



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CIVIL APPEAL CASE NO. 09 OF 2019 (OS)

GRACE CIANJOKA NTHIGAI.....APPELLANT

VERSUS

IDER KEERUA..... 1ST RESPONDENT

JOSELINE MWIMBI.....2ND RESPONDENT

HARRIET KANINI.....3RD RESPONDENT

JUDGMENT

(Being an appeal from the Judgment and decree of the learned HONOURABLE J. M. NJOROGENJOROGE, CHIEF MAGISTRATE IN CHUKA CIVIL CASE NO. 124 of 2016 delivered on 21st November, 2016)

1. The apposite Memorandum of Appeal states as follows:

MEMORANDUM OF APPEAL

GRACE CIANJOKA NTHIGAI the above named appellant appeals to the high court against the ruling of the above mentioned decision on the following grounds:

1. That the learned trial magistrate erred and misdirected himself in law and facts in adjudicating the issues in the application which had been conclusively determined by the High Court of Kenya at Embu in High Court Succession Cause No. 86 of 1988.
2. That the learned trial magistrate erred in law and facts by conferring himself jurisdiction which he does not have in law.
3. That the trial magistrate erred in the law and facts by failing to uphold the rights of an absolute proprietor in land and issuing an order to subdivide the said land without any sound legal backing.
4. That the learned magistrate erred and or misdirected himself in law and facts by misinterpreting the law thereby arriving at a wrong decision.

It is proposed to ask the court for an order setting aside the Judgment, an order for status quo to be maintained pending the hearing and determination of this appeal, and costs to the appellant.

Dated at Chuka this 17th day of December, 2018

KAIMBA, MUTHOMI AND CO.

ADVOCATES FOR THE APPELLANT

2. The Appeal was canvassed by way of written submissions.

3. The Appellant's submissions filed on **25th July, 2019** are reproduced in full herebelow without any alterations whatsoever, including correction of spelling or any other mistakes, if they exist:

APPELLANT'S SUBMISSIONS

May it please you my Lord,

These are the humble submissions made on behalf of the appellant in support of the instant appeal dated 17th December 2018.

We have in the foregoing formulated the following main issue for determination by this honourable court:

(i). Whether the senior principal magistrates court in chuka civil suit no 124 of 2016 had jurisdiction to entertain a claim for inheritance of property under the Land Act 2012 and alter/change the mode of distribution in a certificate of confirmed grant whereas the same had been adjudicated upon by the Embu Principal magistrate court in succession cause no 86 of 1988 and under the Law of succession Act Cap 160.

Background

Your lordship the respondents herein filed suit in the senior principal magistrate court in chuka civil suit no 124 of 2016 seeking an order that the appellant herein who was the defendant therein do share and transfer to them 1.125 acres out of Karingani/Mugirirwa/3423 which is approximately 1.5 acres and which had been inherited from their late father.

Their claim was as per paragraph 10 of the plaint filed in the trial court was primarily based on the right to inherit their late father's estate

They claimed at paragraph 11 of the plaint that they had been mistakenly omitted in the certificate of confirmed grant in Embu Principal magistrate's court succession cause no 86 of 1988.

The appellant herein who was the defendant therein opposed the same by filing her defence.

The appellant at paragraph 3 of her defence challenged the jurisdiction of the trial court to entertain the matter and asserted that the only court of competent jurisdiction was the probate court which had adjudicated the succession issue.

The appellant further asserted in her defence that she was an absolute proprietor with indefeasibility of title under section 23(1) of the Registration of Titles Act (Repealed).

The trial magistrate entered judgement in favor of the respondents herein who were the plaintiffs in the lower court.

The Appellants Case

It is our submission that the **trial magistrate Chuka senior principal magistrate's court civil suit no 124 of 2016** completely erred in law and fact by adjudicating issues that had already been adjudicated upon by a court of competent jurisdiction in **EMBU PMCC SUCCESSION CAUSE NO 86 OF 1988**.

The trial magistrate erred further by arriving at a decision that seeks to alter the mode of distribution in the certificate of confirmed grant issued in Embu PMCC succession cause No.86 of 1988 whereas it is a fact that once a grant is issued, the same can only be annulled or revoked under section 76 of the law of succession Act and under the grounds stipulated therein.

The certificate of confirmed grant that was issued by the probate court gave the appellant herein 1.50 Acres absolutely. The certificate of grant is clear and non-ambiguous that the appellant does not hold the said land in trust for anybody let alone the respondents herein.

