



REPUBLIC OF KENYA



Mureithi & another v Migwi & 4 others (Probate & Administration E005 of 2024) [2025] KEHC 11749 (KLR) (1 August 2025) (Judgment)

Neutral citation: [2025] KEHC 11749 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
PROBATE & ADMINISTRATION E005 OF 2024**

**MA ODERO, J
AUGUST 1, 2025**

BETWEEN

PETER MIGWI MUREITHI 1ST APPELLANT

CHARLES MACHARIA MIGWI 2ND APPELLANT

AND

MUNENE MIGWI 1ST RESPONDENT

SAMUEL MAINA MIGWI 2ND RESPONDENT

STEPHEN VICTOR MUCHANGI ESTHER 3RD RESPONDENT

LUCY NJERI WAHOME 4TH RESPONDENT

ALICE WAMBURA WAIKWA 5TH RESPONDENT

JUDGMENT

1. Before this Court is the Memorandum of Appeal dated 12th March 2024 by which the Appellants Peter Migwi Mureithi and Charles Macharia Migwi seek the following orders;-

- a. That this Appeal against the Ruling and Orders issued on 5th March 2024 and 23rd October 2023 in Karatina Principal Magistrate’s Court Succession Case No. 62 of 2020 In the Matter of The Estate of Migwi Romba Alias Migwi Rumba be allowed.
- b. That this honourable court be pleased to vacate and quash the trial court’s prohibitions order issued against L.R. No. Magutu/Ragati 2049 & Magutu Ragati 2050 pending the hearing and determination of the summons for revocation.



- c. That this honourable court be pleased to quash the orders of the trial court awarding costs to the Respondents in the two trial court's rulings of 23rd October 2023 and 5th March 2024.
 - d. That the costs of this Appeal be awarded to the Appellants.
2. The Respondents Munene Migwi and 4 others opposed the appeal. The Appeal was canvassed by way of written submissions. The Applicants filed the written submissions dated 27th January 2025 whilst the Respondents relied upon their written submissions also dated 27th January 2025.

Background

3. The genesis of this appeal are the two (2) rulings delivered on 24th October 2023 and 5th March 2024 by Hon. E. Kanyari, Principal Magistrate, Karatina Law Courts.
4. This succession cause relates to the estate of the late Migwi Romba alias Migui Rumba (hereinafter the Deceased) who died intestate on 29th November 1981. The main cause was filed at the Karatina Law Courts being Karatina Succession Cause No. 62 of 2020.
5. Following the demise of the Deceased Grant of letters of Administration Intestate was on 3rd August 2020 made to Peter Migwi Mureithi (the 1st Appellant herein). That Grant was duly confirmed on 21st April 2021. Vide the Certificate of Confirmation of Grant the only asset belonging to the Deceased being the property known as LR No. Magutu/Ragati/409 was to be divided equally between the two appellants with each getting 3.3 acres of the land.
6. The 1st Respondent Munene Migwi then filed a Summons for revocation of Grant which he claimed that the Grant issued to the 1st Appellant had been obtained fraudulently and by way of misrepresentation. That whereas the two appellants presented themselves to the court as the only children of the Deceased, the truth of the matter was that the Deceased was survived by twelve (12) children.
7. The 1st Respondent also filed a Summons dated 19th January 2023 seeking conservatory orders in respect of LR Magutu/Ragati/409 and the two subdivisions derived therefrom being LR Numbers Magutu/Ragati/2049 and 2050.
8. In the Ruling of 24th October 2023 the trial Court made the following orders:-
 - “(a) That pending the hearing and determination of the summons for revocation of Grant dated 19th July 2022, a prohibitory order to issue over L.R. No. Magutu/Ragati/2049 and L.R. No. Magutu Ragati/2050”
9. The Respondents being dissatisfied by the Court's decision to grant the above prohibitory orders filed an application dated 1st November 2023 seeking review of the said orders.
10. Vide the ruling delivered on 5th March 2024 the Learned trial magistrate made the following orders:-
 - “The applicants application dated 1st November 2023 is disallowed with costs to the respondents herein and the ruling made on the 24th October 2023 stands. The parties herein are advised to have the matter set down for hearing.”



