



**Gatimu & another v Rwamba (Probate & Administration Appeal
E004 of 2023) [2025] KEHC 4925 (KLR) (25 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4925 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
PROBATE & ADMINISTRATION APPEAL E004 OF 2023**

MA ODERO, JA

APRIL 25, 2025

BETWEEN

JANE WANJIRA GATIMU 1ST APPELLANT

WILSON MWANGI MURAGURI 2ND APPELLANT

AND

MUTHONI RWAMBA RESPONDENT

JUDGMENT

1. Before this Court for determination is the Memorandum of Appeal dated 14th February 2023 by which the Appellants Jane Wanjira Gatimu and Wilson Mwangi Muraguri seek the following orders:-

“(a) That the judgment dated 19th day of January 2023, be set aside and the court do proceed with the confirmation of the Estate.

(b) That the costs of the Appeal be awarded to the Appellant.”

2. The Respondent Muthoni Rwamba opposed the appeal. The matter was canvassed by way of written submissions. The Appellants filed the written submissions dated 4th March 2025 whilst the Respondent relied upon her written submissions dated 5th March 2025.

Background.

3. This Appeal arises from Succession Cause No. 128 of 2019 filed at the Mukurweini Magistrates Court. The succession cause related to the estate of the late Mutahi Njururialias Mutahi S/O Njururi (hereinafter ‘the Deceased’). The Deceased disappeared from his home without any trace in the year 1994. He was presumed dead following a court order issued on 30th October 2013 by Hon. Justice Ombwayo in Nyeri Miscellaneous Application Number 119 of 2012.



4. According to the chief's letter dated 18th August 2014, the Deceased was survived by the following persons:-
 - (1) Rebecca Wanjiru Muraguri - Sister
 - (2) Jane Wanjira Gatimu - Sister-in-law
5. The only asset comprising the estate of the Deceased was the parcel of land known as Lower Muhito/ Mutundu/65 measuring approximately 23.0 acres (hereinafter the 'Suit land'.)
6. Following the order of presumption of death letters of Administration Intestate were on 23rd June 2015 issued to Jane Wanjira Gatimu and Wilson Mwangi Muraguri (the Appellants herein).
7. Thereafter the Appellants filed Summons for Confirmation of Grant dated 24th November 2016 in which they gave proposals on how the deceased's parcel of land ought to be distributed.
8. At this point the Protestor Muthoni Rwamba (the Respondent herein) filed a protest dated 14th December 2016, arguing that herself and her late husband RWAMBA MUGURE are entitled to a share of the suit land. That the Deceased went missing before their share of the land was excised and transferred. That the Protestor and her late husband have been utilising the suit land since the year 1971 even during the period when the Deceased was still present.
9. The Protestor therefore objects her exclusion as one of the beneficiaries to the suit land.
10. The protest was heard interparties by the lower court and vide a Ruling delivered on 19th January 2023 Hon. D.N. Bosibori, Senior Resident Magistrate made the following orders:-
 - “(i) The Affidavit of Protest is upheld to the extent that it raises issues that this succession court lacks jurisdiction to handle.
 - (ii) The Protestor shall institute a separate suit before the MELC within thirty (30) days from delivery of this Ruling and a mention date for compliance shall be fixed during delivery of this Ruling.
 - (iii) The confirmation proceedings are herein stayed awaiting the outcome of the MELC matter.
 - (iv) Costs to abide the decision of the MELC.
 - (v) Any aggrieved party may apply or exercise right to appeal.”
11. Being aggrieved by this Ruling the Appellants file the instant Memorandum of Appeal which was premised upon the following grounds:-
 - “1. That the learned judge grossly erred in fact and law in making a finding that the affidavit of protest raises issues that the court lacked jurisdiction when it was not the issue before court and the issue of jurisdiction had not been raised in the affidavit of protest.
 2. That the Learned Magistrate misdirected himself in law and fact in finding that it had no jurisdiction to determine the dispute before court.
 3. That the Learned Magistrate erred in law and fact in not taking into account the weight and relevance of the evidence submitted by the appellants.



