



REPUBLIC OF KENYA



KENYA LAW
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**Andati v Makwaka (Succession Appeal E003 of 2023)
[2025] KEHC 5558 (KLR) (29 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5558 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION APPEAL E003 OF 2023
SC CHIRCHIR, J
APRIL 29, 2025**

BETWEEN

EMELDA MUHONJA ANDATI APPELLANT

AND

ESAU MBOY MAKWAKA RESPONDENT

*(Being an Appeal against the Ruling of J.R. Ndururi - PM delivered on
26th January 2023 in Kakamega CMC Succession Cause No 435 of 2019)*

JUDGMENT

1. The proceedings herein relate to the estate of Joseph Shitochi, alias, Joseph Shitoshi Ng'ayo (Deceased). Upon his demise; the Appellant petitioned for Letters of Administration of Intestate, which were confirmed on 30/09/2010. On 01/03/2022, the Respondents filed Summons for revocation of Grant. The trial courts heard the said summons and at the end, refrained from revoking the grant but instead recalled the certificate of confirmation that had been issued and directed the Appellant to file an a further Affidavit, presumably of distribution, which reflects a share of the asset(s) allocated to the respondent. It was the trial court's finding that the Respondent's interest in the deceased's estate was a liability to the estate and ought to have been provided for it.
2. Aggrieved by the aforesaid finding, the Appellant filed the present Appeal and has based it on the following grounds:
 1. The Hon. Magistrate erred in both fact and law when he arrogated himself jurisdiction to determine a claim based on a contract for sale of land which is outside the jurisdiction of a Succession Court.
 2. The Honourable Magistrate erred in law and fact when he granted the Respondent Orders that had not been sought.



3. The Honourable Magistrate erred in law and fact when he allowed the Respondent's claim over part of the estate land yet such claim had not been determined by a court of competent jurisdiction.
 4. The Honourable Magistrate erred in law and fact when he concluded that the Respondent's claim was a debt over the estate yet the claim was not a debt as per Section 83(d) of the [Law of Succession Act](#).
 5. The Honourable Magistrate erred in law and fact when he enforced an agreement for sale of part of the estate land yet the validity of the agreements had not been determined in evidence.
 6. The Honourable Magistrate erred in law and fact when he gave orders that were outside the mandate of the Succession Court as defined in Section 2 of the [Law of Succession Act](#).
 7. The Honourable Magistrate erred in law and fact when he gave orders that effectively enforced a void contract that was contrary to the provisions of Section 6(1)(a)(b) of the [Land Control Board](#).
 8. The Honourable Magistrate erred in law and fact when he legitimized the Respondent's occupation of the estate land which was an offence under Section 6 and 22 of the [Land Control Board Act](#) and Section 45 of the [Law of Succession Act](#).
 9. The Honourable Magistrate erred in law and fact when he ignored the principles laid down in [Willy Kimutai Katiti v Michael Kibet](#) CA 51/2015 ELD 2018 to the effect that a void contract is not enforceable and cannot entitle a person to the remedy of specific performance.
 10. The Honourable Magistrate erred in law and fact when he distributed part of the land to the Respondent who was not a defendant within the meaning of Section 29 of the [Law of Succession Act](#).
3. The Appeal proceeded by way of written submissions.

Appellant's Submissions

4. It is the Appellant's Submissions that whereas the trial court based its findings on some agreements dated 3/3/1994, 5/8/1995 and 30/8/2003, the validity of the said agreements had not been proved through a competent court process. It is further submitted that the trial court had no jurisdiction to determine the Respondent's claim, as that falls within the purview of the Environment and Land Court. That therefore the trial magistrate arrogated himself jurisdiction which he does not have. In this regard, the Appellant has relied on the decision of [Re Estate of Alice Mumbua Mutua \(Deceased\)](#) 2017 eKLR.
5. The Appellant further submits that the contracts relied on were null and void; that it failed to meet the mandatory requirements of Section 32 the [Law of Contracts Act](#) and it was erroneous for the Magistrate to validate them and make them the basis for redistribution.
6. It is further submitted that the transaction was also invalid to the extent that the subject land said being an agricultural land, the Land Control Board ought to have given consent to the transaction, which it did not.
7. It is the Appellant's final submission that failure to disclose creditors of the estate is not ground for revoking a Grant, and that there is no such duty placed on the petitioners.



Respondent submissions

8. It is the Respondent's submission that the fact that the Respondent is a creditor to the estate is not denied; that the Respondent has been in occupation of the land for the past 40 years.
9. On jurisdiction, it is submitted on the basis of Rule 73 of the *Probate and Administration Rules* and Section 47 of the *Law of Succession Act* the trial court had jurisdiction to make the orders that it did.

Analysis and determination

10. An appeal from the Magistrate's court is by way of re-trial; Consequently it is the mandate of this court to review the evidence as presented during trial, do its own evaluation of the said evidence and arrive at its own determination. (Ref. *Selle and Ano v Associated Motor board Ltd* [1968] EA 123)
11. I have considered the memorandum of Appeal, the lower court record and the parties rival submissions and I have identified the following issues for determination:
 - a. Whether the trial court had jurisdiction to determine the Respondent's interest in the estate.
 - b). What are the appropriate orders that this court should make.