11. Being dissatisfied with the above rulings the Applicants herein filed the Memorandum of Appeal dated 12th March 2024, which appeal was premised on the following grounds;-

- “ 1. That the learned trial magistrate erred in law and in fact by ignoring, omitting and failing to consider the Appellant’s evidence on the record as contained in the Replying Affidavit dated 8th May 2023, thus arriving at an erroneous, unfair, and unjust ruling.
2. That the learned trial magistrate made a significant error in law and in fact by dismissing excluding, and neglecting to consider the Appellant’s submissions dated 22nd September 2023 on record, thereby reaching an erroneous, unfair, and unjust ruling.
3. That the learned trial court erred in law and in fact for refusing to review the court’s initial ruling of 24th October 2023 despite the glaring mistake or error apparent on the court’s record that resulted in an unfair and unjust ruling.
4. That the learned trial magistrate made a significant error in law and in fact by not considering the Appellant’s evidence and submissions on record and insisting on the prior erroneous stance despite the heavy evidential value of the evidence and the submissions.
5. That the learned trial magistrate erred in law and in fact for misapprehension and misinterpretation the guiding principles in granting prohibitory orders, which are akin to injunctive orders, without any evidence of the suit property being at any risk of being transferred or alienated to the detriment of the Respondents.
6. That the learned trial magistrate erred in law and fact for granting the Respondents’ prohibitory orders despite them not meeting the stringent legal threshold for granting such radical orders.
7. That the learned trial magistrate erred in law and fact by misdirecting and misapplying the principles of costs and judicial discretion by condemning the Appellants to pay costs in an application that was brought by the Respondents and which the trial court did not consider their evidence or submissions in making its ruling.
8. That the learned trial magistrate erred in law and fact by misapplying and misdirecting the principles of costs and judicial discretion by condemning the Appellants to pay costs in an application for review of the court’s ruling that the Respondents did not object.”

Analysis and Determination

12. I have considered the appeal before this court, the record of the lower court as well as the submissions filed by both parties.
13. This is a first appeal. It is settled law that 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 -Vs- Sunday Post Limited [1958] E. A 424]



14. In *Selle and Another -vs- 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 -vs- Attorney General* [2016], eKLR the court of Appeal stated thus:-

“An appeal to this court is by way of a trial 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 allowance in this respect.”
16. It is not in dispute that the Deceased herein passed away on 29th November 1981. It is also common ground that Grant of letters of Administration were issued to Peter Migwi Mureithi (the 1st Appellant) on 11th August 2020, which Grant was then confirmed on 21st April 2021.
17. The Appellants insist that the two parcels of land LR No. Magutu/Ragati 2049 and Magutu/Ragati/2050 do not form part of the estate of the deceased and are not available for distribution to the beneficiaries. That the two (2) parcels of land resulted from the sub-division of LR NO. Magutu/Ragati/409 which was registered in the name of the Deceased. The Respondents on their part take issue with the fact that the transfers of plots 2049 and 2050 took place on 23rd November 2021 almost forty (40) years after the Deceased died.
18. The Respondents insist that the Deceased had during his lifetime transferred LR No. Magutu/Ragati/409 to them during his lifetime. They insist that this parcel of land forms part of the estate of the Deceased. They asked that the said sub-divisions be preserved pending the determination of this succession cause.
19. The main issue for determination in this appeal is whether the decision of the trial court to issue a prohibitory order in respect to the two parcels of land known as LR No. Magutu/Ragati/2049 and LR No Magutu/Ragati/2050 was correct and justified.
20. In the trial court it had been alleged by the Respondents that the two abovementioned parcels of land were sub-divisions of LR No. Magutu/Ragati/490 and that the latter parcel which was registered in the name of the Deceased formed part of the estate.
21. The Respondents had filed summons seeking to revoke the Grant issued to the Appellants in respect of the estate of the Deceased on grounds that the said grant had been obtained fraudulently by concealment of material facts.
22. The Respondents expressed the apprehension that if the prohibitory orders sought were not granted, then the Appellants in whose names Plots 2049 and 2050 were registered may proceed to deal with said sub-divisions in a manner which would be detrimental to the estate and to the other beneficiaries.



23. On their part the Appellants maintained that the two parcels of land do not form part of the estate of the Deceased. The Appellants asserted that the Deceased had during his lifetime transferred the said plots to themselves. The Appellants submitted that in coming to her decision the learned trial magistrate failed to properly adhere to the legal principles governing the granting of prohibitory injunctions.
24. Although the *Law of Succession Act* Cap 160, Laws of Kenya does not have any provision dealing specifically with issuance of conservatory or injunctive orders, several authorities have held that Section 47 of the *Law of Succession Act* and Rule 73 of the Probate and Administration Rules, grant to a Probate Court wide discretionary powers to issue protective orders in respect of the estate of a deceased person.
25. Section 47 of the *Law of Succession Act* provides as follows:-
- The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.
26. Similarly Rule 73 of the Probate and Administration Rules provides that:-
- “Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”
27. Further by Virtue of Rule 63 of the Probate and Administration Rules, the Court is allowed to rely on the provisions of the *Civil Procedure Act* in particular the “Oxygen Rules” espoused by Section 1A of the *Civil Procedure Act* and Rules, is to facilitate the just, expeditious, proportionate and affordable resolution to disputes.
28. The question of whether a court has jurisdiction to issue injunctive orders in a Succession Cause was settled in the case of *Floris Piezzo & Another -vs- Giancarlo Falsconi* (2014) eKLR where the court of appeal while considering whether injunctive orders can issue in a succession cause expressed itself as follows:-
- “We have carefully considered the grounds of appeal, rival written and oral submissions, and the law. The application before the high court was for temporary injunction to restrain the appellants from dealing with the suit premises in a manner inimical to the estate of the deceased. The question which arose and had to be determined first was whether the court had jurisdiction to grant an injunction in a Succession Cause. The appellants took the position that the court had no such jurisdiction whereas the Respondent took the contrary position. However, the High Court was persuaded that Rule 73 of the Probate and Administration Rules reserved the Court’s inherent jurisdiction to allow for the grant of injunctions in deserving cases. We are in total agreement with this conclusion. We have no doubt at all that the *law of succession act* gives the court wide jurisdiction in dealing with the testamentary and administration issues of an estate. Indeed Section 47 of the said Act gives the Court jurisdiction to entertain any application and determine any dispute under the Act and to pronounce such decree and orders as may be expedient. It cannot be said that such decrees and orders would exclude injunction orders. In other words, we are of the same view that Section 47 of the Act gives the Court all-embracing powers to make necessary orders including injunctions where appropriate to safeguard the deceased’s estate. This section must be read together with Rule 73 of the Probate and Administration Rules which further emboldens Court’s jurisdiction to make such orders as may be necessary for



