



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELCA CASE NO. 6 OF 2019**

**NANCY WANGARI KINYUA.....APPELLANT**

**VERSUS**

**ROSE WAMBUI.....1<sup>ST</sup> RESPONDENT**

**CATHERINE NJERI.....2<sup>ND</sup> RESPONDENT**

**(Being an Appeal from the decision of Hon. H.N. NDUNG’U in SPMCC NO. 267/2010 (Kerugoya) delivered on 19<sup>th</sup> January, 2012)**

**JUDGMENT**

Pursuant to an undated and incomplete Memorandum of Appeal, the appellant preferred an appeal against the judgement and orders of Senior Principal Magistrate H.N. Ndung’u in Kerugoya in SPMCC No. 267 of 2010, between *Nancy Wangari Kinyua versus Rose Wambui & Another* delivered on 19<sup>th</sup> January, 2012 on the following grounds:

- 1. The learned magistrate erred in law and in facts by failing to find that land parcel No. Mwerua/Gitaku/827 was jointly registered between the appellant and the respondents hence the appellant’s prayer to have the title partitioned among the three parties to hold in trust for themselves and their children should have been upheld.*
- 2. The learned magistrate erred in law and in facts by finding the appellant had sold 1 acre of the land hence she had no right over land parcel no. Mwerua/Gitaku/827.*
- 3. The learned magistrate erred in law and in facts by failing to find that the appellant became a beneficiary of land parcel no. Mwerua/Gitaku/827(a subdivisions of the original land parcel no. Mwerua/Gitaku/203) in High Court Succession No. 51/1996. In the matter of estate of Dishon Chuma which succession proceedings have never been appealed against/annulled or revoked.*
- 4. The learned magistrate erred in law and in fact by holding that the appellant had sold her alleged  $\frac{3}{4}$  portion of land to one Joseph Githinji Njoya whereas there was no evidence to that effect.*
- 5. The learned magistrate erred in law and in fact by finding that the appellant went to the clan to ask for her brother’s Patrick Wachira’s portion of land whereas there was evidence that he was a beneficiary in High Court Succession No. 51/1996 and was only removed from the title after he died. When the case came up for directions on 11/03/2020, the parties through their Counsels agreed to dispose of this appeal by way of written submissions.*

**Appellant’s Submissions**

The Appellant filed her submissions on 09/03/2020 and submitted that this appeal arose from **CMCC No. 267 of 2016; Nancy Wangari Kinyua versus Rose Wambui & Another** where the appellant had sought subdivision of land parcel No.

Mwerua/Gitaku/827 into 3 equal portions as the said property was registered jointly between herself, her sister, Rose Wambui and her niece Catherine Njeri. She further prayed that upon the proposed subdivision, her portion of land be registered jointly with her children, Catherine Wamutira, Rose Wambui and Robert Muriithi and that of her niece (2<sup>nd</sup> Respondent) be registered in the names of the minor son, Ken Munene Wachira.

The lower court, while dismissing her claim held that she was not entitled to a joint share in the land as she had sold her share of entitlement. This decision was overruled by **Justice B. Olao in ELCA No. 47 of 2014 Nancy Wangari Kinyua Versus Rose Wambui & Another**. The judge found that the magistrate had erred in law and in facts in finding that the appellant had sold one acre of the land and therefore had no right over the suit. However, he ruled that joint ownership cannot be severed without the consent of the joint owners.

After this, **ELCA No. 48 of 2014** judgement on **19<sup>th</sup> May 2017**, the respondent moved the court in the original **CMCC No. 267 of 2008** vide application dated **5<sup>th</sup> July 2017** and sought the name of the appellant herein be removed from the joint title. The court allowed the application on 19<sup>th</sup> October, 2017. Being aggrieved by that decision, the appellant herein sought review of the court's orders of 19<sup>th</sup> October 2017 allowing removal of her name from the joint title.

The appellant submit that the learned magistrate erred in law and fact in disallowing the appellant's application for review dated 24<sup>th</sup> October, 2017. In ELCA No. 48 of 2014 the court erred in law and in facts in making the finding that the appellant had sold one (1) acre of the land and therefore had no right over the suit land.

Thus, Hon. Soita in the present appeal had no right therefore to allow the respondent application dated 5<sup>th</sup> July 2017 that sought removal of the appellant's name from the title. Despite the judgement of the High Court being availed to him Honourable Soita refused to review his orders given in the application dated 5<sup>th</sup> July, 2017. The appellant pray that the application dated 24<sup>th</sup> October 2017 that sought review of the orders removing the appellants name from the title be allowed and that the application dated 5<sup>th</sup> October 2017 be heard afresh or be dismissed.

### **Respondents submissions**

The respondent submit that the appellant has filed a 5 paragraph memorandum of appeal against the judgement and orders of Senior Principal Magistrate H.N. Ndung'u in Kerugoya Law Courts in SPMCC No. 267 of 2010 delivered on 19<sup>th</sup> January, 2012 the same is undated but appears at paragraph 5 of the Memorandum of appeal.

