



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Thenge Kang'ethe (Deceased) (Succession Appeal
13 of 2019) [2025] KEHC 4102 (KLR) (26 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 4102 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
SUCCESSION APPEAL 13 OF 2019**

CW GITHUA, J

MARCH 26, 2025

**IN THE MATTER OF THE ESTATE OF THENGE KANG'ETHE
(DECEASED)**

BETWEEN

KEZIAH WANJIKU THENGE 1ST APPELLANT

JOSEPH NGURE MBURU 2ND APPELLANT

PETER KANGETHE MBURU 3RD APPELLANT

AND

JULIUS NJOROGE KANG'ETHE 1ST RESPONDENT

ESTHER NYAMBURA NJOROGE 2ND RESPONDENT

JUDGMENT

1. This appeal challenges the decision of the trial court regarding distribution of one of the assets belonging to the Estate of the late Thenge Kangethe namely, land known as LR No. LOC 5/ Mariaini/143 (hereinafter the suit land).
2. The brief background to this appeal is that after the demise of the deceased on 14th July 2013, the 1st respondent who was his step brother petitioned for grant of letters of administration to his Estate without the knowledge of the appellants who were the deceased's wife and sons respectively. A grant was issued to the 1st respondent on 10th June 2015 but the same was challenged by the appellants in a summons for revocation of grant dated 17th October 2016.
3. The court record shows that after hearing the summons for revocation of grant, the trial court in its ruling dated 15th June 2017 revoked the grant and issued a new grant to the 1st appellant on 7th February 2018. The 1st appellant thereafter applied for confirmation of that grant vide a summons for



confirmation of grant dated 18th July 2018 in which she identified all assets belonging to the deceased's Estate including the suit land and made proposals for their distribution.

4. With regard to the suit land, the 1st appellant averred that the deceased had bought about two acres of the suit land and held a small portion of it in trust for respondents and proposed that the land be distributed as follows:

Keziah Wanjiku Thenge – 2.1 Acres

Julius Njoroge Kang'ethe – 0.1 Acres.

Esther Nyambura Njoroge - 0.1 Acres.

5. The respondents opposed the mode of distribution proposed in respect of the suit land through a joint affidavit of protest sworn on 26th September 2018 by the 1st respondent on his own behalf and on behalf of the 2nd respondent. In the affidavit, the 1st respondent deposed that the suit land was purchased by their father, the late Kang'ethe Thenge from one Makumi s/o Gathumbi in 1985 but he died before the same was transferred to him; that the land was registered in the name of the deceased being the deceased's eldest son to hold it in trust for himself and members of his family.

6. The 1st respondent further deposed that as their late father had two wives who were the deceased's mother and his mother, the land was subdivided into two equal portions and each household was tilling their half portion of the land; that the deceased's family (the appellants) have been utilizing half portion of the land while together with the 2nd respondent they had been utilizing the other half. He proposed that the suit land be distributed as follows:

Keziah Wanjiku Thenge – 1.2 Acres

Julius Njoroge Kang'ethe – 0.6 Acres.

Esther Nyambura Njoroge - 0.6 Acres.

7. The contested summons was heard by way of viva voce evidence. After hearing the parties, the learned trial magistrate in a ruling delivered on 14th November 2019 upheld the protest and ordered that the suit land be distributed as proposed by the respondents in their affidavit of protest.

8. The appellants were aggrieved by the trial court's decision hence this appeal. In their memorandum of appeal dated 11th December 2019, the appellants advanced seven grounds of appeal in which they principally complained that the learned trial magistrate erred in law and fact by: failing to find that the deceased had purchased two acres of the suit land and only held 0.3 acres thereof in trust for himself and the respondents; determining that the suit land should be shared equally between the 1st appellant and the respondents; disregarding the appellants evidence; imposing unentitled beneficiaries to the free Estate of the deceased and adjudicating on issues of trust without requisite jurisdiction.

9. On the above grounds, the appellants urged the court to set aside the orders made by the trial court and substitute them with an order distributing the suit land as proposed in the 1st appellant's affidavit sworn in support of her summons for confirmation of grant.

10. The appeal was prosecuted by way of written submissions which both parties duly filed and which I have carefully considered together with the authorities cited by both parties.

Having duly read the proceedings before the trial court and the ruling subject of this appeal, I find that two key issues emerge for my determination which are;

- i. Whether the appeal is incompetent as alleged by the respondents.



