



REPUBLIC OF KENYA



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**Murindi v Ngeranwa & another (Civil Appeal 17 of 2022)
[2023] KEHC 183 (KLR) (18 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 183 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL 17 OF 2022
LM NJUGUNA, J
JANUARY 18, 2023**

BETWEEN

PATRICK KARIUKI MURINDI APPELLANT

AND

SILAS N.J. NGERANWA 1ST RESPONDENT

JONATHAN NJIRU MURINDI 2ND RESPONDENT

JUDGMENT

1. The appeal herein was instituted vide a memorandum of appeal dated 24.02.2022 and wherein the appellant challenged the ruling of the trial court (Hon .E.Wasike) PM in Succession Cause 16 of 2010 and which ruling was delivered on 10.02.2022. The appellant raised the following grounds of appeal that:
 - i) The learned trial magistrate erred in law and fact by holding that he had the jurisdiction to hear and determine a question of cancellation of title deed while he was sitting as a Succession Court.
 - ii) The learned trial magistrate misdirected himself on the law by enjoining the 1st respondent as an interested party to succession proceedings while he is not a dependent or a creditor to the estate of the deceased.
 - iii) The learned trial magistrate misdirected himself by failing to consider the evidence on the court record that the 2nd respondent was not a beneficiary to the deceased estate, and therefore had no land to sell to the 1st respondent.
 - iv) The learned trial magistrate erred in law and fact by proceeding to cancel the title over land parcel number Mbeere/Mbita/4750 and awarding the same to



the 1st respondent who is not a beneficiary to the deceased estate by virtue of being a dependent or a creditor.

- v) The learned trial magistrate erred in law and fact by reviewing the orders of 07.03.2019 when no grounds for review had been established.
 - vi) The learned trial magistrate erred in law by failing to appreciate the provisions of article 162(2) and 165 (5) of the constitution and sections 4 and 13 of the Environment and Land Act No. 19 of 2011, that the question of ownership and registration of land can only be entertained by the Environment and Land Court.
2. The appellant thus prayed that the ruling and order dated 10.02.2022 be set aside and be substituted with an order dismissing the summons general dated 28.10.2021.
 3. The appeal was canvassed by way of written submissions.
 4. The appellant in supporting his case summarized the grounds of appeal into three which he listed as hereunder:
 - i) That the 1st respondent bought a portion of 2.19 Ha from the 2nd respondent from Land Parcel Number Mbeere/Mbita/ 1352.
 - ii) That the 2nd respondent was the registered owner during the time of the purchase.
 - iii) That his title to the portion known as Parcel Number Mbeere/Mbita/4750 which was as a result of sub-division from 1352 was eventually cancelled by an order of the court without his notice.
 5. The appellant submitted in reference to the 1st respondent's reliance on the provisions of section 93 of LSA that, though the law protects the interests of a purchaser of either a movable or immovable property from the estate of a deceased person, the 2nd administrator/respondent did not inherit any portion of Land Parcel Number Mbeere/Mbita/1352 which was the only property forming the entire estate of the deceased herein. In the same breadth, this court's attention was drawn to the fact that no beneficiary was given a portion of Land Parcel Number Mbeere/Mbita/1352 measuring 2.19 Ha; that the 2nd respondent in his capacity as the administrator proceeded to subdivide the Land Parcel Number Mbeere/Mbita/1352 into three portions and that the same was done contrary to the confirmed grant. That, however, he proceeded to subdivide the same in measurements contrary to that provided for under the confirmed grant. He wondered where the 2nd respondent got a portion measuring 2.9 Ha from land parcel Mbeere/Mbita/1352 to sell to the 1st respondent. Reliance was placed *inter alia* on the cases of Monica Adhiambo v Maurice Odera Koko [2016] eKLR and Jane Gachoki Gatbeca v Priscilla Nyawira Gitungu & Another [2008] eKLR. It was averred that the dispute raised by the 1st respondent in his summons general is not a dispute between him and the deceased estate and the same is not a dispute under the LSA.
 6. On whether the trial court erred in reviewing the orders dated 07.03.2019, it was submitted that review is provided for under section 80 of the CPA and order 45 of the Civil Procedure Rules. That the application for review was brought two years after the orders had been made and that there is an unexplained period of two years by the applicant. It was the appellant's contention that the court erred in making the orders given that the 1st respondent did not meet the set standard for review. On whether the trial court was clothed with jurisdiction to entertain the question of ownership and cancellation



