Wakigo v Chege & 4 others (Civil Appeal 252 of 2019)
[2025] KECA 1758 (KLR) (24 October 2025) (Judgment)

Neutral citation: [2025] KECA 1758 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 252 OF 2019

M NGUGI, P NYAMWEYA & WK KORIR, JJA

OCTOBER 24, 2025

BETWEEN

DANIEL KAHARA WAKIGO ..... APPELLANT

AND

JOHN KIUMBUKU CHEGE ..... 1ST RESPONDENT

JAMES GITAU CHEGE ..... 2ND RESPONDENT

SIMON MACHIEYA CHEGE ..... 3RD RESPONDENT

HARRISON MUCHENE CHEGE ..... 4TH RESPONDENT

THE PUBLIC TRUSTEE ..... 5TH RESPONDENT

(Being an appeal from the ruling/order of the High Court of Kenya at Nairobi (William Musyoka, J) dated 14{{^th}} June 2018 in HC Succession Cause No. 202 of 1990)

JUDGMENT

1. The original appellant, Daniel Kahara Wakigo, died on 5th May 2020 and was substituted with his widow, Naomi Nyambura Kahara. He was aggrieved by the ruling and orders of the High Court sitting in Nairobi (William Musyoka, J) dated 14th June 2018 in which the court reviewed and set aside its earlier ruling dated 25th November 2016, and cancelled title numbers Dagoretti/Waithaka 724, 725, 726. 727 and 728 which were subdivisions of Dagoretti/Waithaka /44, thereby reverting to the original title. This latter title was initially registered in the name of one John Kirumba Chege (deceased), who died on 28th July 1983. Letters of administration intestate with respect to the estate of John Kirumba Chege were initially issued to the Public Trustee in Succession Cause No. 202 of 1990.

2. In its ruling dated 14th June 2018 which is the subject of the present appeal, the trial court was dealing with an application dated 4th May 2017 seeking review and setting aside of its ruling dated 25th

November 2016. In this latter ruling, the trial court was dealing with two applications. One, dated 4th April 2014, was filed by the respondents before us, John Kiumbuku Chege, James Gitau Chege, Simon Machieya Chege, and Harrison Muchene Chege.

3. In their application, the respondents, who had been appointed administrators of the estate of John Kirumba Chege in place of the Public Trustee on 4th November 2013, sought orders to restrain the appellant before us from evicting or interfering with their quiet possession of the suit properties, orders inhibiting registration of the suit properties in his favour, and cancellation of the titles issued to the appellant. They also sought to have the properties restored to the original title, Dagoretti/Waithaka/44. The respondents further sought orders directing the Public Trustee to surrender all the documents relating to the estate of the deceased to them. They averred that the appellant was claiming to have bought the properties from their mother, Salome Wangui Chege (deceased), but that she had no capacity to sell the property as she only had a life interest in the property at the material time.

4. In the second application dated 24th April 2014, the appellant, Daniel Kahara Wakigo, sought orders for vacant possession of the suit properties; for the respondents to remove their structures therefrom; and for the orders of the court to be executed with assistance from Kabete Police Station. The appellant averred that his wife, (deceased) had acquired the suit properties from Salome Wangui Chege (deceased) the widow of John Kirumba Chege (deceased); that the property had been awarded to him by the court in 'Nairobi CMCCC No.1795 of 2005' and the property was transferred to him by the Public Trustee.

5. In dismissing both applications, the trial court ruled that the parties were asking the court, a probate court, to make orders in relation to CMCCC No. 1795 of 1995, which it had no jurisdiction to do; that the respondents were asking the court to sit on appeal on the judgment in CMCCC No. 1795 of 1995 when there was no appeal from the said judgment before it; and the appellant was seeking enforcement of the judgment in CMCCC No. 1795 of 1995, which the probate court could not do.

6. The court therefore dismissed the appellant's application dated 24th April 2014 in its entirety while allowing the respondents' application dated 4th April 2014 to the limited extent of directing the Public Trustee to release the title documents to Dagoretti/Waithaka/728 to the respondents.

