



**Kinuthia v Kinuthia & another (Civil Appeal 75 of 2016)
[2021] KECA 72 (KLR) (8 October 2021) (Judgment)**

Neutral citation: [2021] KECA 72 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 75 OF 2016
RN NAMBUYE, W KARANJA & PO KIAGE, JJA
OCTOBER 8, 2021**

BETWEEN

MUTHONI KINUTHIA APPELLANT

AND

SAMUEL MUNIU KINUTHIA 1ST RESPONDENT

VIRGINIA WANJIKU KINUTHIA 2ND RESPONDENT

(Being an appeal arising from the Ruling of the High Court of Kenya, (Hon. H.P.G Waweru, J.) dated 21st April, 2016 in Murang'a Succession Cause No. 273 of 2013)

JUDGMENT

- 1 This is an appeal arising from the ruling of the High Court of Kenya at Murang'a, Family Division (H.P.G Waweru, J.) dated 21st April, 2016.
- 2 The background to the appeal albeit in a summary form, is that the rival parties herein separately filed Nyeri High Court Succession Cause Nos. 546 of 2011 and 590 of 2011 seeking a grant of representation intestate to the estate of Kinuthia Munyu who died on 10th December, 2009 at Mariira Ngethu, domiciled in Kenya. The above two causes were consolidated by consent, with Succession Cause No. 546 of 2011 being chosen as the pilot file, resulting in the respective parties herein being appointed therein as joint administrators of the estate of the deceased.
- 3 It is the appellant's uncontroverted position that letters of administration were extracted and submitted to court for endorsement but the court inadvertently failed to endorse the said letters. The court assuming that these had accordingly been endorsed issued directions for filing of the requisite pleadings and liberty to either party to move the Court for confirmation of the grant after complying with the directions on filing of pleadings. It was pursuant to the above directions that the 2nd



respondent filed her pleadings on which she anchored Summons for confirmation of grant dated 20th June, 2012. Beneficiaries of the estate of the deceased were enumerated as follows:

1st House:

Muthoni Kinuthia – Widow
Lydia Wanjiru Mirera – Married daughter
Samuel Muniu Kinuthia – Son
Naomi Njeri Kinuthia – deceased daughter with children

2ndHouse:

Virginia Wanjiru Kinuthia – Widow
David Muniu Kinuthia – Son
Joyce Wanjiku Kinuthia – deceased daughter with children
Susan Wangari Kinuthia – Married daughter
Hannah Wanjiku Kinuthia – daughter
Mary Njeri – daughter
Grace Njambi – daughter
Nancy Wangui Kinuthia – daughter
Rachael Waitherero Kinuthia – daughter
Caro Waruguru Kinuthia – daughter

10. Margaret Waithira Kinuthia – daughter

A List of assets falling for distribution by the Court to the beneficiaries were given as follows:

Lands:

Loc. 2/Mariira/1028 measuring 3.5acres.
Loc.2/Mariira/1156 measuring 2.5acres
Loc.2/Mariira/1576 measuring 1.968H (about 4.8acres.

Shares:

Barclays Bank shares
B.A.T shares
Kenya Commercial Bank shares
Murata Sacco Shares
Ikumbi Tea Factory Shares
K.T.D.A. Shares

Bank Accounts: Family Bank Account Number 0077xxxxxxx



The mode of distribution proposed by the 2nd respondent was as follows:

“5 THAT the deceased herein died intestate and his estate is thus governed by the *Law of Succession Act*, Cap 160 Laws of Kenya (an in particular section 40 thereof)

6. THAT the estate of the deceased ought to be shared out equally as follows:

The first house comprising of four units (4/16) do get $\frac{1}{4}$ (quarter share) and the second house comprising of twelve units (12/16) do get $\frac{3}{4}$ (three quarters) of the three parcels of land thus:

A. Land parcel number Loc. 2/Mariira/1028 measuring 3.5acres to be shared:

- i. Muthoni Kinuthia to get 0.877acres to hold in trust for herself and her family.
- ii. Virginia Wanjiku Kinuthia to get 2.613acres to hold in trust for herself and her family.

B. Land parcel number Loc.2/Mariira/1156 measuring 2.5acres be shared out as follows:

- i. Muthoni Kinuthia to get 0.625acres to hold in trust for herself and her family.
- ii. Virginia Wanjiku to get 1.875acres to hold in trust for herself and her family.

C. Land parcel number Loc.2/Mariira/1576 measuring 4.8acres be shared out as follows:

- i. Muthoni Kinuthia to get 1.2acres to hold in trust for herself and her family.
- ii. Virginia Wanjiku Kinuthia to get 3.6acres to hold in trust for herself and her family.

D. The shares as listed at paragraph 4B and the bank account at 4C be shared out equally as between the two widows Muthoni Kinuthia and Virginia Wanjiku Kinuthia.

