In re Estate of Gathecha Wachihi (Deceased) (Probate & Administration Appeal E023 of 2023) [2025] KEHC 6940 (KLR) (27 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6940 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

PROBATE & ADMINISTRATION APPEAL E023 OF 2023

DKN MAGARE, J

MAY 27, 2025

IN THE MATTER OF THE ESTATE OF THE LATE GATHECHA WACHIHI (DECEASED)

BETWEEN

CHARLES KING'ORI GACHECA ..... 1ST APPELLANT

MARY MUTHONI MWANGI ..... 2ND APPELLANT

REGINA NYAMBURA MWANGI ..... 3RD APPELLANT

AND

MOSES WACHIHI MACHARIA ..... RESPONDENT

(Being an appeal from the Judgment and Decree delivered by Hon. M. N. Munyendo P.M on 24th November, 2023 in Othaya Succession Cause No. E143 of 2022)

JUDGMENT

1. This is an appeal from the Judgment and decree delivered by Hon. M. N. Munyendo P.M on 24th November, 2023 in Othaya Succession Cause No. E143 of 2022. The appellants were the protestors in the lower court.

2. The respondent filed application for confirmation, wherein, land parcel Mahika/Rokera272 was to be divided equally between the two boys. The first appellant filed an affidavit stating that though the Respondent is a child, he settled elsewhere. The deceased purchased two properties for the Respondent, being Ndaragwa/Uruku/1021 (plot 2120 measuring 2 acres and Ndaragwa/Uruku/991 (plot 2112). The respondent went to settle on these parcels of land. The two parcels were bought by their mother through balloting. She indicated the respondent as the owner. The first appellant states that he stayed on land parcel number Mahika/Rokera272 with the parents until their demise in 1993 for the deceased herein, and 2002 for the mother. In a nutshell they stated that the respondent was not entitled to inherit land parcel number Mahika/Rokera272.

3. The respondent averred that he bought land parcel number Ndaragwa/Uruku/1021 (plot 2120 and Ndaragwa/Uruku/991 (plot 2112). The respondent attached copies of certificates numbers 2532 and 3298 showing that he is the proprietor of 20 shares each worthy 1,400,000/= from Othaya Mahiga Exffaco Ltd. He stated that he bought Ndaragwa/Uruku/1021 from Robert Maina Kihara and paid for all his land. In respect of both parcels, the respondent was issued with title deeds for land parcel number Ndaragwa/Uruku/1021 (plot 2120 and Ndaragwa/Uruku/991. He also annexed several receipts for payment for the said parcels.

4. The court dismissed the allegations, hence this appeal where the Appellants raised the following grounds of appeal:

   a. That the learned trial magistrate erred in law and in fact in failing to consider the evidence tendered by the protestors which was to effect that the petitioner had been gifted another property by the deceased and his wife being Ndaragwa/Uruku/1021 hence arriving at an erroneous conclusion that the sole property of the deceased i.e. Mahika/Rokera272 should be divided equally between the petitioner and the 1st protestor.

   b. That the learned trial magistrate erred in law and in fact in failing to consider the evidence of petitioner's witness the first born of the deceased which to a large extent advanced the protestor's case.

   c. That the learned magistrate erred in law and in fact in failing to consider the inconsistencies in the petitioner's evidence, inconsistencies of which were bolstered by the scene visit conducted by the trial court on 14th September 2023.

   d. That the learned trial magistrate erred in law and in fact in finding that all the children of the deceased had renounced their rights to the sole property of the deceased without giving due regard to the reasons advanced.

   e. That the learned trial magistrate erred in law in failing to consider the submissions advanced by the protestors.

5. The memorandum of appeal was repetitive and prolixious contrary to the requirements of Order 42 Rule 1 of the Civil Procedure Rules, which provides as follows:

> " Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.
>
> (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively."

6. The Court of Appeal had this to say about compliance with Rule 86 [now rule 88] of the Court of Appeal Rules (which is pari materia with Order 42 Rule 1 of the Civil Procedure Rules) in the case of Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] eKLR: -

> " We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the

myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others [2013] eKLR) and Nasri Ibrahim v. IEBC & 2 Others [2018] eKLR. In the latter case, this Court lamented:

"We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs." The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues..."

7. The court abhors repetitiveness of grounds of appeal which tends to cloud the key issues in dispute for determination by the court. In the case of Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] eKLR, the court of appeal observed that : -

> " Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the *Kenya Ports Authority Act* ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In William Koross V. Hezekiah Kiptoo Kimue & 4 others, Civil Appeal No. 223 of 2013, this Court stated:
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> "The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better."

8. The rest of the issues are ancillary, repetitive, prolixious and a waste of judicial time. The question this court will have to deal with is whether the magistrate's court had jurisdiction to hear and determine this dispute. This is the only issue addressed in submissions before the court below and before this court.

9. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. In the case of Mbogo and Another v Shah [1968] EA 93 the Court stated:

> " ...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

10. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus classicus case of Selle and another v Associated Motor Board Company and Others [1968]EA 123, where the Judges in their usual gusto, held as follows;-

> " .. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular

circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

11. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. In the case of Peters v Sunday Post Limited [1958] EA 424, the court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."
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> levelling up and down of the facts of exchange between currencies...should be taken into consideration."
>
> Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance..."

12. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them. In Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd (2017) eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth;-

> " Courts adopt the objective theory of contract interpretation, and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. This is what sometimes is called the principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it.

13. In Prudential Assurance Company of Kenya Limited v Sukhwender Singh Jutney and Another, Civil Appeal No. 23 of 2005 the Court citing a passage in Odgers Construction of Deeds and Statutes (5th edn.) at p.106 emphasized that in construing the terms of a written contract;

> " It is a familiar rule of law that no parole evidence is admissible to contradict, vary or alter the terms of the deed or any written instrument. The rule applies as well to deeds as to contracts in writing. Although the rule is expressed to relate to parole evidence, it does in fact apply to all forms of extrinsic evidence."

14. Surprisingly, the protagonists filed the petition of letters of administration in respect of the estate of Gathecha Wachichi. They only indicted that the deceased left behind a small piece of land measuring 0.9 acres. .Annexed thereto was a search showing that the deceased was registered as an owner on 31.1.1958. The Chief's letter annexed also showed that the deceased left behind land parcel Mahika/Rokera272. How these other parcels come in, is beyond comprehension.

15. This court deals only with the deceased's free property. In in re Estate of Lucy Muthoni Obat (Deceased) [2021] eKLR, A O Muchelule, as he then was stated as follows:

> 10. Secondly, under section 3 of the *Law of Succession Act* (Cap 160) upon the death of a deceased person his estate means his free property when he was living. His free property refers to the property that the deceased was legally competent freely to dispose of it and in respect of which

his interest has not been terminated by his death. Where administrators of the estate of the deceased say that a certain property belonged to the deceased and there is a third party laying claim to it, such dispute has to be determined by the Environment and Land Court under section 13 of the Environment and Land Court and Article 162(2)(b) of *the Constitution*.

16. In this case, the deceased was not legally competent to dispose of land parcels Ndaragwa/Uruku/1021 and Ndaragwa/Uruku/991. To clarify further, there is no claim that these properties belonged to the deceased. The allegations instead relate to the deceased's mother, whose estate is not the subject of these proceedings. It is important to note that the rest of the beneficiaries had renounced their rights to the estate. Ipso facto the second and third Appellants cannot competently be aggrieved by the decision. In Re Estate of John Musambayi Katumanga – (Deceased) [2014] KEHC 7506 (KLR), W. Musyoka posited as follows regarding equal sharing of properties:

> 27. The spirit of Part V, especially Sections 35, 38 and 40, is equal distribution, of the intestate estate amongst the children of the deceased. There have been debates on whether the distribution should be equal or equitable. My reading of these provisions is that they envisage equal distribution for the word used in Sections 35(5) and 38 is "equally" as opposed to "equitably". This is the plain language of the provisions. The provisions are in mandatory terms – the property "shall ... be equally divided among the surviving children." Equal distribution is envisaged regardless of the ages, gender and financial status of the children.

17. Further, in Christine Wangari Gachigi v Elizabeth Wanjira Evans & 11 others [2014] KECA 150 (KLR), the Court of Appeal posited as follows on the qualification to get a share under section 38 of the *law of succession act*:

> 1. Under section 38 of the Act; all that one needed to establish in this cause was to show that they were either children or grandchildren of the deceased. Matters of failure to participate actively in the litigation proceedings should not have been a disentitling consideration in respect of the 2nd, 3rd and 4th cross appellants, in the absence of their renounciation of respective claims to the estate.
>
> 2. ...
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> 3. The principle of equality as enshrined in section 38 of the Act is the key principle which ought to have guided the learned Judge in the distribution exercise. We affirm that it is the same principle that will guide our redistribution exercise. In doing so, we find it fit not to treat the eligible grandchildren of the deceased as single units, but to reroute them back to benefit as such through their deceased parents house hold units.

18. Having found that the only free property of the deceased was Mahika/Rokera272, there is nothing wrong with the court decision, sharing the property equally.

19. The net effect is that the appeal lacks merit and is accordingly dismissed. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:

> (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

20. The Court of Appeal in the case of Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR) had this to say:

> " It is our finding that the position in law if that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

21. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> " (18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

22. In the end the Respondent incurred unnecessary costs. The appeal is thus dismissed with costs of Ksh 45,000/= to the Respondent

Determination.

23. The upshot of the foregoing is that I make the following orders:

a. The appeal is dismissed with costs of Kshs. 45,000/= to the Respondent, payable within 30 days, in default execution do issue.

b. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 27TH DAY OF MAY, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

No appearance for parties

Court Assistant – Jedidah