- of the title, it was the appellant's contention that the trial court lacked jurisdiction to entertain the question of ownership of the land and thereafter the cancellation of the title deed. Reliance was made on article 162(2) and 165 (5) of the constitution and sections 4 and 13 of the Environment and Land Act No. 19 of 2011. In the end, this court was urged to find that the trial court erred in both law and fact by making the orders of 10.02.2022 and therefore, this court was urged to set the same aside and order for dismissal of the summons general dated 28.10.2021.
7. The 1st respondent submitted that section 47 of the LSA and rule 73 of the P & A Rules grants a succession court powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process. That such powers include cancellation of title deeds obtained through fraud or where there has been an abuse of the process of the court. It was the 1st respondent's submission that if indeed the succession court had no powers to cancel titles, then it follows that the initial cancellation of the 1st respondent's title was done without jurisdiction. That in view of the foregoing, it was in the interest of justice for the succession court to have the cancelled title reinstated. In reference to the second ground whether the 1st respondent ought to have been enjoined in the succession cause, it was submitted that the same was well founded given that his title to the Land Parcel No. Mbeere/Mbita/4750 had been cancelled by the same court and yet he was not involved in the same. That there is no remedy available for a bonafide purchaser for value such as the 1st respondent when a Succession court cancels his title without his involvement in the proceedings; and he is an interested party who is likely to be affected by the outcome of the proceedings and in this case, he had acquired a title from a beneficiary to the estate who had a valid title to the suitland.
 8. On whether the 2nd respondent was a beneficiary to the said estate, it was submitted that this was an issue awaiting determination before the lower court as the same could be inferred from the court proceedings in the record of appeal. That the 1st respondent conducted due diligence as can be inferred from his supporting affidavit and that the issue can only be raised during the trial at the lower court for the court to interrogate how he acquired his title. On cancellation of title Mbeere/Mbita/4750 and awarding the same to the 1st respondent, it was submitted that what the trial magistrate did was merely to review its earlier orders so that the 1st respondent can be heard as he had a title for the said land. On ground five on whether there were grounds to warrant the review of the earlier orders, the 1st respondent submitted that his title having been cancelled without his knowledge, the recourse available to him was to approach the court to review the said orders. In reference to ground six of the memorandum of appeal, the 1st respondent submitted that the Succession court cancelled his title without notice to him and therefore, there was no way he could move to the Environment and Land Court for order for reinstatement of his title when it was cancelled pursuant to an order in the Succession Cause. In the end, it was prayed that the appeal herein be dismissed as the same was premature and raised no valid grounds as the trial court is yet to pronounce itself on the issues raised therein.
 9. The 2nd respondent submitted that the trial magistrate was dully seized of jurisdiction to entertain any application in determining any dispute under the Law of Succession Act and make any decree or orders in respect to the estate. Reliance was placed on section 70 of the LSA. It was submitted that there is no dispute that Parcel Number Mbeere/Mbita/4750 was a result of the sub-division from Land Parcel Number Mbeere/ Mbita/1352 which was initially registered in the name of the 2nd respondent. It was his case that on 19.04.2021, the appellant filed an application dated 01.04.2021 and that the same is yet to be heard and determined. It was submitted therefore that the appeal is premature as the same is meant to pre-empt the subordinate court from determining the real issues in controversy in the matter before it. Reliance was placed *inter alia* on the cases of Nairobi High Court Petition No. 214 of 2018 Cyprian Andama v The D.P.P & Another and Kilgoris ELC No. 7 of 2021 Parmet ole Kiseet v Sylvia



Moi & Clint Moi & 3 Others. In the end, the 2nd respondent urged this court to dismiss the appeal herein for lack of merit.

