



**Ngari & another v Ngari (Civil Appeal 17 of 2022)
[2023] KEHC 20514 (KLR) (21 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20514 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL 17 OF 2022
LM NJUGUNA, J
JULY 21, 2023**

BETWEEN

LUCY WANGUI NGARI 1ST APPLICANT

EPHRAIM KIUMU MUYA 2ND APPLICANT

AND

JOHN MUYA NGARI RESPONDENT

*(Being an Appeal from the judgment of the Principal Magistrate's Court at
Karatina (the Honourable Magistrate A. Mwangi) delivered on 2.09.2021)*

JUDGMENT

1. The appellants herein filed an appeal against the decision of the trial court delivered on 2.09.2021. They raised their grounds of the appeal in the memorandum of appeal dated 14.11.2022.
2. The appellants raised 5 grounds of appeal in the said memorandum. However, from the perusal of the said grounds, it is clear that the appellants faulted the trial court basically for failing to consider the entirety of the record and evidence adduced; for failing to consider the fact that fraud and misrepresentation were pleaded and thus ended up with the wrong decision; for failing to consider the entirety of the facts surrounding the suit thereby misleading itself into a wrong judgment; for failing to consider the totality of the issues before it and the evidence tendered by the parties as thus misleading itself into a wrong judgment and that the entire judgment and subsequent order was against the weight of the evidence and against the principles of a fair trial.
3. At the hearing of the appeal, parties took directions to canvass the appeal by way of written submissions and wherein each of the parties filed their submissions in support of their rival positions.
4. The appellant after giving a brief background submitted that the appeal raised triable issues for determination to the effect that the respondent fraudulently transferred the suit property to himself



- and misrepresented to the court that the same was available for distribution and which was transmitted to the 1st appellant but which became impossible to transfer thus making the entire succession absurd. That he then swiftly proceeded to have the transmission effected as thus disinheriting the appellants of the estate. That as a result of the said fraud, the court ought to stay the entire judgment and ruling and stop further dealings and transmissions in order to protect the suit property from changing ownership.
5. The respondent submitted that the instant appeal is misconceived, incompetent, vexatious and an abuse of the court process as the appellants have not yet regularized their appointment and the same offends the provisions of Order 9 Rule 9 of the *Civil Procedure Rules* as he came on record after judgment without an order of the court allowing the same or a consent from the firm of Ms. Gori & Ombongi which was representing the petitioner in the lower court. Further that, the appeal is misconceived as the appellant is mixing or confusing the ruling he is appealing against and the court's judgment and that since there was no judgment which was delivered on 2.09.2021, there was nothing to set aside as prayed in the memorandum of appeal. That the appellants ought to address themselves to the ruling delivered by the court but they were nonetheless adducing evidence on issues which were never before the trial court and which the respondent had no opportunity to cross examine on. That the respondent did not mislead the trial court into believing that LR Laikipia/ Tigithi/Matanya/ Block 5/1467 was available for distribution but it was the petitioner in the trial court who had included the same well aware that it did not form part of the estate. That, however, these were matters of facts which the trial court did not consider and thus their inclusion in the appeal was an abuse of the court process. The respondent prayed that the appeal be dismissed with costs and that the stay orders issued be vacated.
 6. It is now well settled that the role of this court, as a first appellate court is to revisit the evidence on record, re-evaluate it and reach its own conclusion in the matter. (See the case of *Selle & Ano. Vs. Associated Motor Boat Co. Ltd* (1968) EA .123). However, this court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings {See *Mwanasokoni – versus- Kenya Bus Service Ltd.* (1982-88) 1 KAR 278 and *Kiruga –versus- Kiruga & Another* (1988) KLR 348)}.
 7. I have certainly perused the trial court's record as required of this court. Just to summarize the same, the appellants herein had filed an application dated 8.06.2021 seeking revocation of grant issued on 11.12.2019 and that the orders sought in the application dated 8.02.2021 be stayed. The grounds in support of the application were as per the supporting affidavit and the grounds on the face of the application and essentially the application was premised on material non-disclosure and fraud as at the time of confirmation of the grant.
 8. On 18.06.2021, the respondent herein filed a notice of preliminary objection to the said application and wherein he raised three grounds to the effect that the application was defective, misconceived and an abuse of the court process; that the application offended the provisions of Order 9 Rule 9 of the *Civil Procedure Rules*; and that the application was an attempt to appeal through the back door. The said notice of preliminary objection was canvassed orally and the court reserved the same for ruling on 26.08.2021. However, the records indicate that the ruling was delivered on 2.09.2021. It is this ruling which necessitated the instant appeal and the same is clear from the memorandum of appeal filed herein.
 9. From the analysis of the trial court's record, the grounds raised in the memorandum of appeal and the rival submissions, I find that the main issue for determination is whether the trial court erred in its decision of 2.9.2021 or rather whether the ruling ought to be set aside.



