



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 142 OF 2019

MARGARET WAHU NDONGA.....APPELLANT

VERSUS

WILLIAM NGARA KIMANI.....RESPONDENT

{Sued in his personal capacity and in his capacity as the Administrator of the estate of Harry Gatigwa Gaitho (Deceased)}

{Being an appeal against the Judgement of Hon. G. Omodho – SRM Thika dated and delivered on the 20th day of September 2019 in the original Kiambu Chief Magistrate’s Court Succession Cause No. 124 of 2001}

JUDGEMENT

This appeal is against the ruling delivered in CM Succession No. 124 of 2001 by Hon. Omodho on 20th September 2019. By that ruling Hon. Omodho reviewed and set aside an earlier ruling delivered by Hon. Khaemba on 8th March 2019. The subject of the two rulings is a parcel of land LR Ndumberi/Tinganga/T.532 which originally belonged to Gatigwa Gaitho, the deceased whose estate is the subject of the succession cause. The appellant and the respondent are both beneficiaries of that estate, the appellant as a daughter-in-law and the respondent as a son of the deceased. LR Ndumberi/Tinganga/T.532 was one of the assets that had been left out of the inventory of the assets of the deceased when the grant was confirmed on 26th July 2002. The same was included upon application by the administrators of the estate by way of a summons dated 20th January 2014. The said summons sought amendment of the confirmed grant and more specifically: -

- “(1) Land Parcel Ndumberi/Tinganga/1822 be registered in the names of Samuel Gaitho Kimani.**
- (2) Land Parcel Number Ndumberi/Tinganga/T.532 to be registered in the names of William Ngara Kimani.**
- (3) Money held at KCB to be released to Charles Kimani Gatigwa.”**

(Underlining mine).

The summons which was vehemently opposed by the appellant was heard by Hon. Khaemba by way of *viva voce* evidence who upon considering evidence and submissions from both sides delivered a ruling on 8th March 2019 and made orders as follows: -

- “(a) That the Petition be amended to remove the name of Samuel Njenga Kanari as a co-administrator of the estate, leaving William Ngaara as the only administrator.**
- (b) That the names of beneficiaries that were left out in the schedule dated 5th February 2001 shall be entered in the list of the surviving children and spouses of the deceased;**
- (b) That the orders made on 26th July, 2001 confirming the grant herein are hereby set aside and/or vacated;**
- (c) That all the properties left by the deceased be included in the inventory of the assets of the deceased.**
- (d) That estate be re-distributed without any interference with the current shares of the beneficiaries, taking into account the interest of third parties.**
- (e) That ownership and possession of land parcel number Ndumberi/Tinganga/T.532 to remain with Margaret Ndong.**

(f) That the monies in KCB be distributed to all the beneficiaries of the estate in accordance of the Act.

(f) That this being a family matter there shall be no order as to costs.”

(Underlining mine).

Thereafter on 8th April 2019 through the firm of Kairu Kimani & Co. Advocates the respondent herein filed a summons dated 5th April 2019 which sought orders inter alia: -

“4. That the court be pleased to review its order made in the ruling dated 8th day of March 2019 requiring that Margaret Wahu Ndonga retains ownership and possession of land parcel number NDUMBERI/TINGANGA/T532 and William Ngaara Kimani be granted the ownership of the said land.” (Underlining mine).

When the advocates appeared before Hon. Khaemba on 24th May 2019 they consented to proceed by way of written submissions. Thereafter the application was placed before Hon. Omodho who considered the submissions and who in a ruling delivered on 20th September 2019 reviewed the order of Hon. Khaemba which had given ownership of Ndumberi/Tinganga/T.532 to the appellant. Hon. Omodho based his decision on a judgement delivered by Okong’o J in ELC CNo. 1298 of 2014.

Being aggrieved by Hon. Omodho’s ruling the appellant preferred this appeal. The appeal is premised on the following grounds: -

“1. THAT the Learned Magistrate erred in law and in fact by allowing the Respondent’s review application dated the 5th day of April 2019 without properly reviewing the record and considering the history of the matter and the rationale behind the ruling of Hon. Khaemba dated the 8th March, 2019.

2. THAT the Learned Magistrate erred in law and in fact by seating as an appeal court to the decision of Hon. Khaemba, a magistrate of concurrent jurisdiction and in fact reviewing the lawful orders as were issued by the trial court.

3. THAT the Learned Magistrate erred in law and in fact by misconstruing, misunderstanding and misapplying the High Court judgement in ELC 1298 of 2014 and consequently granting or awarding the Respondent ownership of the land parcel number Ndumberi/Tinganga/T.532.

4. THAT the Learned Magistrate erred in law and in fact by holding that parcel number Ndumberi/Tinganga/T.532, which had of fact been given to the appellant’s deceased husband as a gift was available for distribution.

