



REPUBLIC OF KENYA



KENYA LAW
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**Ruguru & another v Karatu & another (Succession Appeal
E135 of 2021) [2023] KEHC 1837 (KLR) (6 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1837 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
SUCCESSION APPEAL E135 OF 2021**

JM CHIGITI, J

MARCH 6, 2023

BETWEEN

ELIZABETH RUGURU 1ST APPELLANT

PERIS WANJIRU NJENGA 2ND APPELLANT

AND

KENNETH KARATU 1ST RESPONDENT

ELIJOHN KARIUKI 2ND RESPONDENT

(Being an Appeal from the Judgment of the Senior Principal Magistrate's Court at Kikuyu by the Hon. D.N. Musyoka delivered on the 29th of June, 2021 in Succession Cause No. 11 of 2016.)

JUDGMENT

Brief Background:

1. Muthemba Chege senior (deceased) had three wives, namely, Margaret Mwangi deceased, Elizabeth, Ruguru, deceased, and Jane Gathoni the surviving spouse. He died on July 23, 1968.
2. According to Jane Gathoni, the 3rd house of Elizabeth Ruguru had four children, Henry Chege, Peninnah Njeri, Mary Njeri and Marion Wamoro. According to her all of them are now deceased. They left behind children, who are now before the court seeking the nullification of the certificate of confirmation and the grant in total.



3. According to the statement of Henry Chege Muthemba (referred to as junior, a son of Jane Gathoni and a cousin to Henry Chege, Peninnah Njeri, Mary Njeri and Marion Wamoro, his cousins, the children of Elizabeth Ruguru (3rd house) had the following children.

1. Peninnah Njeri

- i. Kenneth Karatu
- ii. Lucy Ruguru
- iii. Peter Muthemba
- iv. Margret Waithira

2. Mary Njeri

- i. Joyce Wairimu
- ii. Elizabeth Ruguru
- iii. Monica Gakuthia
- iv. Naomi Wangare
- v. Margaret Waithira

3. Marion Wamoro

- i. Elijohn Kariuki Gichua
- ii. Jane Muchiru Gichua

4. Henry Chege

- i. Elizabeth Rugui

4. According to Henry Chege Muthemba the 1st respondent has 10(ten) other cousins all whose grandmother is Elizabeth Ruguru and all who belong to the 3rd house but were left out in the issuance of the grant. The land therefore registered in the name of Lizzie Wanjiku after transmission was registered as such in trust for the entire 3rd house.

5. According to Henry Chege (junior) when the grant was being issued Elizabeth Ruguru never denied that her mother Lizzie Wanjiku had been registered as the owner of the property known as Karai/gikambura/1712 as a representative of the house of her grandmother Elizabeth Ruguru Muthemba.

6. In her affidavit dated November 20, 2017, Elizabeth Ruguru states that Lizzie Wanjiku Chege, her mother was left in custody of the property known LR Kara1/gikambura/1712 since the family was unable to pay and held the title as security and that Lizzie Wanjiku became registered owner as a result of confirmation of grant in Kiambu succession cause No 105 of 1988 and denies that Lizzie Wanjiku was registered. She said that at the time of death, the late Chege had a property known as LR Kara1/gikambura/1712 measuring 3.9 ha. He had divided his properties equally amongst his wives.

7. The controversial parcel of land is LR Kara1/gikambura/1712 which is registered in the name of Lizzie Wanjiku Chege who is the daughter in law of Jane Gathoni.



8. In his finding the trial magistrate observed that now that the issue of the trust had been brought to the attention of the court he had no doubt that the first transmission of the property LR Kara1/gikambura/1712 in favour of Lizzie Wanjiku Chegeh was in trust for all the beneficiaries of the third house. It is the finding of the trial magistrates court on the issue of the ownership of land that has precipitated this appeal.
9. Being dissatisfied with the ruling of Honourable D.N Musyoka that was delivered on June 29, 2021 the appellant filed a memorandum of appeal on the July 29, 2021 wherein she raises seven grounds of appeal. She filed a record of appeal dated February 2, 2022, and a supplementary record dated July 13, 2022, and submissions filed on December 15, 2022.
10. The appellants pray that the ruling delivered on the June 29, 2021, be quashed and set aside and the summons for revocation of grant before the trial court, be dismissed.
11. The appellants also pray that the letters of administration of grant intestate issued on July 7, 2016, and the certificate of confirmation of grant issued on March 7, 2017 be reinstated and upheld to be valid and lawful.

