



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KIAMBU
CIVIL DIVISION
CIVIL APPEAL NUMBER 129 OF 2018
IN THE MATTER OF THE ESTATE OF KANYEKI KIMATU (DECEASED)
BETWEEN
JOHN KAMANDE KANYEKI.....APPELLANT
AND
JOSEPH MUYA KANYEKIRESPONDENT
(Being an appeal from the original judgment and decree of Hon. B. J Bartoo, Resident Magistrate dated 27th September 2018 in Thika Succession Cause Number 107 of 2005)
CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

The Appeal

1. The appellant having been dissatisfied with the judgment of the learned trial magistrate aforementioned lodged this appeal on 4th October 2018 seeking *inter alia* that judgment of the lower court be set aside and orders be made that the application dated 3rd July 2006 be dismissed and that costs in the lower court and in the appeal herein be awarded to the appellant. The appeal is based on grounds THAT:-

- a. The learned judge erred in law and fact in finding that the deceased solely owned land parcel Loc/Mugumo-ini/397 and that the same was available for distribution, yet in fact 3 ½ acres in the said land belonged to JOYCE GACHIRU KIMATU and the deceased was only registered as sole proprietor but held in trust for JOYCE GACHIRU KIMATU.
- b. The learned magistrate failed to appreciate the registration of the lands regime in 1959 during adjudication and completely ignored the fact that women could not be registered as proprietors of land.
- c. The learned magistrate completely misunderstood the law of trust in relation to the confirmation proceedings before her and thus made wrong deductions and finding.
- d. The learned magistrate erred in law and fact in disregarding the proceedings before the District Officer Gatanga in Civil case number 208 of 1983 and their propriety and place before the proceedings before her.
- e. The learned magistrate erred in failing to appreciate that there was material non-disclosure/concealment of the deceased property that ought to have been available for distribution.
- f. The learned magistrate erred in disregarding the proceedings in Thika Succession Cause 170 of 2010 by ignoring the orders therein and/or by sitting on appeal against an order issued by a magistrate of parallel jurisdiction.
- g. The learned magistrate erred in failing to appreciate that vide Thika Succession Cause No. 170 of 2010, in the matter of the estate of JOYCE GACHIRU KIMATU there was confirmation of a grant of the estate and MARGARET MUTHONI KANYEKI had been granted 3 ½ acres in land parcel LOCI/MUGUMO-INI/397. The said grant had not been set aside and

the land was therefore not available for distribution in the present estate.

Background

2. The respondent had filed a summons dated 3rd July 2006 seeking for orders *inter alia* that the grant issued on the 27th day of June 2005 be confirmed and that costs of the said application be provided for. The summons was supported by an affidavit sworn on 3rd July 2006 by the respondent. The appellant filed a protest to the said summons for confirmation of grant by way of an affidavit sworn on 6th December 2006. The appellant filed a further affidavit which was sworn on 2nd October 2008.

3. The summons proceeded by way of *viva voce* evidence and at the conclusion of the hearing, the learned trial magistrate rejected the appellant's protest and allowed the respondent's summons thereby effectively confirming of the grant issued to the respondent on 27th June 2005.

4. It is the said decision that forms the basis of the instant appeal where both parties agreed that the same be canvassed by way of written submissions. The rival submissions are on record.

Duty to this Court

5. As a first appellate court, this court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny before drawing its own conclusion from that analysis bearing in mind that the court did not have an opportunity to hear the witnesses first hand. The Court of Appeal, in the case of *Elizabeth Njambi Kimemia v Florence Ngina Banga [2018] Eklr (VISRAM, G.B.M. KARIUKI & J. MOHAMMED, JJ.A)* held the following in respect of the duties of a first appellate court:

“This is a first appeal and as such, the Court is enjoined by law to proceed by way of re-appraising all the evidence on record before arriving at its own independent conclusion. This was aptly summed up in the case of *Selle vs. Associates Motor Boat & Co. [1968] EA 123* where the predecessor of this Court stated as follows:

“An 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 allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif – vs-Ali Mohamed Sholan [1955], 22 E.A.C.A.270).”

Further, in the case of *RAMJI RATNA AND COMPANY LIMITED V WOOD PRODUCTS (KENYA LIMITED) Civil Appeal Number 117 of 2001* this Court further stated that in a first appeal it will interfere with the decision of the trial judge only where it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.”