10. However, before I proceed to determine the merits of the appeal, I note a preliminary issue which was raised by the respondent in his submissions. The respondent submitted that the appeal herein is misconceived and an abuse of the court process for the reasons that the appellants seem to be mixing issues. As I have already noted, the trial court's record indicate that on the said 2.09.2021, the court did not deliver a judgment but rather a ruling on the preliminary objection which had been filed by the respondent herein. As such, it is indeed wrong to say that the appeal is against the judgment of the trial court delivered on 2.09.2021. The appeal ought to be against the ruling and not the judgment. However, article 159 of the Constitution which requires delivery of justice without undue regard to procedural technicality is available and I invoke the same and as thus I will proceed to determine the appeal as if the appeal is against the ruling of 2.09.2021 and not the judgment as indicated by the appellants.
11. The above notwithstanding, the said ruling was pursuant to a notice of preliminary objection filed by the respondent herein which was in response to an application filed by the appellants dated 8.06.2021. The application sought revocation of grant issued on 11.12.2019 and that the orders sought in the application dated 8.02.2021 be stayed. The notice of preliminary objection raised three grounds. Looking at the said ruling and which the appeal herein seeks to overturn, the trial court basically rendered itself on the preliminary objection. The trial court discussed in details the issue as to the failure to comply with Order 9 Rule 9 of the Civil Procedure Rules 2010 and proceeded to find that the application for revocation was improperly before the court for want of leave from the court for the firm of Ms. Gichuki Wanjohi to come on record or consent from the outgoing firm. The trial court further held that it did not consider grounds 1 and 3 of the preliminary objection as the same did not raise pure points of law.
12. The appellants ought to have restricted their grounds to the findings of the said ruling. However, looking at the grounds on the memorandum of appeal, it is clear that none of the grounds is premised on the said ruling. What the appellants are trying to appeal against is not the finding in the ruling. There was nowhere in the said ruling where the court considered the evidence adduced or the fraud or misrepresentation. It is clear that the appeal is misplaced and based on a wrong ruling. May be it's the reason they indicated as having appealed against a judgment. Even looking at the prayers sought in the memorandum of appeal for instance grounds (a) and (b) thereon, it is clear that the same do not relate to the ruling which was delivered by the trial court. Even prayer (c) of the said memorandum of appeal, there is no justification which was given by the appellants in their submissions to warrant setting aside of the said ruling. It is clear that the whole appeal is misplaced in that the appellants appealed and prosecuted an appeal against a wrong ruling.
13. In my view, the appellants seem to have misunderstood the ruling delivered by the trial court and believed that the application for revocation of grant was determined on its merits and which is not the case herein as the same was dismissed based on an objection on a point of law. In fact, after the delivery of the said ruling, it appears that the next ruling was delivered on 10.11.2021 and which also dismissed the summons for revocation of grant for the same reasons that the same offended Order 9 Rule 9 of the Civil Procedure Rules. Though it is not clear how the court proceeded to deliver a ruling on an issue which had already been determined, I will nonetheless not venture into an issue which I have not been invited to determine on. But the point I want to drive home is that the issues which appears to be the basis of the appeal herein were never considered and/ or determined in the ruling which the appellants seem to appeal against.
14. I thus agree with the respondent that the appeal herein is misconceived and indeed an abuse of the court process. The appeal ought to have been restricted to the said ruling. There is no ground which deals with the finding of the court in the ruling or faults the court's decision in the said ruling. Even in



their submissions, the appellants did not submit at all in regards to the said ruling but on other issues. There is nothing which touches on the finding of the court in the said ruling. It is not possible for the court to determine the grounds of appeal or even frame issues when the grounds of appeal and the submissions in support thereto do not relate to the orders the appellants are appealing against.

15. I am aware as I have noted above that the duties of this court is to revisit the evidence on record, re-evaluate it and reach its own conclusion. But in the instant case, it becomes hard to do so where the court is not guided as to where the trial court went wrong. Such guidance ought to come from the grounds of appeal and the submissions and the appellants have not done so.
16. Considering all the above, therefore, I find the appeal herein is misconceived and an abuse of the court process. The same is hereby struck out. However this being a succession matter involving family members, I will not award costs to any party. Each party to bear his or her own costs.
17. It's so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 21ST DAY OF JULY, 2023.

L. NJUGUNA

JUDGE

.....for the 1st Applicant/Appellant

.....for the 2nd Applicant/Appellant

.....Respondent

