



REPUBLIC OF KENYA



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**Simotwo v Kitiyo (Civil Appeal E048 of 2022)
[2023] KEHC 3632 (KLR) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3632 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E048 OF 2022
JRA WANANDA, J
APRIL 28, 2023**

BETWEEN

SILAS MACHOMU SIMOTWO APPELLANT

AND

CHARLES KIPSIRO KITIYO RESPONDENT

JUDGMENT

1. This Appeal relates to the inheritance or devolution of the property known as L.R. No. Elgon/Chemoge/xxx as one of the assets distributed in Kimilili SRM Succession Cause No. 57 of 2018, the Cause that has given rise to this Appeal.
2. One Simotwo Chesole Mukuta and one MC were apparently step-brothers. This information is contained in a Report dated 07/03/1991 from the District Officer, Kapsokwony Division addressed to the Deputy Registrar of the High Court at Kakamega concerning a dispute over ownership of the properties L.R. No. Elgon/Chemage/xx and L.R. No. Elgon/Chemage/xxx.
3. The Report is exhibited to the Respondent's Replying Affidavit filed on 02/01/2020 in SPM Kimilili Succession Cause No. 57 of 2018. The Report also states that the said MC divorced without getting a child.
4. On his part, Simotwo Chesole Mukuta had three sons, namely, William Machomu, Jackson Simotwo and Luka Kitiyo Simotwo. He was in possession of four land parcels.
5. Upon the death of Simotwo Chesole Mukuta in the year 1987, three of the four properties were amicably shared out between two of his said three sons, as follows:
L.R. No. Elgon/Chemoge/xxx
Approx. 4.4 Hectares
Luka Kitiyo Simotwo (Respondent's father)



L.R. No. Elgon/Chemoge/xxx

Approx 2.6 Hectares

Luka Kitiyo Simotwo (Respondent's father)

L.R. No. Elgon/Chemoge/xxx

Approx 1.1 Hectares

William Machomu (Appellant's father)

6. The fourth property, L.R. No. Elgon/Chemoge/xxx measuring approximately 9.7 Hectares, although apparently possessed by Simotwo Chesole Mukuta was at all material times registered in the name of his said step-brother MC.
7. The Appellant is the son of the said William Machomu, one of the three sons of Simotwo Chesole Mukuta referred to above.
8. It is alleged by the Appellant that L.R. No. Elgon/Chemoge/xxx was occupied by his father William Machomu,. However, there is evidence that the properties L.R. No. Elgon/Chemoge/xxx and L.R. No. Elgon/Chemoge/xxx had subsequently somehow become registered in the name of a third party by the name Mochomu Chemengich.
9. As aforesaid, MC, was at all material times the initial registered owner of L.R. No. Elgon/Chemoge/379 and L.R. No. Elgon/Chemoge/xxx. Since MC did not have a wife or child, when he died, Luka Kitiyo Simotwo one of the three sons of Simotwo Chesole Mukuta was appointed the Administrator of his Estate.
10. Subsequently, on 06/01/1994 the Grant was confirmed and the two properties, L.R. No. Elgon/Chemoge/xxx and L.R. No. Elgon/Chemoge/xxx allocated to Luka Kitiyo Simotwo.
11. Being the Administrator, Luka Kitiyo Simotwo initiated a Court case against the third party Mochomu Mengich in whose name the said L.R. No. Elgon/Chemoge/xxx and L.R. No. Elgon/Chemoge/xxx had somehow become registered.
12. The Court cases were successful and sometime in 1994, Luka Kitiyo Simotwo was registered as owner of the properties and Title Deeds issued in his name. Unfortunately, Luka Kitiyo Simotwo himself died in the year 2005
13. In the year 2010, Luka Kitiyo Simitwo's son, Charles Kipsiro Kitiyo (the Respondent herein) then Petitioned the Court in Kimilili SRM Succession Cause No. 57 of 2018 (the suit that has given rise to this Appeal) for Letters of Administration to manage the Estate of his late father, Luka Kitiyo Simitwo which as aforesaid, included L.R. No. Elgon/Chemoge/xxx and L.R. No. Elgon/Chemoge/xxx.
14. Pursuant thereto, a Grant of Letters of Administration was issued to the Respondent on 12/04/2019 in the said Cause. Subsequently, the Grant was confirmed on 27th November 2019. In the distribution, the property L.R. No. Elgon/Chemoge/xxx devolved to the Respondent and L.R. No. Elgon/Chemoge/xxx was held by him in trust for other beneficiaries.
15. However, on 03/12/2019 the said William Machemo Simotwa, a brother of Luka Kitiyo Simitwo and therefore an uncle to the Respondent, filed an Application under Section 76 of the [Law of Succession Act](#) seeking revocation of the Grant. The bone of contention was distribution or devolution of L.R. No. Elgon/Chemage/xxx.



