



REPUBLIC OF KENYA



KENYA LAW
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**Njuki & another v Ngunjuri & 10 others (Civil Appeal
21 of 2018) [2023] KECA 1640 (KLR) (9 June 2023) (Judgment)**

Neutral citation: [2023] KECA 1640 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 21 OF 2018
W KARANJA, J MOHAMMED & AO MUCHELULE, JJA
JUNE 9, 2023**

BETWEEN

ANTONY NGARURI NJUKI 1ST APPELLANT

CHARLES KATHUTI MWOBE 2ND APPELLANT

AND

KENNETH NGUNJURI 1ST RESPONDENT

ANTONY BUNDI 2ND RESPONDENT

SAMUEL MURIITHO 3RD RESPONDENT

STEPHEN KIURA 4TH RESPONDENT

JAMES GACHING'A 5TH RESPONDENT

MARY NJERI NYAMU 6TH RESPONDENT

SOSPETER GACHOKI NJOGU 7TH RESPONDENT

WILSON NJAGI MUTHIRU 8TH RESPONDENT

JAMES GACHING'A GATUMU 9TH RESPONDENT

JAMES MAGURU WAGICHERU 10TH RESPONDENT

MARY WOTHAYA MURAGE 11TH RESPONDENT

(An appeal from the ruling and order of the High Court of Kenya at Embu (F. Muchemi, J.) dated 28th November 2016 in Embu Succession Cause No. 486 'A' of 2009)



JUDGMENT

1. The deceased, Josia Ndiga alias Josiah Dismus died intestate on 16th February 2005. He was the registered owner of Ngariama/Thirikwa/138. It measured 3.8 Hectares. In Kerugoya Principal Magistrate's Court Succession Cause No. 84 of 2007 the deceased's son, Antony Ngaruri Njuki (the 1st appellant) petitioned for the grant of letters of administration. The grant was issued to him on 15th August 2008, and confirmed on 2nd September 2008. He gave himself 7 ½ acres and gave to the deceased's uncle, Isaac Kathuti Mwobe two (2) acres.
2. Mwobe Kathuti complained before the High Court in Embu in Succession Cause No. 486A of 2009 that the 1st respondent had petitioned for the grant without reference to him and while knowing that the subordinate court lacked the pecuniary jurisdiction to entertain the cause, owing to the value of the deceased's land which was stated in the petition to be valued at Kshs.200,000. He sought the revocation of the grant as confirmed. In the ruling delivered on 19th January 2012 the learned Judge revoked the grant as confirmed on account of lack of jurisdiction.
3. It was clear that following the initial grant and confirmation, the grantee had sold portions of what he had received in the certificate of confirmation to third parties. Some of whom had further sold. The buyers had since obtained title deeds to their respective portions. The buyers had not participated in the application for revocation of the grant. These buyers are the respondents Kenneth Ngunjiri, Antony Bundi, Samuel Muriitho, Stephen Kiura, James Gaching'a, Mary Njeri Nyamu, Sospeter Gachoki Njogu, Wilson Njagi Muthiru, James Gaching'a Gatumu, James Maguru Wagicheru and Mary Wothaya Murage.
4. When the court revoked the grant issued to the 1st appellant, it issued a fresh grant jointly to him and to Mwobe Kathuti. Mwobe Kathuti filed summons for the confirmation for the grant in which he listed himself and the 1st appellant as the only beneficiaries of the deceased. He did not involve the other beneficiaries, including Isaac Kathuti Mbobe who had been named in the petition. He did not involve the purchasers of the portions of the land following the initial grant. Mwobe Kathuti obtained the entire parcel following the confirmation of the grant and issuance of the certificate. At that point, Mwobe Kathuti passed on. His son Charles Kathuti Mwobe (the 2nd appellant) unilaterally obtained orders of substitution.
5. The respondents filed applications for revocation and/or review before F. Muchemi, J. The grounds were that the respondents had not been involved in the events leading to the grant as confirmed to the 2nd appellant, and had in the process been disentitled and yet they were purchasers for value without notice. Secondly, the 2nd appellant had acted fraudulently by causing the manipulation of the Lands Office which had issued him title of Ngariama/Thirikwa/138 whose register had long been closed and new titles issued to them (the respondents) and other people. The 1st appellant did not oppose the applications in the High court.
6. F. Muchemi, J. allowed the respondents applications by reviewing the orders of H.I. Ongudi, J. The court found that when H.I. Ongudi, J, dealt with the application she was not made aware of the designs by the appellants who had not disclosed the fact that the suit parcel had long been subdivided and sold to the respondents who were in occupation, and new titles had been issued. The court then revoked the fresh grant issued to the appellants who had not served the respondents and had proceeded on the basis that the suit property was still in existence. The other reason for the revocation was the fraud that had been perpetrated at the Lands Office at the instance of the 2nd appellant over the register relating to the parcel.



