REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 249 OF 1999

MARY RUGURU NJOROGE …….. APPELLANT

VERSUS

HANNAH WANJIRU WANGANGA …….. RESPONDENT

(Appeal from the judgment of Mr. N. Kamunyi,

Resident Magistrate, dated 24th May 1999 and
delivered on 7th June, 1999 in the Chief Magistrate's
Court t Nairobi, Civil Case No 4661 of 1997)

JUDGMENT

This is an appeal from the Judgment of Mr. N.Kamunyi, Resident Magistrate, dated 24th May 1999 and delivered on 7th June, 1999 in Civil Case No. 4661 of 1997 in the Chief Magistrate's Court, Nairobi.

> The Appellant was the Defendant before the trial Resident Magistrate in this case where the Respondent, as the Plaintiff, in her Plaint amended on 27th August 1997 prayed for judgment against the Defendant for "An order restraining the defendant by herself her servants and/or agents from trespassing into, taking possession of, constructing or in any way interfering with plot Number 218 comprising in L.R. 336/62 situated at Kasarani in Nairobi".

That prayer is based on the Respondent's claim that the suit plot had been acquired by the Respondent's deceased husband in the year 1987 from Ruaraka Sabuni Development Limited and that it was part of the estate of the Respondent's deceased husband. She alleged that the Appellant has wrongfully trespassed into the deceased's said plot, taken possession thereof and has brought in building materials in readiness for construction. The Respondent therefore avers that by reason of the matters aforesaid, the estate of the deceased had been wrongfully deprived of quiet enjoyment and has suffered loss and damage. The Respondent holds a confirmed grant of Letters of Administration to the estate of her deceased husband obtained in High Court Succession Cause No. 56 of 1995 and dated 6th March 1995. It was confirmed on 24th May 1996 – before the Respondent filed this suit on 23rd June 1997.

In her defence dated 17th October 1997, the Appellant did not agree that she had trespassed on the suit plot. She claimed that the suit plot No. 218 is owned by her and that the Respondent did not have a genuine title to the suit plot.

During the hearing the Respondent adduced evidence supported by two other witnesses who included the surveyor then employed by Ruaraka Sabuni Development Company, to the effect that they knew the Respondent's deceased husband bought plots from Ruaraka Sabuni Development Company and that the suit plot number 218 was one of them and that following the allotment of the plots to the Respondent's

husband, the surveyor, Gordon Anyumba, showed the Respondent and her husband where the plots, including the suit plot, were and that, a share certificate was subsequently issued to the Respondent's husband.

For the Appellant, the evidence of the document examiner, Mr. "Hezron Wamwamba Wamalwa", is not comprehensible. He examined and compared signatures on photocopies of certain documents whose writers he did not know. He said he was required to establish whether the signatures were by same hand. He found no agreement. He called the documents certificates of ownership. They were given to Mr. Wamalwa by Mr. P.K. Njoroge, Advocate.

Further, the Appellant was clear that her husband, who is also deceased, was one of the directors of Ruaraka Sabuni Development Company Limited and that he was allocated the suit plot. The Appellant did not know when the allocation was done and whether or not her husband obtained certificate of ownership. But went on to say that it was her husband who started developing the plot in 1989 having been allocated the suit plot in 1987. He built a house with three bedrooms. He died in 1993. The Appellant claims she took over the estate as the administrator. The relevant grant may have been produced during the trial as the list of exhibits attributed to the Appellant and the judgment of the learned trial magistrate at page two suggest, but the grant exhibit said dated 24/6/95 or its certificate of confirmation, have not been filed in this appeal and my search in the lower court's file has not revealed presence of any of the two documents. However the Appellant rented the house to tenants. But when she started to extend the house, the Respondent restrained her in this suit.

Mr. Willy Nyingi Waithaka who gave evidence as DW3 said he was the Chairman of Ruaraka Baba Dogo Project. That is a different name from Ruaraka Sabuni Development Company but the witness did not elaborate. However, he seemed to say that Baba Dogo Development Company had also been there but again he did not elaborate.

This witness said had become Chairman in 1997 January, and knew the suit plot 218 as one sold to Wainaina Njoroge husband of the Appellant. He said following death of Wainaina Njoroge the suit plot was transferred to the Appellant as the administrator of the estate of Wainaina Njoroge. The witness said he signed the transfer to the Appellant on 6th June 1997.

He talked of the presence of white and yellow certificates and branded the yellow certificates fake. They issued white certificates.

Parties produced receipts for various payments of fees in respect of the disputed plots.

From the evidence before the court, the learned magistrate allowed the Respondent's claim prompting this appeal where the Appellant has listed six grounds of appeal.

