



**Mategwa v Muhanda (Civil Appeal 140 of 2017)
[2022] KECA 1029 (KLR) (23 September 2022) (Judgment)**

Neutral citation: [2022] KECA 1029 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 140 OF 2017
M NGUGI, PO KIAGE & K M'INOTI, JJA
SEPTEMBER 23, 2022**

BETWEEN

ELIAS MOARD MATEGWA APPELLANT

AND

JOHN MUREMI MUHANDA RESPONDENT

*(Being an appeal against the ruling of the High Court of Kenya at Kakamega
(R. N. Sitati J.) dated 15th September, 2016 in Succession Cause No. 150 of 2010)*

JUDGMENT

JUDGMENT OF MUMBI NGUGI

1. In its decision dated 15th September 2016, the High Court in Kakamega (Sitati J.) found that the appellant was not a liability in respect of the estate of Paul Muhanda Agonya (deceased), who passed away on September 1, 2008. Letters of administration intestate had been issued to the respondent, a son of the deceased, on July 13, 2012. The appellant claimed to be entitled to a portion of land parcel number Isukha/Kambiri/1631 registered in the name of the deceased, which he had purchased from the deceased. The evidence of the appellant was that he had purchased the said parcel, which the deceased had initially sold to another person in 1983 but that purchaser was unable to complete the transaction so the appellant refunded the amount paid to his widow.
2. The trial court, however, found that plot No. 137 measuring 32x19 metres which the appellant claimed to have bought from the deceased after refunding the purchase price to the widow of the previous purchaser did not form part of the estate of the deceased, which comprised land parcel number Isukha/Kambiri/1631. It further found that there was no evidence that the alleged transaction between the appellant and the deceased had received Land Control Board consent.
3. Finally, the trial court found that since the appellant's claim related to title and use of land, the trial court lacked jurisdiction to hear and determine the claim. If the appellant was interested in pursuing



- a claim for a share of the land registered in the name of the deceased, he ought to have filed his claim before the Environment and Land Court which had the jurisdiction to deal with claims pertaining to title to land. Following its ruling on September 15, 2016, the trial court indicated that the appellant was at liberty to appeal its decision.
4. The appellant was aggrieved by the decision of the trial court and he filed the present appeal. In his rather prolix memorandum of appeal dated November 28, 2017
 5. Additionally, he complains that the trial court had erred in: overlooking his objection and cross-petition and issuing grant of letters of administration upon consideration of the affidavit of protest which only opposed the confirmation of grant; referring to a matter which was never adduced in evidence by citing plot number 137 which was not the subject of the sale agreement between the appellant and the deceased; allowing a petition filed in contravention of the provisions of the Probate and Administration Rules; citing authorities which were not relevant to the case before the court; requiring Land Control Board consent when the certificate of official search of the property had a caution by the petitioner barely a month (after) sale of the portion of the subject property.
 6. The appellant further contends that the trial court erred in: allowing the petitioner to give oral evidence without tendering any documents or supporting affidavits despite the appellant's objection; failing to appreciate that the appellant was a creditor of the deceased's estate and having been left out of the list of persons interested in the estate by the petitioner, was entitled to have the grant issued to the petitioner revoked for concealment of material facts; in finding that it had no jurisdiction to hear his claim because it is a claim to land when it did have jurisdiction as his claim was as a creditor to the deceased's estate.
 7. As a first appellate court, we are required to re-evaluate the evidence and reach our own conclusion-see *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123.
 8. The matter before the trial court related to the estate of Paul Muhanda Agonya who died intestate on September 1, 2008. Grant of letters of administration intestate were issued to John Muremi Muhanda, the respondent, on July 5, 2012. Upon application for confirmation of grant by the respondent the appellant filed an 'objection/ protest' dated 24th May, 2011 in which he alleged that he purchased part of LR. Isukha/Kambiri/1631 from the deceased but the respondent secretly filed the successions proceedings and omitted him as a beneficiary of the estate by virtue of being a purchaser. He annexed to his affidavit of protest a sale agreement which was allegedly signed by the deceased and witnessed by the deceased's wife and daughter.
 9. It was the appellant's case that before he purchased the said parcel from the deceased, the deceased had sold the same parcel to another purchaser in 1983. The said purchaser had failed to pay the full purchase price. Consequently, after the appellant purchased the said parcel from the deceased, he paid to the deceased the full purchase price from which the deceased refunded Kshs. 4,000 to the widow of the 1st purchaser. The appellant relied on a handwritten document signed by the widow of one Andrew Lihumi acknowledging refund of Kshs 4,000 paid to the deceased in respect of 'Plot No. 137 Ivakale Market'.
 10. According to the appellant, the deceased died prior to the transfer of the said parcel of land to him. The Area Chief had excluded his name as a beneficiary of the deceased's estate, and the respondent also failed to include all the beneficiaries of the estate of the deceased when applying for letters of administration intestate.
 11. The appellant's protest was heard by way of oral evidence. The appellant, designated as the plaintiff before the trial court, appeared in person while the respondent, designated as the defendant, was represented by learned Counsel, Mr. Samba, Advocate.



