



Mose v Kirwa (Civil Appeal 125 of 2018) [2022] KECA 730 (KLR) (27 May 2022) (Judgment)

Neutral citation: [2022] KECA 730 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPEAL 125 OF 2018
PO KIAGE, M NGUGI & F TUIYOTT, JJA
MAY 27, 2022

BETWEEN

MARY KWAMBOKA MOSE APPELLANT

AND

ASHA CHEBET KIRWA RESPONDENT

(Being an appeal from the ruling and order of the High Court of Kenya at Eldoret (H. Omondi, J.) dated 20th September, 2018 in SUCCESSION CAUSE NO. 192 OF 2015)

JUDGMENT

Judgment of Kiage,

1. Salem Kiprono Kirwa (deceased), husband to Asha Chebet Kirwa, the respondent, died on 23rd November, 2010. She successfully applied for letters of administration in her capacity as his widow and the grant was issued on 26th January, 2016.
2. Mary Kwamboka Mose, the appellant, objected to the issuance of the grant through a summons dated 11th February, 2016 brought under Section 76 of the *Law of Succession Act* (LSA) and Rule 44 of the Probate and Administration Rules. She prayed for the following orders in the main;
 - a. That in the interim a preservative order do issue restraining the petitioner/respondent and/or beneficiaries of the estate of the deceased from further alienating by way of sale, charge, transfer and/or lease that property known as Uasin Gishu/tapsagoi/267 subject of the estate and this application.
 - b. That the grant of letters of administration intestate issued to Asha Chebet Kirwa made on 20th January, 2016 be revoked and/or annulled.
 - c. That the court do order and or make a declaration that the applicant is entitled to 4 acres of that property known as Uasin Gishu/tapsagoi/267.



- d. That the estate be redistributed taking into account the interest of the applicant as herein above.
3. The application was based on four grounds on the face of it and was supported by an affidavit sworn by the appellant. She averred that she purchased 4 acres from 9.4 Ha of a parcel of land known as Uasin Gishu/tapsagoi/267 (suit property) from the deceased at a consideration of Kshs. 640,000. The sale was effected through a hand written sale agreement dated 27th June, 2006. The appellant paid for the suit property in instalments of Kshs. 140,000 on 18th January, 2007, Kshs. 80,000 on 2nd May, 2007 and Kshs. 20,000 on 2nd June, 2007.
4. The appellant subsequently moved into the suit property and developed it extensively. She asserted that the respondent was aware of the purchase and her subsequent occupation. On 4th February, 2016, the appellant, through her advocates, discovered that the respondent had taken out administration letters without disclosing to the court her existence as a bona fide purchaser for value. According to the appellant, the respondent, through the petition, had initiated a process to dispossess her of her rightful share of the suit property. She avowed that the failure of the respondent to disclose this crucial information was sufficient cause to revoke the grant pursuant to Section 76 of the [LSA](#).
5. The respondent filed a replying affidavit and acknowledged that the appellant indeed bought 4 acres of the suit property from the deceased. However, the appellant failed to obtain consent from the Land Control Board as envisioned in Section 6 of the [Land Control Act](#) (LCA). The respondent averred that on several occasions, she had offered to refund the appellant the said Kshs. 640,000 paid to the deceased. The total consideration translated to Kshs. 155,000 per acre but the appellant declined the offer and instead requested for Kshs. 1,000,000 per acre. The respondent concluded that the application ought to be dismissed as it was frivolous.
6. In a further affidavit, the appellant contended that the deceased by granting her possession of part of the suit property, created a constructive trust in her favour. She also noted the mischief in the petition for the administration letters where other purchasers were listed as beneficiaries while she was discriminated against.
7. The respondent's rebuttal mostly rehashed similar issues as raised in her replying affidavit, save for the fact that she claimed that the Land Control Board actually declined to issue the consent because the respondent's sons objected to it. Therefore, the only recourse for the appellant was to accept the refund.
8. H. Omondi, J delivered a ruling on 20th September, 2018 and dismissed the application. She held the view that the appellant ought to have filed suit at the Environment and Land Court to determine the issue of the failure by the deceased to transfer the property to the respondent, and that this was not sufficient cause to invalidate the grant issued by the court.
9. Aggrieved by the ruling, the appellant filed the instant appeal raising 11 grounds which, abridged, are that, the learned judge erred by;
 - a. Failing to appreciate the jurisdiction of the court, the doctrine of constructive trust and the provisions of the [LSA](#).
 - b. Failing to appreciate that the appellant as the administrator of the deceased's estate has no locus standi before the Environment and Land Court.
 - c. Failing to appreciate that a dependant has no power to invoke the provision of the LCA.
 - d. Failing to consider that the respondent's admission in obstructing the appellant from obtaining consent from the Land Control Board.



