



**REPUBLIC OF KENYA**

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

**ELC APPEAL NO. 119 OF 2013**

GRACE NJERI MUNENE.....APPELLANT

VERSUS

WILFRED MURIUKI MURIITH.....RESPONDENT

***(BEING AN APPEAL FROM THE JUDGMENT DELIVERED ON 28<sup>TH</sup> FEBRUARY 2012 BY HON. E.M. NYAGA – S.R.M AT KERUGOYA SENIOR PRINCIPAL MAGISTRATE’S COURT CIVIL CASE NO. 327 OF 2007)***

**JUDGMENT**

GRACE NJERI MUNENE (the Appellant herein) filed **KERUGOYA SENIOR RESIDENT MAGISTRATE’S COURT CIVIL SUIT No. 327 of 2007** seeking against the Respondent herein **WILFRED MURIUKI MURIITHI** (who had initially been wrongly sued under the names **MURIUKI WARUNYORA**) seeking judgment in the following terms:

- (a) A declaration that the Appellant is the lawful owner of plot No. 39A Kagumo.***
- (b) A permanent injunction restraining the Respondent by himself, his agents, and or servants from trespassing and/or entering into or otherwise adversely interfering with the Appellant’s quiet possession and utilization of plot No. 39A Kagumo.***
- (c) Special damages of Ksh. 15,000 plus interest at commercial rates from 7<sup>th</sup> September 2007 till payment in full.***
- (d) Costs of the suit.***

The Appellant’s claim was predicated upon pleadings that whereas she was at all times relevant to the suit the legal owner of plot No. 39A Kagumo, (the suit plot), the Respondent had on 7<sup>th</sup> September 2007 invaded it and destroyed the perimeter fence.

The Respondent filed a defence and counter-claim in which he pleaded inter alia, that the suit plot is owned by both of them in equal shares and is not the Appellant’s sole property as alleged and she is not therefore entitled to the declaration sought. That the original owners of the suit plot were **JAZEL GITHINJI KABUGI, JONATHAN GICHERE KABUGI, NELSON KIRAGU KARUNJI** and **MURANI KARUNJU** (all deceased) and that it was **JAZEL GITHINJI KABUGI** who had sold his ¼ share of the suit plot to the Appellant’s late husband **PHINEAS MUNENE KABEU**. That the suit plot and plot No. 39B were resultant sub-divisions of plot No. 39 Kagumo. That whereas the suit plot was and remains registered in the name of the Appellant’s deceased husband who owns ½ share thereof, the other

½ share is registered in the names of the Respondent's late father **JONATHAN GICHERE** while plot No. 39B is registered in the names of the late **KIRAGU KARUNJI** and **MURANI KARUNJI**. That the Respondent was declared to be the rightful heir of his late father's share of the suit plot following **KERUGOYA SUCCESSION CAUSE No. 95 of 2001** and whereas the Appellant's husband's share of the suit plot is fully developed with commercial and residential rooms, the Respondent's portion is underdeveloped and that on 3<sup>rd</sup> September 2007, the Respondent fenced his portion of the suit plot using barbed wire and iron sheets at a cost of Ksh. 24,000 but the Appellant demolished it and the matter was reported to the Police. The Respondent pleaded further that the suit was actuated with malice and fraud including the forging of a purported certificate of Confirmation of Grant issued in **NAIROBI HIGH COURT SUCCESSION CAUSE No. 987 of 2000** purporting to have given the Respondent's late father's share in the suit plot to **ABIJAH KABIA MURIITHI** and conspiring with one **TABITHA WATHOKO KABUBO** to have the Respondent's late father's share of the suit plot transferred firstly to **ABIJAH KABIA MURIITHI** and then to **TABITHA WATHOKO KABUBO** and lastly to the Appellant. The Respondent therefore counter-claimed for the following:

*(a) Special damages of Ksh. 24,000.*

*(b) A declaration or finding to the effect that the Respondent is the lawful owner of ½ share of the suit plot and a permanent injunction restraining the Appellant by herself, her agents or servants from trespassing on, entering onto or otherwise interfering with the Respondent's quiet possession and enjoyment of his ½ share of the suit plot.*

*(c) Costs of the suit.*

*(d) Interest on (a) and (b) at Court rates calculated from 5<sup>th</sup> September 2007 till payment in full.*

The suit was heard by **HON. E.M. NYAGA – SENIOR RESIDENT MAGISTRATE** who delivered a judgment dated 28<sup>th</sup> February 2012 dismissing the Appellant's claim and allowing the Respondent's counter-claim. He also awarded the Respondent costs of the suit.

