



REPUBLIC OF KENYA



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**Kingangi v John & 2 others (Civil Appeal 439 of 2019)
[2023] KECA 315 (KLR) (17 March 2023) (Judgment)**

Neutral citation: [2023] KECA 315 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 439 OF 2019
DK MUSINGA, KI LAIBUTA & PM GACHOKA, JJA
MARCH 17, 2023**

BETWEEN

GRACE NJERI KINGANGI APPELLANT

AND

DEDAN THIONG'O JOHN 1ST RESPONDENT

WALTER GITAU JOHN 2ND RESPONDENT

LIZIE NJOROGE 3RD RESPONDENT

(Being an appeal against the ruling of the High Court of Kenya at Nairobi (A. O. Muchelule, J.) delivered on 10th May 2016 in HC. P & A No. 793 OF 1985)

JUDGMENT

1. John Kingangi Thiongo died on January 31, 1973 and, 48 years later, the battle for his only two assets, LR No Dagoretti/Uthiru/222 and Dagoretti/Uthiru/T.340 Kiambu, is still raging in our courts. One question that begs for an answer, and it is a question that rears its head now and then in our courts, is: how long should a beneficiary wait before they can raise a question of fraud in relation to issuance of a grant of letters of administration on probate?
2. By way of background, upon the death of John Kingangi Thiongo (the deceased), letters of administration were issued jointly to the respondents on December 3, 1987. The grant was issued to them in their capacity as sons and daughter-in-law of the deceased. The grant of letters of administration was subsequently confirmed on September 20, 1988 and later rectified on February 13, 1995.
3. On May 3, 2015, almost 25 years after the death of the deceased, the appellant filed summons for revocation of the grant. The grounds for the revocation were: that the grant was obtained fraudulently



by making false statement; that there was concealment from the court of material particulars; and that the administrators had not distributed the estate equally amongst all the beneficiaries.

4. The 3rd respondent opposed the summons for revocation through a replying affidavit sworn on April 12, 2013. In the replying affidavit, she indicated that she was the only surviving administrator as the other two had died. We need not recite the contents of the replying affidavit, but note the salient grounds to be: that particulars of fraud and the delay in raising the issue was not explained; that the estate was distributed in accordance with Kikuyu customary law; and that prior to his death, the deceased had expressed his wish to distribute his estate to his sons in accordance with Kikuyu customary law.
5. Further grounds were that the daughters of the deceased were aware of the distribution of the estate and did not object; that the daughters were given a parcel of land, more particularly land parcel No Dagoretti/Uthiru 984, which they sold to one Kairu Waweru and shared the proceeds; that the estate had already been distributed and third parties had acquired interest after the distribution, and development of the properties had taken place.
6. Upon hearing the parties, the trial judge (A. O Muchelule, J) dismissed the summons for revocation of the grant. The relevant part of the judgment is as follows:
 7. Section 2(2) of the *Law of Succession Act* defines the law that applies to the estate of persons dying before the Act came into force. It provides that:

“The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.
 8. According to the above section, even though the distribution of the estate of the deceased was to be governed by Kikuyu customary law, the administration was to be as per the Act (*In the matter of the estate of Mwaura Mutungi alias Mwaura Gichigo Mbura alias Mwaura Mbura (deceased)*). I note that neither the applicants nor other daughters were listed in the petition as having survived the deceased. This contravened provisions of rule 7 of the *Probate and Administration Rules* that confers a statutory duty on the petitioner to disclose all the surviving children of the deceased. I did not see their consents to the petitions as envisaged under rule 26 of the *Probate and Administration Rules*, or consents to the summons for confirmation of the grant as is required by the law.
 9. However, the applicant filed the application for revocation about 24 years following the confirmation of the grant and the distribution of the estate. She did not seek to explain the delay in bringing the explanation, and she did not say that all this while she was unaware of the matter. Further, it was deponed in the affidavit sworn by Rachael Wambui King’ang’i, Priscilla Tiebo and Monica Muthoni (all daughters of the deceased and sister to the applicant) that during the distribution of the estate they were jointly given parcel Dagoretti/Uthiru 984 which they sold in 2006 to Kairo Waweru for Kshs 2,500,000/= and all (including the applicant) shared. The applicant denied that she benefited from the proceeds, but do not see why her sisters and sister-in-law (Lizzie Njoroge) would be telling untruth about her. Lastly, they all stated that the applicant was married to one Clement Maribe. She admitted that she was married, but denied that her husband was Clement Maribe. She did not however give the name of the man she was married to. I accept the version of her sisters and sister-in-law on this issue.



