REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC APPEAL NO. 48 OF 2014

NANCY WANGARI KINYUA……..….....APPELLANT

VERSUS

ROSE WAMBUI ……..…….1ST RESPONDENT

CATHERINE NJERI……...….…....2ND RESPONDENT

(BEING AN APPEAL FROM THE JUDGMENT DELIVERED ON 19TH JANUARY, 2012 BY HON. H.N. NDUNG'U – S.P.M AT KERUGOYA SENIOR PRINCIPAL MAGISTRATE'S COURT CIVIL CASE NO. 267 OF 2010)

JUDGMENT

This appeal is against the judgment of Miss **NDUNGU H.N. PRINCIPAL MAGISTRATE** delivered on 19th June 2012 in which she dismissed with costs the appellant's claim that land parcel No. MWERUA/GITAKU/827 (the suit land) be sub-divided into three (3) equal portions and be registered in the names of the appellant, the 1st respondent and 2nd respondent respectively together with their children. The respondents who are acting in person resisted the claim and while their "***home-made***" defence in the trial Court was not clear, it is obvious from their oral evidence that they disputed the appellant's claim to the suit land because, although it was registered in their joint names together with one **PATRICK WACHIRA COMA** (deceased), she had sold her share to the suit land.

The dismissal of her suit in the subordinate Court gave rise to this appeal in which she raises the following ground in seeking to have the judgment set aside:

> ***1. That the learned magistrate erred in law and in fact by failing to find that land parcel No. MWERUA/GITAKU/827 was jointly registered between the appellant and the respondents hence the appellant's prayer to have the title partitioned among the three parties to hold in trust for themselves and their children should have been up-held.***
>
> ***2. That the learned magistrate erred in law and in fact by finding the appellant had sold 1 acre of land hence she had no right over land parcel No. MWERUA/GITAKU/827.***
>
> ***3. That the learned magistrate erred in law and in fact by failing to find that the appellant became a beneficiary of land parcel No. MWERUA/GITAKU/827 (a sub-division of original land parcel No. MWERUA/GITAKU/203) in HIGH COURT SUCCESSION CASE No. 51 of 1996 being in the matter of the Estate of DISHON CHUMA which proceedings have never been annulled.***

4. That the learned magistrate erred in law and in fact by holding that the appellant had sold her alleged ¼ portion of land to one JOSEPH GITHINJI NJOYA where there was no evidence to that effect.

5. the learned magistrate erred in law and in fact by finding that the appellant went to the clan to ask for her brother PATRICK WACHIRA's portion of land whereas there was evidence that he was a beneficiary of HIGH COURT SUCCESSION CAUSE No. 51 of 1996 and was only removed from the title after he died.

The appeal was canvassed by way of written submissions which have been filed both by **MS WANGECHI MUNENE** advocate for the appellant while the 2nd respondent filed submissions on behalf of the herself and the 1st respondent.

The parties herein are related. The appellant is a sister to the 1st respondent who is a mother to the 2nd respondent. All three together with one **PATRICK WACHIRA CHUMA** (deceased) were registered as the joint proprietors of the suit land. That land was a sub-division of land parcel No. MWERUA/GITAKU/203 which originally belonged to the late **DISHON CHUMA** the father of the appellant, the 1st respondent, **PATRICK CHUMA** (deceased) and **WAWIRA CHUMA.** Except for the appellant, all the children of the late **DISHON CHUMA** were of un-sound mind and according to **JOHN MUGO NYAMU** who gave evidence in the trial Court as a witness for the respondents, the appellant approached the clan in 1985 following the death of their father seeking to sell a portion of the suit land in order to educate her children since her husband had died. She was accompanied by a buyer one **JOSEPH GITHINJI NJOYA** who was told to sub-divide the suit land and he demanded ¼ acre as his fees plus ¾ acre belonging to the appellant. The suit land was sub-divided but later on, the appellant again came and said that she wanted the portion of **PATRICK WACHIRA.** It was then that it was discovered that the title deed still bore her names yet she had sold her portion. It is this evidence of **JOHN MUGO NYAMU** whom the trial magistrate described as "***honest and truthful"*** that appeared to have carried the day with the Court making a finding that since the appellant has sold her share, she was not entitled to any portion in the suit land.

This being a first appeal, this Court must re-evaluate the evidence, assess it and make its own conclusion remembering that I did not have the benefit of seeing or hearing the witnesses – ***SELLE VS ASSOCIATED MOTOR BOAT COMPANY LTD 1968 E.A 123.***