In the further supporting affidavit filed by the appellant herein and dated 8th April 2019 the appellant annexed the said certificate of confirmation of grant on her affidavit. If the respondents herein felt that there was a mistake in the certificate of confirmed grant, they had the opportunity which they still do, to apply for the rectification or revocation of the said grant.

My Lord, in the Embu Principal magistrate succession cause No.86 of 1988, parties made full disclosures to the court of all material facts to the case including all the children/beneficiaries left behind by the deceased. The respondents herein consented to the mode of distribution which excluded them from a share of the estate. This was made in utmost good faith (*uberimae fidei*).

It therefore follows that if the respondents herein were not satisfied with the confirmation of grant in the succession cause 86/1998 at Embu, then their remedy lied and also lies in a probate court. The lower court in CHUKA CIVIL CASE NO 124 OF 2016 had no jurisdiction at all to alter the mode in the certificate of confirmation of grant issued to JUNIUS IRERI.

Further, at no point in the succession cause, was it ever agreed or recorded that the appellant herein would hold land in trust for the respondents who were adult women of sound mind at the time of the succession cause, neither in the affidavit of the mode of distribution nor in the certificate of confirmed grant. It is thus peculiar and interesting to note that in its judgement at page 3 paragraph 1, the trial court made a finding and I quote "**It was agreed that the 1st defendant was to hold the land on her behalf and in trust of her daughters**". This finding is false and unfounded.

Conclusion

My lord it is apparent that the trial court sitting in chuka erred in adjudication of a dispute whereas the same had already been decided by a probate court of competent jurisdiction.

The respondents if at all were aggrieved by the decision in the Embu principal magistrate court succession cause no.86 of 1988 have a remedy which lies elsewhere and their advocate on record has a duty to advise them accordingly.

My Lord, the introduction of wrong procedures and changing goal posts on known and established legal principles undermines justice and introduces festering waters into the pure streams of justice; such must, immediately be subjected to serious reverse osmosis to purify the streams of justice, if society is to be accordingly regulated by law. The decision of the lower court in civil suit no 124 of 2016 ought to be overturned for the pure streams of justice to rise again.

DATED AT CHUKA THIS 24TH DAY OF JULY, 2019

MUTHOMI GITARI & CO.

ADVOCATES FOR THE APPELLANT

4. On **8th August, 2013**, the appellant filed further submissions. They are reproduced in full herebelow without any alterations whatsoever, including correction of spelling or any other mistakes, if they exist.

APPELLANT'S FURTHER SUBMISSIONS

1. May it please you my Lord,

These are the appellant's further submissions made in furtherance of the submissions filed in this honourable court on 25th July 2019 and in support of the instant appeal.

We have further formulated the following main issue for determination by this honourable court:

Whether the senior principal magistrate's court in Chuka civil suit no 124 of 2016 by entertaining a claim for inheritance of property under the Land Act 2012 and altering/changing the mode of distribution in a certificate of confirmed grant by the Embu Principal magistrate court in succession cause no 86 of 1988 under the Law of succession Act Cap 160 amounted to *res judicata*.

My Lord, it is the appellants assertion that trial court erred in law and facts by failing to recognize that the parties and the facts in issue in **Chuka senior principal magistrate's court civil suit no 124 of 2016 were precisely** similar to the parties and the issues raised and determined in **EMBU PMCCSUCCESSION CAUSE NO 86 OF 1988**.

The respondent herein filed suit in the trial court seeking to inherit their late father's estate as per paragraph 10 of the plaint filed in the trial court. The respondents claimed at paragraph 11 of the plaint filed in the trial court that they had been mistakenly omitted in the certificate of confirmed grant in Embu Principal magistrate's court succession cause no 86 of 1988.

The appellant herein who was the defendant therein opposed the same by filing her defence and at paragraph 3 of her defence challenged the jurisdiction of the trial court to entertain the matter and asserted that the trial court was *res judicata*.

Section 7 of the civil procedure Act, CAP 21 laws of Kenya provides that;

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue by such court.

It is the Appellants submission that the trial court proceeded to hear and determine a matter in which it was manifestly *res judicata*.

In Sylas Njeru M'rithaa –Versus- M'rithaa Thaara Chuka Elc Civil Appeal Case No.5 Of 2019 Eklr, the learned Justice P.M Njoroge in upholding the trial court's decision which rejected the suit for being *res judicata* held that **"...I agree that the suit which has spawned this intended appeal is *res judicata* Chuka H.C.C Appeal No. 33 of 2015. In the circumstances, I decline to escalate this dispute to become an appeal..."**

In Judith Gathoni Willy Vs. George Kihara Muchuki & 2 Others Civil Appeal 277 Of 2004 [2010] eKLR, the Court of Appeal upheld the High Court decision to uphold the preliminary objection as the matter raised in the new suit was canvassed in a succession cause where the grant was already confirmed. If the Applicant had a claim he ought to have lodged it in the existing Succession Cause.