4. That the Learned Magistrate erred in law and fact in not taking into account technical procedural issues rather than considering the substances of the case.
5. That the Learned Magistrate erred in law and fact in failing to consider the merit of the suit and the submissions tendered by the appellants.”

Analysis And Determination

12. I have carefully considered this memorandum of appeal, the record of Appeal filed on 17th October 2024 as well as the written submissions filed by both parties.
13. This is a first appeal. The duty of the first appellate court is to re-evaluate the evidence which was adduced in the subordinate court both on points of law and fact and come up with its own findings and conclusions [see *Peters v Sunday Post Limited* [1958] E.A 424]
14. In *Selle and Another v Associated Motor Boat Company Ltd & Others* [1968] 1 E.A 123 it was stated as follows:-

“.....this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind [the fact] that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears that he has clearly failed on some point to take into account particular circumstances or probabilities materially to estimate the evidence.”
15. Likewise in *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR, the court of Appeal stated thus;-

“An appeal to this court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”
16. Therefore the appropriate standard of review in cases of appeal can be summarized in the following principles:-
 - (1) On first appeal the court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions.
 - (2) In reconsidering and re-evaluating the evidence the first appeal court must bear in mind and give due allowance for the fact that the trial court had the advantage of seeing and hearing the witnesses.
 - (3) It is not open to the first appellate court to review the findings of a trial court simply on the basis that it would have reached a different conclusion had it been hearing the matter for the first time.
17. In this appeal the only matter for consideration is whether the dismissal of the Protest by the trial court was merited.
18. The dispute revolves around the parcel of land known as LR Number Lower Muhito/Mutundu/65 which property was said to belong to the Deceased person. A certificate of official search dated 11th



February 2015 indicated that the suit land was on 7th September 1959 registered in the name of Mutahi s/o Njururi who is the Deceased herein. One Rwamba Murage the husband of the Respondent placed a caution on the said Title on 18th July 2012 followed by a Restriction against any dealings with the suit land on 21st May 2014.

19. The Respondent alleges that the Deceased was her husband's brother and that he held the suit land 'in trust' for himself and the said Rwamba Murage.
20. The Appellants took issue with the fact that the learned trial magistrate pronounced herself on the question of 'Jurisdiction' when that issue had not been raised in their protest. Jurisdiction is the cornerstone of any judicial proceeding. It is not necessary that the question of jurisdiction, or the lack thereof be raised by the parties. The court may acting 'suo moto' address its mind to the question of whether or not it has the jurisdiction to entertain a particular matter.
21. In the celebrated case of Owners Of Motr Vessel 'lilians' -v Caltex Oil (Kenya) Ltd[1989] eKR Nyarangi JA famously stated as follows:-

“Jurisdiction is everything without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
22. In George Kamau Ruria & another v Michael Waweru M' wandia [2021] eKLR it was stated as follows:-

“Despite the parties having not raised the issue as to the jurisdiction of the trial court at the hearing of the protest and further having not raised the same in the instant appeal, it is trite that jurisdiction is everything and without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. (See Owners of the Motor vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR). Further, the issue on jurisdiction can be raised by the parties or suo moto by the court.....” [Own emphasis]
23. Given the centrality and importance of the issue of jurisdiction I find that the issue of jurisdiction I find that the learned trial magistrate was quite right to address her mind to that issue – indeed it would have been remiss not to mention a waste of judicial time for the court to proceed with a matter over which it lacked requisite jurisdiction. I therefore dismiss this ground of the Appeal.
24. The trial court was sitting on a Probate Court having the duty to oversee the distribution on the estate of the Deceased to the genuine beneficiaries. Although the beneficiaries to the estate have been determined the question of whether or not the suit land forms part of the estate of the Deceased is not clear.
25. As pointed out by the learned trial magistrate the dispute went before the Land Dispute tribunal but the decision reached in that forum was never adopted by the court as required by Section 7 of the Land Dispute Tribunal Act.
26. Its manifest that the real dispute here in whether the suit property belonged to the Deceased or whether the Respondent could validly claim ownership of the same on the basis of a Trust. Matters relating to the ownership use and occupation of land have now under Article 162 of *the Constitution* of Kenya 2010 been mandated to be determined by a specialized court being Environment and Land Court