The Appellant's case and submissions

6. It was the appellant's submission that the deceased owned only one half, that is 3 ½ acres, of the parcel of land known by number **Loc.1 Mugumo-ini/397** (hereinafter “*the suit property*”) and that the other half, that is 3 ½ acres, was held in trust by the deceased for one **Joyce Gachiru Kimatu(now deceased)**. The appellant added that during her lifetime, Joyce Gachiru had given her share of the suit property to the appellant's mother, **Margaret Muthoni Kanyeki** who has been utilizing the same since 1954.

7. The appellant submitted that the fact of trusteeship was within the knowledge of the deceased and he had even prior to his death demarcated the entire suit property into three portions: for the 1st wife, **Margaret Muthoni**; for the 2nd wife, **Magdalene Gathoni** and; for the said **Joyce Gachiru**. The appellant stated that in Civil Suit No. 208 of 1983, at the Thika Resident's Magistrate's Court, the deceased was ordered to give Joyce Gachiru her share of 3 ½ acres from the suit property.

8. It was the appellant's submission that only 3 ½ acres out of the suit property was all that was available for distribution among the beneficiaries.

9. The appellant further stated that *vide Thika Succession Cause No. 170 of 2010*, in the matter of the estate of **JOYCE GACHIRU KIMATU**, there was confirmation of a grant of the estate and **MARGARET MUTHONI KANYEKI** had been granted 3 ½ acres out of the suit property. The appellant added that the said grant had never been set aside and the land was therefore not available for distribution in the instant estate.

10. While giving his testimony during the trial court as PW1, the appellant stated that Joyce Gachiru was not registered as a proprietor in the suit property because at the time she did not have an ID card as women could not have any. The appellant stated that the deceased's father had two wives and that the said Joyce Gachiru was one of them and that the other wife called Angelica Wangui wanted to claim the suit property and referred the matter to the District Officer. The appellant stated that the matter was decided and an award was issued which was adopted by the court. In the said proceedings before the D.O, the appellant stated that the deceased testified that the suit property was 9 ½ acres and the award stated that the deceased was to be given 3 ½ acres, the deceased's younger brother 3 acres and the said Joyce Gachiru, the remaining 3 ½ acres. The appellant added that in the said proceedings, the deceased admitted that part of the suit property was registered in trust for the said Joyce Gachiru. The appellant further stated he lived in Joyce Gachiru's portion together with his mother Margaret

11. Margaret Muthoni Kanyeki testified as PW2 and stated that the suit property belonged to Joyce Gachiru and not the deceased and that Joyce Gachiru did not have any children and gave her the land. PW2 added that Joyce Gachiru appreciated her and the appellant as her children and they have been utilizing that portion. PW2 testified that she indeed filed the succession proceedings in respect of the Estate of Joyce Gachiru in *Thika Succession Cause No. 170 of 2010* where she was confirmed as the sole beneficiary of $\frac{1}{2}$ share of the suit property and that that position has not changed. PW2 testified that the deceased was alive when Joyce Gachiru gave her the land. PW2 stated that the suit property was registered in the names of the deceased and Joyce Gachiru. PW2 stated that the dispute at the tribunal involved herself, Joyce Gachiru and the deceased and that the one Angelica Wangui was not Joyce Gachiru. PW2 stated that in those days, women were not registered as land owners.

12. In his written submissions, he appellant submitted that the trial court ought not to have confirmed the grant when she was aware of the decision in *Thika Succession Cause No. 170 of 2010* which was brought to her attention by the respondent's advocates. It was the appellant's further submission that the trial court ought not to have sat as an appellate court to a decision made by a court of concurrent jurisdiction. The appellant submitted that the trial court ought to have taken judicial notice of the existence of the said grant in *Thika Succession Cause No. 170 of 2010*. In any case, the appellant submitted the issuance of two grants in relation to the same property was not procedural.

13. The appellant further faulted the trial court for not taking into account the decision and proceedings of the land tribunal of *Thika Civil Case No. 208 of 1983* stating that the testimony of the deceased then established how the relationship in the family of the deceased was and that the deceased held the suit property in trust for his family and that of Joyce Gachiru. The appellant added that the proceedings of the tribunal was the best evidence on the issue of ownership of the suit property and was admissible and relevant under section 34 of the Evidence Act.

The Respondent's response and submissions

14. The respondent submitted that as per the chief's letter and certificate of official search on record, the deceased was the registered owner of all the suit property and that it was immaterial whether there was another succession cause purporting to subdivide the suit property. The respondent stated that the learned trial magistrate did not overturn any order of a court of similar jurisdiction as what she was invited to refer to was the certificate for confirmation of grant which was not a court order and that she was not provided with the grant of representation that would then have given effect to the confirmed grant.