16. The grounds for seeking revocation were that the Grant was obtained fraudulently by making of false statements and by concealment of material facts, that the process was defective in substance, that the Respondent was using the Grant to disinherit other heirs who have an interest in the said property L.R. No. Elgon/Chemoge/xxx and that he William Machemo Simotwa has been in occupation of the property for a long time.
17. He added that he, William Machemo Simotwa was given the property by their late father before he died in the year 1987, that the Respondent had filed a suit, namely, Kimilili SPM Civil Case No. 117 of 2015 seeking to bar William Machemo Simotwa from using the property but that the suit was dismissed, that the Respondent filed the Succession proceedings without his knowledge and that the Respondent was in the process of transferring the property to himself which action would be detrimental to his share of the property.
18. In his Supporting Affidavit, he deponed that prior to their father's demise in the 1987 he had given him (William Machemo Simotwo) the said property L.R No. Elgon/Chemoge/xxx where he settled with his family to date, that acting as the Administrator of their father's estate Luka Kitiyo Mukuta registered himself as the sole proprietor of the property, that Luka Kitiyo Mukuta was holding the property in trust for him (William Machemo Simitwo) and that he has occupied the property for over 40 years.
19. In response, the Respondent relied on his Replying Affidavit filed on 02/01/2020. He deponed that the Application seeking revocation was filed in bad faith, was misconceived, bad in law and an abuse of the Court process and that although the Appellant was the brother to the Respondent's father Luka Kitiyo Mukuta, he was not a beneficiary of the estate of Luka Kitiyo Mukuta.
20. He added that the property L.R No. Elgon/Chemoge/xxx belongs to his father Luka Kitiyo Mukuta and not the Appellant's father, that the said ownership history was apparent from the Green Card that he exhibited, that a previous Court case Kakamega HC Misc. Appl. No. 97 of 1990 between his father Luka Kitio Mukuta and the third party Mochomu Mengich regarding ownership of the property was resolved in 1993 in favour of his father Luka Kitiyo Mutuka and that this was apparent from the Court proceedings and minutes of a meeting with the DO Kapkoskwony that he exhibited.
21. He further deponed that it is after conclusion of the suit that his father Luka Kitiyo Mutuka petitioned the Court in Nairobi High Court Succession Cause No. 21 of 1985 to appoint him the administrator of the estate of the said MC, that the Grant issued therein was confirmed on 06/01/1994 wherein the two land parcels L.R No. Elgon/Chemoge/xxx and L.R No. Elgon/Chemoge/xxx were given to his father Luka Kitio Mukuta and that the above is apparent from the Certificate of Confirmation of Grant that he exhibited.
22. He also deponed that contrary to the claim by the Appellant, PMC Kimilili Civil Suit No. 117 of 2015 was withdrawn and not dismissed, the withdrawal was made after advice from the Court to file a Succession Cause instead, that the above is apparent from the Withdrawal notice and Grant of Letters of Administration that he exhibited and that not being a beneficiary of the estate of Luka Kitio Mukuta there was no reason for the Appellant to be involved in the Application for Administration of the estate.
23. Further, he deponed that his father Luka Kitio Mukuta did not hold the properties L.R No. Elgon/Chemoge/3xxx, L.R No. Elgon/Chemoge/xxx and L.R No. Elgon/Chemoge/xxx in trust for the Appellant's father since the Green Cards exhibited show the ownership history before his father Luka Kitio Mukuta was registered as owner on 24/01/1994, that the Appellant's father on his part got L.R No. Elgon/Chemoge/xxx which is the property in which the Appellant is a beneficiary, that after the death of his father Luka Kitio Mukuta the Appellant's father caused a lot of mayhem forcing them to



