



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

CIVIL APPEAL NO. 225 of 2013

[FORMERLY NYERI H.C.C.A NO. 48 of 2011]

JULIETTA SARAH NJERI GACHOMO.....APPELLANT

VERSUS

BENSON NJATHAINI KARANJA (*Substituted in*

***place of GABRIEL KARANJA KIBOKO*)....RESPONDENT**

[Appeal from the Ruling and Order of J. Gathuku, Resident Magistrate, in Murang'a Succession Cause No. 107 of 1975 made on 20th April 2011]

JUDGMENT

1. This appeal arose from proceedings in *Murang'a Succession Cause No. 107 of 1975*.
2. The appellant seeks three reliefs: Firstly, that the proceedings of the lower court from 29th February 1984 up to 16th January 2009 be declared null and set aside. Secondly, that the order made on 29th February 1984 authorizing the Executive Officer to execute the transfer instruments over land parcel Loc.11/Maragi/711 (hereafter *the suit land*) to Gabriel Karanja Kiboko be declared void and lifted; and, thirdly, for costs.
3. The centre-piece of the appeal is that Joseph Gachomo (now deceased), and who was the registered owner of the suit land, was neither served nor heard before the impugned order was made.
4. His widow, who is the present appellant, avers that the deceased was registered as the proprietor on 2nd February 1979. She deposed in an affidavit sworn on 1st April 2009 that she was unaware of the transfer of the suit land until the year 2008 when “*she heard Gabriel Kiboko boasting outside her house that he had won*” the succession cause.
5. The memorandum of appeal is dated 11th May 2011 and raises the following six grounds:
 - a. *The learned Resident Magistrate erred in finding that the title of the deceased Joseph Gachomo to land parcel No. Loc.11/Maragi/711 was not lawfully obtained in view of the judgment of Kiharu District Magistrate's court in Land Succession Cause No. 107 of 1975 dated 5.2.1976 which awarded the land to the 2nd respondent herein and who lawfully got himself registered as the proprietor thereof on 15.06.1976 and who in turn transferred it to Joseph Gachomo on 2.2.1979*
 - b. *The learned Resident Magistrate ought to have found that the review of that judgment on 29.12.1979 did not and could not affect the title of Joseph Gachomo which was protected by section 27 and 28 of the Registered Land Act and could not be defeated otherwise than as provided for by the Act. The magistrate wrongly went out of his way to declare the title of Joseph Gachomo unlawful without satisfying the requirements of the Act. Instead he should have found that the proceedings touching on Joseph Gachomo's title were invalid because he was not given an opportunity to be heard.*
 - c. *The learned Resident Magistrate erred in not applying the Interpretation and General Provisions Act which he had cited but which he expressly ignored in deciding that the 2nd respondent's title to land parcel No. Loc.11/Maragi/711 was suspect.*
 - d. *The learned Resident Magistrate went beyond the scope of what he was called upon to adjudicate in the application dated 16.03.2009 which was merely to decide whether the proceedings relating to Joseph Gachomo's land were valid when they were*

taken in his absence and he was not party to the proceedings nor was he served with papers respecting the proceedings ; instead the Resident Magistrate went on to declare Joseph Gachomo's title invalid and unlawful when there was no prayer or such an order ; this was a clear case of the Magistrate going overboard and further evidence of bias and unbalanced consideration of the issues before him.

e. The whole of the reasoning of the Resident Magistrate regarding the validity of the 2nd respondent's title, which was transferred to Joseph Gachomo, was erroneous and against the evidence on record, considering that he had before him the judgement dated 12.1.1976.

f. The learned Resident Magistrate exhibited clear bias and lack of balanced judgement in arriving at the ruling and ignored the laws applicable to this case.

6. The appeal is contested by the respondent.

7. Directions were granted that the appeal be heard via submissions. Both learned counsel filed written submissions on 3rd May 2019; and, 27th May 2020 respectively.

8. On 13th July 2020, I heard further arguments from *Mr. Gichuki*, learned counsel for the appellant; and, *Mr. Kirubi*, learned counsel for the respondent.

9. This is a first appeal to the High Court. It is thus on both *facts* and the *law*. I have re-evaluated the record and drawn independent conclusions. *Peters v Sunday Post Limited* [1958] E.A 424, *Selle v Associated Motor Boat Company Ltd* [1968] E.A 123.

