



In re Estate of David Muriithi alias David Muriithi Ng'ang'a (Deceased) (Civil Appeal E046 of 2023) [2024] KEHC 1691 (KLR) (23 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1691 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E046 OF 2023
LM NJUGUNA, J
FEBRUARY 23, 2024**

**IN THE MATTER OF THE ESTATE OF DAVID MURIITHI
ALIAS DAVID MURIITHI NG'ANG'A (DECEASED)**

BETWEEN

ASENATH IGANDU CHEGE APPELLANT

AND

JANE RWAMBA NJERU RESPONDENT

(Appeal from the Judgment of Hon. D. Endoo RM delivered in Chief Magistrate's Court Embu Succession Cause No. 214 of 2019 on 08th August 2023)

JUDGMENT

1. By a memorandum of appeal dated 30th August 2023, the appellant seeks orders that the appeal herein be allowed, the judgment of the subordinate court be set aside and the protest be allowed. That in the alternative the certificate of confirmation of grant be set aside until the appellant files a suit to recover the property Gature/Nembure/9753 against the administrators of the estate of the deceased. The appeal is premised on the grounds that the learned magistrate erred in law and fact by:
 - a. Ignoring the appellant's evidence that the respondent sold the deceased's parcel number Gature/Nembure/9747 hence has no right to inherit parcel number Gature/Nembure/9753;
 - b. Citing Rule 41(3) of the Probate and Administration Rules and still dismissed the protest and issued a certificate of confirmation of grant instead of setting the matter aside until the ownership dispute is determined;
 - c. Ignoring the appellant and his witnesses' evidence that the remaining land was parcel number Gature/Nembure/9753 which the appellant's mother wished for it to be distributed amongst her 5 daughters excluding all the others; and



- d. Entirely disinheriting the appellant.
2. The deceased herein is the son of the respondent and the grandson of the late Jemima Gichugu Njeru who had 5 daughters namely the appellant, the respondent, Margery Kanini, Lucy Wanjovi and Millicent Muthoni. The respondent petitioned for a grant of letters of administration to the estate of the deceased and the same was issued on 07th September 2022. Upon being appointed administrator of the estate, the respondent filed summons for confirmation of the grant and suggested that the intestate estate of the deceased comprising land parcel number Gature/Nembure/9753 be transferred to the respondent to hold in trust for the deceased's wife and son.
 3. The appellant filed an affidavit of protest to the summons for confirmation of grant stating that the deceased herein is her nephew. That the appellant's deceased mother, prior to her death, had directed that the property parcel number Gature/Nembure/9753 be distributed amongst her 5 daughters being the appellant, the respondent, Margery Kanini, Lucy Wanjovi and Millicent Muthoni. It was her case that if the property is transferred to the respondent alone, the other 4 sisters will be disinherited. She urged that the property be distributed equally amongst the 5 sisters.
 4. The court took viva voce evidence on the protest. PW1 was the appellant who testified that the property parcel number Gature/Nembure/9753 belonged to her deceased mother who intended that the same be subdivided and distributed amongst her 5 daughters. That the respondent was asked to follow up on the process of subdivision but the appellant was surprised to learn that the respondent had transferred the property to her son, the deceased herein. On cross-examination, she stated that before her mother died, she distributed land to all her grandsons who were named after her late husband, including the deceased herein and her (PW1's) son.
 5. That she is claiming the property parcel number Gature/Nembure/9753 because it was her mother's wish for her daughters to inherit the said land. That she distributed the said land in the year 2007 and she died in 2016 and all along, she used to inquire about the title deed in vain. That parcel number Gature/Nembure/9753 was registered to the deceased in 2019. PW2 was James Muchohi Mugo, who stated that the late Jemima Gichugu was his mother-in-law. That prior to her death, she gave land on the right-hand-side of the Embu-Meru road towards Meru, to her grandsons including his son and the deceased herein. That she left parcel number Gature/Nembure/9753 for her 5 daughters.
 6. DW1 the respondent, stated that the deceased was given land parcel number Gature/Nembure/9753 by Jemima Gichugu, his grandmother on 2007. That the portion was slightly bigger than the ones she gave to her other grandsons. That her deceased mother was living on the parcel given to the deceased. That there was a plot that the late Jemima Gichugu spared and sold to one James Njeru Nyaga in order to facilitate subdivision of the other properties for her grandsons and daughters. That John Kariuki, a son of Jemima and the respondent's brother was also given 2 acres as the grandsons were given their portions. That in all these arrangements, the appellant did not complain to Jemima Gichugu and only raise issues when Jemima Gichugu died. That all the properties were subdivided and transacted while Jemima Gichugu was alive.
 7. DW2 was John Kariuki Njeru, brother of the respondent, who stated that the deceased and other grandsons, were given land by his grandmother, the late Jemima Gichugu. That a portion of the land was sold by the respondent to facilitate subdivision and distribution of the land and all this was done before the late Jemima Gichugu died. That the appellant was living with Jemima Gichugu before she died and she knew that land was given to the grandsons including the deceased. That she is lying by stating that she only knew about the deceased's land in 2019.