15. The respondent stated that the certificate of official search proved that the suit property in its entirety formed part of the free property of the deceased and was available for distribution to his dependants to the exclusion of others. The respondent also submitted that it was not in dispute that the deceased once held the suit property in trust for the said Joyce Gachiru but that nowhere in the Land Dispute Tribunal did the proceedings indicate that the appellant had been gifted anything by the said Joyce Gachiru. The respondent submitted that when the pronouncement of the Land Tribunal was made, the deceased and the chairman of the tribunal did not take any necessary steps to enforce the said award and that the same was not done until the deceased died in the year 2000.

16. The respondent submitted that prior to her death, Joyce Gachiru never sought to have her share transferred to her and even if she did, there was no evidence adduced to show that attempts had been made to transfer or gift the appellant her share. The respondent added that as per the evidence of **Mbugua Kimatu**, PW2, Joyce Gachiru had given the deceased her share. The respondent added that Joyce Gachiru never made any attempt to register the trust in her favour.

17. The respondent further submitted that the learned trial magistrate analyzed all the evidence on record including the proceedings of the Land Dispute Tribunal in arriving at her decision and that if there was anything to the contrary, it was Joyce Gachiru who relinquished her right over the suit property in favour of the deceased.

18. The respondent also contended in his submissions that a question of establishing whether a trust existed or not is a matter to be resolved by the Environment and Land Court. The respondent thus urged this honourable court to dismiss the appeal for want of merit.

Legal Analysis and Determination

19. After going through the pleadings, testimonies and written submissions by both parties on record and from my own considered view of the matter, the following are the issues for determination:

- a. Whether a probate court has jurisdiction to determine a question of trust in land.**
- b. Whether there existed a registrable trust in property number Loc.1 Mugumo-ini/397 held by the deceased in favour of Joyce Gachiru Kimatu.**
- c. Whether two different grants can be issued by two different courts of concurrent jurisdiction over the same estate.**
- d. What are the appropriate orders to be issued by the court?**

Whether a probate court has jurisdiction to determine a question of trust in land

20. The respondent, towards the end of his submission appeared to oust the jurisdiction of the probate court in determining questions of trust in land. Both parties appreciate that the issue of whether or not a registrable trust did exist in the suit property in favour Joyce Gachiru is central and forms the crux of the instant appeal. It is undeniable that this is a probate court in as much as it is an appellate one and it is being

called upon to determine whether a trust existed or not but before determining that issue, it is important to determine whether this court has the jurisdiction to do so.

21. Jurisdiction goes into the heart and soul of any proceeding. In this regard, it has been held by various superior courts that if there is a valid question or objection in Law on a matter proceeding before a court of law, either for want of jurisdiction or for some other sufficient reason, then such objection or question should be raised at the earliest opportunity to avoid a waste of valuable judicial time.

22. The Supreme Court of Kenya, in the case of *Republic v Karisa Chengo & 2 others* [2017] eKLR stated that:

“Jurisdiction” has emerged as a critical concept in litigation. Halsbury’s Laws of England (4th Ed.) Vol. 9 at page 350 thus defines “jurisdiction” as “...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.” John Beecroft Saunders in his treatise Words and Phrases Legally Defined Vol. 3, at page 113 reiterates the latter definition of the term ‘jurisdiction’ as follows:

“By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given”.

From these definitions, it is clear that the term “jurisdiction”, as further defined by The Black’s Law Dictionary, 9th Edition, is **the Court’s power to entertain, hear and determine a dispute before it.**

23. In the celebrated Court of Appeal case of *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] eKLR(Nyarangi, Masime & Kwach: JJ A) Nyarangi JA’s words on the potency of jurisdiction still ring loud and clear to date:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

24. In *Re Estate of Stanley Mathenge Ruriga (Deceased)* [2018] eKLR L.W. Gitari J persuasively held that:

“The issue of whether a trust existed or not is a matter which must be determined in a separate suit. The Law of succession Act deals with matters of probate and intestate succession. This is clearly stated in the preamble which states:

“An Act of Parliament to amend, define and consolidate the law relating to intestate and testamentary succession and the administration of estates of the deceased persons, and for purposes connected therewith and incidental thereto.”