12. In his evidence, the appellant testified that he had purchased the portion of the deceased's parcel of land at Kshs. 70,000, which he had done after consulting with the area District Officer sometime in 2008. The deceased had shown him the parcel of land in the presence of the Area Assistant Chief. The Area Assistant Chief had noted that the said parcel had been sold to someone else, but since the said purchaser did not express any interest in the land parcel, his widow was refunded the purchase price of Kshs.4,000 in accordance with the sale agreement dated May 20, 2008. The appellant further testified that he was shown the land which he fenced off. He later learnt that the respondent was ploughing the land, and so he made a report to the area District Officer who summoned the respondent. He further stated that he registered the sale agreement in Nairobi. He was not, however, taken by the deceased to the Land Control Board for consent.
13. Four other witnesses testified in support of the appellant's case. Thomas Shiperu (PW2) testified that he witnessed the sale between the deceased and the appellant on May 20, 2008 and that he saw Kshs.70,000 being exchanged. Makori Atsava Amanabi (PW3) testified that he knew the respondent as the deceased's son and that the deceased had four daughters. Josephat Mutabo Lusiri (PW4), the Area Assistant Chief, confirmed having written three letters at different times regarding the beneficiaries of the estate of the deceased on the instructions of the Area Chief. Since he knew that the appellant had bought land from the deceased, he included him as a beneficiary of the estate.
14. Dominic Lando (PW5) testified that he too had purchased land from the deceased. He had thereafter found that his land had been ploughed by the respondent and his fence removed. He had gone to the District Officer (D.O) following which the respondent had been arrested and locked up in the cells at the D. O's office. He was released the following day after undertaking to restore PW5's boundary.
15. In his testimony before the trial court, the respondent stated that he had applied for and was issued with the grant of letters of administration for the deceased's estate. He denied that the appellant had bought a portion of the deceased's land, Isukha/Kambiri/1631. He further stated that the deceased did not own a parcel of land known as plot number 137. He confirmed that he had been arrested but alleged that he was forced to sign an undertaking dated February 23, 2010. He lives on the land parcel that the appellant had allegedly bought. He was given the green light to apply for the grant of letters of administration intestate by his family, though he did not produce a consent to that effect.
16. At the hearing of the appeal before us, the appellant appeared in person and relied on his written submissions. In the written submissions dated March 15, 2022, the appellant faults the trial court for failing to analyze the factual and legal issues canvassed before her. He submits that the trial court failed to consider his cross petition and observed that the appellant had bought plot number 137 from the deceased which was not part of the estate. He alleges that the trial court determined the matter 'with bias' as she isolated him during the hearing as a result of which the case proceeded without his participation.
17. The respondent's Counsel, Mr. Tanui, did not file written submissions or make oral submissions on his behalf. He informed the Court that his law firm was never served with the record of appeal and so he was not able to even submit orally in response to the appeal. It is to be noted that this matter had come up for hearing on February 7, 2022 when Mr. Samba, from the same law firm as Mr. Tanui, had indicated that the firm's Kakamega office was handling the matter. The issue of service of the record on the respondent's affidavit did not arise at all.
18. Having considered the record of appeal, the judgment of the trial court and the appellant's written submissions, I believe the sole issue for determination is whether the trial court erred in concluding that the appellant was not a liability of the estate of the deceased and that it had no jurisdiction to determine the appellant's claim against the estate of the deceased.