That judgment aggrieved the Appellant who filed this appeal in which she has raised the following three grounds in seeking to have it set aside and substituted with an order allowing her claim with costs:

*1. That the learned trial magistrate erred in law and in fact in making a judgment against the weight of evidence.*

*2. That the learned trial magistrate erred in law and in fact in failing to find that the Appellant had proved her case on a balance of probabilities.*

*3. That the learned trial magistrate erred in law and in fact in failing to find that the Respondent had not proved his counter-claim on a balance of probabilities.*

The appeal was canvassed by way of written submissions which were however only filed by counsel for the Appellant **MAGEE WA MAGEE** advocates.

This being a first appeal, my primary duty is to re-evaluate, re-assess and re-analyze the evidence and draw my own conclusions though always bearing in mind that I neither saw nor heard the witnesses and therefore I must give due regard to the findings of fact by the trial Court unless the same are founded on wrong principles – **SELLE & ANOTHER VS ASSOCIATED MOTOR BOAT CO. LTD & ANOTHER 1968 E.A 123** and also **MKUBE VS NYAMURO 1983 K.L.R 403**.

The three grounds of appeal can be condensed and determined together as they basically take issue with the trial magistrate for erring both in law and fact in failing to find that the Appellant had proved her case and in finding that the Respondent had proved his counter-claim.

From the proceedings and judgment of the trial Court, it is clear that the basis of the Appellant's claim to

the suit plot was that she bought it from **TABITHA WATHOKO KABUBO**. **TABITHA WATHOKO KABUBO** testified as the Appellant's witness and said she bought it from **ABIJAH KABIA MURIITHI** vide an agreement dated 21<sup>st</sup> March 2002 for Ksh. 150,000. That agreement which was drawn by **KIGURU KAHIGA ADVOCATE** was produced as part of the Appellant's documentary exhibits. For purposes of this appeal, I shall reproduce the relevant portion of the said agreement:

***1. WHEREAS plot No. 39A Kagumo Market is registered in the name of PHINEAS MUNENE KABEU and JONATHAN GICHERE who is the husband of the Vendor but now deceased***

***AND WHEREAS the Vendor is the Petitioner in NAIROBI H.C. SUCCESSION CAUSE No. 987 of 2000 whereby under the Certificate of Confirmation issued therein on 9<sup>th</sup> January 2001 she was awarded half (½) share in plot No. 39A Kagumo Market"***

It is clear therefore that **ABIJAH KABIA MURIITHI** who sold the suit plot to **TABITHA WATHOKO KABUBO** through the agreement dated 21<sup>st</sup> March 2002 derived the authority to do so purportedly following the confirmation of the grant in **NAIROBI HIGH COURT SUCCESSION CAUSE No. 987 of 2000** issued on 9<sup>th</sup> January 2001. That grant shows that the Estate of **JONATHAN GICHERE KABUGI** was distributed as follows:

- 1. WILFRED MURIUKI MURIITHI – MUTIRA/KAGUYU/309 - 3 acres solely**
- 2. ROSE WANJIKU MURIITHI – MUTIRA/KAGUYU/309 - 2 acres solely**
- 3. ABIJAH KABIA MURIITHI – Plot No. 39A Kagumo – ½ share.**

There is yet another copy of a confirmed grant also issued in **NAIROBI HIGH COURT SUCCESSION CAUSE No. 987 of 2000** but dated 16<sup>th</sup> January 2002 and which distributed the property of the same deceased as follows:

- 1. WILFRED MURIUKI MURIITHI – MUTIRA/KAGUYU/309 – 3 acres solely***
- 2. ROSE WANJIKU MURIITHI – MUTIRA/KAGUYU/309 – 2 acres solely.***

There is no reference to plot No. 39 "A" in this second grant nor does the name of **ABIJAH KABIA MURIITHI** appear as a beneficiary. It is not clear how two grants were confirmed in the same Succession Cause in respect of one deceased.

