



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MIGORI

(Coram: A. C. Mrima, J.)

CIVIL APPEAL NO. 178 OF 2018

IN THE MATTER OF THE ESTATE OF THE LATE SIPRIANUS NYAMBAI OGI (DECEASED)

SABIANO OUMA NYAMBAI.....APPELLANT

-VERSUS-

1. CLEMENT OTIENO GARI

2. SERFINE ADHIAMBO MIGANDA

3. PANCRAS OTIENO MIGANDA.....RESPONDENTS

(Being an appeal from the judgment and decree by Hon. E. M. Nyagah, Principal Magistrate

in Migori Chief Magistrate's Succession Cause No. 38 of 2016 delivered on 11/12/2018

JUDGMENT

1. The controversy in this matter relates to the parcel of land known as **L.R Suna East/Kakrao/666** (hereinafter referred to "**the suit land**").
2. The dispute traces its genesis from the events of 1949 or thereabout. It was alleged that the original owner of the suit land, *Mathayo Ogi Nyambai*, (hereinafter "**Mathayo**") invited upon his land one *Remjeus Gari* (hereinafter "**Remjeus**"). That was sometimes in 1949.
3. There was no dispute that for a period spanning over 70 years, the family of Mathayo and the family of Remjeus harmoniously lived on the suit land. Each of the families occupied a distinct portion of the suit land.
4. With time the families raised their offsprings respectively. Upon the death of Mathayo, his son, *Siprianus Nyambai Ogi* (hereinafter "**Siprianus**") petitioned for the grant of Letters of Administration Intestate *vide Migori Principal Magistrates Succession Cause No. 710 of 2004*. The grant was issued to Siprianus on 02/02/2005. It was eventually confirmed on 31/08/2005. The suit land which was in the name of Mathayo wholly devolved to Siprianus.
5. Siprianus also passed on. A son to Siprianus one *Sabiano Ouma Nyambai* (hereinafter "**Sabiano**") who is the Appellant in the appeal subject of this judgment, filed a succession cause. That was *Migori Chief Magistrates Court Succession Cause 38 of 2016* (hereinafter referred to as "**the Succession Cause**").
6. Sabiano petitioned for grant of the Letters of Administration Intestate for his father's estate. That is the estate subject of these proceedings. The grant was issued to Sabiano on 29/07/2016.
7. The grant was confirmed and a Certificate of Confirmation of Grant issued on 10/11/2017. The suit land devolved to 14 beneficiaries.
8. The Respondents herein later learnt of the proceedings in the succession cause. The Respondents were the descendants of Remjeus. The Respondents were aggrieved by the fact that none of the children or descendants of Remjeus were involved in the succession cause. Further, none of them had been allocated any portion of the suit land.

9. The Respondents were not for the then obtaining *status quo*. They challenged the issuance of the grant and the confirmation proceedings in the succession cause. That was by way of a Summons for Revocation of the Grant dated 27/06/2018.

10. The Respondents contended that the succession cause was a product of fraudulent dealings on the part of Sabiano aimed at disinheriting them. They further contended that their patriarch, Remjeus, was gifted a portion of the suit land by Mathayo. It was the Respondents' position that as a result and despite the suit land being initially registered in the name of Mathayo, Mathayo held the portion he gifted to Remjeus in Remjeus' trust.

11. The revocation application was heard by way of *viva voce* evidence. In its judgment (which was to be a ruling instead) delivered on 11/12/2018 the trial court allowed the application. The grant issued on 29/07/2016 and which was confirmed on 10/11/2017 were both revoked. No one was appointed as an Administrator(trix) of the estate of Siprianus.

12. Sabiano was dissatisfied with the 'judgment'. He appealed to this Court. He preferred the following 5 grounds of appeal in his Memorandum of Appeal dated 17/12/2018 and filed on 19/12/2018: -

1. That the trial court erred in law and in fact in evaluation of the evidence and the ruling against the Appellant's weight of the evidence.