Issues of ownership of land and declaration of trust are matters which do not fall under the preamble and must be filed as separate suits. Though the applicant claims to be entitled to a share, her claim is based on trust since she is not a widow of the deceased and does not fit in the definition of a dependant under Section 29 of the Law of Succession Act. The High Court has variously held that a party claiming under trust must file a substantive suit. In *Nakuru H. C. Succession Cause No. 488/2010. In the matter of estate of the Late Jonathan Kinyua Waititu.* The Court stated: -

To reaffirm this legal position, I again take refuge in the decision in *H. C. Succession Cause No. 864 of 1996* (2015) eKLR where the court held that:-

“Even if there was material establishing that there was such a trust I doubt that the resolution of this issue would be a matter of the probate court. The mandate of the probate court under the Law of Succession Act is limited. It does not extend to determining issues of ownership of property and declaration of trusts. It is not a matter of the probate court being incompetent to deal with such issues but rather that the provisions of the Law of Succession Act and the relevant subsidiary legislation do not provide a convenient mechanism for determination of such issues. A party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land Court.”

Consequently, and for the reasons above stated, I must find and hold that this court has no jurisdiction to resolve the proprietary interest on land on the alleged trust.

Similarly, Justice Limo in *Kerugoya H. C. Succession Cause No. 90/2013 Elijah Gachoki and Another –v- Stanley Mugo Kariuki & Another* stated:

“It is also important to note that the Law of Succession Act Cap 160 Laws of Kenya really deals with intestate and testamentary succession and administration of deceased persons. The architectural design of the Act is not meant to deal with disputes related to land and in this regard I agree with the 2nd respondent that such disputes whether based on trust or contractual obligations should be left to the Environment and Land Court which by law is seized with the jurisdiction and constitutionally mandated to deal with such disputes under Article 162(2) of the Constitution”.

(Also see **Joel Ngugi J** in **John Mbuu Muthoni & Another v Ruth Muthoni Kariuki [2017] eKLR**)

25. I am in agreement with the aforementioned persuasive decisions and add that this court, whether sitting as a probate or appellate court does not have the jurisdiction of making declaratory orders of proprietary interests on land based on trusts. Such a determination lies elsewhere, that is the Environment and Land Court(ELC) which is a court of concurrent jurisdiction or such subordinate courts with pecuniary jurisdiction that have been gazetted by the Chief Justice to determine land matters. That being the case, I do not think that it would be appropriate for this honourable court to preempt the outcome of the ELC or such court of competent jurisdiction on the issue by discussing the evidence or lack thereof of the impugned trust. Furthermore, and going by section 7 of the *Magistrates' Courts Act, 2015* and section 26 of the *Environment and Land Court Act, 2011*, there was no evidence to show that the trial court or the subordinate court in *Thika Succession Cause No. 170 of 2010* was gazetted and had pecuniary jurisdiction to make declaratory orders on the existence or not of the impugned trust and even if they did, an appeal of that decision would still lie with the ELC and not this court.

26. To this end, it is my conclusion and finding that this court does not have the jurisdiction to determine whether or not there was an existing trust in property number Loc.1 Mugumo-ini/397 that was held by the deceased in favour of Joyce Gachiru Kimatu.

Whether there existed a registrable trust in property number Loc.1 Mugumo-ini/397 held by the deceased in favour of Joyce Gachiru Kimatu.

27. Having found that the court lacks jurisdiction to determine existence of proprietary rights in land in the nature of trusts, I find it moot to deal with this issue.

Whether two different grants can be issued by two different courts of concurrent jurisdiction over the same estate.

28. It is not in dispute that there are two grants in respect of the suit property. One grant was made to the appellant and the respondent on 27th June 2005 in *Thika Succession Cause Number 107 of 2005*(subject of the instant appeal) and confirmed on 27th September 2018 and was in respect of the entire suit property. The other grant was made to **Margaret Muthoni Kanyeki** on 13th June 2011 in *Thika Succession Cause No. 170 of 2010: The Estate of Joyce Gachiru Kimatu* and confirmed on 20th June 2014 and amended on 12th September 2014 in respect of ½ (a half) share of the suit property. One cannot help but notice the absurdity of the two grants and wonder how the same ought to be enforced. I have gone through the pleadings in the file of *Thika Succession Cause No. 170 of 2010* and note that **Margaret Muthoni Kanyeki** did not mention or bring to the attention of that court that *Thika Succession Cause Number 107 of 2005* was pending and that it related to the same suit property, facts which were within her knowledge. It was only after the respondent filed an application objecting to the grant therein that she mentioned the proceedings in *Thika Succession Cause Number 107 of 2005*. This is tantamount to material non-disclosure on the part of **Margaret Muthoni Kanyeki** and I have no doubt that her tight-lipped approach in obtaining the grant in that proceeding misled the learned trial magistrate therein to issue and confirm the grant as he did. In any case, I fail to understand why the learned trial magistrate did not interrogate how **Margaret Muthoni Kanyeki** was laying claim to the suit property when the same was registered in the name of the deceased and not Joyce Gachiru.

