



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Eunice Wanjiru Thumbi (Deceased) (Civil Appeal
63 of 2020) [2025] KEHC 7888 (KLR) (30 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7888 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL 63 OF 2020**

A MSHILA, J

MAY 30, 2025

IN THE MATTER OF THE ESTATE OF EUNICE WANJIRU THUMBI (DECEASED)

BETWEEN

KAREN WANJIRU THUMBI 1ST APPELLANT

PETER MUIGAI THUMBI 2ND APPELLANT

GEORGE MBUTHIA THUMBI 3RD APPELLANT

AND

ESTHER KAGUNDA 1ST RESPONDENT

EUNICE WANJIRU MWARIA 2ND RESPONDENT

(Being an appeal from the ruling of Honourable D. Kavedza, SPM delivered and transmitted electronically to the parties by B. Ojoo (SPM) on the 18th May, 2020 in Githunguri Senior Principal Magistrate's Court Succession Cause Number 62 of 2018)

JUDGMENT

Background

1. The deceased herein was until her demise on 24/08/2015 an administrator of the estate of her late husband Jonah Thumbi Karimi where she had received among other properties LR. Ruiru Town/70 which was registered in her name and which she held in trust for the beneficiaries of the estate of Jonah Thumbi Karimi.
2. During her lifetime and prior to her death, the deceased, is said to have fraudulently, transferred the said LR Ruiru Town /70 to the Appellants who after the demise of the deceased herein continued to collect rent through the deceased's bank account which account the 1st Appellant withdrew Kshs. 3,782,420/= between 7th September, 2015 and 15th February, 2017.



3. It is noteworthy, that by a ruling delivered by Meoli J. on 27th July, 2018, the alleged transfer by the deceased to the Appellants was declared null and void and their title of LR Ruiru Town/70 issued on 5th August, 2013 was cancelled.
4. The Respondents herein aver that they learnt of the withdrawals after the confirmation of grant as such the Respondents filed separate applications dated 9th July, 2019 and 6th August, 2019 in the lower court, which applications raised a similar issue of intermeddling with the deceased's estate where the Appellants were alleged to have withdrawn Kshs. 3,782,420 between 7th September, 2015 and 15th February, 2017 the deceased herein having died on 24th August, 2015.
5. Needless to say that the administrators of the estate of the deceased herein were appointed on 10th January, 2019.
6. The applications were heard and determined and the trial court held that the Appellants had intermeddled with the deceased's estate by withdrawing Kshs. 3,782,420/= and were ordered to refund the monies so as to be shared equally among the beneficiaries of the deceased's estate and in default execution to issue.
7. The Appellants being dissatisfied with the ruling of Hon. D. Kavedza delivered on 18th May, 2020 have preferred this appeal and have listed nine grounds of appeal in their Memorandum of Appeal as follows: -
 - a. The Learned Magistrate erred in law by admitting into evidence and relying on bank statements produced by the Respondents to render her decision, the production and admission of which were in contravention of the Law of *Evidence Act*.
 - b. The Learned Magistrate erred in law and fact by failing to consider the Respondent's submission on the issue of admissibility of the bank statements in light of the fact that the same were contained in an electronic record and no certificate was produced as required under the Section 106B of the *evidence Act*.
 - c. The Learned Magistrate erred in law by failing to find that the Bank statements relied on by the Applicants required authentication as provided under Section 176 and 177 of the Law of *Evidence Act*, Cap 80 and thus erroneously relied on them in her ruling.
 - d. The Learned Magistrate erred in law and fact by determining and finding that the monies complained of by the Respondents formed part of the free property of the estate of the deceased and thus arrived at an erroneous conclusion.
 - e. The Learned Magistrate erred in law and fact by misinterpreting and misapplying the ruling delivered by the High Court of Kenya at Kiambu in *Re Estate of Jonah Thumbi Karimi (deceased)* (2018) eKLR and thus arrived at an erroneous conclusion.
 - f. The Learned Magistrate erred in law and in fact by making a finding that indeed the 1st Respondent had withdrawn monies through ATM transactions while no evidence has been adduced to support this proposition.
 - g. The Learned Magistrate erred in law and fact by making a finding that the 1st Respondent had admitted withdrawing ALL the sums complained of by the Applicants which finding was against the weight of the evidence as the 1st Respondent never made any such blanket admission and thus arrived at an erroneous conclusion.