10. During the virtual hearing of the appeal, learned Counsel Mr. Makori held brief for Mr. Oburu who is on record for the appellant, while learned Counsel Ms. Lagat appeared for the respondent. Both parties had filed written submissions.
11. Mr. Makori submitted that pursuant to the provision of Section 76 of the [LSA](#) the trial court was empowered to canvass any issues brought before it by an interested party. Since the respondent admitted to being aware of the purchase and still chose to exclude the appellant from the list of beneficiaries, that ought to be sufficient cause to nullify the grant issued by the court. Counsel opined that the equitable remedy of constructive trust and estoppel were available to the appellant. He contended that since equity has been put on a higher ranking as one of the national values in Article 10(2)(b) of the Constitution, the court was bound to consider the equitable remedies available to the appellant in making its decision. On this he relied on the holding of this Court in [Willy Kimutai Kitilit -vs- Michael Kibet \[2018\] eKLR](#) where he averred that the LCA was found to be archaic.
12. Counsel implored that pursuant to clause 7 of the Sixth Schedule of the [Constitution](#) the LCA was subject to alterations and modifications in order to bring it into conformity with the provisions of [the Constitution](#). He concluded by urging this Court to allow this appeal and stop the respondent from her illegal actions and trying to use the provisions of the LCA to keep the appellant from her lawfully acquired property.
13. Ms. Lagat argued that the main issue is the appellant's failure to obtain the consent of the Land Control Board within the prerequisite time as prescribed by the LCA. She pointed out that while the agreement was dated 26th June, 2006, the deceased passed away on 23rd November, 2010 and by that time, the consent had not yet been obtained. Counsel contended that despite the appellant's Counsel's efforts to paint the LCA as archaic, it is still the law and is binding upon all. She urged that this appeal be dismissed with costs.
14. I have evaluated the record of the appeal and the submissions by Counsel and distilled the issues for determination as whether; the learned Judge erred by finding that the court lacked jurisdiction to determine the application and whether the learned Judge ought to have applied the equitable remedy of constructive trust and estoppel in favour of the appellant.
15. I am aware of our duty as a first appellate court as was expressed in [Robin Angus Paul & 2 Others -vs- Miriam Hemed Kale \[2019\] eKLR](#);

“As stated earlier, on first appeal this Court is enjoined to re-evaluate, re-assess and re-analyze the entire evidence adduced before the trial court and then determine whether the conclusions reached by the learned Judge are to stand or not and give reasons either way.”
16. While dismissing the appellant's application, the learned Judge held as follows;

“From the foregoing I hold the view that the objector/applicant ought to file suit against the administrator of the estate before the Environment and Land Court to determine the issues raised here. The failure to transfer the land falls squarely within the purview of the Environment and land court, and does not in any way invalidate the grant issued herein.”
17. The learned Judge was clear that the court lacked jurisdiction to determine some of the issues raised in the application. According to her, they belonged within the purview of the Environment and Land Court. On the other hand, learned Counsel for the appellant is of the view that by virtue of **Section 76** of the **LSA**, any party with an issue concerning the property of a deceased person is at liberty to lodge a matter before the family court and it has jurisdiction to determine such matter. In a nutshell,



he argued that the jurisdiction of the family court covers any matter that touches on the estate of a deceased as brought by any party.

18. It is trite that jurisdiction is everything and without it a court has no power to move one more step and must down its tools in respect of the matter. See *Owners Of The Motor Vessel "Lillian S" -vs- Caltex Oil (kenya) Ltd* [1989] eKLR. This position was reiterated by the Supreme Court in *Samuel Kamau Macharia & Another -vs- Kenya Commercial Bank Limited & 2 Others* [2012] eKLR as follows;

"A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings."

19. The question then arises as to whether the construct of the LSA gave the learned Judge jurisdiction to hear the appellant's application, a bona fide purchaser who sought to be declared the rightful owner of part of the suit property and as such for the respondent to be compelled to transfer part of it to her.
20. It is then important to look into the provision of Section 2 of the LSA which deals with its application. It provides;

2. **Appication of Act**

Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after, the commencement of this Act and to the administration of estates of those persons.

21. From the foregoing, it is my conviction that the applicability of the LSA is limited to cases concerning the intestate or testamentary succession of the estate of a deceased, in other words, inheritance issues. It therefore goes without say that anything outside of this does not fall within the purview of the LSA. I am persuaded by the dicta of W. Musyoka in *In Re Estate Of Alice Mumbua Mutua (deceased)* [2017] eKLR where he articulated the jurisdiction of the LSA, as follows;

- 26 It may be argued that the subject land is estate property and by dint of that fact the probate court would have jurisdiction thereon. The position is not as simple. The *Law of Succession Act*, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.

