



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC PETITION NO. 23 OF 2013

B K (suing through her guardian Ad Litem)

P MPETITIONER

VERSUS

D M.....1ST RESPONDENT

IG..... 2ND RESPONDENT

LKM3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

JUDGMENT

1. The background to this case is that the litigants are family. Petitioner B K is a sibling to DM, the 1st respondent and both are children of one MM (deceased). IG and LK who are 2nd and 3rd respondents respectively are children of a son of MM but that son is also deceased. B K is hence an aunt to I and LM apparently also had another child called JC.
2. At the heart of the dispute is the land parcels which were owned by the deceased MM namely L.R Nkuene/Uruku/[particulars withheld].
3. One PM is the one who has filed this suit on behalf of the petitioner in his capacity as a husband and Guardian Ad Litem of the petitioner. P claims that his wife is of unsound mind.

Petitioner's case

4. PM testified as petitioner witness no. 1 and he also adopted his statement filed in court on 2:11:2017 as his evidence. He avers that he is a guardian Ad Litem of his wife B as the petitioner is adjudged as being of unsound mind. PW1's testimony is that land parcel no. Nkuene/Uruku/[particulars withheld] which is 3.3 acres is registered in the name of his wife B K since 1996. He further avers that the said registration occurred pursuant to the confirmed grant in Nairobi High Court Succ. Cause No. 301 of 1995 over the estate of Mwobobia Mungjiiria.
5. Petitioner contends that the 1st and 2nd respondent purported to change the inheritance and transmission of this suit property through Meru CMCC case No. 1247 of 1997 where by a decree was given on 26.11.2010. Petitioner avers that the filing of the case before the Chief Magistrates Court is unconstitutional as a subordinate court cannot usurp the powers of the high court with regard to the administration of the estate of a deceased person.
6. In support of his case petitioner has availed the following documents for the court's consideration:
 - (i) Medical notes from the Ministry of health, Meru Psychiatry unit to indicate that B K is a known mental patient.
 - (ii) A copy of title deed issued on 17.4.1996 to B K.
 - (iii) A Kenya gazette indicating that one KM had applied for a grant of letters of administration in respect of the estate of MM.
 - (iv) A certificate of search indicating that the land no. Nkuene/Uruku/[particulars withheld] in the name of B K was inhibited vide orders in Meru C.M's civil case no. 1247 of 1997.

(v) Crop damage assessment report dated 8.10.2013

7. Petitioner prays for a declaration that the:

(a) L.R. No. Nkuene/Uruku/[particulars withheld], which was transmitted to the petitioner through Nairobi H.C Succ Cause No. 301 of 1995, cannot be tampered with, changed, cancelled or redistributed, other than through the said succession cause aforesaid and any attempted tampering, changing registration, redistributing and/or cancelling the said transmission through Meru CMCC no. 1247 is unconstitutional and made without jurisdiction, and thus the same is null and void abinitio.

(b) An order or Judicial review, quashing and setting aside the decree obtained in Meru CMCC no. 1247 of 1997 and issued on 11/6/2013.

(c) An order for compensation to the petition by the 1st – 3rd respondents, for the damage done on the suit land on 3.10.2013.

(d) Costs of the petition and interests thereon.

The case for respondents

8. IG, the 2nd respondent testified as DW1. She also adopted her statement filed on 26.9.2017 as her evidence. She states that herself and 3rd respondent are children of M who was a son of deceased (M). She avers that they were disinherited from their grand father's estate by their grandmother KM and their aunt B K. That is why they filed the Meru CM's case no. 1247/1997 whereby they sued B K, David Mwirigi and JM for fraudulently transferring their grandfather's land without their knowledge. She further stated that they filed the case because by then, the parcel of land had already been transferred to B K who had become a registered owner.

9. I further stated that they obtained a decree in their favour in the Meru CM's case no. 1247/97 but petitioner having been dissatisfied with the judgment filed an appeal in high court, the same being H.C.C 92 of 1999 whereby the lower court's judgment was upheld.