Under Kikuyu customary law she was not entitled to inherit from her father, now that she was married. Nevertheless, she benefited.

10. In the particular circumstances of this case, I find that it would be unfair and unjust to revive this case. The estate was shared in accordance with Kikuyu customary law and the matter has to be left to rest. I dismiss with costs the application for revocation and/or annulment. It follows that the summons dated July 4, 2016 for injunction against Kairo Waweru has no merit and shall also be dismissed with costs. In any case, Kairo Waweru has been the registered owner of the parcel Dagoretti/Uthiru 984 since December 8, 2006 following the transmission. It is unusual to injunct a registered property of a parcel of land.”
7. Aggrieved by the judgment, the appellant filed the appeal that is now before us raising 11 grounds. We need not recite the grounds in full, but take the liberty to summarize them as follows:
 - a. That the court erred in failing to consider that the law of succession in the first instance came into operation through legal notice No 14 of 1972.
 - b. That the consent of all beneficiaries was not obtained.
 - c. Failing to uphold the constitutional right of equality between brothers and sisters.
 - d. Failing to find that there was no need to explain the delay in filing the summons for revocation as the *Law of Succession Act* has no timelines.
 - e. By finding as a fact that the appellant was married to one Charles Maribe.
8. On their part, the respondents opposed the appeal and filed a notice of grounds affirming the decision dated December 18, 2019. The grounds can be summarized as follows: that the summons for revocation were filed against the 1st and 2nd respondents, who were deceased at the time of filing, and no substitution had taken place; and that the distribution of the estate of the deceased had been done before the filing the summons for revocation.
9. Further grounds were that the assets had passed to third parties who were not party to the proceedings; and that the existence of the daughters was disclosed in the summons for grant of letters of administration and, therefore, there was no concealment or fraud.
10. When the matter was called out for hearing, Ms Muhuhu appeared for the appellant and orally highlighted her written submissions. The 1st and 2nd respondents were represented by Mr Wamae, who also highlighted his written submissions. Mr Wamae brought to the court’s attention that he had filed an application dated October 4, 2019 seeking to strike out the appeal on the ground that no notice of appeal had been served on the 1st and 3rd respondents, and that they were aware that even the 2nd respondent was not served.
11. Mr Wamae further submitted that the appeal was filed out of time, and that the appellant could not rely on rule 82 of the *Court of Appeal Rules, 2010* (now rule 84 of the *Court of Appeal Rules, 2022*) as the appellant did not copy or serve the letter requesting for proceedings on the respondents. Finally, Mr Wamae submitted that the appeal was fatally defective as against the 1st and 2nd respondents as they are dead, and the appellant continues to pursue proceedings against them without applying for substitution.
12. Ms Muhuhu initially contended that she was not aware about the application to strike out the appeal. However, she later conceded that she had indeed filed a replying affidavit dated August 12, 2020 in opposition to the application for striking out.



13. We have carefully considered the record of appeal and the submissions by the parties. Before we address the merits of the appeal, we wish to address the issues raised by the respondents on whether indeed there is a competent appeal before us. The issues raised by counsel for the 1st and 2nd respondent raise serious jurisdictional questions which we must determine first as they go to the core of the appeal.
14. On the question of whether the notice of appeal was served on the respondents, we note that there is a notice of appeal dated May 17, 2016. We also note that the judgment was delivered on May 10, 2016 and, therefore, the notice of appeal was filed within the 14 days as provided for in the rules. However, a perusal of the notice of appeal does not bear any official stamps or signatures in evidence of service upon M/s T. O Kabaka & Co Advocates, Anthony Njoroge Advocates and A I. Onyango & Co Advocates. Service of the notice of appeal is a factual issue, which should be evident through the signature of the receiving party or, at the very least, an affidavit of service. There is no such evidence in the record of appeal. It is also trite law that he who alleges must prove.
15. The second issue raised by the respondents is whether the appellant can rely on rule 84 which states as follows:

“ 84. Institution of appeals

1. Subject to rule 118, an appeal shall be instituted by lodging in the appropriate registry, within sixty days after the date when the notice of appeal was lodged—
 - a. a memorandum of appeal, in four copies;
 - b. the record of appeal, in four copies;
 - c. the prescribed fee; and
 - d. security for the costs of the appeal:

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days after the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.

