



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT EMBU**  
**CIVIL APPEAL NO. 38 OF 2019**  
**Alice Kavia Nyaga.....APPELLANT**  
**VERSUS**  
**Abiud Njue Moses..... RESPONDENT**

**JUDGMENT**

1. Before me is an appeal which was instituted by way of a memorandum of appeal dated 8.07.2019 and wherein the appellant raised six (6) grounds of appeal against the judgment of the trial court (Hon. M.N Gicheru CM) in Embu Succession Cause No. 272 of 2017. In nutshell, the appellant disputed the said decision on the grounds that;-

1. The Chief Magistrate went wrong and misdirected himself in fact that he failed to properly keep record of all proceedings which admission is an indication of judicial bias
2. That the finding and judgment of the learned chief magistrate are contrary to evidence adduced before him
3. That the learned resident magistrate erred in law and in fact in failing to consider the fact that at the time of the delivery of the said judgment, there was a judgment delivered there before by the Honourable High court in Embu High Court Succession No. 803 of 2002 on 7<sup>th</sup> October 2003.
4. The learned chief magistrate erred in law and in fact by contravening the law and overturning the judgment delivered by J.M Khamoni the Judge of this Honourable High Court on 7<sup>th</sup> October 2003
5. The Learned Chief Magistrate erred in law and in fact in putting reliance on agreements which were not made between the respondent and the said late Isaiah Mwaranjiru Nyaga kangiti to arrive at his decision where such agreements were strange and incongruous to the appellant and all other dependants of the said deceased estate
6. The learned chief magistrate misdirected himself on burdens of proof in protection of a deceased's property in succession causes.

2. The appellant as such prayed that the honourable court be pleased to set aside the trial magistrate's judgment dated 7.12.2017 and revoke the certificate of grant dated 7.12.2017; this Honourable Court be pleased to reinstate the judgement delivered by J.M Khamoni the Judge of this Honourable High Court and also the certificate of grant dated 15.11.2010; that the costs of this appeal and that of the trial court be awarded to the appellant; and such further orders may be made by this Honourable Court as it may deem fit to grant.

3. The appeal was canvassed by way of written submissions.

4. The appellant's case is that the respondent alleges to have purchased 1 acre from the estate herein from one Ruth Wambogo Nyaga who is the co-wife to the applicant whereas the suit land was registered in the names of the deceased herein. As such she could not pass a good title and the said vendor was an intermeddler. Further that the court allocated the said one acre without any evidence of the alleged purchase as the sale agreement produced in court indicated one Matthew Tarcision Ndiga as the vendor and not the Ruth Wambogo Nyaga as was alleged.

5. Further that the orders by Khaminwa J that the respondent be given one acre were set aside by the orders of Karanja J (as she then was) on the basis that the judge confirmed a grant which was non-existent but the trial court proceeded to allow the respondent's application and rendered a ruling on 12.06.2017. As such, it was submitted that the grant issued on 7.12.2017 ought to be revoked as the alleged vendor did not have locus standi to sell the part of the estate. It was further submitted that the trial court relied on a non-existent order as Khaminwa J's orders were indeed set aside and as such the trial court ought not to have relied on the said orders. Further that the appellant ought to be

awarded costs of the appeal and of the lower court.

6. The respondent in opposing the appeal herein submitted that the trial court was not obligated to consider the judgment issued on 7.10.2003 since the said judgment did not prevent the respondent from laying claim successfully during the distribution of the estate and that he filed a protest which was heard on merit and he was granted one acre of the estate in the ruling of 12.07.2017.

7. Further that the respondent did produce before the trial court agreements and acknowledgements entered into between him and one Mathew Tarcisio Ndwiga and Ruth Wambogo Nyaga the beneficiaries of the estate herein and which agreements were considered by the trial court and as such the trial court did not err in relying on the said agreements. Further that on 4.12.2017 the appellant's counsel one Ms. Karandi indicated to the court that the respondent could get one acre and consent was recorded by the court and which consent has never been set aside.