10. The history of the dispute can be traced back to the death of one Kiboko Kuria in August 1973. He was polygamous and died intestate. Succession proceedings were filed at Kiharu and later transferred to Murang'a in the abovementioned cause.

11. On 5th February 1976, the beneficiaries present in court recorded a *consent* declaring one of his sons, Silvester Mwangi Kiboko, as the sole heir. Armed with the consent, Silvester transferred the suit land to himself on 5th June 1976.

12. In the meantime, his brother from the second house, Gabriel Karanja Kiboko, lodged an objection. It is material that the earlier consent was *set aside* by a fresh consent of the parties on 10th May 1978.

13. Following a full trial, the lower court rendered its judgment on 29th December 1978. It awarded Gabriel Karanja Kiboko 3½ acres while his brother, Silvester Mwangi Kiboko, got 1½ acres of the suit land.

14. Notwithstanding the judgment, Silvester Mwangi sold the entire suit land to Joseph Gachomo on 2nd February 1979. A new title was issued the same day. The consideration indicated on the Green Card is Kshs 25,000.

15. This conveyance happened on the foundation of the original consent of 5th February 1976. Like I have stated, the consent had been set aside way back on 10th May 1978. In any case, it had been superseded by the final judgment of the lower court of 29th December 1978.

16. Granted that history, it was a misdirection by the learned magistrate to state in the ruling of 20th April 2011 that:

It beats reason how after the said judgment Silvester Mwangi Kiboko became registered as the sole proprietor of the suit land on 5th June 1976; Kiboko Kuria having died on 29th September 1973.

17. The learned magistrate had gone further to state:

I find no evidence that Silvester Mwangi Kiboko ever took out any succession proceedings with regard to the estate of Kiboko Kuria other than what is on record. His registration as proprietor of the land is therefore suspect in view of the judgment of the court.

18. The learned magistrate held a mistaken view that Silvester Mwangi ought to have filed a separate succession cause. The fact was that *Succession Cause No. 107 of 1975* relating to his father's estate was right before the court. It was also clear that Silvester Mwangi had acquired the title by virtue of the original consent of 5th February 1976.

19. I however concur with the learned magistrate and I readily find that once the consent was set aside; and, the final judgment delivered, *all future* transactions built atop the ill-fated consent became void. That must surely include the purported transfer to Joseph Gachomo which was effected well *after* the said judgment.

20. But that said, I remain cognizant that the learned trial magistrate was dealing with a narrow summons by the appellant to *review* and *set aside* the subsequent order of 29th February 1984. That order authorized the Executive Officer to execute the transfer instruments over the suit land to Gabriel Karanja Kiboko. The applicant had alleged that the latter had refused to co-operate as decreed in the judgment.

21. The court below dismissed the appellant's summons for review on 20th April 2011. It is that dismissal that has piqued the appellant and precipitated this appeal. It is thus important to examine the summons a little more closely.

22. The appellant had lodged a summons in general form dated 16th March 2009. The orders sought were two-pronged: To set aside the order of 29th February 1984; and, to declare all subsequent proceedings void. As is clear from its title, the summons sought *review* under Rule 73 of the *Probate and Administration Rules* as read together with Order XLIV of the repealed *Civil Procedure Rules*.

23. The right to be heard is a central feature of the rules of natural justice. Learned counsel for the appellant, *Mr. Gichuki*, cited ***Mbaki & Others v Macharia & Another*** [2005] 2 E.A 206, at 210, where the Court of Appeal stated:

The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.

24. As I will discuss shortly, I am not convinced that either the deceased or his widow (the appellant) were unaware of the proceedings in the lower court. That issue is closely intertwined with the inordinate delays in presenting the appellant's summons dated 16th March 2009.

25. I concur with the learned magistrate that a *delay* of nearly 25 years had taken place from the date of the impugned order. At paragraph 5 of the supporting affidavit, the appellant had casually explained it as follows:

That I have learnt that there have been proceedings going on in this case touching on the title of the late Joseph Gachomo.....and on further inquiry I discovered that there were proceedings dating as far back as 1979 of which neither I nor my husband Joseph Gachomo were aware as neither of us was served with any court papers in that respect.

26. However, in the further affidavit of 1st April 2009 that I referred to earlier, she elaborated that she was in the dark until the year 2008 when “*she heard Gabriel Kiboko boasting outside her house that he had won*” the succession cause. That is when she obtained a limited grant to bring the summons on behalf of the estate and was enjoined into the suit.