10 The above mode is most fair and is in line with both the Constitution and the *Law of Succession Act*. While that proposed by the appellant was as follows:



11. That the estate should thus be shared as follows:

- a. Land parcel No. Loc. 2/Mariira/1576 be registered in the names of Muthoni Kinuthia for herself and her children.
- b. Land parcel No. Loc. 2/Mariira/1028 be registered in the names of Virginia Wanjiku Kinuthia for herself and her children.
- c. Land parcel No. Loc. 2/Mariira/1156 be registered in the names of Muthoni Kinuthia for herself and her children.
- d. Land parcel No. Loc.7/Ichagaki/2023 be registered in the names of Muthoni Kinuthia.
- e. Shares at Ikumbi Tea Factory, Barclays Bank, K.T.D.A and Family Bank account be registered in the name of Muthoni Kinuthia.
- f. Shares at K.C.B, Murata Sacco and B.A.T. be registered in the names of Virginia Wanjiku Kinuthia.

12. The learned trial Judge (J. Ngaah, J.) rendered himself inter alia as follows:

“Taking all the factors I have attempted to analyze hereinabove into consideration I would distribute the estate of the late Kinuthia Munyu as follows:-

1. Land parcel number Loc.2/Marira/1576 measuring 4.8 acres shall be shared out amongst Muthoni Kinuthia and her children in the following shares.
 - a. Muthoni Kinuthia.....1.8 acres
 - b. Lydia Wanjiru Mirara.....1.5 acres
 - c. Samuel Kinuthia Muniu.....1.5 acres
2. Land parcel number Loc.2/Marira/1028 which measures 3.5 acres shall be registered jointly in the name of Virginia Wanjiku Kinuthia and her children.
3. Land parcel number Loc.7/Ichagaki/2023 measuring approximately 0.3 acres shall be registered in the name of Muthoni Kinuthia.
4. Land parcel number Loc. 2/Marira/1156 measuring approximately 2.5 acres shall be divided equally between the Muthoni Kinuthia and Virginia Wanjiku Kinuthia.
5. The deceased’s shares in Ikumbi Tea Factory, Barclays Bank and Kenya Tea Development Authority shall be registered in the name of Muthoni Kinuthia.
6. The deceased’s shares in Kenya Commercial Bank, Murata Sacco and British American Tobacco shall be registered in the name of Virginia Wanjiku Kinuthia.



7. Any credit balance in Family Bank Account No. 0077xxxxxxx shall be shared equally between Muthoni Kinuthia and Virginia Wanjiku Kinuthia.

The grant of letters of administration intestate made to Muthoni Kinuthia and Samuel Muniu Kinuthia on 28th February, 2012 is thus confirmed in the foregoing terms. The costs of the summons dated 20th June, 2012 shall be in the cause. That is the order of the court.”

13 Neither party appealed against the above judgment.

14 On 25th February, 2016, appellant filed an uncontested Summons (General Form) under Rule 73 of Cap 160 Laws of Kenya and all other enabling provisions of the law dated 16th December, 2015 seeking orders as follows:

1. That the Court be pleased to issue letters of administration to the petitioners.
2. Costs of the application in the cause.

15 Upon consideration of the uncontested summons in light of the record, the learned Judge rendered himself as follows:

“Court: I have read the summons dated 16/12/2015 and supporting documents. I have also perused the court record, and it is apparent that a grant of letters of administration was never issued pursuant to the order of 28/02/2012 (no doubt a mistake of the Court, and the petitioner’s failure to follow up matters). That notwithstanding, a summons for confirmation of grant was subsequently filed, heard and allowed (1) and a certificate of confirmation of granted issued on 12/11/2014. This was another mistake, and, prima facie, the proceedings to confirm the grant and the certificate of confirmation of grant were a nullity in law. Let this matter be mentioned on 29/06/2016 for learned counsel for the petitioner/administrator to address the court.”

16 The appellant was aggrieved and is now before this Court on a first appeal raising seven (7) grounds of appeal. In summary, the appellant faults the learned Judge for failing to: give the appellant an opportunity to argue the uncontested summons, appreciate that the record was explicit that letters of administration were not only granted, but were also extracted and filed in court for endorsement but were inadvertently not endorsed by the court; appreciate that declining the order sought was tantamount to condemning the appellant for mistakes of the court and which mistakes in her opinion could have even been rectified by the court suo motu.

17 The appeal was canvassed through written submissions filed by advocates for respective parties herein in their absence and without oral highlighting.

18 Supporting the appeal, the appellant submits that her simple request to the court was for the court to sign the typed letters of administration contained in the court file which the Court had inadvertently failed to sign. In her opinion, this was a clerical error which could have even been corrected by the court suo motu without either party filing an application to that effect. It was therefore erroneous for the learned Judge to nullify the entire proceedings and order a retrial which had not been prayed for contrary to prerequisites set out in Article 50 of the Constitution, Rule 73 of the *Law of Succession Act* and section 3A (1) of the *Appellate Jurisdiction Act* .



19 In rebuttal, the respondents contend that Rule 25(1) of the Probate and Administration Rules is mandatory as the word “SHALL” is used which means that for any grant to be valid, it has to be SIGNED and SEALED which was not the case in the instant appeal. They therefore agree with the position taken by the learned Judge that the purported proceedings for confirmation of grant were null and void and of no effect as they were not undertaken in accordance with the law.