- h. The Learned Magistrate erred in law and fact by arriving at the conclusion that all the Appellants were jointly liable for the monies withdrawn from the deceased's account which finding was unsupported by any evidence.
 - i. The Learned Magistrate misdirected herself by invoking the provisions of Rule 73 of the *Probate and administration Rules, 1980* and granting orders constituting a confirmation of grant which misdirection constitutes an error in law as the rule 73 is not applicable in instances which are covered by clear provisions of law and she had no jurisdiction to grant confirmatory orders on such an application.
8. The parties canvassed and disposed of the appeal by way of written submissions.

Appellants' Submissions

9. The Appellants submit that the bank statements adduced by the Respondents were computer generated as such electronic evidence to which Section 106A of the *Evidence Act* applies and that the Respondents failed to accompany the documents with a certificate of electronic evidence as such the trial court erred in relying on the produced documents. Reliance was placed in the case of *County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others* (2015) eKLR. Further it was submitted that for the bankers' books to be produced as evidence in any judicial proceedings, the production process must comply with the provisions of Section 176 and 177 of the *Evidence Act*. No verification was done as such the bank statements are inadmissible. The deceased was an administrator of the Appellant's late father where she acquired a life interest in LR No. Ruiru Town/70 and the property was registered in her name as such she started collecting rent. The Appellants submit that any monies withdrawn by them was under the instructions by their mother who was of poor health and that in 2013, the deceased transferred the suit property to the Appellants which transfer gave the Appellants the right to collect rent therefrom as the property now belonged to them and the same did not form part of the deceased's estate. The Respondents were said to have failed to prove that the funds withdrawn by the Appellants formed part of the deceased's free property. They denied that the deceased held property from her husband's estate as a trustee for the beneficiaries of the said estate. The Respondents failed to prove that there existed a trust as such the said allegations were unfounded. Reliance was placed in the case of *Aurenzia Gikira Njeru v Kimani Kabenge & 2 others* (2014) eKLR. The Appellants submit that that the ruling of the court did not find that they had participated in any fraudulent dealings in the transfer of LR. Ruiru Town/70 to themselves by the deceased between the period of 24th August, 2015 and 15th February, 2017 and the ruling cancelling the transfer was delivered on 27th July, 2018 as such it would be unjust to punish the Appellants for actions undertaken before the ruling was delivered. The Respondents were said to have failed to show any evidence proving that the Appellants had an ATM card belonging to the deceased's bank account. Lastly it was submitted that the trial court lacked jurisdiction to grant confirmatory orders as the claim for trust ought to be resolved by the ELC court. Reliance was placed in the case of *Monica Waangari Njiiri & 4 others v Eunice Wanjiru Igamba & another* (2016) eKLR.

Respondents' Submissions

10. The Respondents submit that the production of a certificate is only necessary if the Appellants have raised an issue with the soundness of the computer, phone and printer from which the printouts were made which is not the case herein. Reliance was placed in the case of Environment and Land Case 23 of 2011 *Kenya Agricultural Research Institute v Farah Ali & another* (2017) eKLR. It was submitted that it was sufficient that the bank certified the statements as true copies of the original. The Respondents submit that the certificate of lease issued to the Appellants was obtained through



fraud as such the title thereto was void abinitio hence the transfer cannot justify the Appellants' illegal dealings with the deceased's estate. The monies deposited in the deceased's account were said to be for the benefit of all beneficiaries. Reliance was placed in the case of Succession Cause No. E018 of 2021 in *re estate of Geoffrey Kamau (deceased)* (2022) eKLR. Further, the monies in the deceased's bank account were said to form part of the free property of the deceased's estate. Lastly the parties were said to be the beneficiaries of the deceased as such only the succession court had jurisdiction to distribute the deceased's estate hence the trial court was clothed with the requisite jurisdiction to grant confirmatory orders.

Issues for Determination

11. Having considered the appeal and the submissions by the parties, the main issues arising for determination are:-
 - i) Whether Kshs. 3,782,420/= forms part of the free property of the deceased;
 - ii) Whether the order for refund was merited.

