



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC APPEAL CASE NO. 06 OF 2019

MARGARET MUCHIRI APPELLANT

VERSUS

ELIPHAS NYAGA M'RIBU RESPONDENT

JUDGMENT

1. The Judgment in this matter was to be delivered on **24th March, 2020**. This could not be done because of complications brought about by the Corona Virus Crisis. Upon issuance of the apposite notice to the parties, the Judgment will be delivered in open court today. This is because this court lacks the necessary technological facilities to deliver the Judgment electronically. However, all precautions have been taken to ensure compliance with all measures necessary to obviate the spread of the Corona 2019 virus.

2. The Memorandum of Appeal in this Appeal states as follows:

MEMORANDUM OF APPEAL

(Filed pursuant to this honourable court orders issued on 9th July, 2019 vide Chuka High Court E.L.C. Misc. Application No. 4 of 2019)

The appellant above described, being greatly by the Ruling delivered on 24th April, 2019 by the Learned Chief Magistrate Mr. J. M. Njoroge in Chuka Chief Magistrate's Court L.D.T. Case No. 1 of 2011, humbly appeals to this honourable court and set herebelow the following grounds of Appeal.

1. That the Learned Chief Magistrate erred both in law and in fact in failing to appreciate that the legal representation of the deceased plaintiff in Chuka Chief Magistrate's Court L.D.T. Case No. 1 of 2011 was not granted to the Appellant in accordance to the Law of Succession Act.

2. That the Learned Chief Magistrate erred both in Law and in fact in re-opening the appellant's deceased husband's suit (read Chuka L.D.T. Case No. 1 of 2011) and which had been concluded on 7th March, 2012 and boundaries between the suit Lands Muthambi/Gatua/435 and 911 fixed by the District Land Registrar Meru South and the Surveyor as per the Registry Index Map (R.I.M) Gatua Registration Section and when the Appellant deceased's husband (plaintiff in Chuka L.D.T. Case No. 1 of 2011) was alive.

3. That the Learned Chief Magistrate erred both in law and in fact in failing to appreciate that the appellant and who is sickly and old woman was not served with the Hearing Notice for hearing on 17th December, 2018 for the hearing of an application dated 30th June, 2014.

4. That the learned Chief Magistrate erred both in law and in fact in failing to accord the appellant an opportunity of being heard and to seek legal representation by a counsel of her choice and file the necessary replies to the application dated 30th June, 2014, and which had never been served upon the appellant.

5. That the Ruling delivered on 24th April, 2019 by the Chief Magistrate, Chuka Law Courts against the Rules of natural justice and the constitution and should not be made to stand.

REASONS WHEREFORE, the appellant prays for;

a. Quashing of the Ruling dated 24th April, 2019 with costs.

b. Quashing of the order issued on 17th December, 2018.

c. A better and informed decision and/or declaration that Chuka L.D.T. Case No. 1 of 2011 was finalized on 7th March, 2012 and when the District Land Registrar and Surveyor erected the boundaries on the suit lands LR. Muthambi/Gatua/435 and 911, in compliance to the decree issued on 18th March, 2011, in the lower court.

Dated at Chuka this 12th day of July, 2019

FOR; M/S WAKLAW ADVOCATES,

CHUKA HOUSING CO-OP OFFICES

ADVOCATES FOR THE APPELLANT.

3. The appeal was canvassed by way of written submissions.

4. The appellant's written submissions are reproduced in full herebelow without any alterations whatsoever, including of spelling or any other mistakes.

APPELLANT'S WRITTEN SUBMISSIONS ON THE DISPOSAL OF THE APPEAL FILED ON 15TH JULY 2019.

Your Lordship, these are the humble Submissions for the Appellant in respect of the disposal of the Appellant's Appeal filed on 15th July 2019.

