REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 11 OF 2017

HANNAH MWIHAKI KARIGI.....APPELLANT

-VERSUS-

RUTH WAITHERA KARIGI

JEREMIAH MBIRIRI KARIGI & 5 OTHERS.....RESPONDENTS

JUDGMENT

1. This Appeal arises from the judgment dated 11/01/2017 in **Githunguri Principal Magistrate's Court Succession Cause number 21/2009,** in which the Learned Trial Magistrate *inter alia* found that an estate asset described as **Githunguri/Githunguri/T.420** was held in a joint tenancy between the administrators of the estate of the deceased herein, namely, the Appellant, the 1st and 2nd Respondents. The Appellant was aggrieved by the said judgment and has filed this appeal via Memorandum of Appeal filed on 6th February, 2017 and raised the following grounds of appeal:-

> **"a. That the Learned Magistrate erred both in law and fact in failing to consider the evidence given by the Appellant regarding the ownership of property known as Githunguri/Githunguri/420 and hence disinheriting the appellant and/or unfairly allegedly redistributing the proceeds of said property in total disregard of the confirmation of grant despite weight and nature of evidence on record.**
>
> **b. That the learned magistrate erred in both law and fact in giving an erroneous and self-contradictory analysis as to the legality of the sale of the said property to third party by the 2nd and 3rd administrator to the 7th Respondent herein, in exclusion of Appellant of whom he found had no title to pass to the third party at the expense of the Appellant despite the nature, extent and weight of the evidence given.**
>
> **c. That the learned magistrate erred in both law and fact by erroneously offering a third party priority to purchase a portion of the said property way below the market value and/or offering a non-existent portion thereof despite the same court finding that the said property was held by administrators as joint tenancy between the two households i.e the three administrators hold the property as one.**
>
> **d. That the learned magistrate erred in both law and fact by failing to find that the sale of the property Githunguri/Githunguri/420 by the two administrators and 2nd house beneficiaries to the third party in exclusion of one administrator (1st house) was a nullity ab initio and hence a miscarriage of justice despite the nature and weight of evidence on record." (**sic**)**

2. The Court directed that the appeal be disposed of by way of written submissions. Parties filed submissions accordingly. The Appellant filed her submissions through her counsel on 18th September, 2019. Counsel submitted that it was untenable and illegal for the Respondents to assert that the suit property was jointly owned by three administrators in their individual capacity but not as personal representatives. And that such position is contrary to the Certificate of Confirmation of grant issued in the cause. Further that the correct position is that the three administrators held the estate property jointly on their behalf and on behalf of other beneficiaries. Counsel relied on **In Re Estate of Juma Kariuki (2016)** ***eKLR*** where it was held that a purchaser of a deceased's property acquires no interest unless he buys it from the administrators. It was submitted that the purported sale in this case to the 7th Respondent was not by administrators but by beneficiaries and is therefore null and void.

3. The Appellant asserted that at the point of administration the administrators transited from personal representatives to trustees to the respective houses and/or beneficiaries. To support this proposition, counsel cited the case in **Re Estate of Fredrick Kagio Kinyua (Deceased) (2015) eKLR** where it was held that the office of administrator is one of trust and that the personal representative holds property

on behalf of beneficiaries and for their benefit. Counsel contended that the administrators herein could only hold the property in trust of all beneficiaries and respective houses they represent.

4. The Respondents filed their written submissions on 14th January, 2019. Counsel submitted that land parcel number Githunguri/Githunguri/420 belonged to the three administrators herein as tenants in common since joint tenancy can only exist between spouses which the parties herein are not. The Respondents argued that sale of the estate asset was valid and proper, having been done after the Confirmation of grant. The Respondents faulted the trial court's order that the 7th Respondent purchase part of the remaining portion of the asset in dispute at Kshs. 3,000,000/=. The court was urged to dismiss the Appeal.