The question of the trial court's jurisdiction

12. The Appellant has argued that the determination of the Respondent's interest in the estate falls within the exclusive jurisdiction of the Environment and Land Court; that the question of whether there was a valid sale agreement between the deceased and the Respondent is a question relating to land in respect of which the trial court had no jurisdiction as aforesaid.
13. Section 150 of the *Land Act* provides as follows:

“The Environment and Land court established in the *Environment and Land Court Act* (CAP. 8D) ,and the subordinate courts as empowered by any written law, shall have jurisdiction to hear and determine disputes, actions and proceedings concerning land under this *Act*”.

A similar provision is contained in Section 101 of the *Land Registration Act*.

14. Also , Section 9 of the *Magistrate Act* confers the Magistrate's court jurisdiction to adjudicate land disputes, subject pecuniary jurisdiction. The Section states as follows:

“A magistrate's court shall:—

- a. In the exercise of the jurisdiction conferred upon it by Section 26 of the *Environment and Land Court Act* (Cap.8D) and subject to the pecuniary limits under Section 7(1) hear and determine claims relating to :

- (iv) Public, private and community land and contracts, choses in action or other instruments granting any enforceable interest in land.

15. Thus contrary to the Appellant's submissions, the Magistrate's court does have jurisdiction to adjudicate on matters land subject to magistrate's respective pecuniary jurisdiction.
16. The imperative question however, is whether the Magistrate's court sitting as a probate court can, at the same time, adjudicate on a dispute involving the Administrator and any creditor to the estate.



Should the court do so bearing in mind that any appeals arising from such a dispute would the raise the question of to which Appellate should an Appeal if proffered should hear? That is to say whether the Appeal would then go to the high court or Environment and Land court?

17. In my view whereas the Magistrate’s Court does have jurisdiction to adjudicate disputes relating to land or contracts relating to land, my view is that it should be held independent of succession proceedings. I find the decision of Justice Musyoka *In Re Estate of Alice Mumbua Mutua (Deceased)* 2017 cited by the Appellant persuasive in this regard. The Judge stated,

“Clearly, disputes as between the estate and third parties need not be determined within the succession cause. The legal infrastructure in place provides for resolution elsewhere and upon a determination being made by a civil court, the decree or order is then made available to the probate court, for implementation”.

The presumption is that such disputes arise before distribution of the estate or at the Confirmation of Grant.

18. However, the *Law of succession Act* requires the Administrator to make full disclosures of such third party claims at the time of filing the Petition or at the time of the confirmation of grant. Even though the Applicant stated that she does not know what the Respondent’s claim was all about, paragraphs 7,8 and 11 indicate that indeed she was aware of the Respondent’s claims. In paragraph 7, she states,

“...On the contrary, the Applicant forcefully trespassed on the suit land after the demise of my father and chased us out of the suit land.”

In paragraph 8, she states,

“That in response to paragraph 5, I state that the occupation of the Applicant on the part of the suit land is illegal and has been contested.”

In paragraph 11, she states that,

“illegal occupation of the estate land by the Applicant has been successfully challenged in court and the Applicant’s apprehension for eviction as directed by the court cannot be a basis for revocation of the Grant.”

19. For whatever the Respondent’s claim on the deceased’s estate is worth, the Appellant was under an obligation to disclose it, before the court could determine to confirm the grant. The fact that the Appellant is talking of an eviction shows that she was aware of the Respondent’s occupation of the land.

20. Consequently the fact that there was a third party in occupation , whose rights or occupation is contested was a material fact, which ought to have been disclosed. This would then have given the court to direct , if necessary that these rights be determined first on an appropriate forum. In *Maina v Mwangi and another* [2022] KEHC 14263 (KLR). The judge held:

“It is my considered view that a Petitioner for Grant of Letters of Administration should disclose all the relevant information relating to the estate of a deceased’s person where such information is in the knowledge of a petitioner and he/ she hides the information from the court, the court has power to revoke the grant under Section 76 of the *Law of Succession Act...*” The disclosure of any third party claims is to enable the probate court to determine



whether there are in this case contestation touching on title to land so as to refer the matter for determination by the Environment and Land Court.”

21. Thus whereas I agree with the Appellant that the trial court sitting as a probate court ought not to have made a determination on the Respondent’s rights against the estate, failure to disclose those rights is a ground for revocation in terms of section 76 of the *Law of succession Act*.
22. Consequently, the judgement of the trial court dated 26th January 2023 is hereby set aside and substituted with the following orders:
 - a. The Grant of Letters of Administration issued on 12th February 2020 id hereby revoked and the Certificate of Grant issued on 30/9/2020 is hereby set aside. The Deceased heirs are at liberty to agree on new representations to the estate , and present the names to the court.
 - b. Pursuant to the provision of Rule 73 of the *Probate and Administration Rules*, I order that:
 - (i) An order that inhibition is hereby issued against title no. Kakamega/Shivakala/1902, pending any further order of the court.
 - (ii) The Appellant/Petitioner, her Servants or Agents is hereby restrained from evicting the Respondent from land parcel no. Kakamega/Shivakala/1902, pending any further order from a court.

DATED, SIGNED AND DELIVERED VIRTUALLY, AT ISIOLO, THIS 29TH DAY OF APRIL 2025.

S.CHIRCHIR

JUDGE.

In the presence of:

Godwin Luyundi -Court Assistant

Ms. Kadenyi for the Appellant

Ms. Andia for the Respondent.