19. The matter out of which this appeal arose was a succession cause pertaining to the estate of Paul Muhanda Agonya. The respondent applied for letters of administration intestate and sought confirmation of the grant, and the appellant lodged his protest against the confirmation. His claim was that he had purchased from the deceased a portion of land from title number Isukha/Kambiri/1631 measuring 32x19 metres. His claim, therefore, was as a purchaser of land.
20. The appellant impugns the decision of the trial court for, among other reasons, finding that his claim was to a parcel of land known as plot number 137. I note that in the refund document dated May 22, 2008, the widow of a prior purchaser acknowledges refund of a sum of Kshs 4,000 in respect of a parcel of land known as plot number 137. Given that this is a document that the appellant relies on to support his claim that he purchased a parcel of land from the deceased, the trial court cannot be faulted for reaching the conclusion that the property that he purportedly purchased, plot number 137, did not form part of the estate of the deceased, and that the appellant had not proved his claim to a portion of land parcel number Isukha/Kambiri/1631 on a balance of probabilities.
21. However, regardless of whether the appellant's claim was to a portion of plot number 137 or the property registered in the name of the deceased, Isukha/Kambiri/1631, could the trial court have properly considered the appellant as a liability of the estate, and determined his claim to the land in the succession dispute before it? Or was the trial court correct in finding that it did not have jurisdiction to consider the issue, such jurisdiction having been vested by law in the Environment and Land Court.
22. A consideration of the provisions of Article 162 of the Constitution and section 13 of the Environment and Land Court Act, No. 19 of 2011 leads to the conclusion that the trial court cannot be faulted for reaching this conclusion. It is the Environment and Land Court, not a court dealing with the succession to the estate of a deceased person, that has the jurisdiction to consider and determine issues of title to land.
23. It is my finding therefore that the present appeal is without merit, and I would dismiss it. However, as the appellant did not file any submissions or participate actively in the appeal save for the appearance by Mr. Tanui at the hearing of the appeal, I would make no order as to costs.

DATED AND DELIVERED AT KISUMU THIS 23RD DAY OF SEPTEMBER, 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 KIAGE, JA

1. I have had the benefit of reading in draft the judgment of Mumbi Ngugi, J.A. I entirely agree with it and have nothing useful to add.
2. As M'Inoti, J.A is in agreement, the appeal shall be disposed of as proposed by Mumbi Ngugi, J.A.

DATED AND DELIVERED AT KISUMU THIS 23RD DAY OF SEPTEMBER, 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 M'INOTI, JA

1. I have read the Judgment of my sister, Mumbi Ngugi, JA in draft and I fully agree with the reasoning and conclusion. I would only add that the appellant's claim, being substantially a claim for a parcel of land, should have been filed against the estate of the deceased in the Environment and Land Court. His claim was singularly unsuited for adjudication in the Probate and Administration Court.
2. As this Court stated in *Pacific Frontiers Seas Ltd v Jane Mutulu Kyengo & Another* [2022] KECA 396 KLR, the Probate and Administration court is not required to hear and determine each and every dispute that arises in the course of administration and distribution of an estate. Some disputes must be resolved through the dedicated institutions or specific mechanisms provided by the law for that purpose. Indeed, rule 41(3) of the *Probate and Administration Rules* contemplated situations where it is not possible or convenient to resolve some disputes in a succession dispute and the court has to await resolution of the dispute through the appropriate mechanism.
3. I agree that the appeal has no merit and should be dismissed with no costs on costs.

DATED AND DELIVERED AT KISUMU THIS 23RD DAY OF SEPTEMBER, 2022

K. M'INOTI

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