20 This is a first appeal arising from the learned trial Judge’s exercise of discretion in declining to grant appellant’s request for the court to endorse letters of administration duly granted by the court, extracted, placed in the court record but inadvertently not endorsed by the court before summons for confirmation of granted were taken out, filed, heard and determined. Our mandate in resolving the rival positions herein and which we fully adopt is as has been numerously restated both by this Court and its predecessor on the issue. Ringera, J.A (he retired as J.A) in *Githiaka vs. Nduriri* [2004] 1 KLR 67 was explicit that judicial discretion is unfettered with the only caveat being that it should be exercised without whim, caprice or sympathy but with good reason with the sole purpose of doing justice to the parties before the Court. In *Mbogo & Another vs. Shab* [1968] E.A 93; at page 94, paragraph H - 1 Sir Clement De Lestang V.-P: had this to say:

“I think it is well settled that this Court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

See also Sir Charles Newbold, P., in the same decision at page 96 paragraph G - H who expressed himself as follows:

“For myself, I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.”

21 In reiteration of the above principle, the Court in the *United India Insurance Company Limited vs. East African Underwriters Kenya Ltd* [1985] KLR 898

was explicit that interference with exercise of judicial discretion only arises where there is clear demonstration of misdirection in law, misapprehension of the facts, taking into consideration factors the Court ought not to have taken into consideration or failure to take into consideration factors that ought to have been taken into consideration or looking at the decision generally. The only plausible conclusion reached is that the decision albeit a discretionary one is plainly wrong.

22 We have considered the record in light of the above mandate. The issue that falls for our consideration is basically one namely, whether:

1) The learned Judge exercised his discretion judicially when he declined to grant relief sought by appellant in her application.

23 Our appreciation of the uncontroverted background to the appeal already highlighted above and which we fully adopt is that a joint grant of representation to the estate of the deceased was issued to



the respective parties herein. A copy was extracted and forwarded to the court for endorsement but was never endorsed. The aforementioned procedural lapse notwithstanding, the 2nd respondent applied for confirmation of grant pursuant to directions given by the court to either party to move the court for confirmation of the grant after complying with directions on filing of pleadings.

- 24 The 2nd respondent gave her mode of distribution which was contested by the appellant. It is the above rival positions that the trial judge was confronted with resulting in a valid judgment delivered by the trial court on 6th October, 2014. As we have already observed above, it is apparent from the record that neither party appealed against the said judgment. The appellant's uncontroverted position is that it was in the process of execution of that resulting valid judgment that she encountered problems when she was asked to produce both the Letters of Administration and the confirmed grant to facilitate the transfer of properties adjudged in her favour by the valid judgment. That is when it transpired to her that although a copy of the joint grant was on the record, the same had not been endorsed by the trial court hence the application that gave rise to the impugned order which sought to regularize that procedural lapse.
- 25 It is not disputed that parties herein were represented by advocates. In *Owino Ger vs. Marmanet Forest Co-Operative Credit Society Ltd* [1987] eKLR, among numerous others, the Court variously declined to visit wrongs of advocates against clients where like in the instant appeal there was sufficient demonstration that noncompliance with any prerequisites provided for in the *Law of Succession Act* Rules was due to the advocate's fault. This is the party who drafted the rectified joint Letters of Administration and therefore the proper party that ought to have made a follow up to ensure that the same had been endorsed by the court before presenting an application for confirmation of grant.
- 26 Likewise, the court was under obligation in law to ensure that there was a duly endorsed grant on record before proceeding to hear and determine the application for confirmation of grant.
- 27 In light of the above uncontroverted position, it is our finding that in both instances the appellant was not to blame. It would therefore be highly punitive in our view to penalize the appellant for wrongs committed by advocates for the respective parties herein on the one hand and the Court on the other hand.
- 28 Turning to the court acting *suo motu* to nullify the entire proceedings. It is our view that, in nullifying the proceedings, the learned Judge exceeded his mandate as prayed for in the uncontroverted application that he was confronted with. This was contrary to laid down principles of law with regard to pleadings. See the case of *Odd Jobs vs. Mubia* [1970] E.A 476 in which the predecessor of this Court held inter alia that:
- “a court may base its decision on an unpleaded issue, if it appears from the course followed at the trial that the issue has been left to the court for decision.”
- 29 In the result, we are satisfied that the learned Judge exercised his discretion injudiciously when he arrived at the conclusion resulting in the impugned order which we therefore find unsustainable. We therefore make orders as follows:
1. The appeal is allowed in its entirety.
 2. The ruling of the trial court dated 21st April, 2016 and the attendant order dated 13th October, 2016 be and are hereby set aside.
 3. The application dated 16th December, 2015 and filed on 28th February, 2016 be and is hereby restored “ante”.



4. The application restored “ante” pursuant to item 3 above is directed to be placed before a Judge other than H. P. G. Waweru, J. for expeditious hearing and disposal on priority basis.
5. Being a family dispute, will be no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF OCTOBER, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a

True copy of the original

Signed

DEPUTY REGISTRAR