7. The respondents then filed an application dated 4th May 2017 in which they sought to review and set aside the orders of the court issued on 25th November 2016. The basis of the application was that the judgment in CMCCC No. 1795 of 1995 had been set aside. The applicants also sought orders against the appellant and the Public Trustee for intermeddling with the estate of the deceased, and for orders of contempt of court against them. It was the respondents' case that the court orders of 25th November 2016 were obtained through misrepresentation and concealment of material facts; that the appellant and the Public Trustee had failed to disclose that the judgment dated 23rd January 1996, which formed the basis of the orders issued on 25th November 2016, had been set aside by consent on 2nd December 1996; and as a result, the transfer of the property of the estate in favour of the appellant was illegal and fraudulent. Further, that both the appellant's and the Public Trustee's conduct amounted to intermeddling with estate property; and for a finding that they were in contempt of court for misleading the court and unlawfully dealing with the property of the estate.

8. From a perusal of the record of appeal, the following facts emerge. The appellant had filed CMCCC No. 1795 of 1995- Daniel Kahara Wakigo v Salome Wangui Chege and the Public Trustee seeking specific performance of a contract for sale of title number Dagoretti/Waithaka/44 registered in the name of John Kirumba Chege (deceased). No defence was filed in the matter, and it proceeded to hearing ex parte on 5th January 1996 and judgment was entered in favour of the appellant on 23rd January 1996.

9. Thereafter, on 29th March 1996, the appellant applied for review of the judgment to obtain specific orders against the Public Trustee in relation to the suit property, and the judgment was reviewed on 6th June 1996.Subsequent thereto, the 1st defendant, Salome Wangui Chege, filed an application dated 19th June 1996 on 20th June 2016 seeking to set aside the ex parte judgment. The said application was allowed by consent on 2nd December 1996, on terms that the interlocutory judgment entered for the appellant and all other consequential orders be set aside and the suit be set down for hearing de novo, with leave for the defence to be filed out of time. The consent order further provided that the appellant was restrained from interfering, transferring, wasting or in any other manner dealing with the suit properties.

10. The consent order setting aside the judgment notwithstanding, the Public Trustee, as averred in the affidavit sworn on behalf of the office by Mary Njoki Njuya on 2nd June 2017, proceeded to transfer the suit property to the appellant pursuant to a decree obtained in the said judgment. The deceased's property was, as a result, subdivided into the parcels aforesaid.

11. It appears from the record that the appellant's suit, CMCCC No. 1795 of 1995, was not prosecuted, and by an order made on 6th June 1999, the suit was dismissed for want of prosecution.

12. These are the facts that the trial court confronted in dealing with the respondents' application dated 4th May 2017 seeking to set aside its ruling of 25th November 2016. The gist of the respondents' case in that application was that they had discovered new evidence that at the time the Public Trustee transferred the suit property to the appellant, the judgment in favour of the appellant had been set aside.

13. In allowing the application for review, the trial court observed that the appellant and the Public Trustee were aware that the judgment of 23rd January 1996 as reviewed on 6th June 1996 had been set aside pursuant to a consent order entered into on 2nd December 1996. The court noted that in his affidavit in opposition to the application for review, the appellant had conceded that the judgment in his favour had been set aside by consent, but that he had been misled that the judgment was in force.

14. The court termed the appellant and the Public Trustee 'devious and dishonest persons' who chose not to bring to the attention of the court that the judgment in CMCCC No. 1795 of 1995 had been set aside when the applications the subject of the ruling dated 25th November 1996 came up for hearing. Further, that if the judgment had been set aside by the consent orders of 2nd December 1996, then, if any transfers had been done in favour of the appellant on the basis of the said judgment, they ought to be reversed and should have been reversed immediately upon the recording of the consent order. The court therefore granted orders in terms of the prayers sought by the respondents in their application dated 4th May 2017.