27. But that masks a number of facts. Firstly, she omits to mention that an earlier and similar application dated 23rd August 2004 was made by the same lawyers on behalf of one Robert Nduati Mwaura. He is the son of Silvester Mwangi Kiboko and a brother to Joseph Gachomo. In that application he claimed at paragraph 3 of his affidavit that he “*bought a portion of the land from Joseph Gachomo and [he] had lodged a caution*” which was removed by the court on 18th June 2004.

28. That application was dismissed on 3rd December 2007 for, among other reasons, lack of standing; failure to establish grounds for review; and, undue delay of over twenty years.

29. As indicated, Robert Nduati Mwaura had placed a caution on the title way back on 13th July 1984 claiming “*a beneficial interest*”. That explains why the respondent filed a separate application dated 28th May 2004 to lift it. Robert Mwaura now claimed that he and his two brothers, Joseph Gachomo and James Maina Mwangi, purchased the suit land from their father Silvester Mwangi Kiboko. He averred that Joseph Gachomo was to hold the suit land in *trust*. The lower court ordered the caution to be removed on 18th June 2004.

30. Secondly, Joseph Gachomo lived until 28th December 1993, a period of about *nine years* since the impugned order was made. But there is something else that is more telling: At page 35 of the record, Joseph Gachomo appeared as *Witness III* in Succession Cause 107 of 1978 and testified on 21st December 1978. He told the lower court, among other things, that he was in possession of the suit land. Silvester Mwangi Kiboko on the other hand was the applicant in that Succession Cause.

31. I thus find it rather odd that Joseph Gachomo or his widow (the appellant) would claim ignorance of the proceedings or the resultant judgment. It is a convenient afterthought and a red herring.

32. The judgment of 29th December 1978 in the Succession Cause has never been set aside or appealed against. The appellant instead chose only to attack the order of 29th February 1984 which authorized the Executive Officer to execute the transfer instruments over the suit land.

33. Quite apart from the failure of merits of the summons, I also find that there was undue laches running to nearly 25 years. As I have labored to show, the delay was not properly explained or borne out by the facts. The test in a matter of this nature was well explained in ***Ivita v Kyumbu*** [1984] KLR 441. The delay here is *prolonged* and *ill-explained*. It is thus *inexcusable*.

34. I remain alive of the overriding objective to do justice to the parties. See ***Harit Sheth Advocate v Shamas Charania*** Nairobi, Court of Appeal, Civil Appeal 68 of 2008 [2010] eKLR. But justice in this case left the lower court with no alternative but to dismiss the appellant's summons. I concur in that finding.

35. Furthermore, I found earlier that the consent of 5th February 1976 (upon which the transfer to Joseph Gachomo was anchored) was *set aside* way back on 10th May 1978. It was also *superseded* by the final judgment of the lower court of 29th December 1978. It is then plain that the transfer to Gachomo on 2nd February 1979 was null. So much so that setting aside the impugned orders of 29th February 1984 and 20th April 2011 would be to act in vain.

36. Considering the facts and the highly irregular manner of that conveyance, I am also doubtful that Joseph Gachomo would be afforded any or full protection by sections 27 and 28 of the **Registered Land Act** (now repealed) as urged by *Mr. Gichuki*, learned counsel for the appellant.

37. Lastly, I have found no tangible evidence of *bias* on the part of the learned magistrate. He used strong language at times and slightly

overshot the boundaries of the summons. For instance, it was discourteous of him to refer to the appellant as the *purported wife* of the deceased when she had displayed her marriage certificate. But in the end, I am unable to fault his conclusions on the *merits* of the application before him.

38. The upshot is that the appeal is devoid of merit and is hereby *dismissed*.

39. Costs follow the event and are at the *discretion* of the court. I grant the respondent costs in the *lower court*. However, in the interests of justice; considering the history of the litigation; and, the predicament that has befallen the appellant, I order that each party shall bear its own costs in the *appeal*.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 21st day of September 2020.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:

Mr. Gichuki Waiganjo for the appellant instructed by Gichuki Waiganjo & Company Advocates.

Ms. Kimani holding brief for Mr. Kirubi for the respondent instructed by Kirubi, Mwangi Ben & Company Advocates

Ms. Dorcas Waichuhi & Ms. Susan Waiganjo, Court Assistants.