



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**CIVIL APPEAL NO. 47 OF 2015**

**WAWERU CHEGE.....APPELLANT**

**VERSUS**

**STANLEY NYORO KARANI.....1<sup>ST</sup> RESPONDENT**

**JOHN GITAU KAGUMU.....2<sup>ND</sup> RESPONDENT**

Being an Appeal from the Judgment of the Honourable Senior Resident Magistrate B.J. Ndeda delivered on the 26<sup>th</sup> September 2011 in the Chief Magistrate's Court at Thika Civil Suit No. 490 of 2009

**JUDGMENT**

1. On 11<sup>th</sup> June 2009 the respondents Stanley Nyoro Karani and John Giatu Kagumu sued Kiganjo Location Ranching Company Ltd and Gitau Karani seeking an order cancelling certificate number 221 (and the plots Nos. 320, 2501 and 550 arising therefrom) issued by the company on 7<sup>th</sup> October 2008 to Gitau Karani. They also sought that plots numbers 320, 2501 and 550 in the share certificate be registered in their names to hold in trust for their mother's children pursuant to the certificate of confirmation issued in **High Court Succession Cause No. 802 of 1997**. It was the respondents' case that they were sons of the deceased James Karani Muhia alias Karani Muhia who, before his death, was a shareholder of the company. He held share certificate No. 221 issued on 16<sup>th</sup> December 1971. As the shareholder he had been allocated plots Nos. 320, 2501 and 550. Upon his death **High Court Succession Cause No. 802 of 1997** was filed at Nairobi, following which a certificate of confirmation was issued on 26<sup>th</sup> January 1998. The appellants were to hold the plots in trust for their mother's children. It was pleaded that the company had, instead, conspired with Gitau Karani and issued share certificate No. 221 to him when he was not a beneficiary of the estate of the deceased, and upon whom no certificate of confirmation had been issued. Both the company and Gitau Karani had then gone ahead and transferred plots Nos. 2501 and 550 to third parties. The appellant Waweru Chege was added to the case as 3<sup>rd</sup> defendant. This was because he had become the owner of plot No 550. His case was that he had bought the plot from Stephen Njoroge Gachiengo who had bought it from Gitau Karani. The company and Gitau Karani did not file any defence. During hearing it was evident that Gitau Karani (after certificate No. 221 was issued to him on 7<sup>th</sup> October 2008) had sold plot 550 to Stephen Njoroge Gachiengo who had sold it to the appellant, and had sold plot No. 2501 to Jane Njeri Kamuyu.

2. The trial court, in a judgment delivered on 26<sup>th</sup> September 2011, found that the company had transferred the share certificate No. 221 to Gitau Karani at a time when the certificate and the parcels thereon already belonged to the deceased, and that subsequently through the succession case, they had been inherited by the administrators of the estate who are the respondents; that at the time when the company purported to transfer the share certificate to Gitau Karani it had no such share or the plots therein as they were properties of the deceased. The court found that the company had, in so doing, intermeddled with the estate of the deceased. It nullified the transactions by the company that led to the transfer of the share certificate and plots to Gitau Karani.

3. The appellant was aggrieved by the judgment and on 25<sup>th</sup> October 2011 filed a memorandum of appeal to say that the court was wrong in finding that plot No. 550 was part of the estate of the deceased; it was wrong to find that plot No. 550 was part of the deceased's share certificate No. 221 when there was no evidence; that it had erred in failing to find that Gitau Karani was the brother to the respondents (and son of the deceased) whom the deceased had given plot No. 550 as his share which he had gone ahead to sell.

4. The appeal was opposed by the respondents. It was their case that Stephen Njoroge Gachiengo, from whom the appellant had bought the plot, was never the administrator of the estate of the deceased; the sale by Gitau Karani to Stephen Njoroge Gachiengo was illegal as Gitau Karani was not the administrator of the estate of the deceased, and therefore had no capacity to sell any part of the estate; and that company did not dispute that under the share certificate No. 221 were plots Nos 320, 2501 and 550. This was in answer to the claim by the appellant that plot No. 550 was not included in the certificate of confirmation in respect of the estate of the deceased.

5. It is the duty of this court to reconsider the evidence tendered before the trial court and to determine whether the findings made were supported by that evidence. In so doing, the court has to bear in mind that it did not have the advantage of seeing and hearing the witnesses who testified before the trial court. Secondly, an appellate court would not interfere with the decision arrived at by the exercise of discretion by lower court unless it is satisfied either that the lower court had misdirected itself in some matter and as a result arrived at the wrong decision, or that it was manifest from the case as a whole that the lower court was clearly wrong in the exercise of its discretion and that, as a result, there was injustice (**Choitram –v- Nazari [1984]KLR 327**).

6. It was clear that the company and Gitau Karani did not defend the suit in the lower court. There was, therefore, no dispute that share certificate No. 221 had been issued by the company to the deceased on 16<sup>th</sup> December 1971 and that the share had three plots: 320, 2501 and 550. Evidence was given in the lower court in that regard. In the defence filed by the appellant it was not his case that plot No. 550 was not the product of certificate No. 221, or that the certificate had not been issued to the deceased as evidence of his shareholding in the company.

7. It was the respondents' case in the lower court that they were the administrators of the estate of the deceased to whom a certificate of confirmation had been issued. That was not challenged. They showed that they had been granted the estate contained in share certificate No. 221 to hold in trust for the children of their mother. The share certificate had been issued on 26<sup>th</sup> January 1998. Under **sections 79 and 82 of the Law of Succession Act (Cap 160)** it was only the respondents who had the power to sell the estate of the deceased, or any part of it. Gitau Karani may have been their brother, but he had no power to sell the plot to Stephen Njoroge Gachiengo, or to any other person. It follows that Stephen Njoroge Gachiengo had no title to plot No. 550 which he could have transferred to the appellant (**In the Matter of the Estate of M'Muraa Mangua [2010]eKLR**).

8. The sale of plot No. 550 by Stephen Njoroge Gachiengo to the appellant was on 20<sup>th</sup> March 2009. The plot had been sold to Stephen Njoroge Gachiengo by Gitau Karani on 21<sup>st</sup> February 2009. On both occasions, the vendors were not the administrators of the estate of the deceased. The company transferred share certificate No. 221 and the plots therein to Gitau Karani on 7<sup>th</sup> October 2008. The company had no power in law to deal with the estate of the deceased. Both the company and Gitau Karani engaged themselves in a fraud when they purported to deal in the plot over which they had no claim. The lower court was right in nullifying the dealing.

9. In the memorandum of appeal it was claimed that plot No. 550 had been given to Gitau Karani by the deceased as his entitlement, and therefore that he had capacity to sell it. This was never the appellant's case before the lower court, or as contained in the written defence. Gitau Karani did not testify before the lower court on this claim, or at all.

10. I hope I have said enough to show that the appeal has no merits. It is dismissed with costs.

**DATED and DELIVERED at NAIROBI this 26<sup>TH</sup> day of JULY 2018**

**A.O. MUCHELULE**

**JUDGE**