



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELCA NO. 15 OF 2019

CHARLES MWANGI CHEGE.....1ST APPLICANT

ROSE WAMBUI CHEGE.....2ND APPLICANT

-VERSUS-

PETER MUCHIRI KING'ORI.....RESPONDENT

JUDGMENT

1. This Appeal arises from the Judgment of the Honourable Nelly Kariuki, Senior Resident Magistrate dated 22nd March, 2019 as rendered in Nyeri MELC No. 19 of 2018; Charles Mwangi Chege & Another -vs- Peter Muchiri King'ori. The said matter was initially instituted by the Appellants herein – Charles Mwangi Chege and Rose Wambui Mwangi against the Respondent – Peter Muchiri King'ori in this court as Nyeri ELC Case No. 17 of 2014. The same was however transferred to the Lower Court for hearing and disposal by an order of this court issued on 12th March, 2015.

2. By their Complaint dated 1st February, 2014, the Appellants (*as Plaintiffs*) sought an order directing the Respondent (*as Defendant*) to exhume the body of his brother one Gregory Kariuki King'ori who was buried on the parcel of land known as LR No. Thegenge/Karia/3455.

3. Having heard the dispute and in a Judgment delivered on the said 22nd day of March 2019, the Learned Trial Magistrate dismissed the Appellants' suit with costs to the Respondent.

4. Aggrieved by the said determination, the Appellants moved back to this court by way of their Memorandum of Appeal dated 16th April, 2019. The Memorandum of Appeal sets out some eight (8) grounds of Appeal and urges this court to set aside the said Judgment and allow the Appellant's suit on the grounds that:

1. The Learned Senior Resident Magistrate erred in law and fact in holding that there was evidence of intermeddling when LR No. Thegenge/Karia/3455 was registered in the Plaintiff's name pursuant to a grant issued by the High Court in Nyeri High Court Succession Cause No. 1001 of 2009 and which grant had not been revoked or annulled. A miscarriage of justice was thereby occasioned;

2. In so far as a Judge of the High Court had confirmed the grant and issued a certificate of confirmation of Grant in Nyeri High Court Succession Cause No. 1001 of 2009 granting 0.531 Ha to the Plaintiffs which were subsequently registered as LR No. Thegenge/Karia/3455, the Learned Senior Resident Magistrate, in holding that there was intermeddling, thereby sat on appeal against the Learned Judge's orders and in effect overturned the Learned Judge's orders. A miscarriage of justice was thereby occasioned;

*3. Intermeddling being a criminal offence under **Section 45 of the Law of Succession Act Cap 160 Laws of Kenya** requiring (proof) beyond reasonable doubt, and there being no evidence of conviction of the Plaintiffs for such an offence, or even of anyone else, the Learned Senior Resident Magistrate erred in holding that the Plaintiffs were accomplices in the intermeddling and thus convicting them without due process. A miscarriage of justice was thereby occasioned;*

4. In so far as the Defendant admitted in evidence that he participated in the burying of the deceased and threw soil in the deceased's grave to bury him, the Senior Resident Magistrate erred in law and in fact in holding that the "Plaintiffs have not proven on a balance of probabilities who exactly buried the deceased on the suitland". A miscarriage of justice was thereby occasioned'

5. The Learned Senior Resident Magistrate erred in holding that the Defendant was wrongly cited as a Defendant in the case when he himself admitted he buried the deceased on the land. A miscarriage of justice was thereby occasioned;

6. *The Learned Senior Resident Magistrate erred in law in digressing from issues of trespass into determining succession issues which were already res-judicata in the High Court and when this was not a succession cause. A miscarriage of justice was thereby occasioned;*

7. *The Senior Resident Magistrate erred in law in going behind the title to the suit land contrary to **Section 26(i) of Land Registration Act, 2012** which provides that a certificate of title shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner and when such title had not been cancelled or challenged in any court. A miscarriage of justice was thereby occasioned; and*

8. *The Learned Senior Resident Magistrate's Judgment is against the evidence on record.*

5. By directions given herein on 31st May, 2021, it was agreed that the Appeal be canvassed by way of written submissions. I have accordingly carefully studied the Record of Appeal as well as the submissions and authorities placed before me by the Learned Advocates for the parties.

