



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

HCCA. NO. 12 OF 2019

ANNAH KARIGU KABETE.....APPELLANT

VERSUS

HELLEN KATHURE.....RESPONDENT

(Being a decision of Hon. J.M Njoroge in Chuka Succession Cause No.200 of 2018 delivered on 20th February 2019)

J U D G E M E N T

1. This is an appeal by **ANNAH KARIGU KABETE** (the Appellant herein) who being dissatisfied with the decision of Hon. Chief Magistrate J. M. Njoroge in **Chuka Succession Cause No.200 of 2018** delivered on 20th February 2019, has lodged this appeal against **HELLEN KATHURE** the Respondent herein.

2. Before I delve into the grounds of appeal raised, I will briefly consider the brief facts about what the cause at the trial court was all about.

3. The cause at the lower court related to the estate of the late **KAGUNA KIRATU** (deceased) who died intestate on the 3rd August 1984, domiciled in Tunyai Sub-Location leaving behind the following surviving defendants namely:-

- i. Annah Karigu Kabete
- ii. John Muriungi Iguna
- iii. Hellen Kathure Nyamu &
- iv. Joseph Etiti Kaguna

The only property left by the deceased comprising the estate is that property known as S.Tharaka/Tunyai 'A'/101 measuring approximately 11.6 ha or around 28.43 acres.

4. The Appellant was appointed the administratrix of the estate of the deceased on 17th October 2005 and granted letters of administration dated the same day. On 8th August 2006, the administratrix (Appellant herein) applied for confirmation of the said grant proposing the following mode of distribution:-

- a. Annah Karigu Kabete - 7 acres
- b. John Muriungi Iguna - 10 acres
- c. Hellen Kathure Nyamu - balance
- d. Joseph Etiti Kaguna

5. The lower court on 23rd August 2006 confirmed the grant and adopted the proposed mode of distribution as agreed among the

beneficiaries. The certificate of confirmation dated 23rd August 2006 provided as follows:-

- i. Annah Karigu Kabete - 7 acres
- ii. John Muriungi Iguna - 10 acres
- iii. Hellen Kathure
- iv. Joseph Etitu Kaguna balance thereof equally

6. The administratrix (Appellant) carried out her duties of administration and subdivided the estate comprising S. Tharaka/Tunyai 'A' /101 as follows:-

- i. S. Tharaka/Tunyai 'A'/2040 - 2.83 Ha or 6.93 acres

Annah Karigu Kabete

- ii. S. Tharaka/Tunyai/2041 - 2.43 Ha or 6 acres

Annah Karigu Kabete

7. The above stated subdivision and transmission prompted Hellen Kathure to complain and she did so by filing an application dated 29th August 2018 applying that the parcel No. S. Tharaka/Tunyai 'A'/2041 initially meant for her and Joseph Giti Kaguna be given to them pursuant to the certificate of confirmation and asked the court to force administratrix (appellant) to transfer back the said parcel (2041) arguing that the administratrix had no legal basis inserting her name as the owner of that parcel yet she had gotten her rightful share (parcel No.2040).

8. In response to the application the administratrix (Appellant) responded that she had done her work as the administratrix fairly and in accordance to the certificate of confirmation by subdividing the estate into 4 parts namely:-

- a. S.Tharaka/Tunyai A/2040- to herself (Annah Kaguna Kabete) – Administrator.
- b. S. Tharaka/Tunyai A /2041- 6 acres to herself
- c. S. Tharaka/Tunyai a/2042- to Hellen Kathure (Respondent)

9. The Respondent justified taking parcel No.2041 because according to her Joseph Giti had disappeared and no one knew his whereabouts. She added that she would transfer the said parcel to Joseph Giti when he re appears. According to her the applicant (Hellen Kathure) had no basis to complain because she had gotten her share of 6 acres given that the balance of the estate as expressed in the certificate of confirmation was 12 acres. She reasoned that out of 12 acres, Hellen Kathure was to take 6 acres while Joseph Giti was to take the remains 6 acres.