5. The court has considered the evidence adduced at the trial and submissions made on this appeal by the respective parties. The duty of this court as a first appellate court is to re-evaluate the evidence and draw its own conclusions, but always bearing in mind that it did not have the opportunity to see or hear the witnesses testify see **Peters v Sunday Post Limited (1958) EA 424; Sele and Another v Associated Motor Boat Co. Limited and Others (1968) EA 123; Williams Diamonds Limited v Brown (1970) EAI I.**

6. The Court of Appeal in **Ephantus Mwangi and Another v Duncan Mwangi Wambugu (1982) – 88) IKAR** 278 stated that:

> **"A court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have alter on wrong principles in reaching the findings he did".**

7. The undisputed facts of the case are that deceased herein died intestate while possessed of several landed assets. He was polygamous and was survived by two houses. It would appear that the first wife and mother to the Appellant did not survive him, but the second wife Ruth Waithira Karigi did. A grant had issued to the said second wife, her son Jeremiah Mbiriri Karigi and the Appellant herein. The grant was subsequently confirmed paving way for the administration of the estate. A dispute however broke out subsequently between the administrators over the sale of the asset LR No. Githunguri/Githunguri/420 which was less than a quarter acre in size and which the beneficiaries had agreed during confirmation proceedings to sell and distribute proceeds among beneficiaries. Following an impasse, the 1st and 2nd Respondents took matters in their hands and sold to the 7th Respondent the portion of the asset (about2/3) which they claim to belong to them for a sum of Kshs. 5000,000/-. As often happens in such cases, the parties came back to court seeking relief.

8. This appeal relates to the judgment of the subordinate court (**Kuto PM**) on two applications heard simultaneously before the said court. The first to be filed was by **Hannah Mwihaki** a daughter in the 1st house, on 18th February 2015 and seeking interim/permanent orders to restrain **Ruth Waithira Karigi** (widow – 2nd house) her 5 children and the Interested Party (7th Respondent) the declared purchaser from the 2nd house, from intermeddling with, alienating or in any manner whatsoever dealing with all that property known as **Githunguri/Township/420 (**also referred to as **Githunguri/Githunguri/420)**. The second application was filed by **Ruth Waithira Karigi** and her son and co-administrator, **Jeremiah Mbiriri Karigi** on 8th April 2015, and sought an order to authorize the executive officer of the court to *"sign all transfer forms RL & and RL 19 and all subdivision land forms and subsequent Application for land control board consent form and to do all things necessary on behalf of the Respondent Co-Administrator Hannah Mwihaki Karigi"* to effect transfer of seven assets of the estate to the beneficiaries named in the application.

9. The assets listed in the said summons are:

a) LR No. Githunguri/Githunguri 1887

b) LR No. Githunguri/Githunguri 1559

c) LR No. Githunguri/Githunguri 1558

d) LR No. Githunguri/Githunguri 1552

e) LR No. Githunguri/Githunguri 420

f) LR No. Githunguri/Githunguri 2818

g) LR No. Githunguri/Githunguri 1090

10. The applications were seriously contested especially with regard to asset (e) above. On her part, the widow Ruth Waithera Karigi and her household maintained that while she, her son Jeremiah Mbiriri together with Hannah Mwihaki Karigi were the joint administrators of the estate, by virtue of the confirmed grant, the asset No. (e) above vested upon them not as trustees on behalf of other beneficiaries in the 1st and 2nd houses, but in their personal capacity as beneficiaries. Thus the 2nd house defended the sale, without the consent of the 3rd co-administrator of their so called 2/3 shares in the asset (e) above. On this appeal they have maintained that position, pointing to the mode of distribution contained in the certificate of confirmed grant issued on 7th December 2009 and rectified on 3rd June 2010.

11. Not so, according to **Hannah Mwihaki Karigi**. Her position is that the said asset was to be held by the three administrators on behalf of all the beneficiaries of the estate, was to be sold by them and the proceeds shared equally among all the beneficiaries of the estate. That in her view was the purport of the confirmed grant. She too maintains that position on this appeal.

