



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
CIVIL APPEAL CASE NO. 262 OF 2013

JEDIDAH WAMUNYU NYAGA.....APPELLANT

AND

JAMES NDWIGA MUCHIRA.....RESPONDENT

(Being appeal from the ruling of the Senior Principal Magistrate's Court (H. N. Ndungu) at Kerugoya, Succession Cause Number 97 of 1992 dated 29th February, 2012)

JUDGMENT

1. **JEDIDAH WAMUNYU NYAGA** the appellant herein was aggrieved by the ruling of Hon. H. N. Ndungu, Senior Principal Magistrate in **Senior Principal Magistrate's Court Succession Cause No. 97 of 1992** delivered on 29th February, 2012 and has appealed to this Hon. Court seeking to set aside the said Ruling.

1. **Background**

2. The two parties in this appeal are feuding over the estate of the late **MUCHIRA KIBANGA** which is comprised in that property known as **NGARIAMA/KABARE/73**. Initially the cause was vide **Kerugoya Senior Resident Magistrate's Court Succession cause No. 134 of 1986** where **DAMARIS MURINGO MUCHIRA** (deceased) and mother to the Respondent to this appeal had successfully applied for letters of administration in respect of the estate of her late husband – **MUCHIRA KIBANGA** (deceased) who died on 24th March, 1982 at Kerugoya Hospital domiciled at **KANDAI VILLAGE**. **DAMARIS MURINGO MUCHIRA** (deceased) was granted letters of administration and got the estate comprised in **NGARIAMA/KABARE/73** registered in her name through transmission. The appellant herein, on learning of the above developments moved to High Court in Nyeri vide **Nyeri High Court MISC. APP. NO. 11 OF 1988** and successfully sought for revocation of the grant issued to **DAMARIS MURINGO MUCHIRA** in Kerugoya **Senior Principal Magistrate's Court Succession Cause No. 134 of 1986**. The High Court in Nyeri annulled the grant by consent of both parties (Jedidah Wamunyu – the applicant and the late Damaris Muringo Muchira – the then Respondent) on 27th September, 1991.

3. The hon. Judge (Hon. Justice P. K. TUNOI as he then was) further directed or ordered through the consent of parties that the registration of Damaris Muringo Muchira as the owner of **NGARIAMA/KABARE/73** effected on 1st December, 1982 be nullified and the Land Registrar was ordered to cancel the said registration. It was further ordered that **Kerugoya Senior Principal Magistrate's Court Succession Cause No. 134/86** be heard *de novo* and Damaris Muringo Muchira was to be petitioner while Jedidah Wamunyu Nyaga was to be the objector. None of the parties were to file

any further petition, objection and cross-petition or protest through any other pleadings in respect to the said cause.

4. The objector – **Jedidah Wamunyu Nyaga** – later filed **Kerugoya Senior Principal Magistrate’s Court Succession Cause No. 97 of 1992** seeking for letters of administration in respect to the estate of **MUCHIRA KIBANGA** who died on 5th July, 1981 but interestingly was indicated to be the owner of that property known as **NGARIAMA/KABARE/73** the same estate comprising the estate in **Kerugoya Senior Principal Magistrate’s Court Succession Cause No. 134 of 1986**.

5. **DAMARIS MURINGO MUCHIRA** filed an objection and cross petitioned for letters of administration in **Kerugoya Senior Principal Magistrate’s Court Succession Cause No. 97 of 1992** and later an application dated 15th June, 2011 was filed by **JAMES NDWIGA MUCHIRA** – a son and administrator of the estate of the late **DAMARIS MURINGO MUCHIRA** (deceased) who by then had passed on. In the application the applicant sought to stay the confirmation of grant and mark the file as closed on account of the order that had been issued in the High Court in Nyeri (**Nyeri H.C. Misc. App. No. 11 of 1988**) that had directed that the dispute be canvassed through **Kerugoya Senior Principal Magistrate’s Court Case No. 134 of 1986**. The trial court ruled in favour of the applicant on 29th February, 2012 and the said ruling is now the subject of this appeal.

