



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI**

Civil Appeal 41A of 2003

JACKSON NJAGI MIRIO APPELLANT

VERSUS

FRANCIS KANDENGE

JOHN NYAGA KIMANI..... RESPONDENTS

J U D G M E N T

The Respondents herein filed a suit in the Senior Resident Magistrate’s Court at Kerugoya against the appellant and one **Jacinta Muthoni Muriithi** seeking interlia; a re-transfer of land parcel numbers **Inoi/Kariko/ 1711** and **Inoi/Kariko/1712** to themselves, costs of the suit and interest. The suit was premised on the alleged acts of fraud committed by the appellant and the said **Jacinta Muthoni Muriithi** in causing the said parcels of land to be transferred to themselves notwithstanding the fact that the respondents had purchased from **Jacinta Muthoni Muriithi’s** father the whole of land parcel **Inoi/Kariko/763** that was subdivided and gave birth to the two aforesaid parcels of land upon transmission. The appellant of course denied the appellants’ claims. **Jacinta Muthoni Muriithi** did not enter appearance to the summons and accordingly interlocutory judgment in default of appearance was entered against her which was followed by formal proof. By a judgment dated 4th August 2000, the learned magistrate granted the respondents orders as prayed in the plaint against **Jacinta Muthoni Muriithi**. The appellant having entered appearance and filed his defence, the hearing of the case against him commenced in earnest. In a judgment delivered on 14th March 2003, **S. A. Okato**, learned Resident Magistrate, decreed:

- “**1. That section 76 of Cap 160 of the laws of Kenya is hereby invoke (sic).**
- 2. That the certificate of confirmation granted to Jacinta Muthoni Muriithi in succession cause No. 34 of 1996 at Embu is hereby revoked and or annulled.**
- 3. That the land parcel No. Inoi/Kariko/1711 and 1712 are hereby ordered to be re-transferred to the plaintiffs Francis Kandenge and John Nyaga Kimani**”

That decree provoked this appeal.

In the memorandum of appeal drawn and filed by **Messrs Magee wa Magee Advocate** the appellant has faulted the learned magistrate’s judgment on seven grounds. These are:-

1. That the learned magistrate erred in law and fact by making judgment against the wait of evidence.
2. That the learned magistrate erred in law and fact in Effectually revoking a grant confirmed vide Embu Principal magistrate's Court succession cause number 34 of 1996 while he had no jurisdiction to so do.
3. That the learned magistrate erred in law and fact in disregarding the fact that the transfer of the suit land to the appellants as a purchaser vide Embu Principal Magistrate's Court Succession cause number 34 of 1996 could not be invalidated.
4. That the learned magistrate erred in law and fact by disregarding the fact that there was no evidence of fraud by the appellant in acquiring the suit land.
5. That the learned magistrate erred in law and in fact by disregarding and/or overlooking the fact that the appellant was not a party to Nyeri Senior Resident Magistrate court civil suit number 277/1982 and as such the orders therein could not be enforced against him.
6. That the learned magistrate erred in law and fact by disregarding the fact that the parties and subject matter in Nyeri SRMCC No. 277/1982 were different to those in the instant case.
7. That the learned magistrate erred in law and fact by unfairly disregarding the evidence adduced by the appellant.

The facts of the case as can be gathered from the record may briefly be stated. The respondents sometimes in 1976 purchased LR No. **Inoi/Kariko/763** from one Nyaga Nduku. However, the said **Nyaga Nduku** dithered in having the said parcel of land transferred to the Respondents. Accordingly the Respondents sued him in SRMCCC No. 277 of 1982 at Nyeri and obtained a decree compelling the said **Nyaga Nduku** to transfer to each Respondent 1.25 acres from the suit premises and the remaining 0.5 acres be registered in the joint names of **Francis Kige** and **Michael Nyaga Mugo**. The respondents were however unable to execute the said decree immediately.