It is not in dispute that the suit land was at all material times registered in the joint names of the appellant, the 1st and 2nd respondents and their brother **PATRICK WACHIRA CHUMA** (deceased). The title deed dated 29th April 1997 confirms that and it shows the approximate area of the suit land as 0.77 HA. However, among the record herein is another title deed for the same suit land dated 26th April 2010 but now in the names of the appellant and the two respondents only. The name of their brother **PATRICK WACHIRA CHUMA** is deleted. Among the documents herein is an affidavit by the appellant dated 7th April 2010 asking the Land Registrar Kirinyaga District to delete the names of **PATRICK WACHIRA CHUMA** who had died on 27th April 2006 and a death certificate No. 142788 was availed. The strange observation on the title deed to the suit land dated 26th April 2010 is that it still bears the approximate area of the suit land as 0.77 HA which is the same acreage appearing in the original title deed dated 29th April 1997. If indeed the appellant had already sold her portion of the suit land to the said **JOSEPH GITHINJI**, then surely the acreage of the suit land should have been less than the original 0.77 HA. It is instructive to note that the only evidence adduced to prove that the appellant had sold her share of the suit land to the said **JOSEPH GITHINJI** was the oral evidence of the respondents as supported by that of their witness **JOHN MUGO NYAMU** who may have been ***"honest and truthful"*** as found by the trial magistrate but may very well have been mistaken because if a portion of the suit land had been sold, that should have been reflected at least in the Green Card which was not part of the record. The process through which land is sold is very elaborate and there was really no evidence placed before the trial magistrate to demonstrate that indeed a portion of the suit land was sold to one **JOSEPH GITHINJI.** It is also clear from the record that when she was cross-examined by the 1st respondent during the trial, the appellant denied having sold her share of the suit land. She said:

"We agreed as a family to sell 1 acre to do the succession case not that I sold the same"

She also added:

"No, I never sold my portion of the land"

Since the respondents were the ones claiming that the appellant sold her share of the suit land, the onus was on them, under ***Section 109 of the Evidence Act,*** to prove that fact. That was not done and in the absence of such evidence, the trial magistrate was only left with the title deed to the suit land bearing the names of the appellant and the respondents to rely on. And that title deed, by virtue of the provisions of ***Sections 27 and 28 of the Registered Land Act*** (now repealed) under which it was issued, is conclusive proof that the appellant and the respondents are the joint owners of the suit land. It was not therefore correct for the trial magistrate to find, as she did, that the appellant had sold her portion of the suit land. She was bound to find that from the title deed, the suit land was still owned jointly by the appellant and the respondents.

Was the trial magistrate in error in dismissing the appellant's claim to have the suit land sub-divided? I think not. The document of title is silent as to whether the suit land is owned in a joint or common tenancy. The law is that where there is no evidence to show whether land registered in more than one name is held in joint or common tenancy, such property is held in a joint tenancy where the interest of each owner is indeterminable with each owning all and nothing – ***MUKAZITONI JOSEPH VS ATTORNEY GENERAL C.A CRIMINAL APPEAL No. 128 of 2009. Section 91 (4) of the Land Registration Act 2012*** states that:

"If land is occupied jointly, no tenant is entitled to any separate share in the land and consequently –

(a) disposition may be made only by all the joint tenants

(b) on the death of a joint tenant, that tenant's interest shall vest in the surviving tenant or tenants jointly; and

(c) each joint tenant may transfer their interest inter vivos to all the other tenants but to no other person, and any attempt to so transfer an interest to any other person shall be void"

Similar provisions exist in ***Section 102 of the repealed Registered Land Act*** under which the suit land was registered.

Being joint tenants therefore, the plaintiff and defendants are in law considered as one and none of them can claim any portion of the suit land. They hold the suit land as one with equal rights and that ownership of the suit land between them can only be severed through ***Section 91 (7) of the Land Registration Act*** which provides as follows:

"***Joint tenants not being trustees, may execute an instrument in the prescribed form signifying that they agree to sever the joining ownership and the severance shall be complete by registration in the prescribed register of the joint tenants and tenants in common"***. Emphasis added

It is therefore clear that as a joint tenant in the suit land, the plaintiff is not at liberty to unilaterally sever such joint ownership or even purport to sell any portion of the same. Neither can she, as she did by filing the suit in the subordinate Court that gave rise to this appeal, seek orders for the sub-division of land held in a joint tenancy. This is because, all the joint tenants must "***agree to sever"*** that relationship as prescribed under ***Section 91(7) of the Land Registration Act***. It is for that reason that this Court has made the finding above that there could not have been any disposition of any part of the suit land to the said **JOSEPH GITHINJI** and if indeed he took possession of any part thereof, he can only be a trespasser thereon. Therefore, although the trial magistrate in dismissing the appellant's claim in the

subordinate Court arrived at that decision on the basis that the appellant had infact sold her share in the suit land, there was really no evidence to demonstrate that the said **JOSEPH GITHINJI** and the appellant executed any transaction that would lead to the transfer of any portion of the suit land as known in law. There is nothing on record to show that the said **JOSEPH GITHINJI** is infact in possession of any portion of the suit land.

It is clear from the record therefore that although the trial magistrate erred in law and in fact in making the finding that the appellant had sold one acre of the land and therefore had no right over the suit land as pleaded in paragraph two (2) of the memorandum of appeal, the trial magistrate nonetheless arrived at the correct decision in dismissing the appellant's claim that the suit land be sub-divided between her and the respondents. This is because under the law, such severance can only be done with the concurrence of all the joint tenants. The appellant's case in the subordinate Court was therefore bound to collapse as it did.

The up-shot of the above is that this appeal lacks merit. It is dismissed with no order as to costs since the parties are family.

B.N. OLAO

JUDGE

19TH MAY, 2017

Judgment dated, delivered and signed in open Court this 19th day of May 2017

Mr. Magee for Miss Wangechi for Appellant present

Respondents both present

Right of appeal explained.

B. N. OLAO

JUDGE

19TH MAY, 2017