



**Boiyo (Administrator of the Estate Of The Late Isaiah Boiyo Kibunguchi) v Wepukhulu
(Administrator of the Estate of the Late Manasi Wepukhulu Situma) (Succession
Appeal 5 of 2022) [2024] KEHC 2067 (KLR) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 2067 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
SUCCESSION APPEAL 5 OF 2022
DK KEMEL, J
FEBRUARY 22, 2024**

BETWEEN

**DAVID NYONGESA BOIYO APPELLANT
ADMINISTRATOR OF THE ESTATE OF THE LATE ISAIAH BOIYO
KIBUNGUCHI**

AND

**JOSEPH SITUMA WEPUKHULU RESPONDENT
ADMINISTRATOR OF THE ESTATE OF THE LATE MANASI WEPUKHULU
SITUMA**

*(An appeal from the Judgement of Hon. Gladys Adhiambo, Principal Magistrate
delivered on 9th November 2022, in Kimilili P.M.C Succession Cause No. 242 of 2018)*

JUDGMENT

1. The Respondent herein moved the trial court vide summons for confirmation of grant dated 4th August 2017 seeking that the grant of letters of administration in relation to the estate of Manasi Wepukhulu Situma made to him be confirmed and that the deceased's estate be distributed as per the consent of distribution filed in court on 16th August 2017. The Appellant herein protested the confirmation alleging that the interest of the late Isaiah Boiyo Kibunguchi was not factored in the proposed distribution. According to the Appellant, the late Isaiah Boiyo Kibunguchi in the year 1962 purchased land from the late Manasi Wepukhulu Situma measuring 1 ½ acres from the parcel No. Kimilili/Kamukuywa/77 and that he took possession of the same and has been in occupation of it until his demise. The trial court held that the Appellant never produced any proof of the same such as an agreement for sale of land to prove that the late Manasi Wepukhulu Situma sold to the late Isaiah Boiyo Kibunguchi the parcel measuring 1 ½ acres and that the Appellant only made allegations. The



court further held that the Appellants failed to prove the dictates of section 3 (3) of the Contract Act Chapter 23 Laws of Kenya which explicitly provides that no suit shall be brought upon a contract for the disposition of an interest in land unless the said contract is in writing; signed by all parties thereto and that the signature of each signing party is attested to by a witness who is present when the contract was executed by the said party. The trial court proceeded to dismiss the Appellant's protest/objection as the same was unmerited.

2. Aggrieved by the decision of the trial court, the Appellant preferred this appeal on the following grounds:
 - i. The learned magistrate's judgement was against the preponderance of the evidence adduced.
 - ii. The learned magistrate had no justification for rejecting the Appellant's averments that the family of the late Isaiah Boiyo Kibunguchi had lawfully resided on the subject land peacefully and without interruption for the last 59 years.
 - iii. That learned magistrate's judgement is against principles of equity which are entrenched in the laws of Kenya.
 - iv. There was no justification whatsoever for condemning the Appellant to pay costs to the Respondent.
3. The Appellant prayed that this court allows his appeal and direct the Respondent to transfer to the Appellant the 1 ½ acres of land which is occupied by the Appellant's family.
4. The appeal was canvassed by way of written submissions. A perusal of the court record reveals that it is only the Appellant who duly filed his submissions. In a nutshell, counsel submitted that the trial court's decision was a definite error of fact and law as the doctrine of possession recognizes 12 years of peaceful and continuous possession pursuant to the purchase of the land as sufficient to give title to the purchaser. Counsel urged this court not to permit the Respondent to use the provisions of the Contract Act and Land Control Act to defeat equity.
5. Grants are confirmed under section 71 of the Law of Succession Act, which states as follows:

“Confirmation of Grants

71. Confirmation of grants

- (1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the Court for confirmation of the grant in order to empower the distribution of any capital assets.
- (2) Subject to subsection (2A), the Court to which application is made, or to which any dispute in respect thereof is referred, may —
 - (a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or
 - (b) if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of



sections 56 to 66 of this Act, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be administered; or

- (c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other Court all assets of the estate then in his hands or under his control; or
- (d) postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case:

Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the Court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares.”