10. I have considered the appeal, submissions by counsel for the parties and the authorities relied on. This being a first appeal, parties are entitled to expect a rehearing, reevaluation and reconsideration of the evidence afresh and a determination of this court with reasons for such determination. In other words, a first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyze and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that. In Gitobu Imanyara & 2 others v Attorney General [2016] eKLR, the Court of Appeal stated that;

“[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect”

[See also Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR].

11. In re-evaluating the decision of the lower Court, this court will heed to the principles set out in the case of Mbogo & Another v Shah [1968] EA where the Court held as follows;

“An appellate Court will not interfere with the exercise of the trial Courts discretion unless it is satisfied that the Court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous or unless it is manifest from the case as a whole that the Court has been clearly wrong in the exercise of judicial discretion and that as a result there has been injustice.”

12. I have analysed the pleadings before the trial court and I note that what was before the trial court was summons general dated 28.10.2021 in which, the applicant/interested party, the 1st respondent herein had moved the trial court for orders inter alia that he be joined in the proceedings as an interested party and that the court reviews, discharges and vacates its orders made on 07.03.2019 by cancelling the applicant’s title deed for Land Parcel Number Mbeere/Mbita/4750; and proceed to make an order that the said title deed be reinstated. The trial magistrate thus directed that the application be canvassed by way of written submissions and after weighing the evidences of the parties, delivered a ruling dated 10.02.2022 and wherein the court found that the application was meritorious.

13. The appellant having been dissatisfied with the said ruling, has now appealed the same before this court. In disposing the appeal, I will condense all the issue as one and proceed as follows:

14. The appellant has faulted the trial court for holding that he had the jurisdiction to hear and determine a question of cancellation of title deed while the court was sitting as a succession court. Further, that the court irregularly enjoined the applicant/ interested party, the 1st respondent in the suit yet he was a stranger to the estate herein. He argued that the application for review was brought way late after the orders had been made on 07.03.2019 thus an explained period of two years by the applicant; it was his contention that the court erred in making the orders given that the 1st respondent did not meet the set standards for review. On the other hand, the 1st respondent argued that what the trial magistrate did was merely to review his earlier orders so that the 1st respondent gets an opportunity to be heard as the court had cancelled his title deed without his participation.



15. Order 45 basically provides for review. From the provisions of the said Order, a court can only review its orders if the following grounds exist:
- i) There must be a discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made. (See *Pancras T. Swai v Kenya Brewries Limited* [2014] eKLR); or
 - ii) There was a mistake or error apparent on the face of the record [See *Muyodi v Industrial and Commercial Development Corporation & Another* [2006] 1 EA 243]; or
 - iii) There were other sufficient reasons; and
 - iv) The application must have been made without undue delay.
16. The jurisdiction of the court to review and set aside its decision is wide and unfettered. For a party to enjoy this discretion, he/she must demonstrate a sufficient cause warranting setting aside of the orders as issued by the court. In *Wachira Karani v Bildad Wachira* [2006] eKLR Mativo J held that:
- “...Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straightjacket formula of universal application...”
17. In the instant case, the reasons given by the 1st respondent is that he bought the suit land after conducting due diligence; and that the same was registered in the name of the 2nd respondent. That thereafter, the land was subdivided and he obtained Land Parcel Mbeere/Mbita/4750 which he subsequently obtained a title deed for, that he holds to date. That the appellant herein then trespassed on the said land which prompted him to file an ELC case for eviction being Siakago SPMC ELC No. 67 of 2020 which is still pending in court. That it was during the pendency of the said case that the applicant learnt that his title had been allegedly cancelled by the trial court without notice to him. The appellant in rebuttal submitted that it was not necessary for the applicant/1st respondent herein to be informed of the suit given that he was a third party and as such, had no interest in the estate.
18. Order 1 Rule 10 (1) of the *Civil Procedure Rules*, requires that, for a person to be enjoined in a suit, such a person must be a necessary party, or one whose presence is necessary for the effectual determination of the dispute. Hence, in *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 Others* [2014] eKLR, the Supreme Court adopted the definition of ‘interested party’ as given in Black’s Law Dictionary, namely, that such a party must have ‘...a recognizable stake (and therefore standing) in matter’ the Supreme Court proceeded to hold thus at paragraph 18 of its ruling:
- “... an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause.
19. With the foregoing in mind, I have given due consideration to the application dated 28.10.2021; and I find that the subject property, namely Land Parcel Number Mbeere/Mbita/1352 from which Land Parcel Number Mbeere/Mbita/4750 was excised, formed part of the estate of the deceased herein. The applicant annexed to his supporting affidavit a copy of mutation form, certificate of official search and



most importantly a title deed to demonstrate that the subdivision was effected and the subject portion duly registered in his name.

