



**REPUBLIC OF KENYA**

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

**E.L.C.A 18 OF 2014**

**FORMERLY KERUGOYA E.L.C.A NO. 1 OF 2013**

**JOHN KINYUA KIVUTI.....PLAINTIFFS**

***VERSUS***

**KANYI NJIRU.....1<sup>st</sup> RESPONDENT (DECEASED)**

**JOSEPH NYAGA NJIRU.....2<sup>nd</sup> RESPONDENT**

**PETER NDWIGA NJIRU..... 3<sup>rd</sup> RESPONDENT**

**ZACHARIA NJERU NJIRU.....4<sup>th</sup> RESPONDENT**

**THE HON. THE ATTORNEY GENERAL.....5<sup>th</sup> RESPONDENT**

**JUDGEMENT**

**Introduction**

1. Mr John Kinyua Kivuti the appellant has appealed against the judgement of the Chief Magistrate dated 18<sup>th</sup> April 2013. The judgement had dismissed his claim for the subdivision of the suit land number Kagaari/Kanja/226 into 5 portions as set out in paragraph 5 of the plaint.

2. Mr Joseph Nyaga Njiru and the co-respondents (3<sup>rd</sup> and 4<sup>th</sup>) opposed this appeal. They have supported the judgement that dismissed the claim against them.

**The Case for the Appellant**

3. The original plaintiff Reuben Kivuti Wainaina (PW 1) gave evidence in support of the appellant's case. The appellant substituted the original plaintiff who had died. According to the evidence of PW 1, he bought the land from Ileri Njiru. The agreement for the purchase of that land was executed and produced as exhibit 1.

4. According to exhibit 1, the said transaction was between Ileri Njiru (the seller) and Reuben Kivuti Wainaina (the buyer). The land that was sold to the appellant measured 0.81 hectares according to the sale agreement. This was the share of the suit land that belonged to Ileri Njiru. The agreement was executed on 20<sup>th</sup> December, 1978. The balance of the suit land belonged to Kanyi Njiru.

5. Following the sale agreement, the parties appeared before the Land Control Board which granted consent for that transaction. The letter of consent was produced as exhibit 3. According to the letter of consent, Ileri Njiru and Kanyi Njiru transferred the suit land to the following persons without indicating their respective shares:

1. Reuben Kivuti Wainaina (the appellant)
2. Joseph Nyaga Njiru
3. Peter Ndwiga Njiru
4. Zacharia Njeru Njiru

6. Furthermore, after the Land Control Board consented to the transaction, the Land Registrar prepared the green card (certificate of title) which was produced as exhibit 4. According to the green card, the following persons are the beneficiaries:

1. Reuben Kivuti Wainaina share 5/17
2. Kanyi Njiru share 3/17
3. Joseph Nyaga njiru 3/17
4. Peter Ndwiga Njiru share 3/17
5. Zacharia Njeru Njiru share 3/17

7. Apart from Reuben Kivuti Wainaina who got 5/17 share of the suit land the rest of the beneficiaries got 3/17 share of the suit land. The green card (certificate of title) shows that Kanyi Njiru and Ileri Njiru were registered as the proprietors of the suit land by virtue of succession proceedings with each owning separate shares.

8. It is to be noted that Ileri Njiru was not a party to these proceedings. Under cross-examination, the appellant stated that Ileri Njiru no longer lived in the suit land. This Ileri Njiru was the owner of a portion of the parcel of land measuring 0.408 hectares while the share of Kanyi Njiru was 2.35 hectares.

9. It is equally important to note that only Kanyi Njiru held a portion of the suit land as a trustee in her own behalf and on behalf of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents.

10. Under cross-examination, the plaintiff stated that when an application to the Land Control Board was made, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents were minors (infants). According to him, Kanyi Njiru sold to the appellant one acre of land who therefore ended up being the owner of 2 acres of the suit land.

11. In re-examination, the appellant stated that Kanyi Njiru and Ileri Njiru were the administrators of the estate of the deceased Njiru Gacima. By virtue of the grant of the consent by the Land Control Board, the appellant was registered as the owner of his portion of the suit land.

12. Counsel for the appellant put in written submissions. According to him, Ileri Njiru who was the elder son of the 1<sup>st</sup> respondent. The first respondent sold his portion of the suit land to another person which the appellant's father bought in an auction. He also submitted that the appellant bought the portion of the suit land which consisted of the share that was given to Ileri Njiru together with another portion sold to him by the 1<sup>st</sup> respondent.

13. Finally, counsel for the appellant has submitted that there was no fraud involved in the sale transaction because the appellant bought only the share of the late Ileri Njiru. He also submitted that the

appellant is not claiming another share of the estate of Kanyi Njiru. He therefore prays the court to allow the appeal with costs to his client.