It is thus not in dispute that the learned magistrate in **Chuka senior principal magistrate's court civil suit no 124 of 2016** erred in law and fact by adjudicating on a matter that was conclusively heard and determined in **EMBU PMCCSUCCESSION CAUSE NO 86 OF 1988**.

As such and for the reasons outlined above, we pray that the judgement of the trial court be set aside and costs be awarded to the appellant.

DATED AT CHUKA THIS 7TH DAY OF AUGUST 2019

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MUTHOMI GITARI & CO.

ADVOCATES FOR THE APPELLANT

5. The respondents' submissions are reproduced in full herebelow without any alterations whatsoever, including correction of spelling or any other mistakes, if they exist:

RESPONDENTS' WRITTEN SUBMISSIONS

YOUR LORDSHIP,

Introduction

1. The appeal arises from the Judgment of the Lower Court (Hon.Chief Magistrate J.M. Njoroge(Mr.) delivered on 21st November,2018 in CMCC No.124 of 2016, which was a suit between the Respondents-Ider Keeru, Joseline Mwimbi and Harriet Kaninias Plaintiffs and the Appellant-Grace Cianjoka as the 1st Defendant and Junius Ileri Gerrard as the 2nd Defendant respectively.
2. The bone of contention in the lower Court was that the Plaintiffs who are the biological daughters of the late Nthigai Kianya are entitled to a share out of all that parcel of land Known as Karingani/Mugirirwa /3423 registered in the name of 1st Defendant (their mother).
3. That the 1st Defendant had commenced the process of transferring all that parcel of land Known as Karingani/Mugirirwa /3423to her grandchildren namely: Dennis Mugambi Murithi and Gitonga Murithi prompting placing a caution over the said parcel of land and filing the suit in the lower Court .
4. The Orders sought in Cmcc No.124 of 2016 were to restrain the 1st Respondent (their mother) from transferring the suit property to third parties without having the interest of the Plaintiffs at heart.
5. On 21st October,2018 the lower Court ruled that the 1st Defendant was duly served but did not appear and the matter should proceed for hearing not withstanding her absence.
6. The written submissions filed by the Advocates for the Appellant are misleading the Court that the Appellant had entered appearance and filed defence specifically challenging the jurisdiction of the trial Court. It is a total lie.
7. The ground of appeal fault the trial magistrate for anchoring the judgment on a plaint, Evidence adduced at the hearing and finding that the Plaintiffs had proved their case on the balance of probability.
8. The Appellant pleads with this Court for reversal of the outcome of the lower court judgment more specifically setting aside the said judgment and order for status quo to be maintained.
9. The Respondents frame and adopt the following issues for determination:
 - a) ***Whether the Appellant holds parcel Number Karingani/Mugirirwa /3423 in trust for the Respondents under Meru Customary Law.***
 - b) ***Whether the trial magistrate in CMCC 124 of 2016 had jurisdiction to hear and determine the suit VIS-a vis Embu Succession cause Number 86 of 1998.***

Analysis & Discussion

Issue 1

Whether the Appellant holds parcel Number Karingani/Mugirirwa /3423 in trust for the Respondents under Meru Customary Law.

10. In *Richard Nyamemba Auka & 2 others – versus Josephine Motarohi & 2 others* at page 7 where Okongo J. held that:-

“the existence or not of a customary trust is a matter of fact. The alleged trust must be pleaded particularized and proved.....customary trust is classified as an overriding interest which means that it may affect registered land although it does not appear in the register”.

11. In succession case No. 86 of 1988 at Embu, the 2nd Defendant who is the son of Appellant (in CMCC No. 124 of 2016) Petitioned for grant of letters of administration as it had been mutually agreed by the family members of the late Nthigai Kianya despite Appellant being the widow of the late Nthigai Kianya and ranks first in priority for grant of the letters of administration of the said estate.

12. It was agreed during confirmation for grant of letters of administration by the family members of the late Nthigai Kianya that the Appellant would hold in trust the suit property in dispute for the Respondents (daughters) under the Meru Customary Law because some were not married and who were married or divorced would live with their mother, the Appellant herein.