In the meantime **Nyaga Nduku** passed on and the appellant and **Jacinta Muthoni Muriithi**, a daughter of the deceased surreptitiously petitioned the court at Embu for the grant of the letters of administration in Embu SRMC Succession Cause number 34 of 1996. Upon obtaining the grant, the appellant and **Jacinta Muthoni Muriithi** caused land parcel No. **Inoi/Kariko/ 763** to be subdivided into LR Nos. **Inoi/Kariko/1711** and **Inoi/Kariko/1712** respectively. Whereas 1711 was registered in the name of the appellant on the account that he had purchased the same from the deceased. 1712 was however registered in the name of the said **Jacinta Muthoni Muriithi**.

As the acts of **Jacinta Muthoni Muriithi** appeared to have been in breach of the court decree issued in Nyeri SRMCCC No. 277 of 1982 aforesaid, she was arrested charged, convicted and sentenced in criminal case number 1111 of 1997 at Kerugoya law courts.

The appellant participated in the succession cause and sometime on 16th December 1996 together with Jacinta, placed a Notice in the Kenya Gazette to the effect that the title deed to the original suit premises had been lost yet the same was however in the possession of the 1st respondent having been given the same by the late **Nyaga Nduku**.

As for the appellant, his evidence was that he bought 1 ½ acres of the original suit premises i.e. **Inoi/Kariko/763** from **Jacinta** at Kshs.262,500/= vide an agreement dated 26th February 1996. By then the land was still registered in the names of **Nyaga Nduku Kanyoni**, Jacinta's father who was then dead but Jacinta showed him the gazette notice dated 19th February 1996 as proof that she had filed a succession cause in respect of her deceased father's estate and she was including him in the list of beneficiaries of the estate as a purchaser. He said that Jacinta did not have her father's title deed and she

applied for leave to secure a fresh title deed without producing the old one adding that following the conclusion of the succession cause the original suit premises was subdivided and he was registered as the proprietor of LR No. **Inoi/Kariko/1711** and issued with a title deed. He denied committing any acts of fraud and pleaded ignorance of the case between the respondents and Jacinta.

These were the contrasting positions in the case that confronted the learned magistrate. However as already stated he did in the end find for the respondents.

When the appeal came up for hearing the appellant was represented by **Mr. Chomba**, learned counsel whereas the respondents were represented by **Mrs. Rika**, learned counsel. The two counsels with the leave of court agreed to argue the appeal by way of written submissions. The respective written submissions were subsequently filed in court. I have had occasion to carefully read and consider the same as well as the authorities cited.

In the case of **Gudka v/s Dodhia (1982) KLR 376**, it was stated that an appellate court will not ordinarily differ with the finding on question of fact, by the trial judge who had the advantage of hearing and seeing the witnesses. Similarly an appellate court has jurisdiction to review the evidence to determine whether the conclusion reached upon should stand, but this is a jurisdiction which should be exercised with caution. An appellate court is however not bound to follow the factual findings of a trial judge if it appears, after evaluating the evidence, that either he failed to take account of a particular circumstance of evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence. I will bear these injunctions in mind as I ponder over this appeal.

I think that this appeal can be determined on only one issue; whether or not the learned magistrate had jurisdiction to revoke a grant of representation issued and confirmed by the Embu Principal magistrate's court in succession cause number 34 of 1996. This was the 2nd ground of appeal put forth by the appellant in his memorandum of appeal. It is the appellant's submission that in revoking the grant, the learned magistrate violated the mandatory provisions of sections 48(1) and 76 of the law of succession Act. I note that the Respondents in their written submission did not at all address this issue. I take it that perhaps they had no response to the legal issue. In revoking the grant the learned magistrate delivered himself thus **"..... Since what provoked the filing of this suit were fraudulent proceedings in the succession cause No. 34 of 1996 at Embu, I invoke section 76 of Cap 160 laws of Kenya and revoke annul the confirmed grant issued to Jacinta Muthoni Muriithi 1st Defendant"** Section 48(1) of the law of Succession Act confers jurisdiction to the Resident magistrates on certain matters or aspects of succession. It provides as follows:

"1. Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49, a resident magistrate shall have jurisdiction to entertain any application other than an application under section 76 and to determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed one hundred thousand shillings.

