



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC APPEAL NO. 42 OF 2015**

**EMILY WAIRIMU CIIRA.....APPELLANT**

**VERSUS**

**NANCY WANJIRU NJUGUNA.....RESPONDENT**

**RULING**

This appeal has a long history. The dispute between the appellant and the respondent herein started in the year 1996. The respondent filed a suit against the appellant at Githunguri Senior Resident Magistrate's Court namely, Githunguri SRMCC No. 90 of 1997, Nancy Wanjiru Njuguna vs. Emily Wairimu Ciira (hereinafter referred to as the "lower court suit") seeking an order compelling the appellant to transfer to her a portion measuring 0.20 ha. of all that parcel of land known as L.R No. Githunguri/Gathangari/2304. The said portion of L.R No. Githunguri/Gathangari/2304 is hereinafter referred to as "the suit property". In her plaint, the respondent averred that the appellant was at all material times the registered owner of L.R. No. Githunguri/ Gathangari/ 2304 and that on or about the month of January, 1996, she entered into an agreement with the appellant pursuant to which the appellant sold to her the suit property at a consideration of Kshs.165,000/=. The respondent averred that following the said agreement, they sought and obtained consent of the Land Control Board to transfer the suit property to her. The respondent averred that the appellant thereafter refused and/or neglected to complete the agreement despite demand having been made upon her to do so thereby leaving the respondent with no alternative but to file the lower court suit.

The appellant filed a statement of defence in the lower court suit on 19<sup>th</sup> February 1997. In her defence, the appellant admitted the respondent's claim in its entirety. Following this admission, the respondent filed an application by way of Chamber Summons on 28<sup>th</sup> February 1997 seeking judgment to be entered against the appellant on admission. From the record of the lower court, the respondent's application came up for hearing before Hon. M. Rungare S.R.M on 23<sup>rd</sup> March 1997 when Mr. Mwaura advocate appeared for the respondent while the appellant appeared in person. Mr. Mwaura argued the application and urged the court to enter judgment for the respondent against the appellant whom he said had admitted in her defence that she had sold the suit property to the respondent. In her response to the application, the appellant told the court that she had no objection to the application. The appellant told the court that she was willing to transfer the suit property to the respondent provided the respondent paid her a sum of Kshs.7,000/- being the balance of the purchase price that was outstanding. The court after hearing both parties entered judgment for the respondent and directed the appellant to transfer the suit property to the respondent once the respondent had paid to her the balance of the purchase price aforesaid. That order was made on 26<sup>th</sup> March 1997 when the application for judgment on admission came up for hearing.

After that judgment, the respondent took no further action in the matter for about 9 years until 3<sup>rd</sup> January 2006 when she made an application for the removal of a caution that had been registered against the title

of the suit property by some third parties. The respondent's application for the removal of the said caution was allowed on 8<sup>th</sup> March 2006. Following the removal of the said caution, the respondent caused herself to be registered as co-proprietor of L.R. No. Githunguri/ Gathangari/2304 with the appellant in the ratio of 0.367 ha. for the appellant and 0.20 ha. for the respondent. The registration of the respondent as a co-owner of L.R. No. Githunguri/Gathangari/2304 is said to have been effected pursuant to the judgment on admission which was made by Hon. M. Rungare S.R.M on 23<sup>rd</sup> March 1997 aforesaid. The said judgment on admission was not made by Hon. Winfred O. Lichuma (Ag. R.M) as indicated in the extracted order. I have noted from the record that the said judgment of 23<sup>rd</sup> March 1997 has not been set aside.

After the registration of the respondent as a co-proprietor of L.R. No. Githunguri/Gathangari/2304, the respondent moved the lower court once again on 2<sup>nd</sup> July 2007 seeking an order to compel the appellant to sign all relevant documents to facilitate the partitioning of L.R. No. Githunguri/Gathangari/2304 into two portions so that the respondent and the appellant could have separate titles for their respective portions of the said parcel of land. The application was opposed by the appellant who by this time had engaged an advocate to represent her. The appellant contended that the respondent had caused herself to be registered as the owner of L.R. No. Githunguri/Gathangari/2304 measuring 0.20 ha. fraudulently and as such she was not entitled to the order for the partitioning of the said property that she had sought.