12. The trial magistrate's ruling is primarily taken up with that question and whether the purchaser, of the 2/3 portion of the asset (e), one

David Chege Njuki (7th Respondent) had acquired a good title. However, having come to certain findings on these matters, the learned trial magistrate made no orders relating to the applications for determination before him. Instead, he concluded in his judgment that:

> **"The money that was paid by the purchaser was used to pay for a loan and medical expenses for one of the administrators (widow-1st house) and the balance shared among the 2nd house. The said family may not be able to refund the purchase price to the purchaser. On the other hand, David Chege Njuki (purchaser) is a bonafide purchaser for value. He has bought building materials and sand which he has deposited on site.**
>
> **In the interest of justice, I invoke Section 47 and 82 of the Law of Succession and order that:-**
>
> **a) David Njuki Chege be given priority to purchase the remaining portion of land (**1/3 of asset (e) above**) at KShs.3,000,000/= within six months.**
>
> **b) The administrators to file a status report to this court within the said duration.**
>
> **c) A mention date be taken within six months"**

13. The record does not reflect any such mention as having subsequently taken place. Nor is there any record of the administrators filing a status report into court. On 6/2/2017 Hannah Mwihaki Karigi filed the appeal herein against the ruling of **Kutwa, PM.** The court has noted that despite this court having called for lower court record *vide* the letter dated 8th February 2018, the lower court file remained in the lower court even though the Appellant evidently had received copies of proceedings and filed her record of appeal as at 21st March 2018. This anomaly was not noted by the court registry and by this court while setting down the appeal for hearing. Thus, while this appeal was pending judgment, one beneficiary to the estate, **Susan Wachuka Mbugua** filed a summons for revocation of grant on 21st May 2019, in the subordinate court, and an injunctive order to restrain the three administrators of the estate from selling or transferring the listed 13 assets of the estate.

14. A perusal of the lower court file which has now been submitted to this court indicates several appearances by parties to the application after the filing of the summons. There is no indication that during these attendances the parties notified the lower court of the existence of this appeal. Nonetheless the application has not been heard.

15. In light of the orders that this court proposes to make in this matter, it will be unnecessary to go into the merits of the judgment impugned by this appeal. Save to state that the final orders of the court effectively compelled the appellant herein:-

> a) to accept the *fait accompli* that her co-administrators had sold ? of the land parcel Githunguri/Githunguri (Township)/420 to the 7th Respondent herein.
>
> b) to give first priority to the 7th Respondent to purchase the ? balance of the asset Githunguri/Githunguri (Township)/420 at a price determined by the court (KShs.3000,000/=).

16. These are remarkable orders by all definitions and not even the most liberal interpretation of the sections invoked as authority for the making of the orders would support such directions. Ultimately, the judgment left the parties in limbo. With regard to the application filed by Ruth Waithira Karigi,it is not evident at this point, whether the administrators had cooperated to effect the transfer of other undisputed assets to the respective beneficiaries. For indeed, the estate of the deceased was relatively vast. The assets listed in the Rectified Certificate of Confirmation of Grant issued on 7th June 2010 pursuant to orders made on 3rd June 2010 reflects 13 immovable assets. Search certificates reflecting the size of some of these parcels are on the original record.

17. The immovable assets are as follows:

Property Size as per Search Certificate

a) Githunguri/Githunguri/887	0.55 ha
b) Githunguri/Githunguri/1559	2 acres
c) Githunguri/Githunguri/1558	1 acre
d) Githunguri/Githunguri/1552	1 acre
e) Githunguri/Githunguri/420	N/A
f) Githunguri/Githunguri/2818	0.24 ha
g) Githunguri/Githunguri/1090	N/A
h) Githunguri/Githunguri/1075	0.40 ha

i) Githunguri/Githunguri/1187 1 acre

j) Githunguri/Githunguri/1186 2 acres

k) Githunguri/Githunguri/2287 0.607 ha

l) Gatamaiyo/Kambururu/1738 acreage unstated

Other assets comprising the estate were:

m) Cash in Bank – KCB Account No. [.....]

n) Cash in Bank Family Bank Account No.[.....]