- call the clan, that the clan meeting convened on 20/03/2012 resolved that the Appellant moves from the property L.R No. Elgon/Chemoge/xxx and settles in L.R No. Elgon/Chemoge/381 and that the Appellant was warned by the DC not to carry out any activities in L.R No. Elgon/Chemoge/xxx.
24. Unfortunately, after the filing and exchange of the Affidavits, William Machemo Simotwa died. He was then substituted by his son, the present Appellant, Silas Mochomu Simotwo.
 25. The matter was then canvassed by way of written Submissions filed by both parties. In the Submissions the parties basically reiterated what has already been stated above.
 26. In addition, the Appellant submitted that the exhibited Court proceedings in Kimilili SPM CMC No. 117 of 2015 showing that the Respondent had filed a suit seeking the eviction of the Appellant from the property L.R No. Elgon/Chemoge/xxx was sufficient proof that the Appellant was the one who was in occupation. In breach of procedure, the Appellant also introduced some new facts which had not been deponed in his Affidavits.
 27. On 12/10/2021 the Learned Hon. Magistrate G. Adhiambo delivered her Ruling. She dismissed the Appellant's Application. Among her grounds for dismissal was that there was no evidence that the property L.R No. Elgon/Chemoge/xxx was ever registered in the name of the family patriarch Simotwo Chesolei, that the Green Cards exhibited show that the said Luka Kitio Mukuta became registered owner after Mochomu Mengich, not their father Simotwo Chesolei, that there is nothing in the Green Card nor in the Certificate of Confirmation dated 06/01/1994 issued in Nairobi High Court Succession No. 21 of 1995 on Administration of the Estate of the said MC to show that Luka Kitio Mukuta held the property in trust for the Appellant's father and that the Appellant's father did not move to revoke that Grant.

Grounds of Appeal

28. Being dissatisfied by the decision, the Appellant preferred this Appeal filed on 31/05/2022. 5 Grounds of Appeal were raised as follows:
 - i. That the Learned trial Magistrate fundamentally erred in law and fact by failing to appreciate the fact that the Applicant was a beneficiary of the estate of Elgon/Chemoge/xxx as per the Chief's letter.
 - ii. That the Learned trial Magistrate clearly went against the evidence on record acknowledging that the Petitioner suit had been dismissed hence he was a beneficiary.
 - iii. That the Learned trial Magistrate totally erred in law and fact by failing to take into account the oral and documentary evidence given by the Plaintiff/Applicant and his witness.
 - iv. That the Learned trial Magistrate apparently did not analyze the available evidence on record.
 - v. The findings are contrary to the law rules of natural justice and common sense and have resulted into a miscarriage of justice and will result into a breach of peace.

Submissions

29. The Appeal was canvassed by way of written Submissions. The Appellant filed his Submissions on 13/01/2023 and the Respondent filed his on 17/01/2023.