20. Further, from the record, I came across ELC No. 67 of 2020 and an application dated 1.04.2021 both of which are pending determination before the trial court. In the obtaining circumstances therefore, this court holds the view that it would be prudent for the said suit and the application to be substantively heard and determined first. This court is guided by the Court of Appeal decision in the case of *Kamlesh Mansukhalal Damki Patni v Director of Public Prosecution & 3 Others* [2015] eKLR, I agree with the sentiments of the learned Judge of the High Court that:

“It suffices to comment that a court of law should be hesitant at closing the door to the corridors of justice prior to a litigant being heard on his complaint. So far the applicant did not have a chance to file a defence. He sought to set aside that default judgment and that application was dismissed on a date he contents the same was not due for hearing and when he had no notice.....”

21. Further, article 48 of the *Constitution* guarantees every person right to access to justice; in addition, under article 50(1) of the *Constitution*, every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. I say so for the reason that the ultimate goal and purpose of the justice system is to hear and determine disputes fully. It follows that no person who has approached the court seeking an opportunity to ventilate their grievances fully should be locked out.
22. In the premises therefore, and without pre-empting the mind of the trial court, I hold the view that the 1st respondent should be given a chance to be heard in his matter filed before the ELC court and proof his claim as this is the court that has jurisdiction to entertain his claim. With his title cancelled, he will be greatly prejudiced as his suit is based on the validity of that title. Further, as I had noted earlier in this judgment, there is a pending application dated the 1.04.2021 wherein the status of the appellant as a beneficiary to the estate of the deceased has been questioned. In my considered view, due to the pending ELC matter and the said application, this court should refrain from going into so much details so that it does not pre-empt the two courts who are yet to hear and determine the issues before them. It is only fair that we give them a chance to do so.
23. On whether the trial court was clothed with jurisdiction to entertain the question of ownership and cancellation of a title deed, the appellant submitted that the trial court lacked jurisdiction to entertain the question of ownership of land and cancellation of a title deed and that the only court that is granted jurisdiction to entertain suits grounded on the ownership of land is Environment and Land Court. On the other hand, the respondent submitted that Section 47 of the LSA and Rule 73 of the P&A Rules grants a succession court inherent powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process. Such powers include cancellation of title deeds obtained through fraud or where there has been an abuse of the process of the court.
24. In my view, the issue before the trial court was mainly on the issue of review and setting aside the orders issued on 7.03.2019 and not on ownership of the suit land. (See *Hafswa Omar Abdalla Taib & 2 others v Swale Abdalla Taib* [2015] eKLR). Having perused the record and more so, the trial magistrate’s ruling delivered on 10.02.2022, I note that the magistrate reasoned that the court sat as a family court and while on the same, cancelled the alleged title deed and that it was imperative that given that the appellant argued that it had no jurisdiction to entertain the application, then it followed mutatis mutandis that he had no jurisdiction to cancel the title deed in the first place.



25. I have equally read the application dated 21.11.2018 wherein the orders sought by the applicant were to the effect that the court be pleased to order the administrator to distribute to the applicant therein (the appellant) all his entitlement as per the terms of the confirmed grant dated 08.11.2011; cancel all titles emanating from Land Parcel Number Mbeere/Mbita/1352 and that the executive officer, Siakago Law Courts be ordered to execute all necessary documents to complete the applicant's beneficial interest.
26. In my humble view, and going by the analysis hereinabove, I find that the learned magistrate did not err in reviewing the orders of 7.03.2019.
27. In the end, I hereby dismiss the appeal but with no orders as to costs.
28. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 18TH DAY OF JANUARY, 2023.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the 1st Respondent

.....for the 2nd Respondent

