Kamau v Thiongo (Succession Appeal E002 of 2022)
[2024] KEHC 12727 (KLR) (23 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12727 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAHURURU

SUCCESSION APPEAL E002 OF 2022

CM KARIUKI, J

OCTOBER 23, 2024

BETWEEN

JACOB WANGAI KAMAU ..... APPELLANT

AND

JOSEPH KANYI THIONGO ..... RESPONDENT

JUDGMENT

1. The Appellant above named being aggrieved by the judgment of Honourable Judith Wanjala, Chief Magistrate, delivered virtually on the 12th day of July 2022 in Nyahururu C.M. Succession Cause No 2 of 2016, allowing the Respondent's Summons for Revocation of Grant at this moment appeals against the whole of the said ruling and set out the following grounds of appeal inter-alia:-

    a. The learned trial magistrate, in a significant legal misstep, erred in law and fact in holding that the Respondent had proved his application to allow the Summons for Revocation of Grant due to the Appellant's non-disclosure of the Respondent as being a creditor to the Estate of the deceased, the late Irungu Theuri Irungu, yet, the Appellant had only intimated his desire to purchase two (2) acres and could therefore not be considered as a purchaser for value.

    b. The learned trial magistrate erred in law and fact in holding that the Respondent had proved his application to allow the Summons for Revocation of Grant in spite of the said application being barred by dint of sections 37 and 38 of the *Limitation of Actions Act*, Cap. 22. This significant legal issue presupposes that the land of the subject of the estate was owned by the deceased, the late Irungu Theuri Irungu.

    c. The learned trial magistrate erred in law and fact in holding that the Respondent had proved his application to allow the Summons for Revocation of Grant in spite of the said application being barred by dint of section 41 of the *Limitation of Actions Act*, Cap. 22 which dictates

that land owned by the Government, like in the present case (The Settlement Funds Trustees), cannot be alienated, sold and/or subject to adverse possession.

a) The learned trial magistrate erred in law and fact in holding that the Respondent had proved his application to allow the Summons for Revocation of Grant. Yet, the Deceased, the late Irungu Theuri Irungu, had no right, title, or interest to pass to the Respondent since the land subject to succession was still charged to the Settlement Funds Trustee.

b) The learned trial magistrate erred in Respondent's having proved his application law and fact to allow the Summons for revocation of grant despite the fact that the land subject to succession did not comply with Section 6 of the *Land Control Act*, Cap. Cap 302 and by dint of Section 7 and 22 thereof, the transaction was null and void ab inito, illegal, and not enforceable at law.

2. Reasons wherefore the Appellant prays for judgment against the Respondent that:-

3. The order of payment of costs to the Protestor/Respondent be substituted with an order of payment of the expenses in favor of the Petitioner/Appellant.

4. The ruling of the subordinate court delivered on 12 July 2022 be set aside and substituted with an order allowing the Appellant's appeal with costs.

5. Any other or better relief deemed fit by this honorable court be granted.

6. Appellant’s Counsel’s Skeleton Submissions

7. Ground 1

8. It was stated that the Respondent claimed that he purchased two acres out of Plot Number 439 but never presented any conclusive proof by way of written records. The Respondent pointed to a Letter dated 26th January 2016 by the Assistant County Commissioner (located at page 33 RoA) as conclusive proof of purchase.

9. It was argued that the same cannot be relied upon as evidence of the the purchase of two acres because it is a reported account and not a contractual document within the meaning of Section 3 of the *Law of Contract Act*. The Agreements cited by the Respondent (located on pages 22, 27, 28, 29, 30, and 31 RoA) are mostly in Kikuyu, and no translation was available.

10. Further, that for a contract to be enforceable under Section 3 of the *Law of Contract*. The act must be in writing and contain the essential terms of purchase, signed and witnessed. It was the Appellant’s considered opinion that the agreements cited by the Respondent never attained this threshold.

11. Ground 2

12. It was contended that pursuant to the Respondent's Supporting Affidavit (located on page 20 para 30 RoA), the Respondent argues that he took possession of the suit land in 1993, settled his family thereon, and fully developed the land. The Application seeking Revocation of Grant dated 15th April 2018 (located at pages 18 to 40 RoA) was brought after a period of 25 years.

13. The Appellant submitted that the Respondent argues (see page 21 para 20 RoA) that the land was still registered under the Settlement Funds Trustee. He was, therefore, entitled to the Deceased's Estate as a Creditor. He contended that the argument is fallacious in principle. The deceased died before he secured a discharge of charge, and therefore, the suit land was Government land, and the Respondent could never be considered a creditor of the Government.

14. It was averred that the Respondent was never a Creditor of the Estate of the Deceased, and he never had any locus standi to claim any part of the suit land as a creditor of the Deceased as the deceased never enjoyed any right, title, and interest that could be transferred to the Respondent. On the flip side, an argument may be made that if the deceased, as owner, enjoyed powers of disposition (certainly assuming the agreements cited by the Respondent were enforceable), even then, the Respondent's claim would be time-barred by virtue of Sections 37 and 38 of the *Limitation of Actions Act*.