2. An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless the appellant’s application for such copy was in writing and a copy of the application was served upon the respondent.
3. The period specified in sub-rule (1) for the institution of appeals shall apply to appeals from superior courts in the exercise of their bankruptcy jurisdiction.”

16. We note that the appellant’s advocates wrote a letter dated May 16, 2016 to the deputy registrar applying for proceedings and judgment. On the face of it, the letter is not copied to the respondents or their advocates. Further, the appellant has not provided any evidence that the letter applying for the proceedings was served on the respondents.



17. Rule 84 is clear on computation of time and time stops running once a party has written a letter to the court requesting for proceedings. Under the proviso, an appellant would be afforded some reprieve in so far as computation of time is concerned if there was delay in preparation of the proceedings upon making a written request for the proceedings. In other words, the computation of the 60 - day window within which one should lodge the record of appeal is suspended during the typing of proceedings, provided that the appellant serves the letter bespeaking proceedings upon the court and the respondent.
18. In the instant case, the appellant having failed to copy the letter requesting for proceedings to the respondents could not rely on this rule to exclude any days. This means that upon filing the notice of appeal on May 16, 2016, the appellant had 60 days from that date to file the appeal, that is on or before July 15, 2016. The record of appeal was filed on September 9, 2019 and, therefore, it was filed 54 days out of time. There is no evidence that the appellant sought extension of time. On this ground, this appeal is fatally defective. In the case of *Patrick Njuguna Kariuki v Delmonte Kenya Limited* [2020] eKLR, the court held:

“Essentially, rule 82 makes provision for exclusion of the period of delay in the preparation and supply of the proceedings by the registry, provided that in accordance with sub- rule (2) an appellant can demonstrate that firstly, a request for proceedings has been made in writing to the deputy registrar, and secondly, that a copy of such request has been served on the respondent.

But the strictures of rule 82 are clear. Without having served a copy of the letter requesting for certified proceedings on the applicant, the respondent cannot enlist the aid of rule 82 to exclude the period of preparation of the proceedings, with the result that the respondent should have filed the record of appeal within 60 days from the date of filing the notice of appeal. Instead, the record of appeal was not filed until the August 21, 2017, which was long after the expiry of 60 days.

As such, the respondent having failed to file the appeal in accordance with this court’ rules, the record of appeal lodged in this court on August 21, 2017 is hereby struck out.”

19. This Court in *Justus Aloo Ogeka & 6 others v Kenya Union of Commercial Food and Allied Workers & 2 others* [2018] eKLR held:

“As seen above, the respondent failed to serve the request for proceedings on the applicants. The effect of this failure was to preclude the respondent from applying the proviso to rule 82(1) to exclude the period of preparation when computing time to file the record. Without the ability to exclude the preparation period, it was imperative for the record to be filed within 60 days from the date the notice of appeal was filed. It is against this backdrop, that it then becomes apparent that the reason advanced by the respondent that it was unable to file the record because it had yet to be supplied with the proceedings by the registry, essentially falls by the wayside, and it mattered not that the registry had not supplied the proceedings.”

20. The litany of errors in this appeal does not end there. The appellant instituted suit against the 1st and 2nd respondents when it was common ground even at the trial court that they were long dead before the filing of the summons for revocation of grant. This issue was raised by the 3rd respondent in her replying affidavit dated February 14, 2012. The appellant did not take any remedial action to substitute the 1st and 2nd respondents with their personal representatives. It is old hat that one cannot institute a suit or continue a suit in the name of a deceased person.



21. We cite with approval the case of *Viktar Maina Ngunjiri & 4 others v Attorney General & 6 others* [2018] eKLR, where the court held:

“The estate of a deceased person may take over proceedings against him if that person was alive at the time the suit was filed. That notwithstanding, the estate must be made a party and authorized by the court through an executor or a personal representative. A formal application has to be filed to facilitate this. No grant of representation has been presented to court. In the instant case this cannot happen because the deceased died before the suit was filed and the representative of the estate has not been identified. Even if the representative were identified it is not possible to take over a nullity.