6. In confirmation applications, there are two principal factors for the court to consider namely; appointment of administrators and distribution of the estate. The principal purpose of confirmation is the distribution of the assets left behind by a deceased.
7. From the foregoing evidence, it is not in dispute that the estate of the deceased Manasi Wepukhulu Situma was comprised of one asset namely Kimilili/Kamukuywa/77 and that the beneficiaries to the estate agreed to the mode of distribution of the same. It is also not in dispute that the Appellant herein opposed the claim by the Respondent to a portion of parcel number Kimilili/Kamukuywa/77 as they are in occupation of 1 ½ acres as a result of the late Isaiah Boiyo Kibunguchi purchasing the same from the late Manasi Wepukhulu Situma.
8. I have considered the averments of the parties, and the mode of distribution of the deceased’s estate that the Appellant proposes. I have also considered the Appellant’s submission. In my view, the only issue for determination is whether this court should interfere with the decision of the trial court.
9. The Appellant alleged that the late Isaiah Boiyo Kibunguchi had purchased 1 ½ acres of land comprised in land parcel number Kimilili/Kamukuywa/77 from the deceased Manasi Wepukhulu Situma but he did not avail any probable evidence before the court to ascertain his legit claim on the said piece of land. I take liberty to highlight that the evidence rendered to prove his allegations was the uninterrupted occupation of the family of the late Isaiah Boiyo Kibunguchi for the past 59 years and their eventual development of the said portion. A perusal of the lower court record shows that the official search conducted at the land registry indicated that the bona fide owner of land parcel Kimilili/Kamukuywa/77 is deceased Manasi Wepukhulu Situma thus indicating that the same property falls under the estate of the deceased. It is noted that the Appellant failed to produce any sale agreement between the late Isaiah Boiyo Kibunguchi and the deceased Manasi Wepukhulu Situma. Further, the Appellant’s submissions allude to the aspect of adverse possession making it an issue at the heart of title and ownership. Ownership or proprietorship of a property revolves about title, and that clearly places the matter squarely under Article 162(2) of the Constitution in which the appropriate forum to deliberate on it is the Environment and Land Court.
10. The property in question is a registered land. Registration of property and transfers of land are governed by land legislations, to be specific the Land Registration Act, No. 3 of 2012, and the Land Act, No. 6 of 2012. The two pieces of land legislation have elaborate provisions on sale of registered



land, and transfer and registration thereof. A determination of the question as to whether there was a valid sale of the registered land in accordance with the relevant land legislation is an issue that is well outside the jurisdiction of the High Court.

11. My understanding, in the context of the matter before me, is that any disputes or questions or issues that require court intervention, which revolve around sale, registration and transfer of land, fall within the jurisdiction of the Environment and Land Court. The [Land Registration Act](#) and the [Land Act](#), therefore, confer jurisdiction in the Environment and Land Court with regard to all the processes that are subject to the two statutes, and, therefore, the Environment and Land Court and any subordinate court that has been conferred with jurisdiction over the processes the subject of sale, registration and transfer of land is the right forum to adjudicate the matters. All this adds emphasis to the fact that, i have no jurisdiction whatsoever to address the matter that the Appellant herein has placed before me. Suffice here to add that he did not avail any documents to support his claims onto the 1 ½ acres from land parcel Kimilili/Kamukuywa/77. To that extent, i find the Appellant's claim not proved and is dismissed. The Appellant ought to have lodged a suit against the administrators of the estate of Manasi Wepukhulu Situma in the Environment and Land Court either in the High Court or lower court depending on the pecuniary jurisdiction so as to establish his claim of ownership in the subject property but not to interfere with the distribution of the estate of Manasi Wepukhulu Situma especially now that he does not even have evidence of sale.
12. On the ground that the Appellant ought not to have been condemned to pay costs, it is evident that the trial court ordered the Appellant to pay the Respondent costs. By virtue of section 27 of the [Civil Procedure Act](#), it is trite law that the issue of costs is a discretionary award that is awarded to a successful party. In the case of [Party of Independent Candidate of Kenya & another v Mutula Kilonzo & 2 others](#) (2013) eKLR which cited with approval the words of Murray C J in [Levben Products v Alexander Films \(SA\) \(PTY\) Ltd](#) 1957 (4) SA 225 (SR) at 227 that it stated:

“It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion ...But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at....In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”
13. In [Republic v. Rosemary Wairimu Munene \(Ex parte Applicant\) v. Ibururu Dairy Farmers Co-operative Society Ltd](#) Judicial Review Application No. 6 of 2004 Mativo J. held that the issue of costs is the discretion of the court and is used to compensate the successful party for the trouble taken in prosecuting or defending the case and not to penalize the losing party. This position was adopted by the court in [Cecilia Karuru Ngayu v. Barclays Bank of Kenya & Another](#) [2016] eKLR.
14. The import is that a successful party is entitled to costs unless he or she is guilty of any misconduct or there exists some other good reasons and or cause for not awarding costs to the successful party.
15. The award of costs is not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In [Morgan Air Cargo Limited v Everest Enterprises Limited](#) [2014] eKLR the Court noted that;

“The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Cost follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the [Civil Procedure Act](#) is couched the way it appears in the statute; and even all



literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”

16. In the instant appeal, the Appellant provoked the Protest/Objection and lost the same which rendered the Respondent herein to proclaim the status of a victor thus the successful party in terms of the provisions of section 27. The trial court did not see any reason as to why it should deny the victor the costs.
17. I believe that i have said enough. It follows therefore that the learned trial magistrate did not err when she dismissed the Appellant’s application dated 4th August 2017. I uphold the trial court’s decision. Consequently, i find no merit in this appeal. The same is dismissed. In exercise of my discretion, i find that though the Respondent never labored much in the appeal, the court will award one third of costs which shall be on the lower scale.

It is so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 22ND DAY OF FEBRUARY 2024.

D. KEMEI

JUDGE

In the presence of:

Alofi for Khakula for Appellant

Masengeli for Respondent

Kizito . Court Assistant