8. The respondent's advocate notified the court of the witness statements by Margery Kanini, Joseph Njagi Nyaga and Millicent Muthoni Njeru who all supported the respondent's case and that their testimonies were consistent with those of DW1 and DW2.
9. The trial magistrate found that the grandmother of the deceased gave the land to the deceased before her death and the same was duly registered in the name of the deceased. The land was treated as a gift inter vivos and so was any other land which was transacted by the grandmother of the deceased before she died. That none of the parties testified regarding parcel number Gature/Nembure/9747 and the same is not part of the estate of the deceased herein. It was the judgment of the court that the parcel belonging to the deceased be registered to the respondent and the wife of the deceased jointly to hold in trust for the son of the deceased who is a minor.
10. This appeal was canvassed by way of written submissions.
11. It was the appellant's submission that there is an issue of ownership of the land parcel number Gature/Nembure/9753 and that the same should be determined before the estate is distributed. That the trial magistrate erred in distributing the estate when ownership of the subject property should be determined first. That in her judgment she conceded to Rule 41(3) of the Probate and Administration Rules which provides that any part of the estate which is in dispute should be set aside from distribution until such ownership is determined by the correct forum, and yet proceeded to distribute the estate. She urged the court to allow the appeal and grant the orders sought.
12. The respondent submitted that the allegations of the appellant are not genuine and the trial magistrate proceeded correctly in granting the orders. That the grandmother of the deceased gave the land parcel number Gature/Nembure/9753 to the deceased as a gift before she died and that there is sufficient evidence to show that this was the case. That at no point during the lifetime of their deceased grandmother did the appellant question her about giving the land to the deceased, rather, the issue only arose after the death of their mother. That the appellant did not produce proof that the land parcel number Gature/Nembure/9747 was sold and so the allegations cannot be relied on. She urged the court to uphold the findings of the trial court.
13. Having perused the memorandum and record of appeal together with the submissions herein, I find the issues for determination to be as follows:
 - a. Whether the appellant has been disinherited; and
 - b. What properties formed the estate of the deceased for purposes of distribution and who should inherit.
14. The role of an appellate court is to re-examine the evidence at trial and come up with its own conclusions while keeping in mind the findings of the trial court. In the case of *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:

“...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 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...”
15. It is important to note that the deceased herein is the registered owner of the land parcel number Gature/Nembure/9753 which was the only estate he left after his death. The deceased, who died at



28 years old, was survived by his mother, his wife and a son. Both parties herein and their witnesses at the trial stated that the deceased was given the property as a gift by his grandmother in 2007. That the title was processed at the same time and the land was registered in his name. The appellant herein is a maternal aunt of the deceased and the sister of the respondent who is the mother of the deceased.

16. On the question of whether the appellant will be disinherited if the property is distributed according to the trial court, it is not unusual for an aunt of the deceased to inherit so long as they are proven dependants under section 29 of the Law of Succession Act or are next in line in the hierarchy of beneficiaries. However, section 35(1) of the Law of Succession Act gives precedence to a spouse and a child or children of the deceased. It states:

- (1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to-
- (a) the personal and household effects of the deceased absolutely; and
 - (b) a life interest in the whole residue of the net intestate estate:

Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.