15. In his memorandum of appeal dated 7th June 2019, the appellant raised 10 grounds of appeal which are somewhat prolix but when summarized are that the trial judge erred in fact and law in: delivering two conflicting decisions on the same matter by his ruling of 25th November 2016 and the subsequent one of 14th June 2018; failing to appreciate that the matter was still live as there was a pending appeal, Nairobi ELC Civil Appeal No. 1 of 2018 from the decision of the Magistrate's Court declining to reinstate CMCCC No. 1795 of 1995; nullifying titles to his four parcels of land when sitting as a Probate Court which lacked the jurisdiction to do so as such orders could only be made by the Environment and Land Court established under Article 162(2)(b) and (3) of *the Constitution* and sections 13 and 19 of the *Environment and Land Court Act*; misapprehending the facts by failing to appreciate that both parties were unaware that the judgment in CMCCC No. 1795 of 1995 had been set aside; and wrongly imputed dishonesty to him and the Public Trustee when no such deliberate concealment was intended; failed to appreciate that the Public Trustee, as the administrator

of the estate at the material time, acted lawfully under section 79 of the *Law of Succession Act*, and the transactions carried out by the Public Trustee could not amount to intermeddling; nullifying his titles over Dagoretti/Waithaka/724-727 which were not part of the deceased's estate as they had been lawfully sold to his wife by the deceased during his lifetime; that the nullification of his titles contravened section 93(1) &

(2) of the *Law of Succession Act* which protects purchasers who acquire estate property in good faith and for value; and that the decision of the Judge was not grounded on the true facts and applicable principles of law and ought to be set aside.

16. The appellant, represented by learned counsel, Mr. Sumba, at the hearing of the appeal, filed submissions dated 10th December 2019 which he relied on entirely. He reiterated his grounds of appeal that the trial court had no jurisdiction to nullify his registered titles to the four parcels of land while sitting in a probate matter since such powers are exclusively vested in the ELC under Article 162(2)(b) of *the Constitution* and the *Environment and Land Court Act*; that the Judge ignored the fact that the orders issued on 25th November 2016 were final and binding, yet he proceeded to review them without legal justification; that the court misdirected itself by failing to appreciate that, at the time the 2016 orders were made, all parties, including the applicants, were unaware that the judgment in CMCCC No. 1795 of 1995 had been set aside, and therefore, no misrepresentation or concealment of material facts had occurred.

17. The appellant submitted further that the trial court had disregarded the role and mandate of the Public Trustee, who had lawfully administered the estate of the deceased at the material time; and that any transactions done by the Public Trustee were lawful and could not amount to intermeddling. The appellant also submitted that the Judge misapplied section 76 of the *Law of Succession Act* by effectively revoking the confirmed grant without any application for revocation having been filed before the court; and that the trial court erred in law by nullifying his titles without considering the protection afforded to bona fide purchasers under section 93(1) and (2) of the *Law of Succession Act*, given that the transfers were effected by the Public Trustee in its capacity as administrator. It was his submission further that the decision was made without regard to the pending appeal in Nairobi ELC Civil Appeal No. 1 of 2018 which raised similar issues relating to the ownership of the same parcels of land, and thus the ruling had the effect of pre-empting that appeal.

18. The respondents filed submissions dated 19th February 2020 which were highlighted by their learned counsel, Mr. Miyare. While reiterating the facts pertaining to the case leading to the ruling impugned in this appeal, the respondents submitted that ELC Civil Appeal Number 1 of 2018, referred to by the appellant in his Memorandum of Appeal, had been dismissed, and there was therefore no judgment or decree from the subordinate court capable of execution by way of transfer of the suit properties. They submitted that the conduct of the deceased's widow, Salome Wangui Chege, in purporting to sell the property to the appellant amounted to intermeddling; and that the appellant and the Public Trustee knew all along that the interlocutory judgment had been set aside, yet proceeded to pursue execution thereof.

