



REPUBLIC OF KENYA



**Kihara v Kimani (Civil Appeal 218 of 2018)
[2023] KECA 1168 (KLR) (6 October 2023) (Judgment)**

Neutral citation: [2023] KECA 1168 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 218 OF 2018
MA WARSAME, KI LAIBUTA & JM MATIVO, JJA
OCTOBER 6, 2023**

BETWEEN

CECILIA WANGARI KIHARA APPELLANT

AND

IRENE WAMBUI KIMANI RESPONDENT

*(Appeal against the judgement of the High Court of Kenya, Family Division at Nairobi
(Muchelule, J.) dated 30th May 2018 in Nairobi HC P & A Cause No. 40 of 1985)*

JUDGMENT

1. A concise account of the history of this litigation is necessary to properly contextualize the arguments for and against the appellant's appeal against the Judgment of the High Court (Muchelule, J as he then was) dated May 30, 2018.
2. For starters, these proceedings relate to the estate of the late James Kihara Njoroge (deceased) who died testate on March 8, 1984. In his Will, the deceased shared all his properties equally between his two wives, namely Cecilia Wangari Kihara (the appellant herein) and Monica Wamaitha Kihara (deceased). The deceased had 12 children, among them Irene Wambui Kimani, the respondent herein. According to his Will, upon the estate being shared equally between his two wives, each one would at her sole discretion share her entitlement with her children. The deceased appointed his brother Mugo Njoroge (deceased) as executor of his Will. A grant of letters of administration with the Will annexed was issued to the executor on April 23, 1985, and the grant was confirmed on October 23, 1992.
3. Before the High Court, Irene Wambui Njoroge (the respondent herein, who is from the house of Monica Wamaitha Kihara), filed an Application dated November 11, 2011, seeking revocation of the said grant. In the alternative, she prayed that the said grant be amended to vest half of plot No 283/111 & 129/IV/MN under title number CR 5726 to her on behalf of the estate of Monicah Wamaitha



Kihara (deceased). In the alternative, she prayed that all consequential orders made pursuant to the confirmation of the grant be annulled, and that the estate be distributed afresh.

4. The grounds in support of the respondent's aforesaid application, which was brought under section 76 of the *Law of Succession Act*, were that the executor and the appellant made untrue allegations of facts when obtaining the confirmation of grant, and that they omitted the following properties:
 - a. Plot No 283/111 and 129/IV/MN under title number CR 5726 (Kikambala property);
 - b. LR No 533/298 in Molo Nakuru District, which had since been transferred to Joyce Wanjiku Kariuki;
 - c. CR 13052/2, which has been subdivided into plot No 9370 to 9381 and divided amongst the appellant and her children; and
 - d. Plot No 172 (CR 2706) in Likoni,, which the appellant had subdivided into 1925/1 Ms and 1926/1 and thereafter given one portion to her son Paul Mbugua and the other to one Fatuma Abdalla Mwakanga.
5. She contended that the appellant colluded with the executor and omitted the above properties from distribution between the two families. Further, that they conspired to defraud the siblings of Monicah Wamaitha Kihara, who was by then deceased.
6. In opposition to the Application, the appellant stated that the executor listed all known assets of the deceased, including those whose title numbers he did not know; that the Kilifi land, which was at Kikambala, was among the properties listed and the bigger portion of the land was given to the respondent's mother, Monicah Wamaitha Kihara, while the other portion was transferred to the appellant, i.e. title No CR 5xx. She denied owning plot numbers 129 and 283, and stated that her title CR 5xxx was only on plot No 129, a subdivision of the original title while the executor distributed title No CR 13xxx to herself, among other properties.
7. Regarding Plot No 172-(CR 2xxx), she stated that no title documents were annexed to establish that she had subdivided it into 1925/1 and 1926/1 and given one portion to her son. Further, that plot No 172-(CR 2xxx) was never registered in the deceased's name nor did she know one Fatuma Abdalla Mwakanga. In addition, the deceased had built a bar on the property and after his demise, possibly the owner transferred the portion on which the bar stood to her son. In summary, she denied disinheriting anyone and maintained that the property was transferred to her according to the deceased's Will.
8. In the impugned judgment, the learned judge distilled three issues for determination, namely
 - (a) whether the disputed properties belonged to the deceased;
 - (b) whether the properties were omitted from the schedule of distribution of the estate; and,
 - (c) whether the distribution in any way disadvantaged the respondent and her late mother's house.