18. There is also property described in the Further affidavit in support of the summons to confirm grant, filed on 3.12.09 as **LR No. Githunguri/Githunguri 1229** and included in the confirmed grant issued on 7th December 2009 and in the list of assets in the Petition Form P & A 5 dated 15th April 2009. On record is the respective certificate of official search dated 27th March 2019 indicating that the said property was registered in the name of the deceased herein as at the date of search. The asset is 0.15 ha in size. However, the property is not included in the Rectified Certificate of Confirmation of grant dated 7th June 2010 despite the fact that it had been distributed per the confirmed grant. Significantly, the application dated 31st May 20110 for rectification of grant was brought solely to bring in for distribution an item left earlier left out, namely, the Family Bank Account No.212663. The reason for exclusion of the land parcel **LR Githunguri/Githunguri/1229** for the Rectified certificate is not clear from the record. Be that as it may, the Petition Form P & A 5 containing the list of the estate assets and the affidavit of justification by the administrators (P & A 12) dated 5th April 2009, estimate the value of the estate to be KShs.250,000/= Thus, upon the Petition being placed before the relevant judicial officer on 15.11.09, an endorsement was made by the said officer to the following effect:

"(Warning: The estate exceeds the jurisdiction of this court).

19. Inexplicably no steps were taken to file the matter before the High Court. The pecuniary jurisdiction of the subordinate court in succession causes, was prior to the amendment of the Law of Succession Act in 2016, limited to estates whose value did not exceed the sum of KShs.100,000/=. Without doubt, the subordinate court acted without jurisdiction by entertaining this cause. Although the parties had initially acted in person, they were subsequently represented by counsel who seemingly ignored this glaring legal anomaly.

20. The jurisdiction of a court is prescribed by the law, in this case the Law of Succession Act as at 2009 and as subsequently amended. A court of law cannot assume jurisdiction it does not possess whether the parties before it are ignorant of the law or acquiescent. The stated value of this estate in 2009 exceeded the jurisdiction of the subordinate court. Moreover, even with the increased jurisdiction of subordinate courts, from the material on record, the value of the estate at the time of the impugned judgment of 11th January 2017, far exceeded the pecuniary jurisdiction of a principal magistrate under Section 7(1) of the magistrates Court Act 2015 as read with Section 49 of the Law of Succession Act as amended. The learned magistrate who heard the applications leading to the impugned judgment, like others before him were bereft of the necessary pecuniary jurisdiction. The merits of his decision notwithstanding, the fundamental error in this case was a failure of jurisdiction.

21. In the case of **Mercy Kiritu Mutegi v Beatrice Nkatha Nyaga and 2 Others [2013] e KLR** the Court of Appeal in dealing with an appeal emanating from a petition which the court appealed from had no jurisdiction to entertain, having been filed out of time, stated that:

> **"In view of the above determination by the Supreme Court, it was Mr. Mithega's view that this Court lacked jurisdiction to entertain a petition that was a nullity in the first place. The High Court lacked jurisdiction to determine the Petition as well and this was confirmed by the dicta in the case of *Sir Ali Bin Salim vs Shariff Mohammed Sharry, 1938 KLR* where it was stated:**
>
> **" (i) If a court has no jurisdiction over the subject matter of the litigation, its judgments and orders, however precisely certain and technically correct, are mere nullities and not only voidable, they are void and have no effect either as estoppel or otherwise, and may not only be set aside at any time by the court in which they are rendered, but be declared void by every court in which they may be presented. It is well established law that jurisdiction cannot be conferred on a court by consent of parties and any waiver on their part cannot make up for the lack or defect of jurisdiction".**

(ii) ***Macfoy –vs- United Africa Co. Ltd. (1961) 3 All E.R. 1169***, Lord Denning at page 1172 stated as follows:

> **"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse. So will this judgment collapse if the statement of claim was a nullity. But if an act is only voidable, then it is not automatically void. It is only an irregularity which may be waived. It is not to be avoided unless something is done to avoid it. There must be an order of the court setting aside: and the court has discretion whether to set it aside or not. It will do so if justice demands it but not otherwise".**

22. The court further observed that:

"We are alive that jurisdiction for a court of law is everything and without it a court of law will as a matter of course down its tools. Borrowing from a Text "*Words and Phrase Legally defined" Vol 3 I-N Page 113, "Jurisdiction"* is defined as

"By jurisdiction is meant authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a Formal way for its decision. The limits of this authority are imposed by the statute, charter, or Commission under which the court is constituted and may be extended or restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters which the particular court has cognizance, or as to the area over which the jurisdiction shall extend or it may partake of both of these… Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given"

This appeal was however argued before us on merit, besides raising the issue of the competency of the appeal as a point of law, the appellant proceeded with the petition before the Election Court. Indeed she cannot be faulted because there was confusion caused by the conflicting provisions of the Constitution and the *Election Act,* and the Election Court did allow her to proceed. The Court of Appeal also allowed the appellant to proceed with this appeal against the decision of the High Court. This appeal was filed on 20th December, 2013. Having held as we have, that the petition before the Election Court did not lie for reasons that the Election Court's jurisdiction extends to determining validly filed petitions according to the Constitution, we have agonized over whether we should down our tools at this stage".