Analysis

12. Section 45 of the *Law of Succession Act* provides:
 - “(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
 - (2) Any person who contravenes the provisions of this section shall-
 - a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and 26 CAP. 160 Law of Succession
 - (b) be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.” (Emphasis supplied)
13. “Free Property” is described in Section 2 *Law of Succession Act* as follows:

“Free Property’ in relation to a deceased person means the property of which that person was legally competent to freely dispose during his lifetime, and in respect of which his interest has not been terminated by his death”.
14. The Appellants herein contend that in 2013, the deceased herein transferred the suit property to them and the same was registered in their names and a Certificate of Lease was issued in their favour as such the property ceased to belong to the deceased hence the rent collected became their personal property.
15. The Respondents contend that the transfer was unlawful and that the property is free property belonging to the deceased's estate, the deceased having only life interest, upon her death, the property belonged to the beneficiaries of her estate which includes the rental proceeds.



16. This court having perused the lower court record, finds that the Appellants did indeed intermeddle with the estate of the deceased by withdrawing monies from her bank account after her demise without a grant of representation. The deceased died on 24/8/2015. There is evidence of withdraw as between 7/9/2015 and 15/2/2017 which was after the death of the deceased.
17. In their defence, the Appellants allege that the rental proceeds were their personal money as the deceased had already transferred to them the suit property.
18. Without dwelling so much on the issue of the alleged transfer of the suit property by the deceased to the Appellants, being that the same was dealt with by Meoli J. in *Re estate of Jonab Thumbi Karimi (deceased)* (2018) eKLR - Kiambu where the Learned Judge nullified the transfer. The said judgment remains valid to date. In any event, this court concurs with the Learned Judge's finding that the deceased administrator enjoyed a life interest as such had no right to transfer the property to some beneficiaries and leave out others.
19. Be that as it may, the Appellants enjoyed the rental proceeds as their personal money by the fact that the suit property had been transferred to them by the deceased. This court has already found that the trial court did not err when it found that the actions of the Appellants amount to intermeddling.
20. Bearing in mind the above analysis, this court is satisfied that the Kshs.3, 782,420/= withdrawn by the Appellants jointly and/or severally formed part of the free property of the deceased. The same should have been shared equally amongst all the beneficiaries of the deceased's estate.
21. The trial court ordered the Appellants to refund the said amount. The Appellants are aggrieved by this order as according to them the suit property belonged to them the same having been transferred to them by the deceased.
22. For purposes of being just and fair, as much as the trial court ordered that the Appellants refund the amounts withdrawn, given that it is the transfer by the deceased that was found to be unlawful and not the actions by the Appellants per se therefore this court will be lenient to the Appellants.
23. This court therefore, directs that since the Appellants are still beneficiaries of the deceased's estate and in particular the rental proceeds which they are still entitled to and bearing in mind that they already enjoyed the amount of Kshs.3,782,420/= the same shall be withheld from their share of rental proceeds until full recovery of the same by the beneficiaries of the deceased's estate.
24. Upon recovery, the said amount of Kshs.3,782,420/= should be distributed amongst all the beneficiaries of the deceased's estate. The Appellants included.
25. This Court further notes that, as amongst the three Appellants and in regard to the amount of Kshs.3,782,420/= the Appellants are held jointly and/or severally liable. Each party should be held accountable for the share that they personally utilized and/or enjoyed. The same to be ascertained as amongst themselves.

Findings and Determinations

26. For the forgoing reasons this Court makes the following findings and determinations;
 - i. This Court finds the appeal to be devoid of merit and it is hereby dismissed with costs to the Respondents;
 - ii. This Court finds that the monies withdrawn in the sum of Kshs. 3,782,420/= formed part of the Deceased's estate. The lower courts decision is therefore upheld.



- iii. The Appellants share of the incoming rental proceeds be and is hereby withheld until full recovery of the amount of Kshs.3,782,420/= by the deceased's estate.
- iv. Each party to bear their own costs.
- v. Mention on 9/10/2025 for directions.

Orders Accordingly.

DATED SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 30TH DAY OF MAY, 2025.

A. MSHILA

JUDGE

In the presence of;

Sanja -Court Assistant

Miss Maruhi h/b for Mwangi - For the Appellants

Miss Nkosho h/b for Makumi - For the Respondents