6. This being a first appeal, this court is called upon to re-evaluate, re-analyse and reconsider the evidence placed before the trial court and to draw its own conclusions therefrom, bearing in mind of course, the fact that it did not see or hear the witnesses testifying.

7. From a perusal of the Record of Appeal, the basis of the Appellants' case in the subordinate court can be discerned from Paragraphs 4, 5 and 6 of their Complaint dated 1st February, 2019 in which they aver as follows:

"4. The Plaintiffs aver that the said parcel of land was excised from LR No. Thegenge Karia/1962 which was registered in the name of Simon King'ori Thomas, Deceased and the same was sold to them by the Defendant's deceased brother, Gregory Kariuki King'ori together with Jaffer Mwangi King'ori, James King'ori Kanyari and Jarevasio Wachira vide an agreement dated 30th October, 2009 the same being their beneficial interest;

5. The Plaintiffs further aver that the Defendants' brother, one Gregory Kariuki King'ori died on 15th January, 2014 in Kiambu District Hospital and on 25th January 2014, the Defendant without any colour of right unlawfully and wrongfully entered the said parcel of land and interred the remains of his deceased brother, Gregory Kariuki King'ori therein though the burial programme showed that he was to be buried at Kiambu cemetery; and

6. The Plaintiffs further aver that one Michael Magana Nderitu their friend, neighbor and caretaker of the said parcel of land stopped the digging of the grave and prevented the Defendant from burying the deceased thereon but he became violent and buried him inspite of the protests."

8. Those averments were repeated word for word in the statement of Charles Mwangi Chege (*the 1st Appellant*) dated 1st February, 2014 which was adopted as part of his evidence-in-chief in court as well as that of his wife Rose Wambui Mwangi (*the 2nd Appellant*) who did not testify at the trial.

9. In his statement of Defence dated 14th March, 2016, the Respondent vehemently denied being aware of the land sale transaction and being responsible for the burial of his deceased brother on the disputed parcel of land. At Paragraphs 4 to 11 of the Statement of Defence, the Respondent pleaded as follows:

"4. The defendant denies Paragraph 4 (of the Complaint) and further states that parcel No. Thegenge/Karia/1962 belonged to his late father Simon King'ori Thomas and was to be sub-divided among 5 beneficiaries that is Joseph Kinyari King'ori, Gregory Kariuki King'ori, Jerevasio Wachira King'ori, George Mwangi King'ori and myself;

5. The Defendant further states that at no time did he have a land transaction with the Plaintiffs;

6. The Defendant agrees that the deceased was interred on the land herein but denies wrongfully entering the parcel of land and burying the remains of his dead brother he puts the Defendant (sic) to strict proof;

7. ...

8. The Defendant further avers that the brothers secretly filed a succession cause No. 1001 of 2009 (at the) Nyeri High Court and he was not involved as a beneficiary and had never been served with any court papers at all to appear in court;

9. The Defendant further (states that) after the succession case a grant was confirmed and that parcel No. Thegenge/Karia/1962 was to be shared between Peter Muchiri Kabubo and Charles Mwangi Chege and Rose Wambui Chege. Furthermore, Peter Muchiri Kabubo is a stranger to the family of the deceased and was imposed by his two brothers to enable them perpetrate a fraud through the court process;

10. The Defendant avers that he has already filed a summon for revocation of grant as the same was fraudulently obtained; and

11. The Defendant further avers that the children of the deceased are the ones who buried their father on the land."

10. That statement again was the basis of the Respondent's testimony as captured in Court during the trial on 11th September, 2018.

11. Having considered the pleadings and the testimonies of the witnesses, the Learned Trial Magistrate proceeded to dismiss the Appellants' case in her Judgment dated 22nd March, 2019. The reasons for the dismissal of the suit can be discerned from Paragraphs 5, 7 and 8 of the Judgment in which the Learned Trial Magistrate delivered herself as follows:

“5. From the Plaintiffs documents, it is noted that the Sale Agreement for the suit land was entered into on 30th October, 2009 between the Plaintiffs and the relatives of the deceased registered owner. The grant of confirmation of letters of administration for the estate of the late Simon King'ori Thomas of which the suit land was part of was issued on 23rd March, 2010 and confirmed on 23rd July, 2010 by the High Court. This was about 9 months after the sale of the land.