In his defence however, the Respondent told the trial Court that following the death of his father **JONATHAN GICHERE** in 1993, **KERUGOYA SUCCESSION CAUSE No. 95 of 2001** was filed and a confirmed grant was issued on 1<sup>st</sup> July 2002 and plot No. 39 was inherited by him and that he only became aware about the grant issued in the **NAIROBI HIGH COURT SUCCESSION CAUSE** when this case was filed. He added that the **NAIROBI HIGH COURT SUCCESSION CAUSE** was not genuine. He however confirmed that **ABIJAH KABIA MURIITHI** is his mother now deceased. It is clear therefore that when **ABIJAH KABIA MURIITHI** sold ½ share in the suit plot to **TABITHA WATHOKO KABUBO**, she was doing so as the administratrix of the Estate of the late **JONATHAN GICHERE** as per the Grant of Confirmation issued on 9<sup>th</sup> January 2001. **TABITHA WATHOKO KABUBO** then sold it to the Appellant's husband.

In dismissing the Appellant's claim, the trial magistrate made the following observations:

***"However, the Executive officer Family Division High Court of Kenya JOYCE CAROL IGUNYUA (DW3) produced the Succession Cause No. 987/00. She confirmed that the grant was confirmed on 16.1.02 and that there was no record of a grant issued on 9.1.01. She confirmed that there was no property described as plot No. 39A Kagumo".***

**JOYCE CAROL IGUNYA's** evidence must be believed. She was the custodian of the files from the Nairobi High Court Family Division and produced the file in respect to **NAIROBI HIGH COURT SUCCESSION CAUSE No. 987 of 2000**. She was never cross-examined at the trial. Due to the importance of her evidence, I find it prudent to re-produce it.

*'I am CAROL IGUNYA. I am Executive officer – Family Division High Court of Kenya. I have Succession Cause No. 987/00 Nairobi in respect of Estate of Jonathan Gichere Kabugu. Petitioner is Abija Kabugi Mureithi filed on 23.5.2000. Interim grant was issued on 9.1.01. Later, same was issued to the Petitioner. The grant was confirmed on 16.1.02. The properties were MUTIRA/KAGUYU/3093 – 3 acres to WILFRED MURIUKI MUREITHI, MUTIRA/KAGUYU/309 – 2 acres to ROSE WANJIKU MURIITHI. There are no description of plot No. 39 Kagumo. The Petitioner did not get anything. The Certificate of Confirmation of grant is dated 16.1.02. There is no record of grant issued on 9.1.01. I wish to produce the said file as Exhibit.*

*Cross-examination by Mutheki – Nil*

*Cross-examination by Mukuha – Nil”.*

The import of the above testimony was to confirm the Respondent's pleading that the grant issued on 9<sup>th</sup> January 2001 was a forgery and that the only confirmed grant as per the records of **NAIROBI HIGH COURT SUCCESSION CAUSE No. 987 of 2000** is the one dated 16.1.2002 and the witness was emphatic that the grant dated 9<sup>th</sup> January 2001 was not part of the record. Although **MR. KIGURU KAHIGA** who drew the agreement dated 21<sup>st</sup> March 2002 informed the Court that he relied on the confirmed grant dated 9<sup>th</sup> July 2001 (that must have been an error and he must have meant 9<sup>th</sup> January 2001), the Court

record produced by an officer of this Court, and which the trial Court accepted and this Court must also accept, was that infact the only confirmed grant in **NAIROBI HIGH COURT SUCCESSION CAUSE No. 987 of 2000** is the one dated 16<sup>th</sup> January 2002. That grant, as I have already shown above, did not include the suit plot as part of the Estate of **JONATHAN GICHERE**. Therefore, in so far as the agreement dated 21<sup>st</sup> March 2002 by which the suit plot was sold to **TABITHA WATHOKO KABUBO** referred to the confirmation of grant issued on 9<sup>th</sup> January 2001 in **NAIROBI HIGH COURT SUCCESSION CAUSE No. 987 of 2002**, which has now been confirmed not to have been issued by the Court as it is not part of the record, the same agreement was, as rightly found by the trial magistrate, null and void. There was therefore no interest in the suit plot that could be transferred to **TABITHA WATHOKO KABUBO** and subsequently to the Appellant's husband. When **MR. KIGURU KAHIGA** drew the agreement dated 21<sup>st</sup> March 2002, he obviously was only shown the grant issued on 9<sup>th</sup> January 2001 and not the one issued on 16<sup>th</sup> January 2002 and therefore he cannot be faulted for relying on what was placed before him.