5. THAT the Learned Magistrate erred in law and in fact by holding that the trial Magistrate, Hon. Khaemba was in error by giving ownership and possession of parcel number Ndumberi/Tinganga/T.532 to the appellant.”

The appeal proposes to ask this court to grant orders that: -

“a. This Appeal be and is hereby allowed and consequently the entire ruling and orders of the Chief Magistrate’s Court at Kiambu (Hon. Go. Omodho (SRM) dated 20th September 2019 in Succession Cause No. 124 of 2001 be and is hereby set aside.

b. This Honourable Court be pleased to consequently award the ownership and possession of land parcel number Ndumberi/Tinganga/T.532 to the Appellant.

c. The Appellant be and is hereby granted cost of this Appeal.

d. This Honourable Court be pleased to make any further orders and directions that it may deem fit and just in the circumstances and in the best interest of the minors.”

The appeal was canvassed through written submissions. I have carefully considered the record of appeal, the rival written submissions, the cases cited and the law. The respondent herein was the plaintiff in the suit before Okong’o J. He had filed that suit as an administrator of the estate of Gatigwa Gaiho and his main prayer was: -

“(i) An order cancelling the title for all that land parcel known as Ndumeri (sic)/Tinganga/T352 (hereinafter referred to as “suit property”) in the name of the defendan(sic) and the restoration of the property in the name of Gatigwa Gaiho as the owner thereof.”

The defendant referred to in that case is the appellant in this appeal. She had acquired registration and title to LR Ndumberi/Tinganga/T.532 in a “dubious” manner which the respondent successfully challenged and obtained orders from Okong’o J to revert it to the deceased. The judgement of Okong’o J is dated 29th January 2016. I have perused the judgement of Okong’o J and I agree with Counsel for the appellant that in arriving at his ruling the subject of this appeal Hon. Omodho misread that judgement. In the judgement of Okong’o J he simply rectified by cancellation the entries giving the appellant (then defendant in the case) title to the subject land and reverted it the name of Gatigwa Gaiho, the deceased. Okong’o J, held: -

“..... In the face of evidence that the suit property was transferred to the defendant when the registered owner was deceased on the strength of a grant of letters of administration that was issued in a succession cause that did not relate to the deceased, the only conclusion this court can make is that the defendant acquired the suit property illegally and fraudulently as claimed by the plaintiff. Section 80 (1) of the Land Registration Act, 2012 gives this court power to rectify the register of land by directing that any registration be cancelled or amended if it is satisfied that the same was obtained, made by fraud or mistake. The plaintiff has established that the defendant was registered as the proprietor of the suit property by fraud. The plaintiff is in the circumstances entitled to the relief sought for rectification of the register of the suit property.....”

Okong’o J then proceeded to enter judgement for the plaintiff (the respondent in this appeal) as prayed in the plaint. As I have already stated, the main prayer as shown in the judgement sought cancellation of the title held by the defendant’s (now the appellant) and restoration of the property to Gatigwa Gaitho (deceased). The judgement did not grant ownership of that property to the respondent in this appeal. It would appear from Hon. Omodho’s ruling that his intention was to uphold the decision of Okong’o J. However, by allowing the whole of the summons dated 5th April 2019 he went beyond the orders granted by Okong’o J. He reviewed Hon. Khaemba’s order which granted the subject parcel of land to the appellant in contradiction of the superior court’s order and granted ownership of the land to William Ngaara Kimani also in contradiction of the order of the superior court. That was the purport of prayer 4 of the respondent’s application for review. Whereas Hon. Khaemba erred by granting its ownership to the appellant in disregard of the order of Okong’o J, Hon. Omodho also erred by granting it to the respondent. The proper order would have been to review and set aside the order of Hon. Khaemba and revert the parcel of land to the estate of the deceased as ordered by Okong’o J pending confirmation of the grant and distribution of the assets either upon consent of the beneficiaries or upon a judgement of the court. Accordingly, this appeal is allowed in the following terms: -

(i) That the ruling of Hon. Khaemba be and is hereby reviewed and is set aside in so far as it granted ownership of LR No. Ndumberi/Tinganga/T.532 to the appellant.

(ii) That the ruling of Hon. Omodho be and is hereby set aside but only to the extent that it granted ownership of LR Ndumberi/Tinganga/T.532 to the respondent.

(iii) That LR No. Ndumberi/Tinganga/T.532 shall revert to the estate of the deceased Harry Gathigwa Gaitho as decreed by Okong’o J in ELC CNo. 1298 of 2014 and shall be added to the list of assets and shall so remain pending confirmation of the grant in Kiambu CM Succession Cause No. 124 of 2001.

(iv) That parties shall bear their own costs.

It is so ordered.

Signed and dated in Nyamira this 16th day of December 2020.

E. N. MAINA

JUDGE

Judgement dated and delivered in Kiambu Electronically via Microsoft Teams on this 18th day of December 2020.

MARY KASANGO

JUDGE