Determination

30. From the foregoing, I find the following to be the issues that arise for determination in this Appeal:



- i. Whether the Respondent's father, Luka Kitio Mukuta held the property L.R. No. Elgon/Chemage/xxx in trust for his brother William Mochomu Simotwa, the Appellant's father.
 - ii. Whether therefore the Grant should have been revoked.
31. I now proceed to determine the said issues.
32. First, I note that in Ground 2, the Appellant insists that Kimilili SPM 117 of 2015 filed by the Respondent seeking to evict the Appellant and his father from the property L.R. No. Elgon/Chemage/xxx was dismissed. However, as aforesaid the Respondent has deponed that the said suit was withdrawn, not dismissed. He deponed further that he withdrew the suit after the Court advised him to instead file a Succession Cause. He accordingly exhibited the Withdrawal Notice filed in that suit on 26/09/2016.
33. The Appellant did not dispute the authenticity of the Withdrawal Notice. He also did not produce any evidence such as an Order, Decree, Ruling or Judgment to support his allegation that the suit was dismissed. In the circumstances, I find that the suit was withdrawn, not dismissed. Therefore, the suit could not and did not proceed to the stage of determining the parties' rights over L.R. No. Elgon/Chemage/xxx.
34. Ground 2 therefore fails.
35. I also note that in Ground 3, the Appellant alleges that the Learned trial Magistrate erred by failing to take into account the oral and documentary evidence given by the Plaintiff/Applicant and his witnesses. I find this a strange allegation since the case was canvassed by written Submissions and not viva voce evidence.
36. Therefore, insofar as Ground 2 refers to oral evidence and witnesses it also fails.
37. The Appellant has in his Submissions stated that his proposal that the matter be canvassed by way of viva voce evidence was ignored. While I agree that viva voce hearing may have been an appropriate manner of hearing the matter considering the nature, I note that the Appellant was represented by Counsel who never raised any protest and in fact fully participated and complied with the directions to canvass the matter by way of written Submissions. This protest is therefore a clear afterthought.
38. Regarding the rest of the grounds, it is not in dispute that L.R. No. Elgon/Chemage/xxx was initially registered in the name of one MC, as aforesaid apparently a step-brother of Simotwo Chesole Mukuta.
39. It is also not in dispute that the initial distribution and/or devolution or inheritance of L.R. No. Elgon/Chemage/xxx was carried out in Nairobi High Court Succession Cause No. 21 of 1985 which dealt with the Administration of the Estate of the said MC.
40. It is also not in dispute that in the said Nairobi High Court Succession Cause No. 21 of 1985, L.R. No. Elgon/Chemage/xxx was allocated to Luka Kitio Mukuta, the Respondent's father. The Appellant's father never challenged this allocation.
41. It is also a fact that ownership of the property was at some point registered in the name of a third party, one Mochomu Mengich and that Luka Kitio Mutuka successfully initiated Court litigation which culminated into recovery of the property and ownership registered in his name.
42. It is further not in dispute that the Appellant's father died recently in the year 2021 after filing the Application seeking revocation. He was therefore alive when Nairobi High Court Succession Cause No. 21 of 1985 by which the property L.R. No. Elgon/Chemage/xxx devolved to his brother