15. Grounds 3 and 4

16. The Appellant contended that land owned by Settlement Funds Trustees cannot be alienated, sold, and subject to adverse possession as per Section 41 of the *Limitation of Actions Act*. Reliance was also placed on the case of *Jaber Mohsen All & another v Priscillah Boit & another* [2014] eKLR

17. It was submitted to the Respondent that the deceased had no business disposing of the suit land. Therefore, the Respondent, in purporting to secure an interest in the suit land that must be protected (as was upheld by the Learned Trial Magistrate pursuant to page 41 RoA), misses the point entirely.

18. Ground 5

19. The case of *Jaber Mohsen Ali & another v Priscillah Boit* [2015] eKLR was relied on.

20. Respondent's Submissions

21. The appeal is strenuously opposed by the Respondent, who stated that they rely on their submissions filed before the lower Court on 15/9/2021 and which submissions the Appellant has omitted from the record of appeal. We urge the Honourable Court to refer to the submissions from the lower Court record, which was forwarded to this Court for the hearing and determination of the appeal.

22. It was stated that the Respondent proved through documentary evidence and the fact of possession of 2 acres of Land since the year 1993 that, indeed, he had purchased 2 acres of Land from the deceased Irungu Theuri Irungu. Further, the Appellant was a witness to the sale agreement dated 12/2/1990, a fact he did not deny, but he proceeded to petition for a grant without involving the Respondent, who qualified as a creditor of the estate.

23. It was alleged that the Appellant used a letter from an Assistant Chief instead of the Area Chief to petition for a grant to enable him to conceal from the Court the fact that the Respondent was entitled to 2 acres of Land as a buyer. The evidence on record was overwhelming, and the Learned Trial Magistrate was correct in finding that the Respondent was entitled to the 2 acres he bought in 1990.

24. The Respondent urged the Court to find no merits in the appeal. The issue of the *Limitation of Actions Act* raised in the Memorandum of Appeal was not raised before the Trial Court, and the same cannot be litigated for the first time at the appeal stage. Reliance was placed on the case of *Anasazi Gambo Tinga & another v Nicholas Patrice Taburche* (2019) eKLR

25. In conclusion, the Respondent urged the Court to dismiss the appeal with costs and to find further that the record of Appeal is fatally defective and does not comply with the provisions of Order 42 Rule 13 of the *Civil Procedure Rules 2010*.

26. Analysis and Determination

27. This being a first appeal, this court has to re-reconsider the evidence before the trial court and the submissions of the parties and the law. The duty of this Court is as was stated by the Court of Appeal in the case of *Abok James Odera t/a AJ. Odera & Associates v John Patrick Machira & Co. Advocates* [2013] eKLR, where the Court pronounced itself as follows: -

a. "This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess, and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of *Kenya Ports Authority v Kustron (Kenya) Limited* 2000 2 EA 212 wherein the Court of Appeal held, among other things, that: -'On a first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate it and draw its conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.'"

28. Therefore, having carefully perused the record of appeal and submissions by the parties, the main issue falling for determination is: "Whether the trial court was correct in revoking the grant of letters of administration issued to the Appellant.

29. The Appellant herein asserted that the Respondent claimed that he purchased two acres out of Plot Number 439 but never presented any conclusive proof by way of written records. He also averred that the Respondent was never a Creditor of the Estate of the Deceased, and he never had any locus standi to claim any part of the suit land as a creditor of the Deceased as the deceased never enjoyed any right, title, and interest that could be transferred to the Respondent. Further, the Appellant contended that land owned by Settlement Funds Trustees cannot be alienated, sold, and subject to adverse possession as per Section 41 of the *Limitation of Actions Act*.

30. On the other hand, the Respondent stated that he proved through documentary evidence and the fact of possession of 2 acres of Land since the year 1993 that, indeed, he had purchased 2 acres of Land from the deceased Irungu Theuri Irungu. Further, the Appellant was a witness to the sale agreement dated 12/2/1990, a fact he did not deny. Still, he proceeded to petition for a grant without involving the Respondent, who qualified as a creditor of the estate. He also added that the issue of the *Limitation of Actions Act* raised in the Memorandum of Appeal was not raised before the Trial Court, and the same cannot be litigated for the first time at the appeal stage.

31. From my careful analysis of the trial record, it appears that the Appellant's father, the deceased herein, approached the Respondent, requesting him to purchase 2 acres from LR No Nyandarua/ Silibwet/439, the suit land herein to enable him to pay off his loan to the Settlement Fund Trustees. The deceased sold the land for Kshs 45,500/-, which the Respondent stated he paid in installments as shown in the documents he produced in the trial court. He asserted that in 1991, 2 acres were excised from the suit land by a surveyor who erected beacons, and a sketch plan for the proposed subdivision was done. He then settled his family on the land and proceeded to develop it from 1993 to date.