the ends of justice or to prevent abuse of the process of Court. We would imagine such orders would also include injunctive orders.” [Own emphasis]

29. Similarly in the case of Millicent Mbatha Mulavu & another v Annah Ndunge Mulavu & 3 others [2018] eKLR the court affirmed that the above provisions grant to the High Court powers to issue protective measures including issuing injunctions for purpose of preserving the estate of a deceased person. Therefore it is clear that the High Court has jurisdiction to issue all manner of orders including the issuance of conservatory and/or injunctive orders where appropriate in order to preserve and safeguard the estate of a Deceased person pending final distribution to the genuine heirs.
30. The law regarding the grant of injunctive orders was set out in the classic case of Giella -Vs- Casman Brown [1973] E. A. 348 as follows:-

“The conditions for the grant of an interlocutory injunction are well settled in East Africa. First an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide on application of the balance of convenience.”
31. The definition of a ‘Prima Facie Case’ was given in the case of Mrao Ltd -Vs- First American Bank of Kenya Ltd & 2 Others [2003] eKLR as follows:-

“In Civil Case a prima facie case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. This is clearly a standard which is higher than an arguable case.”
32. It is manifest that the dispute in this matter revolves around whether the two subdivisions of LR No. Magutu/Ragati/409 form part of the estate of the Deceased or whether the two subdivisions in fact belong to the Appellants.
33. That determination cannot be made under the auspices of this application. These are issues that can only be determined during the hearing of the summons for revocation of Grant. That summons is yet to be heard.
34. I do agree with the learned trial magistrate that it is in the best interests of justice to preserve the two parcels of land pending the determination of the succession cause. It is my view that if the prohibitory orders were not issued and the Appellants proceeded to sell and/or dispose of the two sub-divisions then this would greatly prejudice the estate of the estate. The best course of action would be to maintain the status quo by preserving the estate in order to allow each of the parties to ventilate their claims. I therefore find that the ruling delivered on 24th October 2023 was sound and I uphold said ruling.
35. The Appellants have also faulted the ruling delivered by the trial court on 5th March 2023. By that ruling the trial court declined to review the ruling of 24th October 2023.
36. I have perused the application dated 1st November 2023 which led to the ruling of 5th March 2024. I find that no persuasive grounds for review were advanced. No error on the face of the record was identified to warrant a review.



37. The Appellants submitted that the trial court failed to consider their written submissions dated 8th May 2023. In her ruling the learned trial magistrate addressed this issue and stated as follows:-
- “Indeed the court did not have the submission of the applicant on the record at the time of its ruling. This is evident in the ruling of the 24th October 2023. However having gone through the submission by the applicants in the matter dated 8th May 2023 I find that I would still have arrived at the same position.....” [Own emphasis]
38. I find that the trial magistrate did adequately address the failure to consider the Appellants written submissions.
39. The Appellants are aggrieved by the decision of the trial court to award costs in both applications to the Respondents. The issue of whether or not to award costs lies at the discretion of the trial court. The appellate court will not normally intervene unless wrong principles of law are applied or unless the costs awarded are too high or too low to be justifiable. Neither is the case in this matter. It is trite law costs follow the event. In both applications the Respondent was the successful party therefore the award of costs in their favour was quite in order. I therefore decline to intervene on the question of costs awarded by the trial court.
40. Finally I find no merit in this appeal. The same is dismissed in its entirety. The rulings of 24th October 2023 and 5th March 2024 are confirmed and upheld. This being a family matter I make no orders on costs.

DATED IN NYERI THIS 1ST DAY OF AUGUST 2025.

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MAUREEN A. ODERO
JUDGE