- ii. If the answer to issue No (1) is in the negative, whether the appeal is merited.
11. In their written submissions, the respondents raised a preliminary point challenging the validity of the appeal. They claimed that the appeal was incompetent and ought to be struck out for the appellant's failure to provide a certified copy of the decree emanating from the trial courts judgement as required by Order 42 Rule 2 of the Civil Procedure Rules (CPC).
12. In my brief response to the above submission, I will be guided by the Court of Appeal's decision in the case of *Josephine Wambua Wanjiku V Margaret Wanjiru Kamau & Another* (2013) eKLR in which the court held that the *Law of Succession Act* was a self-sufficient Act of Parliament with its own substantive law and rules of procedure. The court emphasized that the Civil Procedure Rules were not applicable to succession disputes save in a few identified instances where some specific rules were imported into the *Law of Succession Act* through Rule 63 (1) of the Probate and Administration Rules (P&A Rules). Rule 63 of the P & A Rules provides as follows:
- “Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Order 5, rule 2 to 34 and Orders 11, 16, 19, 26, 40, 45 and 50 (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.”
13. It is clear from the above provision that Order 42 of the Civil Procedure Rules is not one of the rules incorporated into the *Law of Succession Act* and is not therefore applicable to appeals emanating from decisions made by the lower court in succession disputes. I have gone through the *Law of Succession Act* and the P & A Rules and I have not come across any provision that requires an appellant to provide a certified copy of the decree resulting from the contested judgement before an appeal was heard by this court.
14. In the premises, I find that the appellants failure to provide a certified copy of the decree emanating from the impugned Judgement did not render the appeal defective or incompetent. I am thus satisfied that the appeal is competent and is properly before this court.
15. Turning now to the merits of the appeal, the appellants argued in their submissions that the learned trial magistrate erred in finding
- that the deceased was registered in the suit land as a trustee for himself and members of his family; that as a Succession Court, the trial court lacked jurisdiction to adjudicate on issues of customary trust which ought to have been litigated in the Environment and Land Court. For this proposition, the appellants relied on the authority of *Monica Wanjiru Njiiri & 4 Others V Wanjiru Igamba & Another* [2016] eKLR which expounds on the mandate of a probate court and urged me to find merit in the appeal and allow it as prayed.
15. The respondents on the other hand contended that the 1st appellant in her summons for confirmation of grant conceded that the suit land was not owned by the deceased absolutely but that the deceased held a portion of it in trust for his family; that the trial court was thus not invited to determine whether or not the suit land was held in trust but rather, the share that would be distributed to the 1st appellant and the respondents. It was the respondent's case that the trial court was right in holding that the suit land be distributed as proposed by the respondents in their affidavit of protest. They implored me to dismiss the appeal for lack of merit.



16. After my own independent analysis of the evidence presented before the trial court, I find that both the 1st appellant and the respondents were claiming ownership of the suit land. The 1st appellant was claiming that the deceased's estate owned two acres of the said land while the respondents were claiming beneficial ownership thereof asserting the existence of a customary trust in their favour.
17. From the foregoing, there cannot be any doubt that what was before the trial court was a dispute concerning ownership of the suit land. The trial court was called upon to determine whether the deceased's Estate owned 2 acres of the land registered in the name of the deceased or whether the deceased held the entire suit land in trust for himself and members of his family who included the respondents.
18. It is trite that the primary duty of a succession court was to identify the free property of a deceased person and to distribute it to his rightful beneficiaries. Thus, where issues are raised regarding title to land or challenging ownership of the deceased to land on the basis of existence of a customary trust, such issues ought to be resolved in a separate suit or proceedings before the Environment and Land Court which was the court which was constitutionally and statutorily clothed with jurisdiction to adjudicate on all disputes related to ownership of registered land.
19. The above position was re-iterated in the case of re Estate of Mbai Wainaina (Deceased) [2015] eKLR where the court stated as follows:

“...The mandate of the probate court under the Law of Succession Act is limited. It does not extend to determine issues of ownership of property and declarations of trusts. It is not a matter of the probate court being incompetent to deal with such issues but rather that the provisions of the Law of Succession Act and the relevant subsidiary legislation do not provide a convenient mechanism for determination of such issues. A party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land Court.”
20. The respondents in their submissions conceded that the mandate of the probate court does not extend to determining issues of ownership of property in an Estate for purposes of distribution. To this end, they cited the case of re Estate of Julius Ndubi Javan (Deceased) [2018] eKLR in which the court expressed itself as follows;

“...The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified. Thus, where issues on the ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed. And that is the very reason why rule 41(3) of the Probate and Administration Rules was enacted so that claims which prima facie valid should be determined before confirmation.”
21. Given the foregoing, it is clear that the trial court did not have jurisdiction to entertain and determine the parties claim that the deceased either owned some portion of the suit land or held the entire property in trust for the respondents.
22. The learned trial magistrate ought to have distributed the other properties in the Estate whose ownership was not contested and kept distribution of the suit land in abeyance until the respondents' entitlement to it was determined in the appropriate forum.



This is what is required by Rule 41 (3) of the P & A Rules which states as follows;

“Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71(2) of the Act, proceed to confirm the grant.”

23. In this case, the learned trial magistrate did not comply with the provisions of Rule 41 (3) of the P & A Rules and proceeded to distribute land whose ownership was contested. This was an error of law on the learned trial magistrate’s part.
24. For the foregoing reasons, I find merit in the appellant’s appeal and it is hereby allowed. Consequently, the trial court’s decision in respect of distribution of the suit land is hereby set aside. The resultant certificate of confirmation of grant is hereby cancelled. A fresh one to issue with respect to distribution of the other assets in the deceased’s Estate except the suit land.
24. Given my finding above, the distribution of the suit land shall await determination by the Environment and Land Court regarding whether the entire property was subject to customary trust or which part thereof belonged to the deceased’s Estate. The respondents or the 1st appellant shall institute proceedings before the Environment and Land Court for determination of the issue isolated above. Once the Environment and Land Court makes its determination, the parties shall move the trial court for appropriate orders.
25. In order to ensure that the interests of justice are not defeated, in the exercise of the court’s discretion and power under Section 47 of the *Law of Succession Act* and Rule 73 of the P & A Rules, I hereby order that the appellants and the respondents shall continue to be in possession of the half portion of the suit land they are currently utilizing pending determination of their ownership dispute by the Environment and Land Court.
26. This being a family matter, I will not make any order as to costs. Each party shall bear its own costs of the appeal.

It is ordered.

DATED, SIGNED AND DELIVERED AT MURANGA THIS 26TH MARCH 2025.

HON. C. W. GITHUA

JUDGE

In the Presence of :

Mr. Tumu for the appellants

Ms. Sigei for the respondents

Ms. Susan Waiganjo, Court Assistant