2. **The Appellant’s Case**

6. The appellant listed the following grounds in her Memorandum of Appeal.

- i. *That the learned magistrate erred by failing to note that the respondent lacked capacity to file the application dated 15th June, 2011.*
- ii. *That the learned magistrate erred in law by failing to distinguish the estate from the assets of an estate and misdirected herself that the subject matter of the judgment in Nyeri H.C. Misc. No. 11 of 1988 was NGARIAMA/KABARE/73 when on a point of law, the subject matter of the judgment was the estate of Muchira Kibanga (deceased) and that it was the registration of that land which was revoked/nullified. According to the appellant, the estate of Muchira Kibanga who died on 24th March, 1982 remained intact.*
- iii. *That the learned magistrate erred in misinterpreting the ruling of the High Court at Nyeri in holding that the High Court had ordered that the succession to land Parcel No. Ngariama/Kabare/73 be determined in Kerugoya S.P.M.’s Court Succession Cause No. 134/86 which was erroneous.*
- iv. *That the learned magistrate erred in not finding that the subject matter in Kerugoya S.P.M.’s Court Succ. Cause No. 97 of 1992 was the estate of Muchira Kibanga who died on 5th July, 1981 and the estate comprised NGARIAMA/KABARE/73 while the subject matter of Kerugoya S.P.M.’s Court Succ. Cause No. 134 of 1986 was the estate of Muchira Kibanga who died on 24th March, 1982.*
5. *That the learned magistrate’s ruling is erroneous as the land parcel No. NGARIAMA/KABARE/73 cannot be the subject of Kerugoya S.P.M.’s Court Succ. Cause No. 134 of 1986 as the property is not registered in the name of the deceased and in that respect the appellant and her children would be locked out as they are not related to the deceased.*
6. *That the whole ruling was against the weight of evidence and offends all concepts of justice and legal reasoning.*

7. The appellant in her written submissions filed has argued that the learned magistrate erred in her ruling by making a ruling which in effect combined two different estates of two different deceased persons into one cause which in her view is contrary to the law. She has contended that the ruling of the hon. Judge in **Nyeri H.C. Misc. App. No. 11 of 1988** did not say that the succession of land parcel No.

NGARIAMA/KABARE/73 be determined in **Kerugoya Senior Principal Magistrate's Court Succession Cause No. 134 of 1986.**

8. According to the appellant the succession cause he filed vide Kerugoya Senior Principal Magistrate's Court **Succession Cause No. 97 of 1992** was in respect to the estate of her late husband **MUCHIRA KIBANGA** who died on 5th July, 1981 while the **Succession Cause No. 134 of 1986** referred to the estate of the late **Muchira Kibanga** who died on 24th March, 1982. The estates of the two deceased persons, however, are commonly described as **NGARIAMA/KABARE/73**.

9. The appellant has argued that when she discovered that the late Damaris Muringo Muchira had obtained letters of administration and gotten herself registered as the proprietor of **NGARIAMA/KABARE/73** she moved the High Court in Nyeri as aforesaid and got the grant annulled or revoked by consent. It is further submitted that the appellant did not further participate in **Kerugoya Senior Principal Magistrate's Court Case Succession Cause No. 134 of 1986** as she was not a survivor of the late Muchira Kibanga who died on 24th March, 1982 and in view of that she has justified the petition she preferred vide **Kerugoya Senior Principal Magistrate's Court Succession Cause No. 97 of 1997** arguing that the petition was in respect to her late husband who died on 5th July, 1981.

10. The appellant's view is that in view of similarity of the names of the deceased persons (Muchira Kibanga who died on 24th March, 1982 and Muchira Kibanga who died on 5th July, 1981) and the fact that the property in dispute is registered in the names of **MUCHIRA KIBANGA**, it was important to determine who between the two deceased persons named was the actual registered proprietor of the property in question.

11. The appellant has further argued that the Respondent in this appeal did not have capacity to file the application dated 15th June in view of the fact that the limited grant he obtained vide **Meru High Court Succession Cause Misc. No. 21 of 2006** was issued to him on 8th May, 2006 and was in respect to the estate of Muchira Kibanga who died on 25th November, 2003. In her view the Respondent did not have capacity to make the application dated 15th June, 2011 based on the said limited grant.

12. The appellant's contention is that she was perfectly in order to proceed in her petition (**Kerugoya SPMCC Suc. Cause No. 97 of 1992**) and should be allowed to proceed in that cause to its logical end.

3. The Respondent's Case

13. The Respondent has opposed the appeal through written submissions dated 25th August, 2015 and filed on 26th August, 2015. He has supported the ruling of the learned magistrate submitting that the same in his view was sound and correct as it was in line with the consent order entered in **Nyeri High Court Misc. Application No. 11 of 1988** before Hon. Justice P. K. Tunoi (as he then was).

14. The Respondent has submitted that when the earlier grant to his mother was annulled it was clear at the time that the subject matter of the dispute was that property known as **NGARIAMA/KABARE/73** and that is why her name was ordered to be cancelled on the title.

15. The Respondent has faulted the appellant for attempting to secretly file a fresh petition for letters of administration instead of proceeding as ordered by the High Court in Nyeri and contended that the consent in that court was entered in order to give all parties a chance to ventilate their case before court so that the matter could be determined on its merits. The Respondent read mischief in the conduct of the appellant and accused her of trying to benefit from a cause without trial.