### **The Case for the First, Second, Third and fourth respondents**

14. After the close of the appellant's case, it was the turn of the defendant to give evidence. In the meantime, the first defendant (Kanyi Njiru) had died and their counsel informed the court that he was going to call the defendants and one more witness. In the end this never happened. Instead, counsel for the appellant and that of the respondents consulted and agreed that they dispose of the case without calling of oral evidence from the respondents.

15. Furthermore, they agreed to proceed by way of submissions since the case involved issues of law. As a result, of that agreement, the parties made submissions. After that the trial court handed down a judgement dated 18<sup>th</sup> April, 2013. The respondents' counsel filed written submissions in which he submitted that the appellant was not a creditor to the first respondent.

16. He went further to state that he was also not a creditor to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents. In his view, his claim against all the 4 respondents is mis-conceived.

17. Furthermore, he submitted that the administrators of the estate of Njiru Gacima had erred in law by including the name of the original plaintiff as a beneficiary of the estate of Njiru Gacima.

18. According to him, the appellant was not entitled to any share in the estate of Njiru Gacima. He also submitted that the respondents being infants were incapable of transacting any business in relation to the suit land before they attained the age of the majority.

19. Additionally, counsel also submitted that the respondents were entitled to equal shares the estate of the appellants. It was therefore not proper to reduce their shares without their consent. Counsel has also submitted that the whole transaction was based on fraud. He says there was no sale by public auction of the suit land.

20. Finally, he states that if the appellant parted with any money, he should sue the estate of Ireri Njiru. And for that reason, he urges the court to dismiss the appeal with costs to the respondents.

### **The Applicable Law:**

21. The law that applies in this appeal is to be found in the Succession Act Cap 160 of the Laws of Kenya. According to the provisions of the Succession Act, a person who holds a land in trust for those who are under disability such as being of the age of the minority must get approval of the court before he reduces the shares of the minors.

22. The approval sought is to safeguard the interest of the minors (infants). In this way the state as the upper guardian (*parens patriae*) protects the interests of the minors.

23. Furthermore, according to the *English Court of Appeal in Mercantile Union Guarantee Corporation Ltd v. Ball (1937)3 All ER 1* contracts that are regarded as necessities for infants are enforceable against them notwithstanding their being minors.

24. That court stated that if the contract is not one that is beneficial to the infant, it cannot be enforced against such infant.

25. According to the Court of Appeal in *Selle v. Associates Motor Boat Co (1968) EA 123* the duty of a first appeal court is to re-evaluate the evidence and come to its conclusions. Additionally, it has to consider all questions of law raised in the appeal.

### **Issues for Determination**

26. In the light of the foregoing evidence, the applicable law and submissions of both counsel the following are the issues for determination:

1. Whether or not the appellant is entitled to the share of the suit land as shown in the green card (certificate of title), being the share of the late Ileri Njiru.
2. Whether or not the late Kanyi Njiru lawfully disposed of part of the suit land to the appellant.
3. Whether or not the disposal of part of the suit land measuring one acre by the first respondent to the appellant was for the benefit of the four respondents.
4. Who should pay for the costs of this application.

**Evaluation of the Evidence, Findings and the Law:**

27. I have carefully considered the evidence of the appellant, the submissions of counsel and the applicable law. I find from the evidence that the appellant bought a share of the suit land that was owned by the late Ileri Njiru. This is borne out by the sale agreement in respect of the suit land between the said Ileri Njiru and the appellant.

28. I also find that when the late Kanyi Njiru and Ileri Njiru took out letters of administration in respect of the estate of Njiru Gacima, each of these two administrators were confirmed to own shares of the suit land as shown in the green card.

29. Furthermore, when the original plaintiff died, he was substituted with the current appellant. I find that it was necessary for Kanyi Njiru to obtain the approval of the court before selling one acre of the suit land to the appellant. This is a requirement of the Succession Act.

30. It therefore follows that the selling of one acre by Kanyi Njiru to the appellant was in breach of the law. The reason being that this was done without the approval of the court. This confirms the position of the state as '*parens patriae*' in relation to persons with disabilities such as infants, persons of unsound mind and those who are senile.

31. Finally, I find that Ileri Njiru or his estate was not was not joined as a party to the suit as mandatorily required by law. He is the person who sold his share of the land to the appellant. The non-joinder of Ileri Njeru is fatal to the appeal. This also applies to the estate of Kanyi Njiru, who should have been substituted with another person following her death.

32. I agree with the court below that the suit against her abated after her death. She was not substituted with another person as required by law.

**Verdict and Disposal Order:**

33. In the light of the foregoing matters, I hereby make the following orders:

1. The appeal is hereby dismissed.
2. Costs of the appeal to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents.

**JUDGEMENT DATED, SIGNED and DELIVERED** in open court at **EMBU** this.... 23<sup>rd</sup>.... day of ....March....2015

In the presence of Mr P.N. Mugo for Appellant and Mr Kariithi for Respondents

Court clerk Muriithi

Right of appeal under Section 66 Civil Procedure Act explained to parties.

**J.M. BWONWONGA**

**JUDGE**