The respondent's application was heard by Hon. L. K. Mutai S.R.M who allowed the same in a ruling that was delivered on 21<sup>st</sup> January 2008. The learned Magistrate noted that the appellant had admitted expressly that she had sold the suit property to the respondent and had been paid full consideration less Kshs.7,000/-. He found no merit in the appellant's contention that she had not sold the suit property to the respondent. On the allegation that the respondent had acquired the suit property fraudulently, the learned Magistrate observed that the appellant had not made a report of the alleged fraud to the relevant authorities for necessary action to be taken against the respondent. The learned Magistrate formed the view that the appellant was relying on technicalities to defeat the respondent's just claim. He ordered the appellant to sign all relevant documents to facilitate the partitioning of the said property failure to which the executive officer of the court was authorized to sign the same.

The appellant was dissatisfied with the decision of Hon. L. K. Mutai S.R.M aforesaid and filed this appeal against the same. In her memorandum of appeal filed herein on 1<sup>st</sup> February 2008, the appellant challenged the decision of the learned Magistrate on several grounds. Together with the memorandum of appeal, the appellant filed an application for stay of the said decision. On 25<sup>th</sup> February 2009, the appellant's application for stay of execution of the orders of Hon. L. K. Mutai S.R.M made on 21<sup>st</sup> January 2008 was allowed by consent pending the hearing and determination of the appeal herein.

The appellant died on 9<sup>th</sup> March 2009. On 2<sup>nd</sup> December 2010, the respondent brought an application by way of Notice of Motion dated 25<sup>th</sup> November 2010 seeking an order that this appeal had abated. The respondent contended that after the death of the appellant no action had been taken by the appellant's legal representatives to substitute the deceased appellant in this appeal. The application was opposed by one, Catherine Njeri Nganga through a replying affidavit sworn on 26<sup>th</sup> May 2011. Ms. Nganga is one of the legal representatives of the appellant. In her affidavit, she admitted that the appellant died on 9<sup>th</sup> March 2009. She stated that the family of the deceased appellant had taken time before applying to substitute the deceased with her legal representative because one of the deceased's sons who had applied for a grant of letters of administration in respect of the estate of the deceased together with her (Ms. Nganga) had also passed on before the grant was issued. Ms. Nganga stated that the respondent had acquired the suit property fraudulently and as such should not be allowed to benefit from her own wrong. The court heard the respondent's application which was argued by way of written submissions and allowed the same in a ruling that was delivered on 20<sup>th</sup> May 2016. In the ruling, the court made an order that the appeal had abated and that each party should bear its own costs.

I now have before me two applications. The first application has been brought by the legal representatives of the estate of the deceased appellant while the second application has been brought by the respondent.

The application by the legal representatives of the appellant was brought by way of Amended Notice of Motion dated 26<sup>th</sup> July 2016. The main relief sought in the application is the review and setting aside of the said order which this court made on 20<sup>th</sup> May 2016. The application has been brought on the grounds set out on the face thereof and on the affidavit of Catherine Njeri Nganga sworn on 26<sup>th</sup> July 2016. The legal representatives of the appellant have contended that there is an error apparent on the face of the record of the court's ruling made on 20<sup>th</sup> May 2016. The legal representatives of the appellant have contended that the Grant of Letters of Administration in respect of the estate of the deceased appellant was issued in the year 2010 and that the beneficiaries of the estate of the deceased have made an application to substitute the deceased appellant with her legal representatives. The legal representatives of the appellant have contended further that the court determined this appeal on technicalities contrary to the provisions of Article 159(2) of the Constitution of Kenya 2010.

The respondent's application on the other hand was brought by way of Notice of Motion dated 4<sup>th</sup> November 2016. In the application, the respondent has sought an interim injunction restraining the members of the deceased appellant's family from entering or destroying whatever is on L.R. No. Githunguri/Gathangari/2304 pending the registration of the suit property in her name. The respondent has also sought an order authorizing the Deputy Registrar of this court to sign the remaining forms to facilitate the registration of the suit property in her name. The respondent's application was brought on the ground that the appeal herein has abated and her attempts to execute the order of the lower court have been frustrated by lack of authorized person to sign the mutation form for the subdivision of L.R. No. Githunguri/ Gathangari/2304 so that she can have her share thereof registered in her name.