10. The trial court was then called upon to determine the dispute and it determined that as per the wording in the certificate of confirmation, the Respondent herein and one Joseph Giti were to share the balance after deduction from the estate of 7 acres to Annah Karigu Kabete (Appellant) and 10 acres to John Muriungi Iguna. The court further found that the Appellant had registered herself as the owner of parcel No.2041 without indicating that she was holding it in trust for the benefit of Joseph Giti. The trial court having found the transmission unlawful ruled that the parcel would go back to both Hellen Kathure & Joseph Giti as per the certificate of confirmation.

11. As I noted above, the appellant felt aggrieved by the said decision and raised the following grounds namely:-

- a. That the magistrate erred in law and in fact by acting without jurisdiction by purporting to hear and determine an ELC issue when constituted as a P and A court.**
- b. That the trial court failed in not appreciating that the issues as per the application dated 29/8/2018 was predicated on issues of title and land use and therefore the proper forum was the ELC as per Article 162(2)(b) of the Constitution.**
- c. That the issue should not have been determined based on an application and affidavits but should have been commenced by way of a plaint.**
- d. That the magistrate erred by issuing a restraining order when an injunction is not a remedy available in P and A matters.**
- e. That the magistrate erred in delivering a judgment which was not supported by the evidence on record.**
- f. That the magistrate erred in law by conducting a mistrial.**

12. In her written submissions through her learned counsel I.C Mugo & Co Advocate, the Appellant has given a history of the matter and her

pleadings. She submits that the issues of title and use of parcel S.Tharaka/Tunyai/2041 was a matter that could only be handled by the ELC and not a Probate and Administration Court. The Appellant also submits that this matter should have been determined in a main suit after hearing the parties and tabling of evidence at a full hearing. She submits that the respondent's evidence in the application and affidavits were contradictory and the veracity should have been tested through cross-examination. He also submits that Order 40 of the Civil Procedure Rules is not available in succession matters as the Law of Succession Act Rule 63 of the Rules provides the applicability of civil procedure to succession disputes. He holds the position that the trial magistrate could only have revoked the grant to pave way for fresh administration. He further contends that the magistrate referred to revocation of grant when there was no such summons in existence and did not focus on the claim of fraud which should have been made in another court. She maintains that the trial court misdirected itself by delivering a ruling which was not supported by law.

13. The Respondent has opposed the appeal through written submissions by Waklaw Advocates. The Respondent submits that she moved the trial court under Rule 73 of Probate and Administration rules and therefore in her view, the matter was placed properly within the domain and jurisdiction of the probate court. She relies on the case of **Santuzza Bilioti v Giancarlo Falasconi (2014)eKLR** where the court stated that a succession court has power to order a title deed be reverted to the estate which amounts to power to cancel a title deed. She therefore maintains that the orders made by the magistrate were within its requisite jurisdiction. She further submit that the evidence at the lower court is not contested as the Appellant got her proper share in parcel 2040 but wrongfully got herself registered with parcel 2041 which belonged to Joseph Giti, which action she claims was contrary to the certificate of confirmation of grant issued on 23/8/2016. In her view the lower court had no alternative but to order for the cancellation of the title deed. She avers that the court acted judiciously. She submits that it is undisputed that parcel 2041 belongs to Joseph Giti and was rightfully restored to its original status as per the confirmed grant. She relies on the case of **Estate of Mutugi Mbutii (2018)eklr**. In that matter, the court stated that section 47 of the Law of Succession Act gave power to the High Court as well as the Magistrate court to make expedient orders for the ends of justice and that expediency must be given a wide interpretation for the court to exercise its powers. In that case, the court also stated that the registration of the appellant therein was not supported by a decision of the court and was made in unclear circumstances therefore the magistrate had jurisdiction under **Section 47 and Rule 73** to conserve the estate for other beneficiaries and therefore acted within the powers under Law of Succession Act in cancelling the registration of the title deed.