In the Indian case of *C Muttu v Bharath Match Works* AIR 1964 Kant 293, the court observed:

“If he (defendant) dies before the suit and a suit is brought against him in the name in which he carried on business, the suit is against a dead man and it is a nullity from its inception. The suit being a nullity, the writ of summons issued in the suit by whomsoever accepted is also a nullity... It is immaterial that the suit was brought bona fide and in ignorance of the death of such a person.”

In yet another Indian case of *Pratap Chand Mehta v Chrisna Devi Meuta* AIR 1988 Delhi 267 the court, citing another decision, observed as follows:

“..... if a suit is filed against a dead person then it is a nullity and we cannot join any legal representative; you cannot even join any other party, because, it is just as if no suit had been filed. On the other hand, if a suit has been filed against a number of persons one of whom happens to be dead when the proceedings were instituted, then the proceedings are not null and void but the court has to strike out the name of the party who has been wrongly joined. If the case has been instituted against a dead person and that person happened to be the only person then the proceedings are a nullity and even order 1 rule 10 or order 6 rule 17 cannot be availed of to bring about amendment.”

22. In *Viktar Maina Ngunjiri & 4 others v Attorney General & 6 others* (supra) the court held:

“7. It is trite law that the estate of deceased person can only be represented in any legal proceedings by a person who is duly authorized to do so on behalf of the estate. Only a person who has been issued grant of letters of administration has capacity to represent the estate of a deceased person. The powers of the personal representative are set out under section 82 of the Law of Succession Act, cap 160 of the Laws of Kenya which provides as follows:

82. Personal representatives shall subject only to any limitation imposed by their grant, have the following powers:

- a. to enforce, by suit or otherwise, all causes of action which by virtue of any law, survive the deceased or arising out of his death for his personal representative;
- b. to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their



duties, all or any part of the assets vested in them as they think best:

- i. Any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and
- ii. No immovable property shall be sold before confirmation of the grant;
- c. To assent, at any time after confirmation of the grant to the vesting of a specific legacy in the legatee thereof;
- d. "

8. The granted letters of administration takes effect from the date when it is issued as provided under section 80 (2) of the Law of Succession Act which provides as follows:

80(2) A grant of letters of administration, with or without the will annexed shall take effect only as from the date of such grant.

A party can thereof not commence a suit on behalf of the estate of a deceased person without letters of administration and thereafter obtain the letters of administration subsequently. Where a suit is commenced without letters of administration in respect of a deceased estate such a suit is null and void abinitio and cannot be cured by a party subsequently obtaining the letters of administration.”

23. It is not in dispute that the appellant did not get authorization from the court to sue the estate of the 1st and 2nd respondents. It is now clear that this appeal is heading in only one direction, that is dismissal on the various issues that go to the core of the jurisdiction of the court. The courts have said time and again that issues relating to jurisdiction of the court are not technical or procedural. No amount of pumping air into this appeal can resuscitate it.
24. Before we conclude, it is important that we state that even if we were to consider this appeal on merit, it is anchored on quick sand. The appellant alleges fraud 25 years after the issuance of grant of the letters of administration. No explanation for the delay is given. Though she alleges that the daughters of the deceased were discriminated against, there is evidence that they got a share of the property which they sold and shared out the money.
25. It is also quite telling that the appellant’s own sisters, Monica Muthoni and Rachel Wambui Kingangi, filed replying affidavits sworn on April 17, 2014 disputing the allegations by the appellant. They confirm that the estate was distributed in accordance with Kikuyu customary law as per the wish of their father. In addition, they confirm that, indeed, they inherited a parcel of land, Dagoretti/Uthiru 984, which they sold to one Kairu Waweru in the year 2006, and that the money was shared with the sisters, including the appellant.
26. It is therefore clear that whichever way one looks at this appeal, whether on merit or non - compliance with the rules of the court, the appeal is non - meritorious and is for dismissal. Accordingly, we dismiss the appeal and uphold the judgment of the trial court. Though this appeal is lacks merit, we note that



this is a family dispute and that, in order to bring the dispute to an end, each party should bear their own costs.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MARCH, 2023.

D. K. MUSINGA, (P).

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL

I certify that this is

a true copy of the original

Signed

DEPUTY REGISTRAR