INTRODUCTION

Your Lordship, the Appellant filed the Instant appeal after being greatly aggrieved by the Ruling delivered on 24th April 2019 by the Learned Chief Magistrate Mr. J. M. Njoroge in Chuka Chief Magistrate's Court L.D.T. Case No. 1 of 2011.

Your Lordship, the Appellant duly complied with the Court Order issued on 26th July 2019 by depositing the necessary security as Ordered by the Court and therefore the Appellant's Appeal is properly filed in this Honourable Court.

Your Lordship, the Respondent was on 3rd October 2019 duly served with the Appellant's Appeal filed on 15th July 2019 and Record of Appeal filed on 2nd October 2019.

Your Lordship, **the Court records speaks for itself that the Respondent has not filed any response to the Appellant's Appeal**, and in the absence of such, we submit your Lordship, that the Appellant's Appeal is not contested and deserves to be allowed as filed.

EVIDENCE

Your Lordship, the Counsel for the Appellant and the Respondent agreed by Consent that the Appellant's Appeal filed on 15th July 2019 be canvassed by way of written submissions.

Your Lordship, with tramedous respect to the Respondent, we submit that the appellant's Appeal is not opposed by the Respondent and sum total is that the Appellant's Appeal be allowed as filed.

Your Lordship, in summary we submit that the Lower Court **had no Jurisdiction to re-open** a Suit which had been finalized on 7th March 2012. The Learned Chief Magistrate erred in Law and in fact in failing to appreciate that the re-opening of the lower Court Suit **offended the Provisions of Section 7 of the Civil Procedure Act**, and the Respondent's application dated 30th June 2014 in the Lower Court was *Resjudicata* on the strength of the Orders issued on 7th March 2012 and when the boundaries between the Suit Lands LR. MUTHAMBI/GATUA/435 and 911 were duly fixed by the District Land Registrar and the Surveyor and when the Appellant's deceased husband was alive.

Your Lordship, we further Submit the manner in which the Appellant was appointed as a legal representative of her deceased's husband was bad in law, as the Law of Succession was not followed, when appointing the Appellant as a legal representative of her deceased's husband.

Your Lordship, we further Submit that if the Respondent was aggrieved by the Orders issued on 7th March 2012 in the Lower Court, the legal procedure was to Appeal against the said Orders and not to file the application dated 30th June 2014, and when the Appellant's husband was no more.

Your Lordship, Pursuant to the Lower Court Orders of 7th March 2012, **the dispute between LR. MUTHAMBI/GATUA/435 and 911 was laid to rest and the Registry Index Map (R.I.M) accordingly Amended** and the Appellant and the Respondent put into possessions of their respective Land Parcels.

THE LAW

Your Lordship, we shall rely **on the Provisions of Section 7 of the Civil Procedure Act**, to demonstrate that the Learned Chief Magistrate erred in Law and in fact in re-opening the Appellant's deceased husband Suit and which had been concluded on 7th March 2012 and when the Appellant's deceased husband was alive.

Your Lordship, we shall also rely on the celebrated Authorities in Bungoma E.L.C Case No. 62 of 2018 (O.S) and in Malindi HCCC No. 20 of 20115 to demonstrate that the Lower Court **had no Jurisdiction** to entertain the Respondent's application dated 30th June 2014 as entertaining the same, was in effect of sitting on Appeal of its own Orders issued on 7th March 2012.

Your Lordship, we rest our Submissions and pray that the Appeal filed herein be allowed and the Orders sought thereon be granted as prayed.

Your Lordship, we rest our Submissions and Pray.

DATED at CHUKA this ...28th ... day ofNovember,..... 2019

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WAKLAW ADVOCATES,

ADVOCATES FOR THE APPELLANT

5. The respondent's written submissions are reproduced herebelow without any alterations whatsoever, including of spelling or any other mistakes.

