probate court. Indeed, the procedural posture of the case was one of clarifying and enforcing a determination of the probate court. It is simply absurd to suggest that once a probate court has enunciated its verdict; any post-judgment disputes verging on the titles to land as transmitted through succession must be pursued in the Environment and Land Court. Many of our decisions are in accord. See, for example, *Musa Nyaribari Gekuno & 2 Others v Mijienda & Another* [2015] eKLR a decision of this court.
29. The second argument to the effect that the once the title ceased to exist through sub-division and transfer to third parties, that action *ipso facto* extinguished the probate court's jurisdiction respecting the same parcel does not fare any better. There is simply no such monstrous doctrine of *fait accompli* in our jurisprudence: one which would incentivize disputants in probate matters to swiftly if fraudulently subdivide and transmit parcels of land owned by the estate to third parties then whip up the preliminary objection of cessation of existence of the former title to inoculate their fraud. On the contrary, the rule of law is the opposite: Section 47 of the *Law of Succession Act* clothes the probate court with jurisdiction to determine all disputes respecting the estate. Analogous reasoning based on section 80 of the *Land Registration Act* supplies further refutation of the appellant's argument in this regard. The section provides that:
- “(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
- (2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence



of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.

30. Was it un-procedural for the learned judge to have determined the dispute in the absence of the third parties to whom the new sub-divided titles were transmitted? I think not. Like the learned judge reasoned, what was before him was a probate dispute – indeed, in its post-distribution posture. The court was expected to determine if the distribution of the estate was done in accordance with its own determination. That is a dispute that between the beneficiaries to the estate. While the third parties might eventually be affected by the court’s determination, their remedy, if any, would not be in the probate cause. Their presence in the probate cause at the tail end would not be useful when the probate court’s task was limited to determining if its decision on distribution was faithfully adhered to. At any rate this entire argument of prejudice to third parties is idle because those on whose behalf it is taken up are not before us to argue their supposed grievance.
31. Finally, this leads to the substantive question. The question the learned judge had to answer was whether the appellant distributed the estate of the deceased as per the ruling of Chitembwe, J dated October 16, 2014. The judge, after due analysis, concluded that the appellant did not. With respect, the learned judge cannot be faulted for coming to that conclusion. Indeed, as demonstrated in the history of the case given above, the answer was plain and obvious. There is simply no interpretive technique that can yield the outcome the appellant wanted in the High Court and in this court. The ruling of October 16, 2014 was explicit that LR North/Maragoli/Kisatiru/8XX – MML to hold in trust for HM & LM . This simply meant that the parcel of land was to be registered in the name of the respondent for the benefit of her two daughters. Instead, the appellant registered it in her name. In her submissions in this court, she suggests that the register can be rectified to add the name “in trust for HM and LM .” However, that will not cure the illegality already committed: the appellant extracted a certificate of confirmation of grant which was at variance with the orders of the court and then proceeded to transmit the estate at an even further variance.
32. The analysis is exactly the same for the second parcel of land – LR Kakamega/Soy/3XX. The court’s order was explicit that 5 acres was to be carved out of the mother title and to be registered in the name of the respondent for the benefit of her two daughters. Instead, as rehashed above, the appellant ended up sub-dividing and then transferring the whole parcel to third parties. There is simply no logical interpretive technique one could use to translate what Chitembwe, J said in his ruling of October 16, 2014 to what the appellant ended up effecting. In short, the certificate of confirmation of grant as extracted and as executed did not reflect the ruling of October 16, 2014. Indeed, it departed wildly from the ruling.
33. Having reached the same conclusion as the learned judge that the certificate of confirmation of grant dated November 27, 2014 and the actual distribution of the estate of the deceased was not faithful to the ruling of October 16, 2014, and having found that the court had jurisdiction to consider the application brought by the respondent, it follows that I agree that it was not an abuse of the learned judge’s discretion to make the orders that he did: cancellation of the titles that had been derived from the parcel known as LR Kakamega/Soy/3XX to facilitate the carving out of the 5 acres ordered by the court which is to be registered in the name of the respondent for the benefit of HM and LM ; as well as the cancellation of the title to land parcel LR No N Maragoli/Kisatiru/8XX and its reissuance in the name of the respondent to hold in trust of her two daughters.
34. In the circumstances, I find no basis for interfering with the ruling, orders and/or decree of the superior court. Accordingly, I am satisfied that this appeal lacks merit. I would dismiss it with costs to the respondent.



Judgment Of Kiage, Ja

1. I have had the benefit of reading in draft the judgment of my learned brother Joel Ngugi, JA and I am in full agreement with his reasoning the conclusion he reaches, and the order he proposes.
2. As Tuiyott, JA also agrees, the appeal is dismissed with costs.

Judgment Of Tuiyott, Ja

1. I have had the advantage of reading in draft the judgment of Joel Ngugi, JA, with which I am in full agreement and have nothing useful to add.

DATED AND DELIVERED AT KISUMU THIS 31ST DAY OF MARCH, 2023.

JOEL NGUGI

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

Signed

DEPUTY REGISTRAR

