



**EMN v CWG & another (Civil Appeal 36 of 2021)
[2024] KEHC 1047 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 1047 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL 36 OF 2021
RM MWONGO, J
JANUARY 25, 2024**

BETWEEN

EMN APPELLANT

AND

CWG 1ST RESPONDENT

GWG 2ND RESPONDENT

*(Being an appeal against the Ruling dated 21st September, 2021
of Mutiso PM in Wang’uru PM Succession No 124A of 2016)*

JUDGMENT

1. The appellant is aggrieved by the orders of the trial Court in its ruling delivered on September 21, 2021 in Wanguru PM’s Succession Cause No.124A of 2016. The impugned ruling allowed the respondent, CWG, to sell the deceased’s land parcels numbers Inoi /Kamondo/ xxx, xxx, xxx. xxx and xxx and apply the sale proceeds to pay fees for her minor, and file accounts for the surplus.
2. The appellant’s appeal is premised on the following grounds:
 - i. The learned trial magistrate erred in law and fact in failing to distinguish a claim under Children’s Act and one under the Law of Succession Act.
 - ii. The learned trial magistrate erred in law and fact for directing that 5 plots in a prime area within Kutus Township be sold for purposes of paying school fees for a child of one house, being Ksh.2,323,600/=, yet no valuation reports were filed in respect of the five properties to show their cumulative value.
 - iii. The learned trial magistrate erred in law and fact in failing to make a finding that the estate of the deceased is yet to be distributed amongst the houses of the deceased as per section 40 of the



Law of Succession Act, and therefore one house cannot get special consideration over the other houses during the pendency of the case.

- iv. The learned trial magistrate erred in law and fact in failing to appreciate that execution of contempt of court orders could not be substituted with orders for sale of deceased's property.
 - v. The learned trial magistrate erred in law and fact in failing to consider whether the appellant had in any way failed to comply with the court orders, and whether she receives rent over plot numbers xx Kerugoya and xxx/xxx/xx Nairobi.
3. The appellant prays that the appeal be allowed and the ruling and orders of the trial court be set aside and substituted with an order dismissing the application dated 3rd August 2021 in the trial court.

Appellant's Submissions

4. Parties filed written submissions as directed by the court
5. The appellant submitted that the legal provisions cited in the application, being rules 49 and 73 of the probate and administration rules are provisions for general application. Even though the three wives had been issued with letters of administration in respect of the estate of the deceased, the grant was yet to be confirmed. There is no single provision of the law in the Law of Succession Act that allows the selling of immovable property of a deceased person before the confirmation of grant.
6. The duties of personal representatives are contained in section 83 of the Law of Succession Act. In fact, section 82(b)(ii) of the said Act expressly provides that no immovable property shall be sold before the confirmation of the grant. The impugned orders were in violation and went against the provisions of the said section 82(b)(ii) of the Act.
7. Further, there was absolutely no basis for giving an order for the sale of 5 parcels of land even before ascertaining the value thereof. As the court observed while granting orders for stay of execution, on page 133 of the record of appeal in paragraph 5, only one parcel of land fetched Kshs.5,000,000 against the alleged fees payable of kshs.2,323,600. There were no conditions attached to the said orders to sell the 5 properties, for example, that the amount realized from the sale be deposited in a joint account of the three administratrixes and be specifically used for payment of school fees, or any other control measures.
8. Nothing was exhibited to show that the appellant benefitted from any money collected as rent, for the court to hold that she had refused to render accounts for monies collected, yet under sections 107,108 and 109 of the Evidence Act, any person who alleges must prove. It was incumbent upon the respondent to show that the appellant was benefitting in any way, yet as one of the administratrixes of the estate, she had a duty under section 83(b) of the Law of Succession Act to collect the free property of the deceased and collect moneys payable from the deceased's properties, or seek such orders for collection and preservation of free property of the deceased in her capacity as one of the administratrix of the estate.

Respondent's Submissions

Grounds 1, 2 and 3

9. The respondent submits that the Law of Succession Act, Cap 160 makes provision for dependants out of the deceased's net estate under Sections 26, 27 and 28 and grants the court complete discretion to order that a specific share of the estate be given to the dependant, or to make such other provision by way of periodic payments or a lumpsum.



10. The respondent cited the case of *NSS v Mukesh Kumar Hirji Punia Shah & 2 others* [2016] eKLR in which it was stated:

“The court relied on Section 27 of the *Law of Succession Act* in making its determination to make lumpsum payments towards the school fees, related payments and maintenance of the dependant out of the estate of the deceased. The court further noted that an application for provision of a dependant must be made before confirmation of the grant as provided for under section 30 of the *Law of Succession Act*. The Court also noted that even if the applicable law in a succession matter is the *Law of Succession Act*, where orders sought relate to a child, the best interests of the child are paramount and cited the provisions of Article 53(2) of *the Constitution* and Sec 4(3) of the *Children Act* No.8 of 2001 as read together with Article 159 (d) of *the Constitution*.”