6. ...

7. In my understanding, it is clear that the sale of parcel 1962 was undertaken well before the grant of letters of administration for the deceased's owner's estate was issued and therefore there is evidence of intermeddling of the property of the deceased person contrary to the Act as above. In my view, the sellers of the parcel 1962 did so illegally while presuming rights to the estate as intended beneficiaries by virtue of their relationship to the deceased. Be that as it may, the administration of the estate had yet to be determined therefore for all interest and purposes, the deceased's property was under the care of the State until such determination had issued from the Honourable Court. In the same vein, I am also of the view that the Plaintiffs' herein were not innocent purchasers but accomplices to the intermeddling as they paid the deceased's owner's relatives Kshs.50,000/- to cater towards legal fees for the succession process and further claimed to be beneficiaries to the estate knowing very well that they were not dependents of the deceased; and

8. Secondly, the Plaintiff's claim that the defendant buried the late Gregory Kariuki on the suit land. The Defendant claimed that it was the deceased's son and his siblings who buried their father and not himself. He further denied having been issued with the burial permit. The Plaintiffs have not proved on a balance of probabilities who exactly buried the deceased on the suit land and I find that he was wrongly cited as the defendant in this case. In summary, having found that the Plaintiffs' acquisition of the suit land was unprocedural *ab initio* by virtue of being accomplices to the intermeddling of the estate of the late Simon King'ori Thomas, then it consequently follows that their rights to the suit land do not hold water.”

12. The Appellants have attacked those findings and the conclusion by the Learned Trial Magistrate basically on some three main grounds. The first major ground is that the Learned Trial Magistrate erred in law in holding that there was evidence of intermeddling when LR Number Thegenge/Karia/3455 was registered in the Appellants'

name pursuant to a grant issued in Nyeri Succession Cause No. 1001 of 2009 which grant had not been revoked or annulled. That given that the Judge had confirmed the grant subsequent to which the land was registered in the Appellants name, the Learned Magistrate thereby sat on appeal against the Judge's orders and that the Appellants had thereby been convicted of a criminal offence without due process.

13. That ground of appeal is actually based on a deliberate distortion of facts by the Appellant. From their own documents produced before the Learned Trial Magistrate annexed herein at Pages 37 to 60 of the Record of Appeal, it is evident that they entered into the Sale Agreement for the suit property with the Respondent's brothers including the now deceased Gregory Kariuki King'ori on 30th October, 2009.

14. As at that time, the property known now as Thegenge/Karia/3455 was not in existence. That is why in the pre-amble to the Agreement, the parties do not refer to the land. Instead, they agree as follows:

“WHEREAS

1. The vendors hold beneficiary interest of one point two five (1.25 acre) or 0.533 Ha in all that parcel of Land Title No. Thegenge/Karia/1962, measuring approximately 1.7 acres situated in Nyeri District, and registered in the name Simon King'ori Thomas (now deceased) as provided for in a separate agreement dated 9th October, 2009 reached by the vendors herein and confirmed by the sub-chief (a copy annexed hereto);

2. The purchasers are desirous of purchasing the said 1.25 acre/0.533 Ha of the said parcel of land and the vendors are willing to set off their combined share of 1.25 acres in that parcel of land.

15. The property referred to in the Agreement is therefore the parcel of land which belonged to and was registered in the name of the Respondent's father. The Respondent was not part of the Agreement and it was clear that his brothers including the one he is accused of burying on the same parcel of land did not involve him in their transaction.

16. Furthermore the Appellants were clearly aware that the land as at the time was still registered in the name of the Respondent's father who was already then deceased. That much is clear from the Acknowledgment Note executed between the Appellants and the sellers of the land on 12th October, 2009. Out of the sum of Kshs.332,000/- disbursed to the sellers on the said date, the sum of Kshs.50,000/- is clearly marked out **“to cater for the legal fees towards a succession.”**

17. While it was not clear when the succession cause was filed, a Grant of Letters of Administration Intestate was subsequently issued to the Respondent's two brothers James King'ori Kinyari and Jaffer Mwangi King'ori on 23rd March, 2010. That Grant was confirmed and a certificate of confirmation issued on 23rd July, 2010. A perusal of the said certificate reveals that the two Appellants herein are listed as heirs of the late Simon King'ori Mwangi entitled to jointly inherit 0.531 Ha. of the parcel of land known as Thegenge/Karia/1962.