Resolving the above issues, the learned judge stated as follows:

- “7. Among the list of properties alleged to have belonged to the deceased and left out of the schedule for distribution were plot No 283/11 and plot No 129/IV/MN under title number CR 5xxx. The applicant stated that, all along, she knew that the land belonged to her mother and that, when her mother died, she went to a surveyor who pointed out the land to her, but that she found out that the land was in the name of the respondent, a fact that was confirmed by the search she conducted on 23rd August 2011. She further stated that according



to the entries on the title the property was transferred by the executor to the respondent on June 14, 1996 and this was after the death of the deceased and of her mother. She annexed to her Affidavit in support of the application a copy of the title for the Kikambala property and a certificate of postal search which confirmed the registered owner of the properties to be the respondent. The respondent testified that plot no 129/IV/MN was her land over which she had had title for over 20 years, and that she was assigned the property by the executor following the distribution of the estate of the deceased. She also stated that the land referred to as Kwa Muhindi was bigger than Kwa Ngombe and was assigned to the applicant's mother. It was her case that the beneficiaries together with the executor knew about the Kikambala property, that she did not know why the property was not included in the list of assets owned by the deceased, and that the exclusion was by mistake.

8. When the surveyor Ben Mwaura Karanja (DW2) testified, and produced a report dated May 15, 2017, he stated that plot No MN/3/283 neighbours plot No MN/IV/129 but that the former had never been owned by the deceased, or the respondent. His evidence was that plot No MN/IV/129 had been changing hands until 14th June 1996 when it became registered in the name of the respondent; that an excision survey to create the new Mombasa/Malindi road caused plot No MN/10/129 to be subdivided into MN/IV/129/1 (2.646 acres) which became the road reserve and MNB/IV/129/2 (15.85 acres) which became plot No MN/111/481 with reference to plan FR No 99/5 generating deed plan 82259. The section number changed from IV to III due to the change of road alignment since the road was the sectional boundary.
9. I have looked at the executor's affidavit dated September 18, 1995 (and which the respondent made reference to). There was no reference to plots Nos 129/IV/MN or MN/III/283. The respondent stated that Plot No 129/IV/MN was assigned to her by the executor during the distribution of the estate.

However, now that the executor makes no reference to it, how did he distribute it to her" Nonetheless, what is clear is that the plot belonged to the estate of the deceased, and that is why the respondent could plead that he is the one who allocated it to her. Since this plot was available for distribution, and considering the terms of the Will, the executor ought to have shared the property equally between the two houses.
10. There was an allegation that plot No LR No 533/298 in Molo Nakuru District had since been transferred to Joyce Wanjiku Kariuki. The respondent denied any knowledge of the property. The applicant did not produce any title documents to establish ownership of the property, either that it belonged to the deceased or that it had been transferred to Joyce Wanjiku Kariuki. I find that the allegation was not substantiated.
11. Regarding the allegation that CR 13xxx/2 had been subdivided into plots No 9370 to 9381 and divided amongst the respondent and her children, I note that the executor's affidavit confirmed that CR 13xxx/2 had been allocated to the respondent. The property cannot be re-distributed.