8. Section 50 of the Law of Succession Act gives this court jurisdiction to determine appeals against any order or decree made by a Resident Magistrate in succession causes. As a first appellate court, this court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, before drawing a conclusion from that analysis. The court has however to bear in mind the fact that it did not have an opportunity to see and hear the witnesses first hand. This was buttressed by the Court of Appeal in the case of **Peter M. Kariuki –vs- Attorney General [2014] eKLR.**

9. The appellate court further ought not to interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong because it has misdirected itself or because it has acted on matters which it should not have acted or it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion (See **Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278 and Kiruga –versus- Kiruga & Another (1988) KLR 348.**)

10. Under Section 78 (2) of the Civil Procedure Act the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of the original jurisdiction in respect of suits instituted therein. The Law of Succession Act having not expressly provided for the procedure on appeal, it is my considered view that the above legal authorities suffice in that respect.

11. I have certainly perused and understood the contents of the pleadings, proceedings, ruling, grounds of appeal, submissions and the decisions referred to by the appellant. I have indeed re-evaluated the evidence tendered before the trial court and it is my considered view that the main issue for determination is whether the appeal herein ought to succeed. In determining this issue, I will also determine whether the trial court erred in arriving at the impugned judgement.

12. At the onset, I need to note that the appellant indicated on the memorandum of appeal that the appeal herein is against the judgement of the trial court made on 7.12.2017. However, I have perused through the trial court record and I note that there is no such a ruling/judgment. What the record indicate is that the matter came-up before the trial court on 4.12.2017 and wherein the counsel for the appellant indicated that they had no objection to the respondent herein getting his one acre of land. The trial court proceeded to make orders wherein it confirmed the grant dated 15.11.2010 on condition that the respondent herein gets his share out of the estate. The trial court proceeded to issue a certificate of confirmation of grant on 7.12.2017 and wherein the respondent is indicated as one of the beneficiaries.

13. However, the appellant argues that the respondent was not a purchaser of the said one acre and no evidence in that respect was tendered and further that the purported seller was an intermeddler.

14. As I have noted, the orders of 7.12.2017 were recorded by consent. It is now settled that a consent judgment can only be set aside on the grounds which would justify setting aside a contract. Such an order can be challenged on grounds that it was obtained by fraud or mistake or misrepresentation or any other reason which would persuade a court to vary or set aside the consent/decre. (See **Wasike v. Wamboko (1988) KLR 429.**)

15. In my view, the appellant having consented to the respondent getting a share of the estate, she cannot then turn around and challenge the respondent's entitlement to the same unless she sets aside the consent order. Unfortunately, the appellant is not trying to set aside the said consent order but appealing against the same and wherein the evidence in appeal does not support the setting aside of the said orders. The appellant cannot further proceed to challenge the sale agreement between the appellant or rather the process through which the appellant became entitled to the estate. In my view, by her counsel having recorded the consent, the same ratified and indeed settled all the existing legal dispute as to the entitlement by the respondent.

16. In **Hirani –vs- Kassam (1952), 19 EACA 131,** the Court of Appeal with approval quoted the following passage from Seton on Judgments and Orders, 7th edition, Vol.1 p.124 as follows:

**“Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them..... and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the Court..... or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the Court to set aside an agreement.”**

17. Further in the case of **Kenya Commercial Bank Ltd –vs- Specialized Engineering Co. Ltd (1982) KLR P. 485** it was held that:

**“A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or by an agreement contrary to the Policy of the Court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the Court to set aside an agreement.**

18. In the same case the Court further held that:

**“An advocate has general authority to compromise on behalf of his client as long as he is acting bona fide and not contrary to express negative direction. In the absence of proof of any express negative direction, the order shall be binding”.**

19. I have already stated that despite the appellant having indicated that she is challenging the judgement of 7.12.2017, what is on record is an order recorded by consent and which the appellant has not challenged either by seeking it's setting aside or in this appeal. Her submissions dwelt on the issue of ownership and which in my view has been overtaken by events. As such, I find that the appeal herein has no merits and it is hereby dismissed with costs to the respondent.

20. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 19<sup>TH</sup> DAY OF OCTOBER, 2021**

**L. NJUGUNA**

**JUDGE**

.....for the Applicant

.....for the Respondent