



REPUBLIC OF KENYA



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**In re Estate of Kiimani Thairu (Deceased) (Civil Appeal  
E043 of 2024) [2025] KEHC 7529 (KLR) (29 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7529 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CIVIL APPEAL E043 OF 2024**

**FN MUCHEMI, J**

**MAY 29, 2025**

**IN THE MATTER OF THE ESTATE OF KIIMANI THAIRU (DECEASED)**

**BETWEEN**

**HENRY KIMANI THAIRU ..... APPELLANT**

**AND**

**TERESIAH WANJIRU NGARI ..... 1<sup>ST</sup> RESPONDENT**

**JAMES NJOROGE NGARI ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the Ruling of Hon. A. Mittulab (SPM) delivered  
on 20th February 2024 in Thika CM Succession Cause No. 253 of 1998)*

**JUDGMENT**

**Brief facts**

1. This appeal arises from the judgment of Thika CM Succession Cause No. 253 of 1998 where the court dismissed the appellant's summons for revocation of grant dated 12<sup>th</sup> September 2022.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 8 grounds summarized as follows:-
  - a. The learned trial magistrate erred in fact and law in finding the appellant's summons for revocation of grant was res judicata and hereby dismissing the same.
  - b. The learned trial magistrate erred in law and in fact in failing to consider that the issue before the trial court was whether the grant should be revoked and not the issue of ownership of land parcel number LOC.20/Mirira/816 formerly known as Gikindu/Mirira/816.



- c. The learned trial magistrate erred in law and in fact in failing to consider that the alleged beneficiaries of the deceased obtained titles to LR. No. LOC.20/Mirira/816 through the succession process and the said titles could only be challenged in a succession court.
3. Parties put in written submissions to dispose of the appeal.

### **Appellant's Submissions**

4. The appellant argues that the matter is not res judicata as the suit in Murang'a ELC Case No. 30 of 2018 relates to the use and occupation of, title to land and the summons for revocation dated 12<sup>th</sup> September 2022 relates to the law relating to intestate and testamentary succession and the administration of estate of deceased persons. The appellant argues that the trial magistrate failed to appreciate that the said summons sought to revoke the grant issued on 10<sup>th</sup> April 2001 and confirmed on 2<sup>nd</sup> March 2011 which could not be determined by the Environment and Land Court. To support his contentions, the appellant relies on the case of *In Re Estate of Bernard Mutie Munyaka (Deceased)* [2019] eKLR.
5. The appellant argues that the 2<sup>nd</sup> respondent is a stranger to the estate pursuant to Sections 29 and 66 of the *Law of Succession Act*. The 2<sup>nd</sup> respondent has neither demonstrated a direct relationship with the deceased or any dependency or creditor claim. Further, the 2<sup>nd</sup> respondent as an administrator of the estate does not participate in the determination of summons for revocation as he is not a party to the proceedings, he is not a beneficiary or a creditor pursuant to Section 83(e) and (g) of the *Law of Succession Act*. To support his contentions, the appellant refers to the cases of *In Re Estate of Alice Mumbua Mutua (Deceased)* (Succession Cause 3142 of 2003) [2017]eKLR and *In Re Estate of Kirogo Njoroge (Deceased)* (Succession Cause No. 557 of 2015) [2023] KEHC 565 (KLR).
6. Relying on Section 76 of the *Law of Succession Act* and the cases of *Jamleck Maina Njoroge vs Mary Wanjiru Mwangi* [2015] eKLR and *Estate of Katana Vuko Wale vs Hamisi Katana Vuko* [2021] eKLR, the appellant argues that the grant of letters of administration issued to the 1<sup>st</sup> respondent on 10<sup>th</sup> April 2001 and confirmed on 1<sup>st</sup> March 2011 was made without material disclosure that the alleged Kimani Thairu (deceased) was not actually deceased but is the appellant herein known as Henry Kimani Thairu of ID NO. 0282889 formerly known as Kimani Thairu of ID No. 15411/KBU which were facts well known to the respondent. Further, the 1<sup>st</sup> respondent failed to disclose that LR. No. Gikindu/Mirira/816 as renamed to LOC.20/Mirira/816 was registered in the name of the appellant on 5<sup>th</sup> January 1972 making the proceedings defective in substance.
7. The appellant argues that the 1<sup>st</sup> respondent claimed that the deceased died in the year 1949 yet the chief's letter indicates that the deceased died between the years of 1948 to 1949. The appellant submits that he produced a land certificate was issued in the year 1973 and the green card shows that the suit land was registered in the name of Kimani Thairu in the year 1971. Thus a dead person cannot be registered as the owner of land more than 20 years after his death and for a title deed to be issued in his name. Further the appellant argues that the 1<sup>st</sup> respondent and the initial petitioner never submitted any identification documents for the alleged deceased. Neither did they produce a death certificate.
8. The appellant further submits that the 1<sup>st</sup> respondent and her predecessor did not annex any copies of the title to the land parcel number Gikindu/Mirira/816 also known as LOC.20/Mirira/816 and the 1<sup>st</sup> respondent admitted that she never had the title to the suit land prior to petitioning for the grant. To support his contentions, the appellant relies on the case of *In Re Estate of Mugao Mburi M'Kigwanja (Deceased)* [2022] KEHC 12316 (KLR).
9. The appellant submits that he adduced evidence through his supporting affidavit dated 12<sup>th</sup> September 2022 to demonstrate that the name Kimani Thairu of identity card number 15411/KBU and himself