The application by the legal representatives of the deceased appellant was brought under among others, Order 45 rules 1, 2, 3 and 4 of the Civil Procedure Rules. Order 45 rule 1 of the Civil Procedure Rules provides that, a person considering himself aggrieved by a decree or order from which an appeal is allowed but from which no appeal has been preferred or by a decree or order from which no appeal is allowed and who from 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 an account of some mistake or error apparent on the face of the record or for any other sufficient reason desires to obtain a review of the decree or order may apply for a review of such decree or order without unreasonable delay. In the case of National Bank of Kenya Ltd –vs- Ndungu Njau, Court of Appeal at Nairobi, Civil Appeal No. 211 of 1996 (Unreported) the Court of Appeal stated that:

*“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion on law. Misconstruing a statute or other provision of law cannot be a ground for review.”*

In the case of, Nairobi City Council vs. Thabiti Enterprises Ltd, Court of Appeal at Nairobi, Civil Appeal No. 264 of 1996, it was stated that:-

*“The current position would then, appear to be that the court has unfettered discretion to review its own decree or orders for any sufficient reason.”*

The order of this court made on 20<sup>th</sup> May 2016 in respect of which a review has been sought, declared the appeal herein to have abated. The abatement of the appeal was by operation of law. The appellant died and no steps were taken to substitute the appellant with her legal representatives. As I have stated earlier, the application which gave rise to the order of 20<sup>th</sup> May 2016 was opposed by the legal representatives of the appellant through the affidavit of Catherine Njeri Nganga sworn on 26<sup>th</sup> May 2011. In the affidavit, Catherine Njeri Nganga narrated the difficulties the legal representatives of the appellant had faced in their endeavor to obtain Grant of Letters of Administration in respect of the estate of the appellant. The

court considered the reasons which Catherine Njeri Nganga had given for the failure of the legal representatives of the deceased appellant to substitute the appellant and found the same unsatisfactory. The court stated as follows:

*“It is not in dispute that appellant herein died on 9<sup>th</sup> March 2009. It is also not in dispute that for the last five (5) years the legal representatives of the deceased have not made an application to be made parties to this appeal for the purposes of proceeding with the same. The reasons which have been put forward by the appellant’s daughter, Catherine Njeri Nganga for her inaction are not valid. One does not require a full grant of letters of administration to be made a party to a suit on behalf of a deceased party. It does not take five (5) years to obtain a limited grant of letters of administration”.*

From the material now placed before the court, it appears that the legal representatives of the appellant were in fact issued with a full Grant of Letters of Administration in respect of the estate of the deceased on 22<sup>nd</sup> December 2010. The said Grant of Letters of Administration was rectified on 18<sup>th</sup> January 2012. No explanation has been given in the present application why the legal representatives of the deceased did not file an application to substitute the deceased appellant even after they had been issued with a Grant of Letters of Administration. The legal representatives of the appellant have not satisfied me that there is any error apparent on the face of the ruling delivered herein on 20<sup>th</sup> May 2016. The legal representatives of the appellant have also not placed before me any new evidence which was not available to them when the order of 20<sup>th</sup> May 2016 was made. I have considered whether there are any other sufficient reasons that would justify the review of the said order of 20<sup>th</sup> May 2016. I am not satisfied that there is any. Due to the foregoing, I am not satisfied that a case has been made out warranting the review sought by the legal representatives of the deceased appellant.

With regard to the respondent’s application, I also find no merit in the same. This appeal as I have stated above has abated. The court cannot therefore issue any substantive orders in the same. I wish to point out also that after the abatement of the appeal, the orders of stay of execution which were granted in this appeal on 25<sup>th</sup> February 2009 of the decision of Hon. L.K. Mutai which was made on 21<sup>st</sup> January 2008 also lapsed. Hon. L.K Mutai had ordered the deceased appellant to sign the relevant documents to facilitate the transfer/transmission of the respondent’s portion of the suit property to her and in the alternative the executive officer of the court was authorized to sign the said documents on behalf of the deceased appellant. Since the order was made in the lower court and there is now no order staying the execution of the same, the respondent should seek assistance of the executive officer of Githunguri Senior Resident Magistrate’s Court where the order was made to execute for her the relevant forms. Githunguri Senior Resident Magistrate’s Court file which was brought to this court for the purposes of this appeal can be sent back to Githunguri for that purpose. Neither the Deputy Registrar nor the executive officer of this court can get involved in the execution of the orders issued by the lower court.

For the foregoing reasons, I find no merit in the two applications before me. The amended Notice of Motion application dated 26<sup>th</sup> July 2016 by the legal representatives of the deceased appellant and the Notice of Motion application dated 4<sup>th</sup> November 2016 by the respondents are dismissed. Each party shall to bear its own costs.

**Dated and Delivered at Nairobi this 6<sup>th</sup> day of October 2017**

**S. OKONG’O**

**JUDGE**

**In the presence of**

**Mr. Ondieki                    for the Appellant**

**In person                    for the Respondent**

**Catherine**

**Court Assistant**