Pressure of work does not permit me to be detailed and I will therefore handle the six grounds together.

A difficulty which, unfortunately, is never appreciated in cases of this type is the fact that buyers or allotees come to court to fight each other over possession or ownership of a plot or parcel of land leaving behind the party who sold or allotted the suit plot or suit parcel of land to them. Having come to court, they expect the court to say who between them is the owner or lawful possessor of the suit plot or suit parcel of land. After the court has given such an order, to which the seller is not a party, I am not informed how the successful party goes further to handle the matter with the seller who sometimes is responsible for the mess- setting the parties in positions to fight and leaving them fight each other while he stands aside watching as the court comes, in to decide the winner in a decision which does not legally bind the seller because he is not a party.

I should have thought in cases of this type, parties be told at the outset to go and bring the seller – join him – in the suit before the suit may take off. What Mr. Willy Nyingi Waithaka told the court may not be what the seller would have told the court as a party and in any case, it does not make the judgment in this case bind the seller. In this suit the Respondent claiming to be owner of the suit plot comes for retraining

orders only. The Appellant also claiming ownership of the same plot opposes the Respondent's claim. The court grants the Respondent's claim. Assuming that the court's order stops at what the prayer in the amended plaint wants; obviously the question of ownership remains. The court order does not bind the seller who knows that only one of these parties is the owner. The seller may therefore be saying that the party restrained is the owner? The court does not know, but that is what the seller may be saying and within the confines of the prayer in this suit, the court has no lawful way of preventing what the seller is saying from happening.

Perhaps the learned trial magistrate sensed such a situation and that is why in his judgment he purported to make a declaration, which had not been prayed for, stating:

> "The Plaintiff is the rightful owner of plot No. 218 Baba Dogo situated at Kasarani".

I hold that it was a misdirection for the learned Magistrate to have gone so far, as nobody had asked him to say what is contained in that quotation. The extracted decree as filed in this appeal has left that part out. But the judgment has it on page three as order number one- among the three orders the learned magistrate finally made. I may add, with due respect, that that order was not based on sufficient evidence.

That brings out a deficiency in the Respondent's case. It is in evidence that the Appellant is and has been in possession of the premises and has actually done some development. That is what the Respondent is calling trespass as she claims also to be in possession asserting that her husband had done some fencing. I have said there is a dispute as to ownership of the suit plot. The Respondent has asked for a restraining order only. She has not asked for a declaratory order as to ownership or title. She does not ask for delivery of vacant possession or eviction. So that the granted restraining orders are against a party who is already in possession because of occupation and development on the suit plot. Those orders will not remove the Appellant's occupation and developments. They are therefore inadequate and I do not see how it was felt they can satisfactorily help the Respondent out.

Looking at the grounds upon which parties in this appeal based their respective cases, I note the Respondent based her case on the fact that she is the administrator of the estate of her late husband and she goes on to state in paragraph five of her amended plaint that the estate has been wrongfully deprived of quiet enjoyment and has suffered loss and damages. To sustain such a claim, the suit plot must have been listed as one of the assets in the estate of the deceased and reflected in the schedule found in the certificate of confirmation of the relevant grant.

Looking at the certificate of confirmation dated 24th May 1996, the suit plot No. 218 does not appear among the listed assets in the estate of the husband of the Respondent. However, since number 336/62 has also been mentioned in these proceedings and it has sometimes appeared as if plot number 218 was part of number 336/62, the nearest entry I find among the assets in the certificate of confirmation of grant is entry (e) reading: "Baba-Dogo Plot No. 336/62 site No. 250".

But that description does not agree with the description of the suit plot in the amended plaint. In paragraph three of the plaint the description is Plot number "218 comprised in L.R. Number 336/62 situated at Kasarani in Nairobi". A similar description is found in prayer (a) in the plaint. No evidence was adduced to show that the description of the suit plot as given in the plaint refers to the plot listed in the schedule to the certificate of confirmation of grant dated 24th May 1996 as "Baba-Dogo Plot No. 336/62 site No. 250". In the circumstances I have no evidence from which to conclude that the suit plot is one of the assets in the estate of the deceased husband of the Respondent so that paragraph five of the amended Plaint is satisfied. That being the position, then the Respondent evenas an Administrator of that estate, has no lawful authority to claim the suit plot.