RESPONDENT'S SUBMISSIONS

Your Lordship,

The Appellant filed the instant Appeal on 15th July 2019 appealing against the orders of Honourable J.M Njoroge Chief Magistrate ruling delivered on 24th April 2019. The Appellant has cited five (5) grounds of appeal as follows:-

1. THAT the Learned Chief Magistrate erred both in law and fact in failing to appreciate that the legal representation of the deceased plaintiff in Chuka Chief Magistrate's Court LDT Case No. 1 of 2011 was not granted to the Appellant in accordance to the Law of Succession Act.
2. THAT the Learned Chief Magistrate erred both in Law and in fact in re-opening the Appellant deceased husband's suit (read Chuka LDT Case No.1 of 2011) and which had been concluded on 7th March 2012 and boundaries between the suit lands MUTHAMBI/GATUA/435 and 911 fixed by the District Land Registrar Meru South and the Survey as per the Registry Index Map (R.I.M) Gatua Registration Section and when the Appellant deceased's husband (plaintiff in Chuka L.D.T Case No. 1 of 2011 was alive.
3. THAT the learned Chief Magistrate erred both in Law and in fact in failing to appreciate that the Appellant who is sickly and old woman was not served with the hearing Notice for hearing on 17th December 2018 for the hearing of an application dated 30th June 2014.
4. THAT the Learned Chief Magistrate erred both in Law and in fact in failing to accord the Appellant an opportunity of being heard and to seek legal representation by a counsel of her choice and file the necessary replies to the application dated 30th June 2014 and which had never been served upon the Appellant.
5. THAT the Ruling delivered on 24th April 2019 by the Chief Magistrate Chuka Law Courts is against the Rules of Natural Justice and the constitution and should not made to stand.

Your Lordship,

In her written submissions the appellant has indicated that the Appeal is unopposed and should be allowed as prayed.

However your Lordship, this argument is raised *per incurium* order 42 Rule 16 provides that; "*Any party to an appeal who does not intend to appear in person or by a advocate at the hearing of appeal may file a declaration in writing to that effect and lodge written submissions of the arguments in support of or in opposition to the appeal, as the case may be and shall, within seven (7) days after lodging the submissions, serve a copy thereof on the other party or on each other party appearing in person or separately represented.*"

From the foregoing it is clear that a respondent can chose to file written submissions only. The Appellant cannot argue that an appeal is unopposed. This practice only applies to applications, complaints, originating summons but not appeals.

Your Lordship, this appeal is fatally incompetent and wrongly before you for the simple reason that the Appellant has failed to attract and attach the order appealed against. order 42 Rule2 of the Civil Procedure Rules provides; "*Where no certified copy of the decree or order*

appealed against is filed with the memorandum of appeal, the appellant **shall** file such certified copy as soon as possible and in any event within such time as the court may order and the court need not consider whether to reject the appeal summarily under Section 79 B until such certified copy is filed.(The word is shall file. the appellant has to).

Your Lordship,

On the first ground of appeal the appellant states that legal representation was not granted upon the appellant in accordance with the Law of Succession Act. The appellant has not tried to quote the violated provision of the Law of Succession Act. Be as it may, it is the Respondent argument that when he realized that the appellant husband who was the plaintiff in LDT NO. 1 OF 2011, is deceased, he moved the court to substitute the deceased plaintiff vide an application dated 04th November 2014. The same is attached in page 59 of the record of appeal. The said application was heard and orders granted on 11th December 2018. The order is in page 53 of the record of appeal. The Appellant never appealed against the order of appointment as legal representative so the same was validly issued.

Your Lordship,

The appellant appeal is against the ruling of Honourable Njoroge that was made on the 24th April 2019 dismissing her application dated the 4th January 2019. The ruling was in regard to an application by the appellant seeking to set aside and or vary another order that had been issued by the court. The appellant has not appealed against the orders of the court issued on the 17th December 2018, which orders touched on the implementation of the decree of the court. The said orders of 17th December 2018 remain legal, valid and binding.