11. The respondents refer to rule 73 of the Probate and Administration Rules which grants the court the inherent power to make such orders as it may deem necessary to meet the ends of justice.

Grounds 5 and 6

12. The appellant avers that the learned trial magistrate erred in law and fact by failing to appreciate that execution of contempt of court orders could not be substituted with orders for sale of the deceased's property.

13. Section 83 (h) of the *Law of Succession Act* Cap 160 which provides the duties of administrators of estates. One important duty is to produce, if required by the court, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate inventory of all dealings therewith.

14. The respondents submit that the Appellant who was the 2nd Petitioner in Wanguru Succession Cause No.12A of 2016 had a duty to account under Section 83 (h) of the *Law of Succession Act* Cap 160 having been appointed as one of the administrators. Having failed to comply with the courts orders to provide an inventory of the assets and liabilities of the estate of Fredrick Gateri Machanga (deceased), the court had the power and discretion to order that a specific share of the estate of the deceased be appropriated towards the provision of the urgent needs of the dependant Junior Darwin Machanga who was a minor and a dependent of the deceased.

Issue

15. The kernal issues for determination by this court are as follows:

1. Whether a distribution to a dependant can be effected prior to a determination on distribution.
2. Whether the appeal should be allowed.

Analysis and Determination

16. The appeal is against the orders in the ruling delivered on 21st September, 2021.

17. The ruling resulted from the summons dated 3rd August, 2021 where the applicant sought for an order authorizing the sale of Plot No. Inoi/Kamondo/xxx, xxx, xxx, xxx and xxx so as to pay the school fees for JDM (a minor) at [Particulars Withheld] School.

18. The court allowed the application and ordered the deceased's properties to be sold. This led to the current appeal on the grounds aforesaid:

Sale of deceased property before confirmation of grant



19. The trial court ordered for the sale of the deceased property to pay school fees for his dependant. At the time the grant had not been confirmed.
20. The court held that in determining the any dispute involving a child, the best interest of the child must be considered.
21. The respondent submits that the [Law of Succession Act](#), Cap 160 makes provision for dependants out of the deceased's net estate under Sections 26, 27 and 28 and grants the court complete discretion to order that a specific share of the estate be given to the dependant, or to make such other provision by way of periodic payments or a lumpsum.
22. Section 26 [Law of Succession Act](#) provides that:

“Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate.”
23. Reliance was placed on the decision in: *NSS v Mukesh Kumar Hirji Punia Shah & 2 Others* [2016] eKLR where: The court relied on Section 27 of the [Law of Succession Act](#) in making its determination to make lumpsum payments towards the school fees, related payments and maintenance of the dependant out of the estate of the deceased. The court further noted that an application for provision of a dependant must be made before confirmation of the grant as provided for under section 30 of the [Law of Succession Act](#). The Court also noted that even if the applicable law in a succession matter is the [Law of Succession Act](#), where orders sought relate to a child, the best interests of the child are paramount and cited the provisions of Article 53(2) of [the Constitution](#) and Sec 4(3) of the [Children Act](#) No.8 of 2001 as read together with Article 159 (d)of [the Constitution](#).”
24. I would note, quickly here, that in the case of *SS v Mukesh* (above) the court relied on provisions of the will of the deceased expressly providing for dependants.
25. However, the appellants submitted that section 82(b)(ii) of the said Act expressly provides that no immovable property shall be sold before the confirmation of the grant. The impugned orders of the trial court were in violation and went against the provisions of the said section 82(b)(ii) of the Act.
26. In *re Estate of Jamin Inyanda Kadambi (Deceased)* [2021] eKLR it was stated that:

“A valid sale of estate property can only be by those to whom the assets vest by virtue of section 79, and who have the power to sell the property by virtue of section 82. Even then, immovable assets, like land, such as Kakamega/Kegoye/xx, cannot be disposed of by administrators before their grant has been confirmed, and if land has to be sold before confirmation, then leave or permission of the court must be obtained. That is the purport of section 82(b)(ii) of the [Law of Succession Act](#). Clearly, the sale transaction that was carried out by the administrators was contrary to sections 45 and 82(b) (ii) of the [Law of Succession Act](#), and was invalid for all purposes. It cannot be asserted at all, and am surprised that persons to whom administration of the estate herein can purport to support a sale transaction that was carried out contrary to the very clear provisions of the law.”