- 27 Disputes of course do arise in the process. The provisions of the *Law of Succession Act* and the *Probate and Administration Rules* are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who are neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the *Law of Succession Act* and the *Probate and Administration*



Rules. Such have to be resolved through the structures created by the Civil Procedure Act and Rules, which have elaborate rules on suits by and against executors and administrators.” (Emphasis added)

22. From the foregoing decisions, it is clear to me that for a matter to fall within the purview of the **LSA** it must; concern itself with the determination of the assets of a deceased, the survivors of the deceased and persons with beneficial interest; involve itself with the distribution of the assets of a deceased among the survivors and any persons with beneficial interest. Those people do not include creditors, purchasers, or such other third parties.
23. This position was affirmed by this Court while dealing with a deceased’s shares in a company in Pacific Frontier Seas Limited -vs- Kyengo & Another (Civil Appeal 32 of 2018) [2022] KECA 396 (KLR) as follows;

“In our view the above judgments of this Court and the decisions of the High Court in Re Estate of Alice Mumbua Mutua (supra), Patrick Kibathi & 2 Others v. Charles Kigwe Gathecha (supra) and in Re Estates of Gitere Kahura and Mary Nyokabi (supra) represent the correct law. Where there is no dispute on the shares held by the deceased in a company, the succession court has the jurisdiction to decide whether they are available for distribution and how they should be distributed. When there is intermeddling and interference with properties of the deceased, including shares, the court has jurisdiction to stop the intermeddling and to preserve the estate. However, when the dispute veers off to contestations on who are the company’s shareholders, directors, the extent and number of shares, the properties of the company, the filing of annual returns, occupation of the company’s properties, liabilities of the company, etc., those are, with respect, issues for the company to be resolved under the legal framework provided by the Companies Act.” (Emphasis added)

24. In a case similar to the above where the deceased’s shares in a company were in issue in Rosemary B. Koinange (suing As Legal Representative Of The Late Dr. Wilfred Koinange And Also In Her Own Personal Capacity) & 5 Others -vs- Isabella Wanjiku Karanja & 2 Others [2017] eKLR, this Court held;

“54. There can be no argument that the shares of a deceased in a limited liability company are assets which the family has power to distribute in a Succession Cause. The argument is rather that when there is a dispute on ownership of the shares, only a ‘Companies Court’ has jurisdiction to adjudicate.” (Emphasis added)

25. It is clear to me that not every issue concerning the estate of a deceased falls under the ambit of the LSA. Issues arising that can be dealt with under a different law cannot therefore be determined by the family court. From the record, the appellant sought for the revocation of the grant, an injunctive order restraining the respondent and her agents from interfering with the suit property, a declaration that she was the rightful owner of 4 acres out of the suit property and for the redistribution of the estate to take into account her interest. It is clear that the appellant in Pacific Frontiers (Supra) brought some contestations, to borrow the Court’s phraseology, that veered off the purview of the LSA.
26. The determination of whether or not the appellant is entitled to the ownership of the 4 acres of the suit property and all the issues that arose as a result concerning constructive trust, estoppel and the lack of consent from the Land Control Board can only be heard and determined by the Environment and Land Court whose jurisdiction as provided for in Section 13(2) of the Environment and Land Court Act includes hearing of disputes relating to title of land, private contract relating to land and any enforceable interests in land which no doubt cover the issues raised in the application. Therefore, I



would hold that the learned Judge did not error in concluding that she lacked jurisdiction to entertain the application.

29. I note that; one ground of appeal states that the learned Judge erred by failing to appreciate that the administrator of a deceased's estate has no locus standi before the Environment and Land Court. With respect nothing could be further from the truth as being the legal representative of the estate of the deceased; the respondent can sue and be sued. The appellant has an avenue to properly have her issues heard and determined and the family court is not the proper forum.

30. In the result, this appeal lacks merit and I would dismiss it with costs.

As Mumbi Ngugi and Tuiyott, JJA agree, it is so ordered.

DATED and delivered at Kisumu this 27th day of May, 2022.

P. O. KIAGE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

Judgment of Mumbi Ngugi, JA

1. I have read in draft the judgment of Kiage, JA and I am in full agreement with the findings and conclusions reached and have nothing useful to add.

Dated and Delivered at Kisumu this 27th day of May, 2022.

MUMBI NGUGI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

Judgment of Tuiyott, JA

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

Dated and delivered at Kisumu this 27th day of May, 2022.

F. TUIYOTT

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JUDGE OF APPEAL

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

Signed



DEPUTY REGISTRAR