In urging this Court to allow the appeal, counsel for the Appellant **MR. MAGEE** has submitted, citing **Section 93 (1) of the Law of Succession Act**, that the transfer of the suit plot to **TABITHA WATHOKO KABUBO** was proper and she is an innocent purchaser because **ABIJAH KABIA MURIITHI** had been issued with a confirmed grant in **NAIROBI HIGH COURT SUCCESSION CAUSE No. 987 of 2000**. The Appellant would have had a case if the grant issued on 9<sup>th</sup> January 2001 was confirmed to be part of the record in **NAIROBI HIGH COURT SUCCESSION CAUSE No. 987 of 2000** or if the grant issued on 16<sup>th</sup> January 2002 had been amended to include the suit plot. As it is, the only confirmed grant existing when **ABIJAH KABIA MURIITHI** sold the suit plot to **TABITHA WATHOKO KABUBO** was the one issued on 16<sup>th</sup> January 2002 and it did not permit **ABIJAH KABIA MURIITHI** as the vendor, to transfer the suit plot to **TABITHA WATHOKO KABUBO** or to any other purchaser for that matter. What **ABIJAH KABIA MURIITHI** did therefore was intermeddling with the property of a deceased person which is infact a criminal offence under **Section 45 of the Law of Succession Act** because she did not possess a valid grant allowing her to deal with the suit plot as at 9<sup>th</sup> January 2001

when she sold it to **TABITHA WATHOKO KABUBO**. Section 93 (1) of the Law of Succession Act which counsel for the Appellant relied on reads:

***“A transfer of an 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 commencement of this Act”.*** Emphasis added

That provision is clear that a transfer can only be valid if done by a person **“to whom representation has been granted”**. As is now clear, no representation had been granted by the High Court in Nairobi or any other Court to **ABIJAH KABIA MURIITHI** as at 9<sup>th</sup> January 2001. The Appellant’s counsel has also submitted that this Court should treat **TABITHA WATHOKO KABUBO** as an innocent purchaser. **When TABITHA WATHOKO KABUBO** testified in the trial Court, she confirmed that when she bought the suit plot from **ABIJAH KABIA MURIITHI** she did so pursuant to the Succession process. She said:

***“Plot No. 39A sold to me by ABIJAH KABIA MURIITHI who sold ½ share to me. It belonged to her husband. Yes she was the owner through succession of her late husband Jonathan Gichere. I sold the plot to Grace’s late husband Phineas Munene Kabuu”.***

The law is that every person is presumed to be attentive to what passes in the Courts of justice – MANJI VS INTERNATIONAL UNIVERSITY & ANOTHER (1976-80) 1 K.L.R 250. Therefore if **TABITHA WATHOKO KABUBO** had conducted due diligence, she would have confirmed from the record that there was infact no grant confirmed on 9<sup>th</sup> January 2001 in the Nairobi High Court Succession Cause No. 987 of 2000. The case of DIPLOCK VS WINTLE 1984 Ch 485 cited by counsel for the Appellant does not, in the circumstances, aid the Appellant because as I have already found above, **ABIJAH KABIA MURIITHI** who sold the suit plot to **TABITHA WATHOKO KABUBO** did not herself have any valid title to the property that she could transfer to another party. The Appellant’s case in the subordinate Court was clearly for dismissal and the trial magistrate cannot be faulted for the decision that he arrived at.

The only fault I detect in the trial magistrate’s judgment is that apart from declaring the Respondent the lawful owner of the suit plot and injuncting the Appellant, her agents or servants from trespassing thereon, he also awarded the Respondent special damages of Ksh. 24,000 being the value of the barbed wire and iron sheets used in fencing the suit plot. That was a special damage claim which the law requires to be specifically proved. I have looked at the Respondent’s testimony and apart from stating that the Appellant destroyed his fence worth Ksh. 24,000, he did not avail any documents as evidence to prove that claim. He was therefore not entitled to judgment for Ksh. 24,000 which the trial Court awarded him. This Court must therefore interfere with that award.

The up-shot of the above is that there is no merit in this appeal which I hereby dismiss save that the judgment in the trial Court is interfered with to the extent that the Respondent is not entitled to special damages of Ksh. 24,000. In the circumstances of this case, I also order that each party to meet their costs of this appeal and in the Court below.

**B.N. OLAO**

**JUDGE**

**8<sup>TH</sup> DECEMBER, 2017**

Judgment dated, delivered and signed in open Court this 8<sup>th</sup> day of December, 2017 at Kerugoya

Mr. Munenf for Mr. Magee for the Appellant present

Appellant present in person

Respondent absent

Mr. Gichia Court clerk present.

**B.N. OLAO**

**JUDGE**

**8<sup>TH</sup> DECEMBER, 2017**