Analysis and Determination

14. This court has considered this appeal and the response made. The issue for determination in this appeal is fairly simple and it is whether the lower court had the requisite jurisdiction to entertain the application dated 29th August 2018 and grant orders the prayers sought thereof.

15. The application dated 29th August 2018 as noted above was brought to the trial court by way of summons seeking the following relief.

- i. Deletion of Appellant's name in the title in respect to S. Tharaka/Tunyai/A'/2041 and title issued thereof be cancelled.
- ii. That the parcel No. S. Tharaka/Tunyai/A'/2041 be registered in favour of the applicant (Respondent herein) and Joseph Giti Kaguna as per certificate of confirmation of grant dated 23rd August 2006 &
- iii. Preservatory orders restricting dealings on parcel SouthTharaka/Tunyai 'A'/2041.

16. The above are the relief sought and granted by the lower court. The jurisdiction of a probate court as per Law of Succession Act (Cap 160) covers the administration of estate of deceased persons **Section 48** of the Act provides as follows:-

“Notwithstanding any other written law which limits jurisdiction but subject to provisions of section 49 (dealing with monetary and territorial limits), a magistrate shall have jurisdiction to entertain any application and to determine any dispute under this Act and pronounce any decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed the pecuniary limit prescribed under Section 7(1) of the Magistrates Court Act 2015.”

17. The cited law also therefore give/grants jurisdiction to the magistrates courts to deal with estates of deceased persons so long as the value such estate does not go beyond their monetary jurisdiction or fall outside their respective territorial or geographical jurisdiction. The lower court's jurisdiction in this instance has not been faulted on either monetary or territorial jurisdiction. The Appellant states that the trial court should not have dealt with the application dated 29th August 2018 because in her view the prayers or reliefs sought therein could only be granted by ELC and/or that the reliefs should have been canvassed through a plaint and full trial.

18. There is no dispute that that property known as S. Tharaka /Tunyai/A'/2041 is a resultant subdivision of S. Tharaka/Tunyai/A'/101 which comprised the estate of the late Kiguna Karigu Kabete, the deceased in the cause in the lower court. As I have highlighted above, the estate solely comprised that property known as S. Tharaka/Tunyai/A'/101 and going by the certificate of confirmation dated 23rd August 2006, that estate was directed to be subdivided into 3 portions as suggested/proposed by the Appellant herself in her summons for confirmation of grant dated 5th May 2006.

19. It is quite clear that despite the court adopting the proposal by the Appellant to divide the estate into 3 portions that is to say;

- a. Annah Karigu Kabete - 7 acres
- b. John Muriungi Iguna - 10 acres &
- c. Hellen Kathure

d. Joseph Giti Kaguna the balance thereof equally,

the Appellant as conceded went ahead and subdivided the estate into 4 portions namely:-

a. S.Tharaka/Tunyai 'A'/2039

John Muriungi - 10 acres

b. S. Tharaka/Tunya 'A'/2040

Annah Karigu Kabete - 7 acres

c. S. Tharaka/Tunyai 'A'/2041

Annah Karigu Kabete - 6 acres &

d. S. Tharaka/Tunyai'A'/2042

Hellen Kathure (the Respondent herein) - 6 acres

20. The Appellant on the face of the subdivisions carried out clearly went against the decision of the lower court and the question posed is did the Appellant have authority or capacity to unilaterally subdivide the estate and distribute it in any other mode other than the proposed mode of distribution approved by the lower court which of course was sitting as a probate court? The answer to that question is obviously in the negative. The Appellant, the appointed administratrix in the lower court could only act as per the grant issued to her. The grant confirmed by the lower court only vested 7 acres of land to the Appellant. She absolutely had no power to vests on herself extra share whether or not she intended to hold it in trust for Joseph Giti Kaguna, the beneficiary who is reported to have disappeared without trace. If she wanted to hold the share on behalf of Joseph Giti Kaguna, then nothing could have been easier than for her to propose to the same lower court that she would hold the said share (parcel No.2041) in trust for Joseph Giti Kaguna.