18. Arising from the foregoing, it was evident that contrary to the Appellant's submissions there was an attempt by the Appellants and some of the Respondent's brothers including the deceased Gregory to dispose of the property belonging to the late Simon King'ori Mwangi without compliance with the Law of Succession Act. That act as was found by the Learned Trial Magistrate in her Judgment amounted to intermeddling with the estate of the deceased as defined under **Section 45 of the Law of Succession Act**.

19. The observations made by the Learned Trial Magistrate concerned the findings based on the material placed before her and the same cannot be equated in my view to sitting on appeal against the decision confirming the Certificate of Grant which was issued some nine (9) months after the Appellants purported to acquire the suit property by way of the Sale Agreement.

20. The next ground raised by the Appellant was that the Respondent admitted throwing soil onto his brother's grave during the burial and that the Learned Trial Magistrate erred in her holding that the Plaintiffs had not proven on a balance of probabilities who exactly buried the deceased on the suit land.

21. As a matter of fact, the orders sought herein were for the Respondent to be ordered to exhume the remains of his deceased's brother who was buried on the parcel of land known as Thegenge/Karia/3455. I did not think that the communal act of attending a funeral and participating in returning soil to one's grave could be equated to taking charge of the deceased's remains and proceeding to someone else's land and burying the same therein. If that were the case, it would follow that any person who attended the burial ceremony would be deemed to have, as it were, buried the deceased on the land.

22. As can be seen from the Appellants' pleadings cited hereinabove, they were not themselves present when the remains of the late Gregory Kariuki King'ori were interred in the suit land. The 1st Appellant who testified on behalf of the 2nd Appellant told the court that it is one Michael Nderitu whom they described as their friend, neighbour and caretaker who told them that he tried to stop the Respondent from digging the grave and burying the deceased thereon but the Respondent became violent and buried the deceased in spite of his protest.

23. Needless to say, that was clearly hearsay evidence and the Appellants were under a duty to call as their witness the said Michael. He was however not called as a witness and no reason was given for such failure. That being the case, there was clearly no basis upon which one can fault the Learned Trial Magistrate on her finding that there was no evidence placed before the court to demonstrate that it was the Respondent who buried the deceased on the land to warrant his being compelled to exhume the body.

24. As the Respondent told the court, the deceased was a man with adult children as at the time of his death. The burial permit was not issued to the Respondent but to one of the deceased's sons. That son was not sued in these proceedings and I wish to say no more in that respect.

25. The third final major ground of Appeal was that the Learned Trial Magistrate had gone behind the title to the suit land contrary to **Section 26(1) of the Land Registration Act, 2012** which requires all courts to take a certificate of title as *prima facie* evidence that the person named therein is the proprietor of the land.

26. With respect, again, I did not think that there was any basis for this ground of appeal. The single issue that was before the Learned Trial Magistrate was whether the Defendant was responsible for the burial of his brother on the suit property to warrant his being directed to exhume the remains of the deceased. There was no dispute as to the ownership of the suit property and the Learned Trial Magistrate did not make any determination thereon.

27. At any rate a perusal of the said **Section 26(1) of the Land Registration Act 2012**, reveals that it only protects such a title where the same is procedurally and regularly procured. That being the case, the mere fact that the Learned Trial Magistrate expressed misgivings at the manner that the title was procured cannot in my view amount to a violation of **Section 26(1) of the Act** aforesaid.

28. In the result, I did not find any basis to interfere with the findings of the Learned Trial Magistrate. This Appeal clearly lacks basis both in law and in fact. It is dismissed with costs to the Respondent.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 20TH DAY OF JANUARY, 2022.

In the presence of:

Mr. Mwaniki holding brief for Gikonyo for the Appellant

Ms Miriti holding brief for Karweru for the Respondent

Court assistant - Wario

.....

J. O. Olola

JUDGE