



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERUGOYA**

**ELC CASE NO. 6 OF 2019**

**NANCY WANGARI KINYUA.....1<sup>ST</sup> APPLICANT**

**VERSUS**

**ROSE WAMBUI.....1<sup>ST</sup> RESPONDENT**

**CATHERINE NJERI.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

Pursuant to an undated and incomplete Memorandum of Appeal, the Appellant appealed against the judgement and orders of Senior Principal Magistrate H.N. Ndung'u in Kerugoya Law Courts in SPMCC No. 267 of 2010 **Nancy Wangari Kinyua Versus Rose Wambui & Another** delivered on **19<sup>th</sup> January, 2012** on the following grounds:

- 1. The learned magistrate erred in law and in facts by failing to find that land parcel No. Mwerua/Gitaku/827 was jointly registered between the appellant and the respondents hence the appellants prayer to have the title partitioned among the three parties to hold in trust for themselves and their children should have been upheld.**
- 2. The learned magistrate erred in law and in facts by finding the appellant had sold 1 acre of the land hence she had no right over land parcel No. Mwerua/Gitaku/827.**
- 3. The learned magistrate erred in law and in facts by failing to find that the appellant became a beneficiary of land parcel No. Mwerua/Gitaku/827 (a subdivisions of the original land parcel No. Mwerua/Gitaku/203) in High Court Succession No. 51/1996 in the matter of Estate of Dishon Chuma which succession proceedings have never been appealed against/ annulled or revoked.**
- 4. The learned magistrate erred in law and in fact by holding that the appellant had sold her alleged ¾ portion of land to one Joseph Githinji Njoya whereas there was no evidence to that effect.**
- 5. The learned magistrate erred in law and in fact by finding that the appellant went to the clan to ask for her brother's Patrick Wachira's portion of land whereas there was evidence that he was a beneficiary in High Court Succession No. 51/1996 and was only removed from the title after he died.**

**Appellant's Submissions**

The appellant submitted that the case emanated from **CMCC No. 267 of 2016; Nancy Wangari Kinyua Versus Rose Wambui & Another** where the appellant had sought subdivision of land parcel No. Mwerua/Gitaku/827 into 3 equal portions as the said property was registered jointly between herself, her sister, Rose Wambui and her niece Catherine Njeri. After the said partition, she further prayed that her portion of land be registered jointly with her children, Catherine Wamutira, Rose Wambui and Robert Muriithi and that of her niece (2<sup>nd</sup> Respondent) be registered in the names of the minor son, Ken Munene Wachira.

The lower court while dismissing her claim held that she was not entitled to a joint share in the land as she had sold the same. This decision was overruled by **Justice B. Olao in ELCA No. 47 of 2014 Nancy Wangari Kinyua Versus Rose Wambui & Another**. The judge found that the magistrate had erred in law and in facts in finding that the appellant had sold one acre of the land and therefore had no right over the suit. However, he ruled that joint ownership cannot be severed without the consent of the joint owners.

After this **ELCA No. 48 of 2014** judgement on **19<sup>th</sup> May 2017**,????????????????? the respondent moved the court in the original **CMCC No. 267 of 2008** vide application dated **5<sup>th</sup> July 2017** and sought the name of the appellant herein be removed from the joint title. The court

allowed the application on 19<sup>th</sup> October, 2017. Being aggrieved by this decision, the appellant herein sought review of the court's orders of 19<sup>th</sup> October 2017 allowing removal of her name from the joint title.

The appellant submit that the learned magistrate erred in law and fact in disallowing the appellant's application for review dated 24<sup>th</sup> October, 2017. In ELCA No. 48 of 2014, the court erred in law and in facts in making the finding that the appellant had sold one (1) acre of the land and therefore had no right over the suit land. Thus, Hon. Soita in the present appeal had no right therefore to allow

the respondent application dated 5<sup>th</sup> July 2017 that sought removal of the appellant's name from the title. Despite the judgement of the High Court being availed to him, Honourable Soita refused to review his orders given in the application dated 5<sup>th</sup> July, 2017.

The appellant pray that the application dated 24<sup>th</sup> October 2017 that sought review of the orders removing the appellants name from the title be allowed and that the application dated 5<sup>th</sup> October 2017 be heard afresh or be dismissed.

### **Respondents submissions**

The respondent submit that the appellant has filed a 5 paragraph Memorandum of Appeal against the judgement and orders of Senior Principal Magistrate H.N. Ndung'u in Kerugoya Law Courts in SPMCC No. 267 of 2010 delivered on 19<sup>th</sup> January, 2012, the same is undated but appears at paragraph 5 of the Memorandum of Appeal.