The ruling appealed against by the appellant is the ruling in regard to the dismissal of her application for review. In the entire ruling of the Honourable Njoroge learned Chief Magistrate, there is no single sentence that he has that LDT NO.1 OF 2011 be re-opened as alleged by the appellant. Ground 2 of the appeal intends to castigate the learned magistrate unjustifiably in that in his ruling he never rendered a decision on the itemized issue.

Your Lordship, Ground 3 of the appeal alleges that the learned Chief Magistrate failed to consider that the elderly appellant was not served with a hearing notice. But we humbly submit that this far from the truth your Lordship the Appellant having been served with an application she failed to reply to the application, she was given a chance to respond on three (3) occasions but she refused to put in a replying affidavit. Your Lordship, the lower court record shall bear me witness on this. The appellant by design has failed to put on record these proceeding of the lower court on the record of appeal so as to deny this court crucial information.

The learned magistrate observed that the Appellant was present and did not object to the application and hence was allowed as prayed. This observation was made by the learned Magistrate at page 39 line 11 of the record of appeal.

Your Lordship, in regard to ground 5, the appellant alleges that she was not granted an opportunity to be heard. However, she has failed to point to a particular incidence when she was denied a chance to be heard. In regard to the application dated 4th January 2019 which culminated to this appeal the appellant was granted a chance to submit and she submitted and a decision rendered. In regard to the application dated 30th June 2014, the appellant cannot say “ that she was not served” at the appeal stage. This is an afterthought in that she did not raise that issue in her supporting affidavit to the application for setting aside judgement sworn on 4th January 2019 and attached at page 51 of the record of appeal.

This fact was not presented before the chief magistrate for consideration and determination. The respondent is right to state that the appellant has picked this issue from the air.

The appellant has not raised any Constitutional Provision that was infringed by the decision of the Magistrate, litigation has to come to an end and we pray that this appeal be dismissed with costs to the respondent for lacking merit.

Our prayer!

DATED AT CHUKA THIS ...6TH DAY OF JANUARY.....2020

FOR: KIJARU, NJERU & CO.

ADVOCATE FOR THE RESPONDENT

6. I have carefully gone through the proceedings in the lower court. I have perused the pleadings proffered by the parties to buttress their diametrically incongruent assertions.

7. The court notes that this appeal has been spawned by the ruling of the learned Chuka Chief Magistrate, CM Njoroge, delivered on 4th January, 2019. In his ruling, the Learned Chief Magistrate opined as follows:-

“The court has considered the contentions by both sides from the records, on 17.12.2018 the application dated 30.6.2014 was coming up for hearing interpartes. The respondent/applicant was present and did not object to the application, and hence was allowed as prayed. The said applicant sought to implement the decree of the court by the Surveyor Land Registrar. The court observes that on 17.12.2018, the applicant did not plead;

a. The suit had abated.

b. That she was not served with the application.

c. That she was elderly and sick.

d. That she required time to file a reply.”

“For orders of review to issue a party has to demonstrate that there exists an error, apparent on the face of the record, that a new fact or made (sic) has emerged that was not within the knowledge or was not considered by the court. The applicant has not proved the existence of any of the above grounds, that would move the court to vary or review its orders dated 17.12.2018.

The court finds no merit in the application dated 4.1.2019. The same is dismissed with costs.”

8. Having considered all the evidential facts in this matter, I make the following findings:-

a. Grounds 1, 2, 3 and 4 are dismissed. I find that the Learned Chief Magistrate gave a well-reasoned ruling and therefore, the claims made in these grounds of appeal have no basis. Nowhere do I find that the Chief Magistrate’s Ruling was against the rules of natural justice and the constitution.

9. In the circumstances, I enter judgment for the Respondent against the appellant in the following terms:

a. This appeal is hereby dismissed.

b. Costs are awarded to the respondent.

Delivered in open Court at Chuka this 5th day of May, 2020 in the presence of:

CA: Ndegwa

Muturi Kirimi present for the appellant

Eliphas Nyaga M’Ribu - respondent

P. M. NJOROGI,

JUDGE.