7. This appeal relates to the ruling dated 28th November 2016 by F. Muchemi. J. The grounds were as follows:-

- “1) The learned judge failed herself by not differentiating /“1) The learned judge failed herself by not differentiating between Mwobe Kathuti and Isaac Kathuti Mbobe thus the whole ruling on 28th November 2016 has no meaning as Mwobe Kathuti is not in the grant in the subordinate court.
- 2) That the learned judge did not consider the defects of the proceedings to obtain the grant from the subordinate court. These names such as Gift Isaac Kathuti is changed from Isaac Kathuti Mbobe has per the grant and Dismus Njagi Ndiga is left out as in the chief’s letter dated 23rd March 2017.
- 3) The learned judge did not consider that the grant was secretly and fraudulently obtained in that there was no information given regarding others who were residing and have developed the said estate in the proceedings of the subordinate court.
 - i. Coffee was planted by Mwobe Kathuti, 7½ Acres. Affidavit of Mwobe Kathuti 4/9/2009;
 - ii. There was loan secured by the title of 60,000/- (search in the subordinate court);
 - iii. There was a provincial tribunal going on thus Ngaruri as running two matters in two different constitutional institutions which is very wrong, case no. 3 of 2009 dated 2nd February 2009.
- 4) The learned judge failed in that she did not consider that jurisdiction is power vested by the constitution and anything out of jurisdiction should not be considered or heard in a superior institution.
- 5) The learned judge did not consider that from the proceedings that the sizes the respondents are claiming were beyond and could not fit in what was awarded from the lower court since the grant was acquired through under estimated size of land and its value i.e ruling by the Hon. Justice Ong’undi.
- 6) The learned judge failed herself in that she did not take into consideration of the corrections made on 2/11/2016 and do thorough search on it before relying on it to conclude the whole matter.
- 7) The learned judge did not follow that service done to Ngaruri on 25/3/2011 he signed and the same affidavit was the one used in delivering the ruling on 19/1/2012 by Justice Hon. Ong’udi but concludes that Ngaruri wasn’t signing the documents.
- 8) The learned judge failed in that she would have considered that Ngaruri was undermining power of the court by not attending the courts proceedings while very aware on all dates as he was always served.
- 9) The learned judge did not identify that the (11) respondents had not done any search both formal and informal, since no evidence or order indicating that those who were residing here were formally evicted from the estate.”

8. It is notable that the 1st appellant did not oppose this appeal. In fact, it is interesting why he was dragged by the 2nd appellant in the appeal. He did not appeal the decision by the learned Judge.



9. We have considered the record, the grounds of appeal and the respective submissions by the 2nd appellant and Mr. Maina Kagio for the respondents. The respondents opposed the appeal by supporting the findings in the impugned ruling. Their substantial contention was that the 2nd appellant knew that they were purchasers who were in occupation and who were entitled to be involved in the proceedings to defend their claim to their respective portions, but that he had fraudulently left them out and interfered with the records at the Lands Office by cancelling their titles without a court order.
10. We are alive to the fact that we are the first appellate court. Our jurisdiction is to subject the whole case before the High Court to reconsideration on questions of fact and law, and to affirm or reverse the findings of the Court. This duty was stated in *Selle & Another -v- Associated Motor Boat Co. Ltd & Others* [1968]EA 123 in the following terms:-
- “..... this court must reconsider the evidence and evaluate it itself and draw own conclusions though it should always bear in mind that it had neither seen nor heard the witnesses and should make due allowance in this respect.”
11. The learned Judge was alive to the fact that the 2nd appellant was guilty of material non-disclosure and was also guilty of fraudulently dealing with the suit property which the deceased had left. The 2nd appellant and his late father Mwobe Kathuti knew that the respondents had purchased portions of the deceased’s land, had obtained respective titles and occupied the parcels. The respondents were entitled to know that succession proceedings were ongoing and that they would affect their titles. They were entitled to be invited to be heard before any orders were issued. The 2nd appellant was not good enough to bring the respondents on board. He ended up acquiring the entire parcel.
12. Secondly, following the initial certificate of confirmation, the register in respect of the suit property had been cancelled, and fresh titles issued. How the titles were cancelled and title to the suit property re-issued without a court order is what fraud is all about, and the 2nd appellant was responsible for all these.
13. Section 76 of the Law of succession Act (Cap. 160) provides as follows:-
- “A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion-
- (a) that the proceedings to obtain the grant were defective in substance;
 - (b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
 - (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
 - (d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either-
 - (i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or
 - (ii) to proceed diligently with the administration of the estate; or



- (iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and
- (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
- (e) that the grant has become useless and Inoperative through subsequent circumstances.”

14. The justice of this case demands that an opportunity be given to all persons claiming to be beneficiaries of the estate of the deceased Josia Ndiga alias Josiah Dismus, and all those persons (including the respondents) who claim to have bought portions of the deceased’s the suit property for value without notice, to each be given an opportunity to be heard before the estate is distributed. Now that the learned Judge revoked the grant that had been issued and confirmed, the first business will be to appoint persons who shall in the interim administer of the estate of the deceased.

15. In conclusion, therefore, we find no merit in the appeal by the 2nd appellant. The appeal is dismissed with costs.

DATED AND DELIVERED AT NYERI THIS 9TH DAY OF JUNE 2023.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