17. In her affidavit of protest, the appellant alleged that land parcel number Gature/Nembure/9753 was supposed to be for the appellant, the respondent and their 3 sisters jointly while the land parcel number Gature/Nembure/9747 was the one that was given to the deceased herein which was sold by the respondent. It was her testimony that her deceased mother gave gifts of land to her grandsons and left the parcel number Gature/Nembure/9753 to be held by the 5 sisters. She contested ownership of the piece of land which was in the name of the deceased. PW2 also stated the same in his evidence. Throughout the evidence, it has come out clearly that the deceased's grandmother gifted land to the deceased in 2007.

18. It is her argument in this appeal that there is a looming issue of ownership of the parcel of land and that she should be allowed time to ventilate the issues in the Environment and Land Court (ELC) before the estate is distributed. The ideal situation would be for the appellant to demonstrate that a case has been filed in ELC seeking to determine ownership of the land before attempting to halt the confirmation proceedings. Staying proceedings is not a trivial matter and should be done only where it is extremely necessary. In the case of *Kenya Wildlife Service –vs- James Mutembei* [2019] eKLR held that: -

“....Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent...”

19. Without a substantial reason to halt the proceedings pending determination of an ELC suit which has not yet been instituted, this court cannot consider the appellant's prayer. In the case of *In re Estate of Cypriano Kaiji Gikono (Deceased)* [2020] eKLR, the court was faced with a similar predicament and the appellant was denied the orders sought. It was held thus:

“...She attempts to stake her claim through succession causes which to me is most inappropriate approach unless she is armed with a valid court order vesting ownership in her which the court should give effect in the succession cause.....I should think that, perhaps, the applicant does not assign appropriate proportion of weight or relevance to the said



determination in the succession causes. If she could count or clothe those decisions with the necessary legal vitality, perhaps, it may occur to her that other forums, say, appeal or a suit in ELC, may be appropriate in her quest for ownership of the suit land. She may have a valid claim..... She has participated in these proceedings throughout and she would have known better the appropriate intervention before and after confirmation of grant. At this stage, her application to exclude the suit land unless armed with a valid court order may be a toll order to achieve...”

20. Further, in the case of *in re Estate of Stone Kathuli Muinde (Deceased)* [2016] eKLR the court discussed the effect of Order 37 of the Civil Procedure Rules in succession proceedings where an issue of ownership of property has arisen within the proceedings, and held that :

“...If a decree is obtained in such suit in favour of the claimant then such decree should be presented to the probate court in the succession cause so that that court can give effect to it.”

21. Rule 41(3) of the Probate and Administration Rules refers to Sections 71(2) and 82 of the *Law of Succession Act* on the duties of personal representatives in regards to defining the estate for distribution, whether or not the question involves 3rd parties. It provides thus:

“Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71 (2) of the Act, proceed to confirm the grant.”

22. It is the duty of personal representatives and/or third parties to initiate the ELC proceedings if any and once the proceedings are in place or any orders emanate from the said court, the succession court will give effect to the order to halt proceedings pending determination of the ELC suit. As it is, the appellant has not demonstrated to the trial court or to this court that there are pending proceedings in that court whose subject is the land parcel number Gature/Nembure/9753. Therefore, in my view, the property forms the estate of the deceased and should be distributed accordingly.

23. Since the appellant has also failed to demonstrate that she is a beneficiary of the estate of the deceased, I have perused the findings of the trial court on the distribution. The trial magistrate ordered that the mother and wife of the deceased be registered as joint trustees of the property and will both hold it in trust for the minor. The wife of the deceased has not contested this position and I see no need to interfere with this arrangement. The appellant is not a beneficiary of the estate and will not in any event be disinherited from an estate on which she has no right to claim.

24. Therefore, this appeal lacks merit and it is hereby dismissed.

25. It is so ordered

DELIVERED, DATED AND SIGNED AT EMBU THIS 23RD DAY OF FEBRUARY, 2024.

L. NJUGUNA

JUDGE

.....for the Appellant



.....for the Respondent