12. Lastly, on the allegation that the respondent had subdivided plot No 172 (CR 2xxx) in Likoni into 1925/1 Ms and 1926/1 and thereafter given one portion to her son Paul Mbugua and the other one to Fatuma Abdalla Mwakanga, the applicant stated that the properties had been transferred to other people, but indicated that she did not have the searches for the properties. The respondent stated that the deceased had leased the land and when he died the owner subdivided the land into many plots and sold them, and her son Paul Mbugua bought one of them. The burden was on the applicant to prove that plot No 172 (CR 2xxx) in Likoni belonged to the deceased. The burden was not discharged. I find that the property was not shown to be part of the estate of the deceased.
 13. In conclusion, I declare that plot No MN/IV/129/2 (which became plot No MN/111/481) measuring about 15.85 acres which is registered in the name of the respondent, and which belonged to the deceased, is so registered and held in trust in equal shares between her (the respondent) and the applicant's late mother Monica Kihara Wamaitha for their respective children. I order the registration to be cancelled so that there will be fresh registration in equal shares between the respondent and the administrator of the estate of Monica Wamaitha Kihara.
 14. This was a family dispute. Each side shall pay own costs.”
9. The appellant seeks to overturn the above verdict citing six grounds in her Memorandum of Appeal dated July 5, 2018, which are mainly narrative and may be safely condensed into three. In summation, the appellant's grounds are: (a) whether the learned judge erred in awarding the estate of Monicah Wamaitha half of plot number MN/IV/129/2; (b) whether the learned judge misinterpreted the Will; and (c) whether the learned judge failed to consider the evidence and submissions.
 10. The appellant's prays that the orders in respect of plot number MN/IV/129/2 measuring 15.85 acres be set aside, that this Court directs that the appellant's registration as the proprietor of the said property be left intact; that the respondent pays the costs of this appeal and costs in the court below; and, lastly, that this court grants any other relief it may find fit and just to grant.
 11. In his submissions, the appellant faulted the learned Judge for relying on an affidavit dated September 18, 1995, sworn by the executor, claiming it was not sworn in support of the application for confirmation of the grant. The appellant argued that, by the time the affidavit was sworn, the grant had already been confirmed and title number MN/IV/129/2 had not been distributed, consequently, the executor could not include it in the schedule of the properties to be distributed and that, therefore, it was a misdirection for the judge to conclude that there was no explanation as to how it was distributed to the appellant, and yet there was evidence that, by the time the said affidavit was sworn, the property was charged to a bank, and was not available for distribution. The appellant argued that the respondent never helped her to repay the said loan. Further, that she had possession of the land, which was transferred to her on June 14, 1996, and, therefore, her right to legitimate expectation as to the entitlement of the said land had accrued.
 12. The nub of the respondent's submissions is that the executor left some of the deceased's properties out and that, therefore, the distribution was not equal among the beneficiaries as the Will provided. Further, that some of the estate properties which were left out were transferred to the appellant. It was contended that, in the course of the distribution, the executor filed in court an Affidavit sworn



- on September 18, 1995, which was relied upon by both parties, and in which he disclosed that plot number MN/IV/128/2 belonging to the deceased was not disclosed, even though the executor knew the deceased had charged it to a bank. Further, that after the charge debt was paid, the executor transferred it to the appellant, which suggests collusion between the two.
13. The respondent cited section 76 of the *Law of Succession Act*, which provides the grounds upon which a grant may be revoked, including concealment of material facts, or where the grant has become inoperative or useless. She argued that the material presented before the court disclosed sufficient grounds for revocation and that, therefore, the trial court did not error as claimed.
 14. Responding to the argument that the learned judge erred in finding that there was no explanation as to why LR No MN/IV/129/2 (MN/111/283) was not referred to in the executor's Affidavit dated September 18, 1995, the respondent submitted that the key issue was whether the said property belonged to the deceased, and whether there was collusion between the executor and the appellant to omit the said property from the deceased's properties for distribution. She submitted that the executor knew the property at the time of the distribution because it was transferred to the deceased on May 9, 1975, and that the deceased charged it the same day.
 15. The respondent disagreed with the appellant's submission that the trial court misconstrued the deceased's will and added that plot MN/IV/129/2 ought to have been shared equally.
 16. Regarding the application filed by the respondent's brother, John Njoroge, seeking revocation of the grant after the demise of the executor, the appellant stated that the said application was dismissed for want of prosecution, unlike her application for revocation of the grant, which was allowed on merit.
 17. Lastly, regarding the appellant's argument that her right to legitimate expectation had accrued since the property had since been transferred to her and she was already in occupation, the respondent submitted that the said doctrine is inapplicable in the instant case and relied on *Justice Kalpana H. Rawal v Judicial Service Commission & 3 others* [2016] eKLR which underscored that for an expectation to be legitimate, therefore, it must be founded upon a promise or practice by a public authority that is expected to fulfil the expectation.
 18. We start by observing that the decision under challenge emanated from an application for revocation of the grant. The application was brought under section 76 of the *Law of Succession Act*, which stipulates specific grounds upon which a court may revoke a grant. However, a reading of the grounds cited in the memorandum of appeal and the appellant's submissions show that the appellant is not questioning whether any of the grounds provided under section 76 of the *Law of Succession Act* were proved. Conversely, the appellant prays that the finding in respect of plot number MN/IV/129/2 measuring 15.85 acres decreeing that the said land be shared equally among the two widows be set aside. She also prays that this Court directs that her registration as the proprietor of the said property be left intact; that the respondent pays the costs of this appeal and in the court below.
 19. It is manifestly clear that the appellant's grievance is that the above property was not available for distribution because it had been charged to a bank. We shall address this ground later. Firstly, because the ruling in question was pursuant to an application under section 76 of the *Law of Succession Act*, we shall first address our mind to the question whether any of the grounds under the said section was proved to merit revocation of the grant.
 20. Section 76 of the *Law of Succession Act* provides:

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by an interested party or of its own motion-



- a. that the proceedings to obtain the grant were defective in substance;
 - b. that the grant was obtained fraudulently by making of a false statement or by the concealment from the court of something material to the case;
 - c. that the grant was obtained by means of untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
 - d.
21. As was held by this Court in *Matheka and another v Matheka* [2005] 2 KLR 455, in an application under section 76, “there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by the making of a false statement or by concealment of something material to the case or that the grant was obtained by means of untrue allegation of facts essential in point of law or that the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the estate”.
 22. Our reading of section 76 is that the grounds upon which a grant may be revoked or annulled are statutory, and that it is incumbent upon any party making an application for revocation or annulment of a grant to demonstrate the existence of any, or some, or all of the foregoing grounds. In summary, the grounds stipulated in section 76 are: the propriety of the grant making process; mal-administration; or where the grant has become inoperative due to supervening circumstances.
 23. As was held by the Supreme Court of India in *Anil Bebari Ghosh v SMT Latika Bla Dassi & others* in [1955] AIR 566, the expression “defective in substance” means that the defect was of such a character as to substantially affect the regularity and correctness of the proceedings. The reason provided for failure to include the above property in the list of the deceased’s properties was that the subject property had been charged to a bank at the material time. Apparently, the appellant paid the loan and the executor transferred the property to her. A petitioner for grant of letters of administration is required to not only provide a full list of the deceased’s properties, but also enumerate the liabilities, if any. The existence of a loan, which is for all practical purposes a liability to the estate, was not disclosed as required in a petition for a grant of letters of administration. This omission renders the proceedings defective in substance. The appellant cannot surmount the requirement to disclose all the assets of the deceased and his liabilities. The explanation offered shows that the appellant and the executor were at all material times aware of the existence this property as comprising part of the deceased’s estate.
 24. A grant may be revoked on account of false statements and concealment of vital matters, or on grounds that the applicant deceived the court. (See this Court’s decision in *Samuel Wafula Wasike v Hudson Simiyu Wafula* CA No 161 of 1993 (Unreported). From the evidential material before us, we find that there was a deliberate non-disclosure of the existence of the said property. This apparent failure to disclose, and the subsequent transfer of the property to the appellant, could not have been by accident or inadvertent mistake. From the facts before us, it is clear that both the omission and the transfer were deliberate, intentional and well planned. Failure to disclose, or concealment of material facts, is a ground for revocation of a grant under section 76. This ground was proved. We therefore find no reason to fault the learned judge for revoking the grant on this score.
 25. We now turn to the appellant’s prayer that the trial court’s finding in respect of plot number MN/IV/129/2 requiring that it be shared equally between the two widows of the deceased be set aside, and that her registration as the proprietor of the said property be left intact. To begin with, there is no



dispute that the said property belonged to the deceased. At this point, we find it useful to reproduce an excerpt of the English translation of the deceased's Will appearing at page 023 of the Record of Appeal:

"I, James Kihara Njoroge declare that all my properties belong to me and my two wives, namely Cecilia Wangari and Monica Wamaitha, and I further declare that even where I had my property or properties registered in other persons names, that property so registered does not belong to the people so registered but still belongs to me and my aforesaid two wives as I have not given such properties to the people in whose names they are registered.