29. From the record, the issue of the confirmed grant in *Thika Succession Cause No. 170 of 2010* was brought to the attention of the trial court but the trial court makes no reference to it in its judgment which I think was an oversight if not an error on the part of the learned trial magistrate. Had the learned trial magistrate given more thought and attention to the decision in *Thika Succession Cause No. 170 of 2010*, she would have come up with a different decision or direction that was not in vain or unenforceable like the instant one.

30. The issuance of the two grants over the same suit property by two different courts which contradict each other is an embarrassment to the court process for which I fault **Margaret Muthoni Kanyeki**. The two grants no doubt present a difficulty and/or impossibility when it comes to distribution and enforcement.

What are the appropriate orders to be issued by the court?

31. Having found that this honourable court has no jurisdiction to determine a question of trust in land and that issuance of two different grants by two different courts over the same suit property is an embarrassment to the court process, the final and most important issue for determination is what orders would be appropriate in the circumstances.

32. **Rule 73 of the Probate and Administration Rules** enshrines the inherent power of this court. It reads:-

“Nothing in this rule shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the court”.

33. **Section 47 of the Law of Succession Act** spells out the jurisdiction of the High Court in the administration of estates in these terms:

"The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient:..."

34. Article 165(6) and (7) of the Constitution of Kenya provides as follows:

“(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”

35. Based on the aforementioned provisions as read with *section 76 of the Law of Succession Act*, it is my considered view that the grant that was made to **Margaret Muthoni Kanyeki** in *Thika Succession Cause No. 170 of 2010, The Estate of Joyce Gachiru Kimatu* ought to be revoked on the ground that there was concealment of material facts. I am also satisfied that the that the proceedings to obtain the grant therein were defective and illegal in substance.

36. Being satisfied that the question of ownership of the suit property based on the impugned trust ought to be determined first by the Environment and Land Court or such subordinate court with competent pecuniary jurisdiction that has been duly gazetted to handle land matters, the grant made and confirmed on 27th September 2018 to the appellant and respondent herein in the instant suit cannot be enforced in the meantime and shall to be stayed.

Conclusion

37. For the foregoing reasons, the appeal fails for want of jurisdiction. I now make the following final orders:

i. This court ousts its jurisdiction suo moto and orders that either of the administrators i.e JOHN KAMANDE KANYEKI or JOSEPH MUYA KANYEKI file a substantive suit within 60(sixty) days either in the Environment and Land Court in Kiambu or a subordinate court with pecuniary jurisdiction gazetted to determine land matters, for a determination of whether the deceased KANYEKI KIMATU held a half share of property number Loc.1 Mugumo-ini/397 in trust for JOYCE GACHIRU KIMATU.

ii. The Grant issued to MARGARET MUTHONI KANYEKI on 13th June 2011 in Thika Succession Cause No. 170 of 2010: The Estate of Joyce Gachiru Kimatu be and is hereby revoked. The summons for revocation of grant dated 12th April 2019 therein be and is hereby considered spent.

iii. Pending the hearing and determination of the suit in the Environment and Land Court or a subordinate court with pecuniary jurisdiction gazetted to determine land matters in (i) above, a stay order be and is hereby issued in respect of the grant confirmed to JOHN KAMANDE KANYEKI and JOSEPH MUYA KANYEKI on 27th September 2018. The grant confirmed may be rectified accordingly as per the final decision of the ELC or a subordinate court with pecuniary jurisdiction gazetted to determine land matters in (i) above

iv. Pending the hearing and determination of the suit in the Environment and Land Court or a subordinate court with pecuniary jurisdiction gazetted to determine land matters in (i) above, a stay order be and is hereby issued in respect of the proceedings in Thika Succession Cause No. 170 of 2010:The Estate of Joyce Gachiru Kimatu.

v. The respective files in Thika Succession Cause No. 170 of 2010:The Estate of Joyce Gachiru Kimatu and Thika Succession Cause Number 107 of 2005 be and are hereby sent back to the Chief Magistrates’ court in Kiambu for directions on whether there is a subordinate court with pecuniary jurisdiction gazetted to determine land matters or whether the suit in (i) above shall be filed in the Environment and Land Court in Kiambu.

vi. Each party to bear their own costs.

Judgment written and signed at Kapenguria.

RUTH N. SITATI

JUDGE

Judgment, delivered, dated and countersigned electronically at Kiambu on this 21st day of May,2020

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CHRISTINE W. MEOLI

JUDGE