Failure to render accounts for rent monies collected

27. In the court ruling delivered on 19th January, 2021, the appellant was ordered to pay fees for the minor from the rent collected from Plot No xxx/xxx/xx Nairobi and Plot No. xx Kerugoya. Further, they failed to accounts for the same. The court held that it was a glaring and open contempt of court.
28. The appellant submitted that it was incumbent upon the respondents to show that the appellant was benefitting in any way, yet as one of the administratrixes of the estate, she had a duty under section 83(b) of the *Law of Succession Act* to collect the free property of the deceased and collect moneys payable from the deceased's properties, or seek such orders for collection and preservation of free property of the deceased in her capacity as one of the administratrix of the estate.
29. The respondent submitted that the court had the power and discretion to order that a specific share of the estate of the deceased be appropriated towards the provision of the urgent needs of the dependant who was a minor and a dependent of the deceased.
30. Nevertheless, the appellant to argues that the failure to render accounts of the deceased's property cannot be resolved by ordering the sale of the property before the confirmation of grant.
31. Reliance was placed on the case of *Elias Kiambi & 2 others v Martin Macharia Maina [2020] eKLR*. There it is held that the Act prohibits the transfer of immovable property before the confirmation of grant. See Section 82 (ii) of the Act which provides:

“No immovable property shall be sold before confirmation of the grant;”

Disposition

32. In the impugned Ruling of the trial court, it is clear that the trial magistrate had previously ordered that fees for the minor be paid from rents collected from Plot No. xxx/xxx/xx/ Nairobi, and Plot No. xx Kerugoya. He further ordered accounts to be availed by the administrators.
33. On the failure of the administrators to comply, the trial court expressed its “shock” at the contempt. The court, citing the need for urgency in dealing with children’s matters, then ordered the sale of parcel numbers Inoi/Kamondo/xxx, xxx, xxx, xxx and xxx to pay for the fees of the minor JDM.
34. It appears to me that the court was hasty and reckless in making this decision. Valuations of the properties had not been made to enable the court to judiciously determine whether the said sale proceeds would suffice. The court had, and has, many tools at its discretion to ensure that administrators who do not follow its orders are dealt with. In addition, the court also has wide discretion to engage valuers, and it could have done so to avert the problem of unfairly and unproportionately allocating too much of the deceased's estate to one beneficiary as a dependant in this case.
35. Further, the trial magistrate does not appear to have considered what proportion of the “net estate” the properties sought to be sold would comprise, and whether the debts, liabilities and other costs of probate and reasonable expenses of administration had been taken into account. I think that before Section 26 or 27 of the *Law of Succession Act* is invoked, the court should be fully informed or aware of what the value of the “net estate” in Section 26 is, and as duly defined in Section 2 of the *Law of Succession Act*.
36. A court exercising its discretion under Section 26 or 27 of the *Law of Succession Act* in favour of a dependant, should not act in such a way that the result may be to punish other beneficiaries for



the missteps of the administrations. The court must take a balanced approach considering all the circumstances of the case. This is precisely what Section 28 of the [Law of Succession Act](#) requires.

37. In the present case, there is no indication in the impugned ruling that the trial magistrate took into account the circumstances required to be taken into account under Section 28 of the [Law of Succession Act](#).
38. In the trial court's hasty action in ordering sale of the deceased's properties, it appears that it did not take into account the following: That two of the properties ordered for sale Inoi/Kamondo/xxx and xxx were registered in the joint names of the deceased and one Jeremiah Gateri, according to searches held in the lower court file. The searches are dated 6.11.2011 over one year after the deceased died.
39. In conclusion, my view is that there is no doubt that a court has a broad discretion to make provision for a dependant by ordering a specific share of the estate to be applied to the dependant under Section 27 and 28 [Law of Succession Act](#). However, the court in so doing must take into account all the circumstances set out in Section 28 of the [Law of Succession Act](#), before exercising its discretion.
40. Section 28 [Law of Succession Act](#) provided as follows:

“In considering whether any order should be made under this Part, and if so what order, the court shall have regard to-

 - a. the nature and amount of the deceased's property”
 - b. any past, present or future capital or income from any source of the dependant;
 - c. the existing and future means and needs of the dependant;
 - d. whether the deceased had made any advancement or other gift to the dependant during his lifetime;
 - e. the conduct of the dependant in relation to the deceased
 - f. the situation and circumstances of the deceased's other dependants and the beneficiaries under any will;
 - g. the general circumstances of the case, including, so far as can be ascertained, the testator's reasons for not making provision for the dependant.
41. In this case, the trial court did not take into account the circumstances spelt out in Section 28 [Law of Succession Act](#). In the result the orders given were bereft of the considerations that, mandatorily ought to have been taken into account. To that extent, the ruling of the trial court went beyond the scope of the law and was thus unlawful.

Conclusions and Disposition

42. For the reasons given, I find and hold that the impugned ruling of the trial court was inconsistent with the law and cannot stand.
43. Accordingly, the appeal succeeds and this court allows it in its entirety.
44. In the event, the court hereby sets aside the ruling of the trial court and substitutes the same with an order dismissing the application dated 3rd August 2021 in the trial court.
45. The appellant shall have the costs of the appeal.
46. Orders accordingly.



DATED AT KERUGOYA THIS 25TH DAY OF JANUARY, 2024

R. MWONGO

JUDGE

Delivered in the presence of:

1. Asimwe - holding brief for Magee for the appellant
2. Kagio - for the Respondent
3. Murage, Court Assistant