of identity card number 0282889 refer to one and the same person and thus he is the registered owner of LR. No. LOC.20/Mirira/816 as at 5<sup>th</sup> January 1973 being Kimani Thairu ID 15411/KBU. The appellant therefore argues that as an interested party he had the requisite locus standi to apply for revocation of the grant as his suit land was distributed in the deceased's estate yet the property is not free property of the deceased.

10. Relying on the decisions in *Santuzza Bilioti alias Mei Santuzza (Deceased) vs Giancarlo Falasconi* [2014] eKLR; *In Re Estate of Leah Wanguii Nding'uri (Deceased)* [2020] eKLR; *Salome Wambui Njau* (suing as the administratrix of the Estate of peter Kiguru Peter Njuguna (Deceased) vs *Caroline Wangui Kiguru* (2013) eKLR; *Nyamweya Munyasya Mulili & 3 Others vs Sammy Muteti Mulili* [2017] eKLR; *Estate of Moffat Mariga Ng'ethe (Deceased)* HCSC No. 1665 of 2008 and *Estate of Jonah Thumbi Karimi (Deceased)* HCSC 104 of 2017, the appellant submits that the court has the requisite jurisdiction to revoke the said registration of the certificate of confirmation of grant as a transmission on land parcel number Gikindu/Mirira/816 later renamed to LOC.20/Mirira/816.

### **The Respondents' Submissions**

11. The respondents refer to the case of *Ng'ang'a vs Matheri* (Civil Appeal 131 of 2023) [2024] KEHC 6713 (KLR) (6 June 2024) and submits that pursuant to the prayers the appellant sought before the lower court, the said court was not possessed of the requisite jurisdiction to grant such orders as they were beyond the probate court. Further in the cases of *Mathew Njega Njogu & Another vs Rosemary Muthoni Njue* [2021]eKLR; *Priscilla Ndubi & Zipporah Mutiga vs Gerishon Gatobu Mbui, Meru Succession Cause No. 720 of 2013*; *Re Estate of Stone Kathuli (Deceased)* [2016] eKLR and *Alexander Mbaka vs Royford Muriuki Rauni & 7 Others* [2016] eKLR and submits that the primary duty of the probate court is to distribute the estate of the deceased to the rightful beneficiaries and where issues of ownership of property are raised in a succession cause, they must be resolved before such property is distributed.
12. The respondents submit that from the summons for revocation of the appellant, the issue in contention was the ownership of LR. No. LOC.20/Mirira/816 whose issues were beyond the jurisdiction of the probate court.
13. The respondents argue that the issue of the identity of the appellant was raised and determined in the Environment and Land Court whereby the court found that the appellant failed to prove that he and the deceased are one and the same person. To that end the appellant could not be an interested party to the proceedings in the probate court as he had no stake in the estate of the deceased.
14. The respondents further argue that the appellant did not prove fraud or misrepresentation in acquisition of LR. No. LOC.20/Mirira/816 in the environment and land court or in the probate court. The respondents submit that the appellant lodged an appeal at Nyeri Court of Appeal No. E021 of 2021. He later said he filed a notice of withdrawal of the appeal but he does not have orders for such withdrawal. The respondents argue that the appellant was trying to regurgitate issues that were dismissed by the ELC court before the probate court made its ruling.
15. The respondents argue that when the ELC court pronounced itself on the ownership of the suit property, that issue compromised the entire revocation application before the succession court. The title was and is still in the names of the 2<sup>nd</sup> respondent, which was found to be legally obtained. Consequently, a succession cause was filed and the suit property was duly transmitted to the 2<sup>nd</sup> respondent. As such, the question of validity of a title deed issued to them could not be impeached through the probate court. The respondents submit that the proper court to determine the issue of



ownership of land is the ELC Court and not a succession court which the ELC Court in ELC Case No. 30 of 2018 dealt with.