19. The respondents submitted further that the appellant could not claim protection under section 93(1) and (2) of the *Law of Succession Act*. They submitted that the sections only apply to transfers by a person to whom a grant of representation has been confirmed; that beside the sale being undertaken by Salome Wangu Chege who was not a representative of the deceased's estate, the alleged transfer was irregularly made by the Public Trustee without any authority, court order or decree; that since there is no suit or pending dispute over Dagoretti/Waithaka/44, it is needless to allow the appeal as doing so would occasion prejudice and injustice to the respondents by letting the appellant retain titles to the properties fraudulently and illegally acquired, but which are occupied by the respondents.

20. The respondents submitted, finally, that since the High Court was seized of jurisdiction over the estate of John Chege Kirumba which comprised Dagoretti/Waithaka/44 in High Court Succession Cause No. 202 of 1990, it had jurisdiction under sections 47 of the *Law of Succession Act* and rule 73 of the Probate and Administration Rules to stop intermeddling with the deceased's property and to preserve it by ordering cancellation of titles irregularly acquired.

21. It was the respondents' submission further that pursuant to Order 45 of the Civil Procedure Rules, the High Court has a discretionary jurisdiction to review its decree or order, provided there's discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced at the time when the decree was passed or the order made. The respondents submitted that the High Court properly exercised its discretion in their favour in reviewing its ruling, and they asked this Court to dismiss the appellant's appeal with costs.

22. We have considered the record of appeal and the impugned ruling dated 14th June 2018. We have also considered the submissions of the parties and the facts before the trial court, which we have evaluated in accordance with our mandate as a first appellate court, which is to consider the evidence before the trial court, evaluate it, and draw our own conclusions- see Selle v Associated Motor Boat Co. Ltd [1969] E.A. 123.

23. The application before the trial court dated 4th May 2017 sought, among other orders, review of the ruling of the court dated 25th November 2016, and cancellation of the titles to the suit properties issued on the basis of the judgment in favour of the appellant on 23rd January 1996. The respondents based their application on, among others, Articles 10, 50 and 159 of *the Constitution*, sections 45 and 47 of the *Law of Succession Act*, Rule 59 and 73 of the Probate and Administration Rules, and section 5 of the *Contempt of Court Act*, No. 46 of 2016, and all other enabling provisions of the law. The grounds for the application were, among others, that they had made new discoveries relating to CMCCC No. 1795 of 1995 which were deliberately concealed from the court by the appellants.

24. The power to review decisions in civil matters is provided for in section 80 of the *Civil Procedure Act*, which grants an aggrieved party the right to apply for review of a decree or order from which an appeal is allowed but has not been preferred, or from which no appeal is allowed. Order 45 Rule 1 of the Civil Procedure Rules sets out the grounds on which review can be sought, these being the 'discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason.' We observe that the respondents did not reference these provisions in their application, though they adverted to them in their submissions before us.

25. As the trial court noted in its ruling, the judgment entered in favour of the appellant in CMCCC No. 1795 of 1995 had been set aside, by consent of the parties, on 2nd December 1996. As we noted earlier in the judgment, the consent order entered before Wendoh, PM, (as she then was), set aside not only the judgment but also all orders consequential thereto. Thus, at the time the trial court heard the applications dated 4th and 24th April 2014 and rendered its ruling dated 25th November 2016, there was no judgment in force in favour of the appellant, and any subdivisions carried out pursuant to that judgment should have been cancelled. This was not done and, as we also noted earlier, the appellant had obtained a decree to compel the Public Trustee to transfer the suit properties to him, with which the Public Trustee had complied.

26. As the trial court observed in its ruling, the fact that the judgment in favour of the appellant and all consequential orders had been set aside was within the knowledge of the appellant and the Public

Trustee. Yet, at the hearing of the applications dated 4th and 24th April 2014, neither informed the court of this fact. Indeed, they held out as the correct position, in their responses to the application for review, that the judgment was still in force.