The respondent submit that the tone and intent in the submissions is an appeal against the decision of Hon. Soita to review his orders dated 18<sup>th</sup> March, 2018 yet in the whole record of appeal there is no memorandum of appeal against the judgement/decision of Hon. Soita.

The respondent submit that **Order 42 rule 1 (1) (2)** provides in mandatory terms, the form in which an appeal should take by providing that:

- (1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.*
- (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.*

The respondents submit that the memorandum of appeal is at variance with what the appellant is seeking. The appellant had a chance to amend the record of appeal but did not do so. Hence, the court should strike out the appeal. Nevertheless, if the court was to allow the appeal and commit it to hearing, on what grounds should the respondents respond to, the ones in the impugned Memorandum of Appeal at page 5 or the none grounds at the heading of appeal.

The respondents submit that the applicant seek to review the decision in application dated 19<sup>th</sup> October, 2017 that was dismissed by the lower court. Further, **Section 45 (6)** bars a court from rehearing a review once the initial review has been heard. The respondents urge the Court to dismiss the appeal in its entirety and or dismiss the application dated 24/10/2017 with costs in line with **Order 45 (6) of the CPA**.

### **ANALYSIS**

I have considered The appellant five paragraph memorandum of Appeal which is undated the record of appeal and the submissions by the parties through their Counsels. The said memorandum of appeal appearing at page 5 of the record of Appeal appears to be challenging the judgement and orders of Senior Principal Magistrate Hon. H.N. Ndung'u in Kerugoya Law Courts in SPMCC No. 267 of 2010 **Nancy Wangari Kinyua versus Rose Wambui & Another** delivered on 19<sup>th</sup> January, 2012. From proceedings in the record of appeal and the submissions by the parties, it is clear that the impugned judgment by the trial magistrate delivered on 19/01/2012 aggrieved the Appellant who preferred an appeal before this Honourable court vide ELCA No. 48/2014. By a judgment delivered on 19/05/2017, this court dismissed the appeal with no order as to costs. Also attached to the record of appeal is an application by the Respondents/defendants before the Magistrates court dated 05/07/2017, ostensibly filed after the appeal was dismissed on 19/05/2017. The Defendants had sought an order that the name of the plaintiff to be deleted from the register of land parcel No. MWERUA/GITAKU/827. The defendants had also sought an order that the plaintiff to surrender the title deed of land parcel No. MWERUA/GITAKA/827 in default the production of the same be dispensed with. In a ruling delivered by Hon. S.M.S SOITA delivered on 08/03/2018, the learned Magistrate dismissed the said application with costs.

In yet another application before this Hon. Court being MISC. APPL. No. 05/2018 dated 21/05/2018, the defendants sought leave to file appeal out of time against the lower court ruling by Hon. SMS SOITA, Chief Magistrate issued on 08/03/2018 in CMCC No. 267/2010. In a ruling delivered on 13/02/2019, this Hon. Court allowed the said application and gave the defendants leave to appeal within 7 days from the date thereof.

Though the appellants from the five Grounds of the undated Memorandum of Appeal is clear that the appeal is in respect of the judgment of Hon. H.N. NDUNG'U, SPM delivered on 19/01/2012, proceedings and decision delivered by Hon. S.M.S SOITA and the leave sought and granted by this Hon. Court in respect to that decision attached to the record of appeal gives two separate appeals thereby causing confusion and lack of clarity as to which impugned decision this appeal relates to. **Order 42 Rule 1 (1) & (2)** provides as follows;

- '(1) Every appeal to the High Court shall be in the form of a Memorandum of appeal signed in the same manner as a pleading.*

*(2) The Memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.'*

I agree with Counsel for the Respondent that the appeal herein is incompetent as the Memorandum of appeal contained at page 5 of the record of appeal is not signed as required in law. The Appellants had a chance to amend the record of appeal when directions were being taken under **Order 42 Rule 1 (2) & (4) CPR**. For this reason alone, I find this appeal incompetent.

Even assuming I was wrong in my analysis and evaluation, this appeal cannot even succeed on merit. First, the impugned judgment of Hon. H.N. NDUNGU delivered on 19/01/2012 was appealed against vide ELCA NO. 48/2014 and this Hon. Court rendered itself on 19/05/2017 dismissing the appeal with no order as to costs. Secondly, the application by the appellants before Hon. S.M.S SOITA dated 24/10/2017 seeking an order for review of his decision issued on 19/10/2017, cannot be brought for review a second time. An application for review can only be brought once and any attempt to bring such an application the second time is barred under **Order 45 Rule 6 Civil Procedure Rules** which provides as follows;

*'6. No application to review an order made on an application for review of a decree or order passed or made on a review shall be entertained'.*

## **CONCLUSION**

For all the reasons given hereinabove, I find this appeal both incompetent and lacking merit. The same is hereby dismissed with costs to the respondent.

**JUDGMENT READ, DELIVERED AND SIGNED IN OPEN COURT AT KERUGOYA THIS 21ST JANUARY, 2022.**

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**HON. E.C. CHERONO**

**ELC JUDGE**

*In the presence of:-*

1. Ms Ndungu holding brief for Nyaga for the Appellant
2. Ms Kimata holding brief for Chomba for Respondent
3. Kabuta, Court clerk.