4. Issues and Determination

16. I have considered the appeal and the submissions made in support. I have also considered the opposition through the Respondent's written submissions. The appeal in summary has raised two

important issues that will determine it. These are:

- i. Whether the Respondent had capacity or competency to file the application dated 15th June, 2011.
- ii. Whether the subordinate court correctly interpreted the decision in Nyeri High Court **Misc. Application No. 11 of 1988** in her ruling dated 29th February, 2012 which is now the subject of this appeal.

17. I will begin with the second issue which I consider to be the substratum of the decision or the ruling in the subordinate court. I have looked at the record keenly and I have noted that both parties are in agreement that the estate in dispute comprises that property known as **NGARIAMA/KABARE/73** registered in the name of one **MUCHIRA KIBANGA** a deceased person. Where the divergency of opinion begins is who the holder of that name is. The appellant claims that MUCHIRA KIBANGA is her late husband who died on 5th July, 1981 and was the owner of **NGARIAMA/KABARE/73** which is the subject of the succession cause in **Kerugoya Senior Principal Magistrate's Court Succession cause No. 97 of 1992** while the Respondent claims that the late MUCHIRA KIBANGA is his late father who died on 24th March, 1982 and was the registered owner of the same parcel of land.

18. I must say at the onset that it is not uncommon to have two people sharing the same names but it is rather odd and peculiar to find two different estates in the name of deceased persons with similar names with each petitioner claiming beneficial interests on the same estate. In such a scenario one of them must surely be trying to be a bit clever.

19. I have noted from the record that the appellant, **Jedidah Wamunyu Nyaga** filed an application for revocation of grant issued to Damaris Muringo Muchira which had been issued to her on 1st September, 1987 as indicated above. That grant had enabled her to be registered as the proprietor of the estate of **Muchira Kibanga** which comprised that property known as **NGARIAMA/KABARE/73**. The appellant who was the applicant knew this to be a fact. This can be discerned from the consent the two parties entered by Hon. Justice P. K. Tunoi (as he then was) in **Nyeri High Court Misc. Application No. 11 of 1988**. The terms of the consent were as follows;

“1. Grant made to Damaris Muringo Muchira by the Resident Magistrate's Court at Kerugoya on 1.9.87 in Succession Cause No. 134 of 1986 be and is hereby nullified.

2. The registration of Damaris Muringo Muchira as the proprietor of land parcel No. Ngariama/Kabare/73 effected on 1st December, 1987 be and is hereby ordered nullified and revoked and the Land Registrar Kirinyaga is hereby ordered to cancel the said registration.

3. The Succession Case No. 134 of 1986 at Kerugoya Resident Magistrate's Court be heard de novo and the parties Damaris Muringo Muchira be named petitioner therein and Jedidah Wamunyu Nyaga be named objector therein. None of the parties herein shall be required to file petition, objection, cross-petition or protest or any other pleadings in respect of the said succession cause.

4. No order as to costs.”

20. The above consent clearly dealt with the rules of engagements in **Kerugoya Principal Magistrate's Court Succession Cause No. 134 of 1986**. The judge gave clear directions on how the matter was to proceed and both parties including the appellant were in agreement and clear in their minds of the property forming the estate and the deceased person. Both parties agreed that the succession cause was to be heard afresh. The question I now wish to pose is when did the appellant realize that the grant and the entire succession proceedings in **Kerugoya Senior Principal Magistrate's Court Succession Cause No. 134 of 1986** referred to a different deceased person? Or why alter the rules of engagements when the judge in Nyeri had given a clear direction with a view to having an expeditious disposal of the cause? Furthermore assuming the appellant realized later as she says, that she was not related to Muchira

Kibanga the deceased whose estate was the subject in **Kerugoya Succession Cause No. 134 of 1986** and the annulment in **Nyeri High Court Misc. 11 of 1988**, the question not answered in this appeal is why she did not move the High Court in Nyeri to review the orders given if at all the consent was entered by mistake? I think that was the reason she should have moved the court to review the consent entered. She consented to the cause being heard *de novo* vide **Kerugoya Succession Cause No. 134 of 1986**.

21. The learned magistrate faulted the appellant for commencing **Succession Cause No. 97 of 1992** contrary to the orders issued by the High Court in Nyeri. This Court finds that the learned magistrate contrary to what the appellant has submitted, was correct. The subject matter of the judgment in **Nyeri High Court Misc. No. 11 of 1988** was the estate of Muchira Kibanga and it comprised that property known as **NGARIAMA/KABARE/73** which had by then changed hands *via* transmission to Damaris Muringo Muchira. This Court finds that at the time the parties appeared in Nyeri High Court on 27th September, 1991 when the said consent was entered, the deceased person that was being referred to was MUCHIRA KIBANGA who had died on 24th March 1982 and whose estate was the subject matter in **Kerugoya Senior Principal Magistrate's Court Succession Cause No. 134 of 1986**.