10. Irene also stated that PM is not a family member and he should stay away from the estate of M.

11. Documents produced in support of Respondent's case are:

- (i) A copy of the Judgment in H.C.C 92 of 1999.
- (ii) Proceedings in CMCC No. 1247 of 1997.
- (iii) Order in CMCC NO. 1247 of 1997 dated 9.9.1997
- (iv) Decree in CMCC No. 1241 of 1997
- (v) Mutation forms for Nkuene/Uruku/[particulars withheld]

Determination

12. I have considered all the arguments raised herein as well as the rival submissions of the parties. The main issue for determination is whether the proceedings and judgment in Meru CMCC no. 1247 of 1997 are valid in light of the Nairobi succession case no. 301 of 1995. The court will also determine whether PM has capacity to institute the suit on behalf of his wife (B).

13. **Validity of the Proceedings and Judgment in CMCC. No. 1247 of 1997;** The petitioner claims that the magistrate's court had no jurisdiction to determine the case since by then, the petitioner had already inherited the property through transmission in Nairobi Succession cause no. 301 of 1995. PW 1, PM has admitted that when judgment was delivered in Meru CMCC No. 1247/1997, they (him and B) appealed to the high court in H.C. Civil Appeal No. 92 of 1999. In cross examination, PW 1 had this to say about the high court case; **"B was the appellant. The case was thrown away"**.

14. Both the Meru CMCC No. 1247/97 and the Meru H.C.C No. 92/1999 were filed after the Nairobi succession cause 301 of 1995. It follows that the parties and in particular the petitioner herein had an opportunity and a platform to bring to the attention of the courts, the existence of the alleged succession cause no. 301 of 1995 (if there was ever such a case).

15. I have read the High court judgment in HCC No. 92 of 1999, whereby the high court upheld the lower court's judgment. It follows that the next cause of action that petitioner ought to have undertaken was to proceed to appeal against the high court judgment and not to file this petition. The orders sought in the present petition are meant to circumvent the orders of the high court in case no. 92 of 1999 and by extension the orders in the CMCC 1247/1997. This suit cannot therefore be equated to the authorities cited by the Petitioner in- **John Muriungi Mugwika vs. Charity Mpinda M'ugwika (2018)eKLR Nancy Wanjiru Mwaura vs. George Njoroge & 3 Others (2017)ekLR and Noah Talam vs. Joseph Koech Tonui (2013)ekLR**. It follows that this petition is unmerited.

16. **The succession Cause;** It is averred by the petitioner that she inherited her father's property via the Nairobi succession cause no. 301 of 1995. I have perused the entire file and I have not seen any confirmed grant emanating from this case.

17. **Locus Standi**; The petitioner has submitted that he has locus standi to institute this suit on behalf of his wife B. To this end, he has relied on the provisions of article 22 and 258 of the constitution. He has also relied on the case of **Kiluwa limited & another vs. commissioner of lands and 3 others (2015)Eklr.**

18. PM has however identified himself as a **guardian ad litem** of B on the basis that B is a person of unsound mind. The law on the management of the property of a mentally ill person is enshrined in the mental health Act whereby the orders for the appointment of a person to manage the affairs of a mentally sick person are issued under section 26 of the mental health act. In the case of **Isaac Kipkemboi Chesire & 4 Others vs. Joseph Kimitei Kwamboi & 3 Others and Rose Cheruiyot Rono & 3 Others (Interested parties) ELC No. 520 of 2012, Eldoret**, it was stated thus; **“This court finds that it has not been established that Matilda Sawe is the guardian ad litem of the estate of John Malan Sawe hence the application for substitution is not well founded....”**.

19. I find that PM has not established that he is a guardian ad litem in respect of the estate of B K. He therefore had no capacity to file this petition.

Conclusion

(i) This petition is hereby dismissed with costs to respondents.

(ii) The decree and consequential orders in Meru CMCC NO. 1247/1997 are to be implemented forthwith.

(iii) Any conservatory orders issued in respect of land No. Nkuene/Uruku/[particulars withheld] including prohibition and inhibition orders are to be lifted forthwith to facilitate the implementation of the aforementioned decision.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 18TH DAY OF JULY, 2018 IN THE PRESENCE OF:-

Court Assistant: Janet/Galgalo

Ashaba holding brief for Mwirigi for petitioner

Mutunga for 1st & 2nd respondents

Peter Marangu

HON. LUCY. N. MBUGUA

ELC JUDGE