All my properties shall be shared equally between my said two wives each shall thereafter at her sole discretion distribute by (sic) amongst her children her share of my property.

All debts owed to me shall be paid in equal shares to my said two wives namely, Monica Wamaitha and Cecilia Wangari who shall likewise pay my creditors in a similar manner."

26. The essentials of testamentary capacity were laid down in the English decision by the Queen's Bench Division in *Banks v Goodfellow* [1870] LR 5 QB 549 as follows:

"...a testator shall understand the nature of the act and its effects, shall understand the extent of property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties-that no insane delusion shall influence his will in disposing property and bring about a disposal of it which if the mind had been sound, would not have been made."

27. The deceased's Will is not contested. The equal distribution as per the Will is not in contention. Our reading of the judgment leaves us with no doubt that the learned judge was alive to the terms of the Will. The learned judge, at paragraph 9 of the judgment, stated: "... nonetheless, what is clear is that the plot belonged to the estate of the deceased,... Since the plot was available for distribution, and considering the terms of the will, the executor ought to have shared the property equally between the two houses." We find no reason to suggest that the learned judge misdirected himself by so holding.
28. The appellant also invites this Court to find that the learned judge erred in not taking into account her submissions and her evidence. Granted, when evaluating or assessing evidence, it is imperative for a Court to evaluate all the evidence, and not to be selective in determining what evidence to consider. The conclusions reached must account for all the evidence. Some of the evidence may be found to be false. Some evidence maybe found to be unreliable. Nevertheless, none of it may simply be ignored.
29. The facts found to be proven and the reasons for the judgment of the trial court must appear in the judgment. If there was evidence led during the trial, but such evidence is not referred to in any way in the judgment, it is safe for a Court of Appeal to assume that such evidence was either disregarded or not properly weighed or even forgotten. However, the best indication that a court has applied its mind in the proper manner is to be found in its reasons for judgment, including its reasons for the acceptance and the rejection of the evidence.
30. Nonetheless, by requiring a trial court to consider and weigh all evidence does not mean that the judgment must also include a complete embodiment of all evidence led as if it comprises a transcript of the proceedings. All it means is that the summary of the evidence led must indeed entail a complete embodiment of all the material evidence led. This court must determine the submissions and the evidence alleged not to have been considered, as understood within the totality of the evidence, compare it to the factual findings made by the trial court, and then determine whether the trial court applied the law or applicable legal principles correctly to the facts in coming to its decision.



- 31. This means that if an Appellate Court is of the view that a particular fact is so material that it should have been dealt with in the judgment, but that such fact is completely absent from the judgment or merely referred to without being dealt with when it should have, this will amount to a misdirection on the part of the trial court. The appeal court must then consider whether the said misdirection, viewed either on its own or cumulatively together with any other misdirection's, is so material as to affect the judgment in the sense that it justifies interference by the Court of Appeal.
- 32. We have gone through the submissions and the evidence tendered before the trial court. We have also read the judgment, the evaluation of the evidence and submissions and the reasons for the decision. We generously reproduced an excerpt of the judgment earlier. We are satisfied that the learned judge considered all the relevant evidential material and submissions before him. We find no merit in the assertion that the trial Court did not consider the appellant's evidence and submissions, a contention that remains unsubstantiated so as to warrant our judicial intervention.
- 33. The appellant purported to invoke the doctrine of legitimate expectation, claiming that the property has since been transferred to her, and that she has been in possession. We respectively find and hold that the said doctrine has no relevance or application in the circumstances of this case. The attempt to seek refuge or solace in the said doctrine is, in our respectful view, misguided.
- 34. In view of our analysis and determination of the issues discussed herein above, the conclusion becomes irresistible that this appeal fails. The upshot is that the appellant's appeal against the judgment and decree of the High Court of Kenya at Nairobi (Muchelule, J.) (as he then was) delivered on May 30, 2015, is hereby dismissed. The appellant shall also pay the respondent the costs of this appeal and costs in the High Court. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF OCTOBER, 2023.

M. WARSAME

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