Provided that for the purpose of this section in any place where both the High Court and a resident magistrate's court are available, the High Court shall have exclusive jurisdiction to make all grants of representation and determine all disputes under this Act."

Section 76 of the same act is also relevant in the circumstances of this case. It provides:

"A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion"

- (a) that the proceedings to obtain the grant were defective in substance;**
- (b) that the grant was obtained fraudulently the making of a false statement or by the concealment from the court of something material to the case;**

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either:-

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.

My careful reading of these provisions of the law leaves me in no doubt at all that the learned magistrate had no jurisdiction to revoke the grant issued and confirmed as aforesaid. In purporting to revoke a grant of representation issued and confirmed the learned magistrate gravely erred. It was contrary to the mandatory provision of the aforesaid provisions of the law. Powers to revoke and or annul a grant of representation is solely vested in the High Court of Kenya.

I am certain that the learned magistrate was driven to make such monumental error out of what he perceived as injustice occasioned to the respondents by the Acts of the appellant and Jacinta. Having held that the conduct of the appellant and Jacinta were fraudulent and having ordered the retransfer of land parcel No. **Inoi/Kariko/1711** and **1712** to the appellants, the learned magistrate suddenly realized that such order would be in vain unless the confirmed grant was revoked. It is then that he proceeded to revoke the same. I appreciate the learned magistrate's gallant efforts to do justice to the parties in the circumstances of this case. However law is law and it has to be applied as it is. It has been said that jurisdiction everything in civil proceedings. In this case the learned magistrate had no jurisdiction to make the order for the revocation of the grant. A feeling of a sense of injustice cannot and shall never be a reason enough for a magistrate or judge to assume and cloth himself with a jurisdiction which he does not have. On the material before me I have no doubt that the learned magistrate was right in holding that Jacinta lacked capacity to enter into an agreement to sell the original suit premises as at 26th February 1996 when the agreement for the sale of a portion of the suit premises was executed. She had by then not obtained a grant of letters of administration to the estate of her deceased father, **Nyaga Nduku**, the owner of the original suit premises. Accordingly the agreement of sale she entered into was null and void abinitio. Further and I agree with the learned magistrate that the appellant was irregularly included into the succession cause earlier alluded to as a purchaser when he was not. He did not buy the land from the deceased **Nyaga Nduku** and did not therefore qualify as a beneficiary to the estate of the deceased by virtue of being a purchaser. On the material before me I have no doubt in my mind at all that the grant was obtained fraudulently by making of false statements or by concealment from court of something material to the case.

It is also not lost on me that due to her conduct, **Jacinta** was charged, tried, convicted and sentenced in Kerugoya Magistrate's Court Criminal Case number 1111 of 1997. All these were sufficient grounds for the revocation of the grant by court suo moto or on an application of a concerned or interested party. However, the learned magistrate should not have invoked Section 76 of the Law of Succession Act to move suo moto and revoke/annul the grant. He did not have that jurisdiction. That jurisdiction cannot only be invoked by the High Court. For the sake of justice, the learned magistrate should have informed the parties to move to the appropriate forum to have the grant revoked and or annulled. I am also not certain that a magistrate sitting in Kerugoya court would have jurisdiction to revoke a grant issued and confirmed by another magistrate's court in a different station suo moto.

The conclusion I have come to regrettably is that the appeal succeeds. Accordingly I allow the appeal

and set aside the orders of the learned magistrate. In view of peculiar circumstances obtaining in this case I will make no order as to costs.

I will however invoke sections 76 of the law of succession Act, 73 of the probate and administration rules and section 60 of the Constitution of Kenya and call for the court file in respect of Embu Principal Magistrate's Court Succession cause number 34 of 1996 for further orders and or directions.

Dated and delivered at Nyeri this 31st day of January 2008

M. S. A. MAKHANDIA

JUDGE