32. The deceased then passed on in 1995 before he had completed the transfer of the 2 acres of land to him. The Appellant, being the deceased's estate administrator, then filed for a grant of letters of administration stating that he was the only heir to the estate without including the Respondent, despite the knowledge that he had an interest in the 2 acres. It was alleged that the Appellant obtained an introduction letter from the Assistant Chief instead of the Chief, who knew that the Appellant was claiming two acres from the estate. The Appellant then received a grant of letters of administration in his name for the entire suit land, which is what the Respondent sought to have revoked in the trial court.

33. Evidently, the Respondent did indeed enter into a sale agreement with the deceased to buy 2 acres of his land. The Appellant herein and his mother witnessed and signed the deal. Furthermore, the Respondent went on to settle on the piece of land and proved that he paid the loan owed by the deceased to the Settlement Fund Trustees. He produced a myriad of documents indicating that he paid

money towards the purchase price of the land that was even over and above what was agreed upon. He spent a total of Kshs 53,000/- yet the agreed purchase price was Kshs 45,750/-. Therefore, I'm afraid I have to disagree with the Appellant's assertions that the Respondent did not produce conclusive proof that he purchased the 2 acres from the deceased.

34. Moreover, the Respondent settled on the piece of land even when the deceased was still alive and had paid land rates to the County Council of Nyandarua as per the receipt he produced dated 20/2/1990. Notably, both parties appeared before the Assistant County Commissioner and Area Chief, where it was resolved that the Respondent had bought 2 acres from the deceased and should, therefore, be included in the Succession Cause once it is filed. Cunningly, the Respondent obtained an introduction letter from the Assistant Chief stating that he was the only beneficiary and knowingly omitting that the Respondent was a purchaser.

35. Revocation of a grant is governed by Section 76 of the *Law of Succession Act*, which states as follows:-

36.

> 76. Revocation or annulment of grant

37. 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 motion—

38. that the proceedings to obtain the grant were defective in substance;

39. that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

40.

> (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;

41. that the person to whom the grant was made has failed, after due notice and without reasonable cause either—

42. to apply for confirmation of the grant within one year from the date thereof, or such more extended period as the court order or allows, or

43. To proceed diligently with the administration of the estate or

44. 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

45. that the grant has become useless and inoperative through subsequent circumstances.

46. Further, *In re Estate of Prisca Ong'ayo Nande (Deceased)* [2020] eKLR, the court stated that:-

47. "Under section 76, a court may revoke a grant so long as the grounds listed above are disclosed, either on its motion or on the application of a party. A grant of letters of administration may be revoked on three general grounds. The first is where problems attended the process of obtaining the grant. The first would be where the process was defective, either because some mandatory procedural step was omitted, or the persons applying for representation were not competent or suitable for appointment, or the deceased died testate having made a valid will. Then, a grant or letters of administration intestate was made instead of a grant of probate, or vice versa. It could also be that the process was marred by fraud and misrepresentation or concealment of matters, such as where some survivors are not disclosed, or

the Applicant lies that he is a survivor when he is not, among other reasons. The second general ground is where the grant was obtained procedurally. Still, the administrator, after that, got into problems with the exercise of administration, such as when he failed to apply for confirmation of the grant within the time allowed, failed to proceed diligently with administration, or failed to render accounts as and when required. The third general ground is where the grant has become useless and inoperative following subsequent circumstances, such as where a sole administrator dies, leaving behind no administrator to carry on the exercise, or where the sole administrator loses the soundness of his mind for whatever reason or even becomes physically infirm to the extent of being unable to carry out his duties as administrator, or the sole administrator is adjudged bankrupt and, therefore, becomes unqualified to hold any office of trust."

48. Accordingly, and as correctly stated by the trial magistrate in her judgment, I'm afraid I have to disagree with the Respondent when he says that the Respondent did not purchase the two acres. He produced overwhelming evidence that he did and that the Appellant knew the same. Furthermore, I concur with the trial magistrate that Section 66 of the *Law of Succession Act* recognizes creditors or purchasers in succession proceedings. The interests and rights of a purchaser are also protected in Rule 44(1) of the *Probate and Administration Rules*.

49. It is clear that the Appellant concealed the fact that the Respondent was a purchaser for the value of the estate by stating that he was the only heir contrary to Section 76 of the *Law of Succession Act* as was held by the trial court. The Appellant was well aware of the Respondent's interests but manipulated the process in order to conceal this fact from the court when obtaining a grant. Therefore, I find that the trial magistrate correctly exercised her mandate and discretion in revoking the grant issued to him. Additionally, I agree with the Respondent that the issue of the *Limitation of Actions Act* raised in the Memorandum of Appeal was not raised before the trial court, and the same cannot be litigated for the first time at the appeal stage.

50. In the end, I find that the instant appeal has no merit and makes the orders;

    i. The appeal is dismissed in its entirety, and I uphold the judgment of the trial court. The Appellant shall bear the costs of this appeal.

JUDGMENT, DATED, SIGNED AND DELIVERED AT NYANDARUA THIS 23RD DAY OF OCTOBER 2024.

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C. KARIUKI

JUDGE