2. That the trial magistrate erred in law and in fact by granting judgment based on constructive trust which had not been prayed for and on the basis of a prayer that was not sustainable in law.

3. That the trial magistrate erred in law and in fact by failing to address his mind to the fact that the respondents failed to prove any fraud and/or any concealment of material facts that would warrant a revocation of grant.

4. That the trial magistrate misdirected himself in reaching his decision on wrong interpretation and application of rules of gift under succession law.

5. The learned trial magistrate erred in law and fact by failing to consider and analyse the Appellant's evidence and thereby arrived at the wrong finding on the judgment.

13. Directions for hearing of the appeal were taken. The parties agreed to dispose of the appeal by way of written submissions. This Court approved of the mode of hearing of the appeal. The parties duly complied. They filed substantive submissions and referred to several decisions in support of their rival submissions.

14. As the first appellate Court, my role is to revisit the evidence on record, evaluate it and reach my own conclusion in the matter. (See the case of **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**). This Court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga –versus- Kiruga & Another (1988) KLR 348**).

15. I have carefully and keenly read and understood the proceedings, the impugned 'judgment', the grounds of appeal and the parties' submissions.

16. There is a preliminary issue which I must first deal with. It deals with the propriety of the Summons of Revocation whose 'judgment' resulted to the appeal subject of this judgment.

17. The Respondents' claim traced its roots to the actions of Mathayo and Remjeus way back in 1949. The suit land was eventually registered in the name of Mathayo. When Mathayo died, his son, Siprianus successfully petitioned for the administration of the estate of Mathayo. That was through *Migori Principal Magistrates Succession Cause No. 710 of 2004*. As said, the grant was issued as prayed. The grant was confirmed and the whole suit land devolved to Siprianus.

18. When Siprianus died, his son, Sabiano successfully petitioned for the administration of his estate. That was through *Migori Chief Magistrates Court Succession Cause 38 of 2016*. The grant was eventually confirmed and the estate of Siprianus duly distributed.

19. The Respondents then joined the band wagon and sought for the revocation of the grant and the confirmation proceedings in *Migori Chief Magistrates Court Succession Cause 38 of 2016*.

20. Siprianus was a son to Mathayo. May be he was or he was not the only child of Mathayo. Siprianus had a right to inherit from his father. He also had the right and ability to acquire his own property. There was no evidence to the effect that when Remjeus was allegedly gifted part of the suit land by Mathayo Siprianus was present. In other words, the issue of the alleged gift was between Mathayo and Remjeus.

21. In that case therefore the right estate which the descendants of Remjeus ought to have challenged the succession proceedings was to be the estate of Mathayo in *Migori Principal Magistrates Succession Cause No. 710 of 2004* and not the estate of Siprianus. As stated, Siprianus had nothing to do with the alleged gift between Mathayo and Remjeus.

22. To that end therefore I am satisfied, and hereby find and hold, that the Summons for revocation dated 27/06/2018 was a false start. The application was filed in a wrong suit and it challenged wrong proceedings.

23. The foregone finding is sufficient to dispose the appeal. A consideration of the other issues would be academic. Accordingly, the appeal is allowed and the 'judgment' of the trial court rendered on 11/12/2018 is hereby set aside. I substitute that finding with an order dismissing the Summons for revocation dated 27/06/2018 with costs to the Appellant.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 25th day of June 2020.

A. C. MRIMA

JUDGE

Judgment delivered electronically through: -

1. tommboyaadvocates@gmail.com for the firm of Messrs. Tom Mboya & Company Advocates for the Appellant.
2. omondekiserawakili@yahoo.com for the firm of Messrs. Omonde Kisera & Company Advocates for the Respondent.
3. Parties are at liberty to obtain hard copies of the Judgment from the Registry upon payment of the requisite charges.

A. C. MRIMA

JUDGE