23. Regarding the fate of a suit or cause filed in a court without jurisdiction, the Court of Appeal had this to say, in **Phoenix of EA Assurance Company Limited v S.M. Thiga t/a Newspaper Service [2019] e KLR:-**

"We have carefully considered the record, the submissions by counsel and the law. The main issue is whether the subordinate court had jurisdiction in the first place to entertain the respondent's suit.

According to the appellant, the court had no jurisdiction and the suit was a nullity *ab initio* and it could not therefore be transferred to the High Court whether by consent or otherwise. On the other hand, the respondent seems to be saying that the subordinate court had jurisdiction to hear the suit but only award damages that were within its pecuniary jurisdiction, and therefore the suit was transferable to the High Court.

We are not persuaded that proposition by the respondent is correct in law. Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself. The subordinate court could not therefore entertain the suit and allow only that part of the claim that was within its pecuniary jurisdiction. In another *locus classicus* in this subject, this Court pronounced; Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd. (1989):

"Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction….Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given."

These words were echoed by this Court in* Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel (2016) eKLR *in the following words:-

"In numerous decided cases, courts, including this Court have held that it would be illegal for the High Court in exercise of its powers under S.18 of the Civil Procedure Act to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow a court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign, It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks parties cannot even seek refuge under the O2principle or the overriding objective under the Civil Procedure Act, the Appellate Jurisdiction Act or even Article 159 of the Constitution to remedy the same.

…In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through transfer."(Emphasis ours)

Decided cases on this issue are legion and we cannot cite all of them. The case of Joseph Muthee Kamau & Another v. David Mwangi Gichure & Another (2013) eKLR is however on all fours and addresses the issue raised by Ms. Wambua as to whether the subordinate court could still hear the suit but only allow the maximum damages allowable within its pecuniary jurisdiction. The Court succinctly settled this point in the following words :-

"When a suit has been filed in a court without jurisdiction, it is a nullity. Many cases have established that; the most famous being Kagenyi v. Musirambo(1968) EA 43. The same would apply to pecuniary jurisdiction in a claim for special damages where the liquidated sum claimed exceeds the court's pecuniary jurisdiction.

We hold that jurisdiction cannot be conferred at the time of delivery of judgment. Jurisdiction does not operate

retroactively. Jurisdiction must exist at the time of filing suit or latest at the commencement of hearing.".

24. Similarly, the succession cause in the lower court was a nullity *ab initio* and all orders including grants emanating therefrom are null and void *ab initio*. It is as if the suit had never been filed. Both the cause in the lower court and the appeal therefrom do not lie. This court is not oblivious or unsympathetic of the situation the parties have found themselves in, despite having been represented by counsel. At the time of giving directions, this court did not have the original record, and in retrospect, it seems that the record of appeal filed by the Appellant was incomplete. Nevertheless, a court of law cannot ignore a patent illegality brought to its notice and compound such illegality by proceeding to give judgment on what is unmistakably an incompetent and null appeal. In the **Phoenix of E.A Assurance Co. Ltd case** the Court of Appeal started off by stating that:

> **"2. In common English parlance, "Jurisdiction" denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and to make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity *ab initio* and any determination made by such court will be amenable to being set aside *ex debito justitiae*."**

25. It follows that both the cause in the lower court and the appeal herein are a nullity, an exercise in futility. In the circumstances, the appeal herein is struck out but in view of the nature of these proceedings, the parties will bear own costs.

DATED AND SIGNED AT KIAMBU THIS 20TH DAY OF FEBRUARY 2020.

……

C. MEOLI

JUDGE

In the presence of:

Miss Gathua for the Appellant

Mr. Kinyanjui holding brief for Mr.Kinuthia for the Respondents

Court Assistant - Kevin/Nancy