21. This court finds that for the Appellant to act contrary to the certificate of confirmation and confer herself a benefit without going through the lawful procedure was an abuse of the powers granted to her as the administratrix. This court further finds that the objection raised in the lower court by the Appellant when the Respondent sought for redress, was in itself and an attempt to abuse court process, This is because she obtained the property by way of transmission on the strength of letters of administration granted to her by the same lower court that she now says lacked jurisdiction to entertain the application to cancel her registration as the owner of parcel No.2041.

22. It is also the finding of this court that where jurisdiction obtains to issue the grant, certainly same jurisdiction can be used to revoke, cancel, reverse and rectify the same depending on circumstances in probate matters. The Appellant could not have used probate proceedings to unlawfully convert what the certificate of confirmation did not vest to her and then when cornered turn back and say the same court lacked the jurisdiction to reverse or correct the wrong doing. The lower court under **Rule 73** Probate and Administration Rules had jurisdiction to inquire into how the administration of the estate was done and whether the administration reflected the letter of the certificate of confirmation. The Appellant's contention that the lower court lacked jurisdiction to entertain and grant the reliefs sought in the application dated 29th August 2018 was not only fallacious but mischievous as well. It was meant to cover for the mischief of subdividing and distributing the estate of the late Kaguna Karigu Kabete in a way other than the way the court had directed vide the certificate of confirmation dated 23rd August 2016. In the case of **Floris Piezzo & Another –vs- Giancarlo Falasconi (2014) eKLR**, while considering whether an injunction can issue in a Succession Cause the Court of Appeal expressed itself as follows;

1. "We have carefully considered the grounds of appeal, rival written and oral submissions, and the law. The application before the high Court was for temporary injunction to restrain the appellants from dealing with the suit premises in a manner inimical to the estate of the deceased. The question which arose and had to be determined first was whether the Court had jurisdiction to grant an injunction in a Succession Cause. The appellants took the position that the Court had no such jurisdiction whereas the Respondent took the contrary position. However, the High Court was persuaded that Rule 73 of the Probate and Administration Rules reserved the Court's inherent jurisdiction to allow for the grant of injunctions in deserving cases. We are in total agreement with this conclusion. We have no doubt at all that the Law of Succession Act gives the Court wide jurisdiction in dealing with testamentary and administration issues of an estate. Indeed Section 47 of the said Act gives the Court jurisdiction to entertain any application and determine any dispute under the Act and to pronounce such decree and orders as may be expedient. It cannot be said that such decrees and orders would exclude injunction orders. In other words, we are of the same view that Section 47 of the Act gives the Court all embracing powers to make necessary orders, including injunctions where appropriate to safeguard the deceased's estate."

23. This court further in addition to the above finding, also for purposes of clarity notes that the parcels No.2041 & 2042 were unlawfully created. The parcel ought to have been one and the same owned equally by both Hellen Kathure & Joseph Giti Kaguna. The ownership of the two beneficiaries is common which means that each shall own an equal share. In the event of death of either of the two then, his/her share will be administered in accordance with the law and the beneficiaries of the estate will be such persons as provided under **Section 29** of the **Law of Succession Act**. So if the said Joseph Giti Kaguna is not alive or presumed dead then the law will take its course in succession proceedings as provided. There are no short cuts because the Law of Succession Act (Cap 160 Laws of Kenya) makes provisions for such eventualities. However if the ownership of Hellen Kathure and Joseph Giti Kaguna was joint then by operation of the law, the surviving joint owner would have automatically assumed ownership without going through succession proceedings. The court hereby orders that the properties known as S. Tharaka/Tunyai'A'/2041 and 2042 shall be amalgated into one and shall be held by both Hellen Kathure and Joseph Giti Kaguna in equal share.

The upshot of this is that this court finds no merit in this appeal. The same is dismissed with costs.

Dated, signed and delivered at Chuka this 30th day of July 2020.

R.K. LIMO

JUDGE

30/7/2020

Judgment signed, dated and delivered in the open court in presence of Mugo for Appellant and Kirimi for Respondent.

R.K. LIMO

JUDGE

30/7/2020