27. Whether or not to review a decision requires the exercise of discretion. As is now well settled, an appellate court will interfere with the exercise of discretion only in the circumstances enunciated by this Court in Mbogo & Another v Shah [1968] EA 98:

> " ....a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."

28. In United India Insurance Co Ltd & 2 Others vs East African Underwriters (Kenya) Ltd, Madan, JA. expounded on the circumstances under which this Court will interfere with the exercise of discretion by the trial court as follows:

> " The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

29. In this case, the trial court found that its decision in the ruling dated 25th November 2016, which it had reached, primarily,on the basis that there was a judgment in favour of the appellant with respect to the suit properties, merited review. It did so upon finding that the appellant and the Public Trustee, who were, in its view, ''devious and dishonest persons' had withheld crucial information from it. In the circumstances, we are satisfied that the trial court properly exercised its discretion in reviewing its orders dated 25th November 2016.

30. The appellant is dissatisfied with the cancellation of the titles resulting from the subdivision of Dagoretti/ Waithaka/44, which he and the Public Trustee carried out on the strength of a judgment that had been set aside by consent. It must be recalled that the property at issue comprised the estate of a deceased person, administration with respect to which had been conferred on the Public Trustee. As a probate court, the trial judge had, in the circumstances of this case, the discretion, as provided in rule 73 of the Probate and Administration Rules, to issue the orders that it did cancelling the unlawfully obtained titles. The rule provides that:

> " Nothing in these Rules 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 process of the court.

31. In the circumstances of this case, cancelling the titles which had been issued on the basis of a judgment that had been set aside by consent was a proper exercise of discretion by the trial court, and was in accord with its powers under rule 73 of the Probate and Administration Rules.

32. The appellant contended before us that the trial court erred in law by nullifying his titles without considering the protection afforded to a bona fide purchaser under section 93(1) and (2) of the *Law of Succession Act*, given that the transfers were effected by the Public Trustee in his capacity as the administrator of the estate of the deceased, John Kirumba Chege. This section provides that:

> " 1. All transfers of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act, by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.
>
> 2. A transfer of immovable property by a personal representative to a purchaser shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities, funeral and testamentary or administration expenses, duties, and legacies of the deceased have not been discharged nor provided for."

33. We have considered this argument against the facts before us.

We observe, first, that the appellant's case was that the suit property was sold to him by Salome Wangui Chege, the widow of John Kirumba Chege. The said Salome Wangui Chege was not the administrator of the estate as letters of administration intestate had been issued to the Public Trustee. Secondly, the purported transfer was done by the Public Trustee, not pursuant to a confirmed grant, but in enforcement of a decree purportedly issued in favour of the appellant in CMCCC No. 1795 of 1995. The transfer, thus, was done pursuant to a judgment which had been set aside by consent several years prior to the transfer, a fact that was well within the knowledge of the appellant and the Public Trustee. In the circumstances, it is our finding that section 93 of the *Law of Succession Act* was of no avail to the appellant.

34. Finally, the appellant makes the rather convoluted argument that because he has a pending appeal, ELC No. 1 of 2018, challenging the decision of the Magistrate's Court declining to reinstate CMCCC No. 1795 of 1995 which had been dismissed for want of prosecution, the trial court should not have cancelled the titles issued pursuant to the judgment in the suit (which had been set aside!). It was submitted for the respondents that the appeal had been dismissed in a decision of the ELC (Komingoi J.) dated 11th December 2019, which they submitted they had annexed to their submissions, but had not.

35. In any event, and with the greatest respect to counsel for the appellant, even assuming that the appeal is still live, whatever its outcome, the titles issued pursuant to the judgment that had been set aside by the consent order of 2nd December 1996 had no basis whatsoever in law, and were a nullity ab initio. They could not be allowed to remain on the register, with the attendant danger of transactions involving third parties being entered into, further complicating the matter.

36. We accordingly find no merit in this appeal, and it is hereby dismissed with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF OCTOBER, 2025.

MUMBI NGUGI

.....

JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.