22. The appellant herein despite clear directions from the High Court in Nyeri, changed her mind and filed a fresh petition purporting that the petition was in respect to a different deceased person and a different estate. The learned magistrate in her ruling correctly read some mischief in this conduct by the appellant. This court has noted that the appellant tried at the subordinate court and has even tried in this appeal to show that the Appellant is not interested in the estate in the **Succession Cause No. 134 of 1986** at Kerugoya Senior Principal Magistrate's court but behind the veil, she wants to remove that property comprised in **NGARIAMA/KABARE/73** from the reach of the Respondent and his siblings vide Kerugoya Succession Cause No. 97 of 1992.

23. This Court has also noted from the documents filed in both succession causes (134/86 and 97 of 1992) that there seems to be a relationship between the two families which is subject to confirmation at the hearing of this cause. The brother of the deceased in **Kerugoya Succession Cause No. 97 of 1992** as given by the petitioner is **Stephen Mugo Kanyuiro**. The Respondent in this appeal swore an affidavit deposing that his late father had a cousin named **ABISHAGI NJOKI KANYUIRO** who was allowed into the estate by his late father. The last names are similar. It is further deposed that Abishagi Njoki Kanyuiro came with her son named **JULIUS NYAGAH KANYUIRO** and that the said son later changed his names to MUCHIRA KIBANGA a name similar to that of the deceased. In her affidavit in support of the confirmation of grant dated 25th May, 1993 on page 14 of the record of appeal, the appellant Wamunyu deposed that ABISHAGI NJOKI was the mother of MUCHIRA KIBANGA – her husband. It is on the strength of this "MUCHIRA KIBANGA" (deceased) (referred to as Julius Nyaga Kanyuiro by the respondent in his affidavit sworn on 15th June, 2011) that the appellant brought the petition in **Kerugoya Succession Cause No. 97 of 1992**. I have no doubt in my mind that this is where the mischief resides in this appeal.

24. On the issue of capacity by the Respondent to make the application dated 15th June, 2011 in **Succession Cause No. 97 of 1992**, I do find that the letters of administration *ad litem* obtained by the Respondent vide **Meru High Court Misc. No. 21 of 2006** was irregular and technically insufficient to confer capacity to him. This is because the deceased person named therein is one **MUCHIRI KIBANGA** who died on 25th November, 2003. So the grant was defective on two fronts namely:

1. The name of the deceased and the date of death is totally different from the deceased named in **Kerugoya Senior Principal Magistrate's Court Succession Cause No. 97 of 1992**.
2. The Respondent was coming in in place of his late mother Damaris Muringo Muchira who was the administratrix in the **Kerugoya Senior Principal Magistrate's Court Succession Cause No. 134 of 1986**. The letters of administration *ad litem* did not reflect that and which was erroneous.

The learned magistrate should have noted the anomalies and find that the Respondent needed to regularize his position as the law required.

25. However, despite this finding, this Court is under a constitutional duty as per **Article 159(2)(d)** of the **Constitution** to dispense justice without undue regard to technicalities. I find that although the Respondent did not have capacity to make the application dated 15th June, 2011, which gave rise to the ruling that is now the subject of the above appeal, the appellant's petition (**Kerugoya Senior Principal Magistrate's Court Succession Cause No. 97 of 1992**) in the first place was made in contravention of valid court orders issued vide **Nyeri High Court Misc. Application No. 11 of 1988**. The appellant ought to have ventilated his case in **Kerugoya Senior Resident Magistrate's Court Succession Cause No. 134 of 1986** as directed by the hon. Judge in Nyeri.

26. From the foregoing I find no merit in this appeal. The same is dismissed. In order to bring this matter to an end I invoke this Court's powers under **Section 47** of the **Law of Succession Act** and direct that decision made by Hon. Justice P. K. Tunoi in **Nyeri High Court Misc. No. 11 of 1988** is still valid and should be complied with by all parties in this cause. The substitution of the late Damaris Muringo Muchira be done promptly and in accordance with the law. In that regard the limited grant of letters of administration *ad litem* issued vide **Meru Misc. No. 21 of 2006** to **James Ndwiga Muchira** on 8th May, 2006 is hereby revoked for the reasons aforesaid. I make no order as to costs.

Dated and delivered at Kerugoya this 7th day of March, 2016.

R. K. LIMO

JUDGE

7.3.2016

Before Hon. Justice R. Limo J.,

Court Assistant Willy Mwangi

Gichuki for appellant present

Igati for Nganga for Respondent present.

COURT: Judgment signed, dated and delivered in the open court in presence of Mr. Gichuki for the appellant and Igati Mwai holding brief for Nganga for the Respondent.

R. K. LIMO

JUDGE

7.3.2016