Analysis and Determination

12. The parties agreed to dispense of the appeal through written submissions. The appeal raises three issues for determination:
 - i. Whether this court has the jurisdiction
 - ii. Whether or not the trial magistrate, usurped his power and acted beyond jurisdiction thus arriving at the impugned decision.
 - iii. Whether or not Lizzie Wanjiku Chege held the property LR Kara1/gikambura/1712 in trust for the third house of the late Muthemba Chege.

The issue of jurisdiction

13. In his affidavit dated October 17, 2017 Henry Chege depones that the property in issue is registered in the name of Lizzie Wanjiku, Chege. At paragraph 11 of his affidavit, he further depones that Lizzie Wanjiku held the property in trust for the beneficiaries, who he proceeded to list therein.
14. In paragraph 12 he further depones that on the April 17, 2012 the late Lizzie Wanjiku's brother took the original title of 1812 to him. He confirms at paragraph 13 that he has the original title in his custody.
15. From the above as read alongside the applicants list of documents, dated August 17, 2018. I have satisfied myself that the title to LR Kara1/gikambura/1712 is indeed in the name of Lizzie Wanjiku and that the same was issued on the May 31, 1994.
16. The proprietorship section, further confirms that the title is registered in her name and that no transactions have taken place since the it was issued.
17. At paragraph 13 of his further affidavit, dated December 4, 2017, Henry Chege indicates that the property did not belong to Lizzie Wanjiku alone.
18. At paragraphs 13 and 16 of the same affidavit, he mentions that the issues around the ownership were being addressed not only by the chief, but had also within the family. The deponent has a concern with whether the beneficiaries, have a right to benefit from the estate relating to LR Kara1/gikambura/1712.



19. Kenneth Karatu one of the applicants in succession case number 11 of 2012 in his affidavit repeats the same sentiments and indicates that the first petitioner does not own LR Kara1/gikambura/1712 at paragraph 11 and 12 of his affidavit.
20. In her replying affidavit dated November 30, 2017 Elizabeth, present a contrary position in so far as the ownership of LR Kara1/gikambura/1712 is concerned.
21. At paragraph 7, she says that her mother was given the property, absolutely, and not on trust, and that the title was handed over to her.
22. At paragraph 8, she says that upon the death of Lizzie, Chege John Kimuyu, her brother came to her and pretended to assist transfer the title to her.
23. From the foregoing the issue that sticks out is whether or not Lizzie Wanjiku held the title for the property known as LR Kara1/gikambura/1712 absolutely or in trusts for the benefit of the beneficiaries of her house.
24. Under rule 41(3) of the Probate and Administration Rules, the court seized of a confirmation application should be wary of proceeding, within the same confirmation application, in a manner that will determine disputes that relate to the ownership of some of the assets placed before it for distribution.
25. The said rule provides that any such questions ought to be placed before another court, in separate proceedings, ostensibly limited to the question of ownership.
26. Rule 41(3) of the *Probate and Administration Rules* states as follows:

“Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subjected to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under order XXXVI, rule 1 of the Civil Procedure Rules, and may thereupon, subject to the proviso to section 71(2) of the Act, proceed to confirm the grant.”
27. This position has been highlighted in *Re The Estate of Kipyego Chepsiror Kolil* (2007] eKLR (Ibrahim D, *Everline Atiang' Wanyama v William Osayo Siroko & another* 2014] eKLR (Tuiyott), *In Re Estate of Stone Kathuli Muinde (Deceased)* |2016 eKLR (Musyoka D), *In re Estate of Muthiani Mutule (Deceased)* 20171 EKUR (C Kariuki D, *in re Estate of Julius Naubi Javan (Deceased)* (2018] eKLR (Gikonyo D), *In re Estate of Njagi Njeru (Deceased)* (2018] eKLR (Muchemi), *In re Estate of Kariuki Ngunyu Deceased* 2019] eKLR (Ngaah D), *In re Estate of Henry Njau Ngotho (Decesaed)* 2020 eKLR (Muchelule) and *In re Estate of M'guatu M'itania (Deceased)* (2020] eKLR (Gikonyo J).
28. In *Re Estate of Kimani Kinuthia* [2008] eKLR (Ibrahim J, it was stated that succession proceedings were not the appropriate way to challenge title of the deceased to assets said to comprise his estate, and that a claim that such assets were subject to a trust in favour of the claimant ought to be subjected to separate proceedings. It was further stated that in such claim the claimants have to prove the trust, and thereafter seek revocation of the title or partition, in proceedings which require declaratory orders of existence of the trust. It was emphasized that such was not the function of a probate court or of a succession cause, where the claimant was neither a beneficiary or defendant of the deceased, and that succession proceedings were not appropriate for resolution of seriously contested claims against the