The respondent submit that the tone and intent in the submissions is an appeal against the decision of Hon. Soita to review his orders dated 18<sup>th</sup> March, 2018 yet in the whole Record of Appeal, there is no Memorandum of Appeal against the judgement/decision of Hon. Soita. The respondent submits that **Order 42 rule 1 (1) (2)** provides in mandatory terms, the form in which an appeal should take by providing that:

*“(1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.*

*(2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively”.*

The respondents submit that the memorandum of appeal is at variance with what the appellant is seeking. The appellant had a chance to amend the record of appeal but did not do so. Hence, the court should strike out the appeal.

Nevertheless, if the court was to allow the appeal and commit it to hearing, on what grounds should the respondents respond to, the ones in the impugned memorandum of appeal at **page 5 or the none grounds** at the heading of appeal. The respondents submit that the applicant seek to review the decision in application dated 19<sup>th</sup> October, 2017 that was dismissed by the lower court. Further, **Section 45 (b)** bars a court from rehearing a review once the initial review has been heard.

The respondents urge the court to dismiss the appeal in its entirety and/or dismiss the application dated 24/10/2017 with costs in line with **Order 45 (6) of the CPA**.

### **Issues**

1. Whether the appeal should succeed.

### **Analysis**

The appellant filed an undated and incomplete Memorandum of Appeal against the judgement and orders of Senior Principal Magistrate H.N. Ndung'u in Kerugoya Law Courts in SPMCC No. 267 of 2010 **Nancy Wangari Kinyua Versus Rose Wambui & Another** delivered on 19<sup>th</sup> January, 2012.

The appellant submitted that the decision by Senior Principal Magistrate H.N. Ndung'u in Kerugoya Law Courts in SPMCC No. 267 of 2010 **Nancy Wangari Kinyua Versus Rose Wambui & Another** delivered on 19<sup>th</sup> January, 2012 was overruled by **Justice B. Olao in ELCA No. 47 of 2014 - Nancy Wangari Kinyua Versus Rose Wambui & Another**. The Hon. Judge found that the magistrate had erred in law and in facts in finding that the appellant had sold one acre of the land and therefore had no right over the suit. However, he ruled that joint ownership cannot be severed without the consent of the joint owners.

After this **ELCA No. 48 of 2014** judgement on **19<sup>th</sup> May 2017**, the respondent moved the court in the original **CMCC No. 267 of 2008 vide application dated 5<sup>th</sup> July 2017** and sought the name of the appellant herein be removed from the joint title. The court allowed the application on 19<sup>th</sup> October, 2017. Being aggrieved by this decision, the appellant herein sought review of the court's orders of 19<sup>th</sup> October 2017 allowing removal of her name from the joint title.

The appellant pray that the application dated 24<sup>th</sup> October 2017 that sought review of the orders removing the appellants name from the title be allowed and that the application dated 5<sup>th</sup> October 2017 be heard afresh or be dismissed. The respondent submit that the tone and intent in the submissions is an appeal against the decision of Hon. Soita to review his orders dated 18<sup>th</sup> March, 2018 yet in the whole record of appeal there is no memorandum of appeal against the judgement/decision of Hon. Soita.

## **Memorandum of Appeal**

From the undated memorandum of appeal and the appellant's submissions it is clear that the appellant has appealed and submitted on different issues. Moreover, the issues appealed and submitted upon have already been previously decided. In the Memorandum of Appeal, he seeks to appeal against Senior Principal Magistrate H.N. Ndung'u in Kerugoya Law Courts in SPMCC No. 267 of 2010 ***Nancy Wangari Kinyua Versus Rose Wambui & Another*** delivered on 19<sup>th</sup> January, 2012. This decision was overturned by ***Justice B. Olao in ELCA No. 47 of 2014 Nancy Wangari Kinyua Versus Rose Wambui & Another*** on 19<sup>th</sup> May 2017.

## **Submissions**

The appellant pray that the application dated 24<sup>th</sup> October 2017 that sought review of the orders removing the appellants name from the title be allowed and that the application dated 5<sup>th</sup> October 2017 be heard afresh or be dismissed. He submits that Honourable Soita refused to review his orders given in the application dated 5<sup>th</sup> July, 2017.

The respondent submits that the Appellant's Memorandum of Appeal does not conform to the law and should be struck out. The respondents submit that ***Order 42 rule 1 (1) (2)*** provides in mandatory terms, the form in which an appeal should take by providing that:

*“(1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.*

*(2) The Memorandum of Appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively”.*

The following decision affirms that a party cannot appeal an order after review of the same.

## ***Serephen Nyasani Menge Versus Rispah Onsase [2018] e KLR***

In my view, a proper reading of ***Section 80 of the Act and Order 45 Rules 1 and 2*** makes it abundantly clear that a party cannot apply for review and appeal from the same decree or order.

## **Opinion**

1. I opine that the memorandum of appeal be struck out.
2. Costs to be awarded to the respondents.

**JUDGMENT READ, DELIVERED IN OPEN COURT AT KERUGOYA AND SIGNED THIS 3RD DAY OF DECEMBER, 2021.**

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**HON. E.C. CHERONO**

**ELC JUDGE**

*In the presence of:-*