### **Issue for determination**

16. The main issue for determination is whether the appeal has merit.

### **The Law**

17. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another vs Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:

“.....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. In particular,, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”

18. In *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR the Court of Appeal stated that:-

An appeal to this court from a trial by the High Court is by way of 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.

19. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-
- a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
  - b. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and
  - c. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

### **Whether the appeal has merit.**

20. The deceased herein died in the year 1949. Grant of letters of administration intestate was issued on 10<sup>th</sup> April 2001 in favour of the 1<sup>st</sup> respondent. The said grant was confirmed on 10<sup>th</sup> September 2008. The estate of the deceased which comprised of LR. No. LOC.20/Mirira/816 was distributed solely to the 1<sup>st</sup> respondent. The appellant thereafter filed Summons for revocation of Grant on 21<sup>st</sup> September 2022 on the grounds that the proceedings to obtain the grant were defective, obtained fraudulently by making false statements and by concealment of facts material to the case. The applicant further sought for the orders of revoking the transfer of title to LR. No. LOC.20/Mirira/816 to the beneficiaries and for cancellation of the subsequent transfer and registration of the petitioner over the suit land and that court do order that the suit land revert to him. It was the appellant’s case that he and the deceased are



one and the same person only that he was issued with a 2<sup>nd</sup> generation identity card which included the name Henry. It was his case further that the suit land was registered to him on 5<sup>th</sup> January 1973.

21. The respondents in rebuttal argued that the issues as raised by the appellant in the summons were res judicata having been heard and determined in the ELC Court and in any event upon the ELC Court determining ownership of the suit property to the deceased, the appellant had no claim in the succession court.
22. From the record, the matter in the ELC Court being Murang'a Case No. 30 of 2018 Henry Kimani Thairu vs James Kimani Thairu, Francis Kariuki Kimani, Teresia Wanjiru Ngari, Elizabeth Wanjiru Maina and Agnes Nyambura Kihara was instituted on 30<sup>th</sup> June 2016 whereby the appellant herein sought a declaration that the land parcel Gikindu/Mirira/816 belonged to him. In the said case, the appellant argued on the issue of his identity claiming that he and the deceased herein were the same person and further that the respondents obtained the suit and fraudulently. Consequently the court ought to have found that he is the lawful registered owner of the suit land. The defendants in that case argued that they acquired the suit land through transmission in the succession cause which was initially filed by their mother in the year 1998 and the administrator was later substituted when she passed away. The defendants further argued that the said grant was not challenged or revoked. The ELC Court rendered its judgment on 17<sup>th</sup> December 2020 dismissing the appellant's claim for lack of proof on a balance of probabilities.
23. Upon dismissal of the ELC suit, the appellant filed the summons for revocation before the magistrate court, Thika. The said Summons for revocation raise similar issues as those raised in the ELC claim. The parties therein were the same save some additional beneficiaries in the estate. Thus, it is clear that the Summons for revocation in the instant cause is res judicata as provided for under the law. That notwithstanding, the issues raised by the appellant in the Summons for revocation call for the trial court to determine the issue of ownership of the suit property which were decided in the ELC court at Murang'a. As rightly set out, the primary function of the probate court is to distribute the estate of the deceased to its rightful beneficiaries. Where issues of ownership of the property of the estate arise in a succession cause, they must be resolved before such property is distributed which was done in regard to this matter. Magistrate's court sitting as a probate court had no jurisdiction to deal with ownership of the suit land. The ELC Court having determined the ownership of the suit land, the appellant had no legal interest in the estate of the deceased. The Summons for revocations was bound to fail.
24. The Magistrate's ruling delivered on 12<sup>th</sup> September 2022 was based on cogent evidence including the judgment of Murang'a ELC case No.30 of 2018 which had already decided the issues of ownership of the land L. R. LOC 20/Mirira/816. The ELC court is a court of equal status with the High Court and it is clear that the learned magistrate relied on the ELC judgment which is one of a superior court. Further, the magistrate found that the appellant not being a beneficiary in the deceased's estate had no locus standi to claim the estate of the deceased. The deceased was survived by beneficiaries who had a legal interest in the estate. The appellant having lost the case of ownership of the land in the ELC Court could not have been accepted as a beneficiary in the succession court.
25. I reach a finding that the ruling of Hon. M. Atyang was based on the law and is hereby upheld.
26. This appeal fails and is hereby dismissed with costs to the respondent.
27. It is hereby so ordered.

**JUDGMENT DELIVERD VIRTUALLY, DATED AND SIGNED AT THIKA THIS 29<sup>TH</sup> DAY OF MAY 2025.**

**F. MUCHEMI**



**JUDGE**