On the other hand even if it were held that the difference in the description does not matter and that therefore "Baba- Dogo Plot No. 336/62 site No. 250" in the certificate of confirmation of Grant is the suit plot, another problem is that pleadings show that plot No. 336/62 was divided into several plots and that the deceased husband of the Respondent bought plots 215, 216, 216B, 217 and 218 out of plot No. 336/62. There has been no evidence that those were the only sub-divisions from plot No. 336/62. There

has been no evidence that the deceased husband of the Respondent was the only person entitled to get portions from or sub-divisions of Plot No. 336/62. If therefore there were more sub-divisions than the five allocated to the deceased husband of the Respondent, then it was legally wrong for the Respondent to have listed "Baba-Dogo – Plot No. 336/62 site No. 250" in the manner done in the certificate of confirmation of grant as that means that the deceased husband of the Respondent owned the whole of Pot No. 336/62 – when the correct position may not be so.

On the other hand, a grant of letters of administration or Probate, together with its certificate of confirmation of grant are not meant to confer to the administrator or personal representative or beneficiary for that matter, ownership of or title to an asset where the deceased did not have that ownership or title in the asset in question. In such a situation, a personal representative merely takes over whatever interest the deceased may have had in the asset in question. In the circumstances of this case therefore, where no legal title has been issued by relevant Government authorities, the entry in the schedule in the certificate of confirmation of grant relating to the suit plot should have been made to show that the personal representative, the Respondent in this appeal, was only administering and distributing the interest of her deceased husband in "Baba-Dogo Plot No. 336/62 site No 250." Thereafter she would go a head using normal legal machinery to ensure that she obtains the title to have it transmitted to the entitled beneficiary.

Concerning the Appellant, what I have said about the Respondent with regard to the description of the suit plot in the Plaint or pleadings in relation to the description of same property in the certificate of confirmation of grant issued to the Respondent more or less applies if it is correct to say, as the learned trial Magistrate said, that the Appellant had also obtained a grant to the estate of her deceased husband.

What is to be noted and added is that the Appellant does not claim to have acquired ownership of the suit plot through the grant of letters of administration, although the evidence of Mr. Willy Nyingi Waithaka suggests the transfer of the plot to the Appellant was done because she was administrator. That grant is therefore useless in this suit. But even if the transfer were done because she was an administrator, the manner in which it was done does not reflect what Mr. Waithaka said. It reflexes what the Appellant said as supported by documentary evidence that it was a transfer not based on her status as an administrator. The transfer form shows it was the Appellant's deceased husband transferring the suit plot to the Appellant on 6th June 1997 long after he had died. It includes nothing relating to the grant of letters of administration. It is not shown anywhere that the deceased signed it, although a number of other people signed it including Mr. Willy Nyingi. To my mind, such a transfer cannot be legally acceptable as a dead person cannot come back on this Earth to engage in activities like transfer of assets in his estate. If that were possible, there would be no necessity for the existence of the Law of Succession Act, Chapter 160 Laws of Kenya, in our law books.

The alleged transfer was done on 6th June 1997 and this suit was filed on 23rd June 1997. By 6th June 1997 the Appellant must have known that this suit was in the air and it is likely that the transfer was done with the dispute in this suit in mind.

To conclude, let me add that the two transactions being relied upon in this suit are incomplete. The sale of the suit plot by Ruaraka Sabuni Development Company Limited to the Appellant's husband and subsequent purported transfer of the plot to the Appellant on the one hand and the sale of that plot by the same company to the husband of the Respondent and the subsequent administration of the plot by the Respondent on the other, are the two transactions I am saying are incomplete. This is because, as the seller and the buyer must have known, none of those transactions was to stop where it has stopped to-date. The seller and buyer knew they were supposed to go further and have the buyer obtain title to the plot from the Ministry of Land and Settlement to acquire the ownership the court would accept as prima facie evidence. That is why, in this suit, the seller should have been made a party, not only to assist the court reach the conclusion as to who is the rightful owner of the suit plot, but also to explain to the court why, to date, that owner and the seller have not gone to Land Office in the Ministry of Land and Settlement and obtained the relevant title. It is the duty of a seller in a situation like this to ensure that each buyer obtains ownership through the acquisition of a title from the Government so that the seller does not set buyers fighting each other while the seller stand aside watching. Else, why can't he be

charged with receiving money by false pretences?

From what I have been saying above therefore, this case lacks merits right from the start and I see no way of sustaining it. Accordingly, this appeal be and is herewith allowed; the trial Magistrate's aforesaid judgment set aside and the Respondent's suit before the trial Magistrate dismissed meaning that this court has refused to grant the restraining orders the Respondent asked for in her amended plaint and there is no order as to ownership of the suit plot.

The Respondent to pay costs of this appeal and costs of proceedings in the court below:

Dated this 6th Day of June 2003.

J.M. KHAMONI

JUDGE

Present:

Mr. Kurauka for Mrs. Thangei for the Appellant.

Mr. Mugambi for the Respondent.