- Luka Kitio Mukuta (Respondent's father) was heard and determined yet he did not challenge that devolution.
43. The above history of ownership of L.R. No. Elgon/Chemage/xxx is verifiable from the Green Card excerpt produced by the Respondent.
 44. Nairobi High Court Succession Cause No. 21 of 1985 was filed in the year 1985 and the Grant was confirmed about 9 years later on 06/01/1994. It has not been alleged that the Appellant's father was not aware of the institution of the Succession Cause in 1985 or confirmation of the Grant in 1994. There is also no explanation why the Appellant's father only raised an objection 15 years later in December 2019 when he filed the Application for revocation in the subsequent SPM Kimilili Succession Cause No. 57 of 2018, long after the Grant had been confirmed in Nairobi High Court Succession Cause No. 21 of 1985 and distribution of L.R. No. Elgon/Chemage/xxx finalized.
 45. It has not been explained why the Appellant's father never raised any issue on the devolution of the property to Luka Kitio Mukuta when Luka Kitio Mukuta was himself still alive. Why wait until the death of Luka Kitio Mukuta then introduce challenges targeted at Luka Kitio's Mukuta's son when the same should have been raised with Luka Kitio Mukuta when he was still alive?
 46. It is also not in dispute that the present Kimilili Succession Cause No. 57 No. 2018 which is the subject of this Appeal relates strictly to the Estate of Luka Kitio Mukuta in which the Appellant's father, not being a son, daughter or spouse, dependant or heir of any kind is not and cannot be a "beneficiary" under the *Law of Succession Act*. The present Cause only dealt with subsequent devolution of the property from Luka Kitio Mukuta to his son, the Respondent.
 47. I also note that the Respondent has produced minutes of a clan meeting held on 06/01/2012 in which a Resolution was reached that the Appellant's father "... should remain in the original demarcation as previously shown by the late Simotwo Chesolei in 1979 plot number Elg/Chem/xxx" and "that the Appellant " moves back to the original land of the late Simotwo Chesolei plot Elg/Chem.xxx (of his father) from Elg/Chem.No. xxx"
 48. The Appellant did not deny the authenticity of the said minutes or controvert the contents thereof. In the circumstances, the minutes will be deemed to be genuine.
 49. It is therefore this Court's finding that the Appellant's father's remedy, if any, lay in challenging or raising his objection in the said Nairobi High Court Succession Cause No. 21 of 1985 which is the Cause that dealt with the estate of the said Masai Chesolei. It is in that Cause that the property L.R. No. Elgon/Chemage/xxx devolved to his brother Luka Kitio Mukuta, the Respondent's father. In failing to raise any challenge in that earlier Succession Cause, the Appellant and/or his father slept on their rights, if any and cannot be allowed to raise the same in the present Cause.
 50. On the allegation that the property was held by Luka Kitio Mutuka in trust for the Appellant's father, it was held in *Felista Muthoni Nyaga vs Peter Kayo Mugo* [2016] eKLR that:

"while it is the law that the registration of a party as the proprietor of land does not defeat a claim of trust nor relieve such proprietor of his obligation as a trustees, there must be evidence upon which a Court can conclude that in fact the registered proprietor of the land subject of the suit before it is in fact holding the same as a trustee for the benefit of others."



51. Similarly, in *Susan Gacheri Mugambi vs Maureen Florence Kagwiria & 2 others* [2016] eKLR it was held that:

“A Trust is a powerful institution and a substantial question of law. But its existence is largely a matter of fact unless it is presumed. Thus, he who alleges existence of a fact must prove. On this see section 109 of the Evidence Act which states that:

“109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

52. Again, in *Patrick Mathenge Gachui vs Karumi Wambugu & another* [2010] eKLR, the Court held as follows:

“The burden of proving trust rests on the protesters. In my view, they have failed miserably to prove such trust. Their entire evidence was hearsay which a court of law cannot act upon. The mere fact that the protesters are in occupation of the suit premises is no proof of trust. In any event it is apparent that the 2nd protester only came to the suit premises in 1986. It is also instructive that the deceased got registered as the proprietor of the suit premises in 1978 when the 1st protester's father and 2nd protester were all adults. One wonders then why the two could not at the time claim their portion of the suit premises if indeed they were clear in their minds that their deceased brother held the suit premises in trust for himself and themselves. The trust having not been proved, there is no basis for the protests. Accordingly, they are dismissed.”

53. From the above authorities, it is clear that the Appellant bore the burden to prove the existence of the alleged trust. He however failed to discharge this burden. He never even sought to bring independent evidence of any elder or someone conversant with the estate to demonstrate that the property was held in trust for the Appellant's father.

54. This Court therefore further finds that the Appellant failed to demonstrate that the property was held by Luka Kitio Mutuka in trust for the Appellant's father. No grounds to justify revocation of the grant were therefore placed before the trial Court.

Final Orders

55. The Court having made the findings above, it is its holding that this Appeal lacks merits. It is hereby dismissed.

56. Being a family matter, each party shall bear its costs of this Appeal.

DELIVERED VIRTUALLY, DATED AND SIGNED AT ELDORET THIS 28TH DAY OF APRIL 2023

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JOHN R. ANURO WANANDA

JUDGE