estate by third parties. The court finally held that it had no jurisdiction, within the context of the succession proceedings, to determine the claim of a trust or to grant relief related to it.

29. The trial court, sitting as a probate court, is not an Environment and Land Court, in the sense of a court vested with jurisdiction to determine disputes over such issues. That jurisdiction is vested in the Environment and Land Court, by dint of article 162(4) of the Constitution, and the vesting is exclusive and under article 165(5) of the Constitution is emphatic that the High Court shall have no jurisdiction over matters the subject of article 162(2) of the Constitution.
30. The dispute as highlighted from the rival submissions by the parties herein did not only spiral into the family dispute resolution mechanisms, the parties enlisted the help of the police and the chief to no avail. They eventually moved to court.
31. The scope and jurisdiction of the Environment and Land Court is set out in section 13 of the Environment and Land Court Act, which states as follows:

“ 13 (1) The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with article 162(2) (b) of the constitution and with the provisions of this Act or any other law applicable in Kenya relating to the environment and land.

(2)In exercise of its jurisdiction under article 162(2)(b)of the Constitution, the court shall have power to hear and determine disputes relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources; relating to compulsory acquisition of land; relating to land administration and management; relating to public, private, and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and any other dispute relating to environment and land.”
32. The issue as to the ownership of the property for LR Kara1/gikambura/1712,cannot and could not have been conveniently nor conclusively determined during the confirmation proceedings since confirmation and probate proceedings in general, are not suited for determination of such questions, for they are tailored only to address questions relating to distribution of estates, not questions of ownership.
33. Issues around how property was acquired, and how it is held are questions that fall squarely within the mandate and jurisdiction of the Environment and Land Court, by virtue of article 162(2) of the Constitution.
34. The determination of the disputes around the ownership of a contentious parcel of land and the title thereto calls for scrutiny and the examination of the title in question.
35. The issues of proof as set out in section 107 and 109 of the Evidence Act must guide the court in determining whether the parties have proved their cases on a balance of probabilities when it comes to the question of ownership of property.
36. This calls for the summoning of witnesses like the registrar of lands, the production of legal documentation like sale agreements, transfers, mutations, land control board consents, valuation reports, receipts for stamp duty, the production of searches and at times green cards inter alia. During such a hearing, the court gets to interrogate overriding interest questions in the process of conducting. This process is very rigorous.
37. It is no wonder the law maker created the provision for the postponement of the confirmation of grant whenever issues of trust or ownership are raised at the grant confirmation stage.



38. Unlike the Probate and Administration Court sitting to confirm grants, the Environment and Land Court has the infrastructural legislative framework to deal with the foregoing trial entries.

Disposition:

39. From the foregoing analysis, it is clear that the trial magistrate fell into error when she failed to appreciate the glaring ownership wrangles that were raised during the confirmation of grant phase.

40. Having determined the issue of jurisdiction, then the 2nd and 3rd issues are rendered moot and the same collapse and fall by the wayside.

Orders

- a. The appeal succeeds.
- b. The ruling delivered on the June 29, 2021, is hereby set aside and the certificate of confirmation of grant issued on seventh March 2017 is hereby set aside.
- c. The confirmation of the grant is hereby postponed to abide the determination of the question of ownership or trust in separate proceedings in the appropriate court.
- d. The costs of the appeal shall be to the appellant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT KIAMBU THIS DAY 6TH OF MARCH 2023.

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JOHN CHIGITI (SC)

JUDGE