13. We submit that the Appellant being well versed with Meru Customary Law adhered to the beliefs and norms until the year 2016 when she demolished the Respondents' houses, chased them and commenced the process of transferring the Suit Property to her grandchildren.

14. It is our submissions that in Meru Customary the mother holds the property for her daughters for reasons that they could not inherit directly from their late fathers.

15. **Eugene Cotran** in his statement of African Law stated that ***“inheritance under Meru Law is patrilineal.”***

16. It is our humble submissions that the judgment of the lower court was sound and well-reasoned within the confines of Sections 28 of the Land Registration Act which provides that.

“ unless the contrary is expressed in the register , all registered land shall be subject to following overriding interest as may for the time being subsist and affect the same without being noted on the register .Trust including customary Law..”

17. It is our humble submissions that the Appellant transferring the suit property to the grand children goes against the norms and beliefs of the Meru Customary Law by failing to give a share to her own biological children (the respondents herein) and the lawful beneficiaries of the estate of late Nthigai Kianya.

ISSUE 2

Whether the trial Magistrate in Cmcc No. 124 of 2016 had jurisdiction to hear to determine the suit Vis-a Vis Embu Succession cause No. 86 of 1988.

18. It is our humble submissions that the suit was lodged by the Respondents in the lower court seeking an order of injunction against the Appellant from transferring the suit property to her grandchildren without factoring in the interest of her own daughters whom she chased away from the suit property and lives in rented houses.

19. We submit that Chief Magistrate being of higher rank than that of Principal Magistrate had jurisdiction to hear and determine Cmcc No. 124 of 2016.

20. We submit that appeal should be dismissed with cost.

Dated at Nairobi this 30th day of September. 2019

MURIMI MURANGO & ASSOCIATES

ADVOCATES FOR THE RESPONDENTS

6. The only issue to be determined is if or if not the Hon. Magistrate in the lower court was right in entering judgment for the plaintiffs against the 1st defendant.

7. This being a first appeal, this court is entitled to consider the lower court's decision and arrive at its own decision.

8. I have considered the pleadings, the submissions and the authorities proffered by the parties in their diametrically incongruent assertions. The authorities proffered by the parties are good authorities in their facts and circumstances. In coming to my decision in this appeal, those authorities have been taken into account. I do not need to regurgitate the legal principles they espouse, as they have been elaborated upon in their submissions which have been reproduced in full in the earlier part of this judgment.

9. It is clear from the plaint that the plaintiffs sought orders distinct from what was being canvassed in Embu PMCC No. 86 of 1988. They do not attack the integrity of the Succession cause. They do not challenge the fact that the Appellant Grace Cianjoka Nthigai was registered owner of the suit land vide the apposite succession cause. What they are claiming is part of the land now registered in the name of the

appellant. They say that they are the biological children of Nthigai Kianga (deceased), the husband of the appellant. By virtue of that fact they say that the suit land is ancestral land.

10. I do not agree that the magistrate in the lower court interfered with the findings of the succession case at Embu. This is a completely different case where they are claiming a portion of their ancestral or family land. The appellant has not controverted the assertion that the respondents are children of the late Nthigai Kianga, the father of the plaintiffs. She also does not deny that she is the mother of the plaintiffs. Nowhere does she claim that she personally bought the suit land. I do unequivocally find that the suit land is ancestral or family land. It is quite clear to me that the appellant is discriminating against the respondents just because they are of the female Gender. This atavistic provenance cannot be embraced in this enlightened age. Principle (f) of Land Policy as contained in Article 60(1) of the Constitution of Kenya is veritably pellucid that gender discrimination will be eliminated in law, customs and practices related to land and property to land. This judgment upholds this principle.

11. I do not agree with the assertion by the respondent's advocate that the Chief Magistrate in the lower court could overrule the decision made by a Senior Principal Magistrate as was made in Embu PMCC Succession Cause No. 86 of 1988. Only the High Court or a Court of Equal Status with the High Court can do that on appeal. Nevertheless, I have found that the suit that has spawned this appeal was completely different from the succession cause.

12. Having carefully gone through the impugned judgment I find that it has been buttressed by sound legal basis. I do not find any reason to interfere with it.

13. In the circumstances, I enter judgment for the respondents in the following terms:

a) This appeal is hereby dismissed.

b) Costs are awarded to the respondents.

14. Orders accordingly.

Delivered in open Court at Chuka this 4th day of December, 2019 in the presence of:

CA: Ndegwa

Murango Mwenda h/b Muthomi Gitari for the Appellant

Muriithi Murango for the Respondents

P. M. NJOROGE,

JUDGE