(‘ELC’). Section 13 of the *Environment and Land Court Act* provides for the jurisdiction of that court as follows:-

“Jurisdiction of the Court

- (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
- (2) In exercise of its jurisdiction under Article 162(2) (b) of *the Constitution*, the Court shall have power to hear and determine disputes-
 - (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (b) relating to compulsory acquisition of land;
 - (c) relating to land administration and management;
 - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - (e) any other dispute relating to environment and land. [Rev. 2012] No. 19 of 2011 Environment and Land Court 9 [Issue 1]

27. Therefore, the correct and proper forum before which the Objector ought to ventilate his claim to the suit property is the ELC. The Environment and Land Court is the only court exclusively mandated by law to determine the question of ‘ownership’ of the suit property.
28. In Re Estate Of Stone Kathubi Muinde(Deceased) [2016] eKLR Hon. Justice William Musyoka held that:-

“Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit properly brought before a civil court in accordance with the provisions of the *Civil Procedure Act* and the Civil Procedure Rules. This could mean filing suit at the magistrates’ courts, or at the Civil or Commercial Divisions of the High Court, or at the environment and Land Court. If a decree is obtained in such suit in favour of the claimant then such decree should be presented to the probate court in the succession cause so that that court can give effect to it.” (own emphasis)

29. In Re Estate Of Peter Igamba Njoroge 2016 eKLR a case on all fours with the present case Hon. Justice A. K. Ndungu stated as follows:-

“The mandate of the probate court is limited. A distinction ought to be made between a claim against the Estate of a deceased and a claim on inheritance in respect of the estate of the deceased. In our instant suit the objectors are not claiming any interest as dependants or direct beneficiaries of the deceased. Their claim is that the title to the parcels of land is held in trust for them. Indeed this is a claim for a proprietary right.”

As held in HC Succession Cause No. 864 IF 1996 [2015] eKLR even if there was material establishing that there was such a trust I doubt that the resolution of this issue would be a matter for the probate court. The mandate of the probate court under the *law of succession Act* is limited. It does not extend to determining issues of ownership of property



and declaration of trust. It is not a matter for the probate court being incompetent to deal with such issues but rather 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.

Consequently and for the reasons above stated I must find and hold that this court has no jurisdiction resolve the proprietary interest on land based on the alleged trust.

“In this case therefore the only path legally open to the applicants is to institute proceedings to articulate their claim/rights in the right forum which is the Environment and Land Court.” [Own emphasis]

30. The Respondent herein claims a proprietary interest in the suit land on the basis of an alleged trust. This claim can only be ventilated in the ELC. As it is the Deceased only had one asset being Lower Muhito/Mutundu/65. If he had other properties the probate court could proceed to confirm the Grant for distribution of the other properties while awaiting a decision from the ELC in respect of the suit land. However in the circumstances where only one asset exists I find the trial magistrate was quite right to stay the issue of confirmation of Grant until the question of the existence of a trust is determined by the court with jurisdiction to make such declaration.
31. Finally and in conclusion I find that the learned trial magistrate was right to refer this matter to the Magistrate Environment and Land Court (MELC) for determination of the dispute regarding ‘Ownership’ of the suit land. In the premises I find no merit in this appeal. The same is hereby dismissed in its entirety. Costs will be met by the Appellant.

DATED IN NYERI THIS 25TH DAY OF APRIL 2025

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MAUREEN A. ODERO
JUDGE

