



**Njeru & 7 others v Njeru (Civil Appeal 107 of 2017)
[2022] KECA 1285 (KLR) (18 November 2022) (Judgment)**

Neutral citation: [2022] KECA 1285 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL 107 OF 2017
W KARANJA, MSA MAKHANDIA & HA OMONDI, JJA
NOVEMBER 18, 2022**

BETWEEN

**JOHN MACHARIA NJERU 1ST APPELLANT
STELLAMARIS NDUNGE MASILA 2ND APPELLANT
CATHERINE NYAGUTHII GATUGI 3RD APPELLANT
FRANCIS KOIYA NDIRANGU 4TH APPELLANT
PETER KIGOTHO MWANIKI 5TH APPELLANT
MOSES MAINA MACHARIA 6TH APPELLANT
FESTUS GACHINGA MWANGI 7TH APPELLANT
SAMUEL WAWERU KARIUKI 8TH APPELLANT**

AND

MICHAEL MUCHOKI NJERU RESPONDENT

*(An appeal against the ruling of the High Court of Kenya at Nakuru
Ndungu (J.) dated 22nd February 2019 in Succession Cause no. 38 of 2007)*

JUDGMENT

1. The appellants herein prefer this appeal against the judgment and decree of the High Court at Nakuru (Ndungu J), which was to the effect that the applications dated February 5, 2013 and April 14, 2015 were allowed, a grant of letters of administration intestate issued to the respondent; and be confirmed in terms of paragraph 7 of the respondent's supporting affidavit; the registration of the interested parties as the proprietors of titles Nos Nyandarua/Oljoro orok/Salient/23945, 23950, 24601 to 24608, as well as all the sub-division of original title No Nyandarua/Oljoro orok/Salient/1328; and directed the land registrar to rectify the register of titles by deleting the names of the respective owners;



- and registering the names of the deceased so as to allow distribution of the estate. This court is urged to allow the appeal, set aside the impugned decision, dismiss the two applications and condemn the respondent to bear the costs.
2. The background to this appeal can be traced to the demise of Esther Wambui Njeru (deceased), who died intestate on August 15, 1975 in Nyahururu; survived by 6 children, and her estate was listed as comprising of the property known as Oljoro Orok Salient Scheme Nyandarua district.
 3. Subsequently, the 1st appellant John Macharia Njeru, the deceased's son filed a succession cause and was issued with letters of administration intestate, which were later confirmed on November 29, 2000. In that cause the 1st appellant had indicated that he and one, Daniel Mwatha Njeru were the only survivors of the deceased and the sole property was as result transmitted to the administrator absolutely, who caused it to be subdivided into various parcels which he then sold to 3rd parties now registered as owners.
 4. Michael Muchoki Njeru, the 5th born child of the deceased, respondent (who was the objector in the High Court) moved court by way of summons for revocation or annulment of grant on the grounds that the proceedings to obtain the grant were defective and the grant was obtained fraudulently, which application was allowed.
 5. The respondent thereafter filed two applications, a summons dated February 5, 2013 seeking to be appointed administrator and issued with letters of grant; the grant be confirmed; and the registration of the appellant as the proprietor of the suit property be cancelled, and the estate be distributed afresh to the beneficiaries.
 6. The 2nd application dated April 14, 2015 was a further summons seeking to cancel the registration of the interested parties, being 2nd - 8th appellants together with the subdivision of the original title. The 2nd - 8th appellants were registered proprietors of the sub-divisions of the original title, and which the 1st appellant had transferred to them.
 7. In the High Court the respondent denied that the suit property was purchased by his brother, insisting that it was the deceased's intention that the property be inherited by him solely. The respondent also argued that there was no proof that his brother took out a loan to purchase the suit property and maintains that the deceased died intestate. He thus sought cancellation of titles issued to the interested parties, describing their conduct as intermeddling with the estate, and describing the transfers as were fraudulent aimed at defeating succession cause.
 8. The 1st respondent also contended that the 2nd - 8th respondents were not innocent purchasers, because a caution had been registered on the suit property on April 16, 2011, yet the 2nd - 8th respondents were issued with title on December 18, 2014 and February 2, 2015, so they must have had notice of the caution.
 9. At the trial, the 1st appellant, argued that although registered in the name of the deceased, he was the true owner of the suit property, which he purchased from Ol'joro'orko Salient Settlement Scheme. That, the deceased, his mother, was a member of the settlement scheme, and he took advantage of this and acquired the property through her, and explained that the suit property was in her name because he had given her 500/- for registration.
 10. He told the trial court that:- their deceased mother introduced him to the committee; the property belonged to him; he continued to make loan payments for the same; and that no family member ever resided on the suit property; his elder brother and sister (both deceased) did not object to him being the sole beneficiary of the property as they understood how he acquired it; and the respondent's claim was



time barred by virtue of section 20(2) of the *Limitation of Actions Act* as the property had since been subdivided and sold to third parties, whose titles could only be set aside on account of fraud which had not been pleaded.

11. The interested parties' (being the 2nd – 8th appellants) case was that when they entered agreements for sale of the suit property they were not aware of any adverse interests, although they admitted that by the time they were issued with title deeds between December 2014 and March 24, 2014 there was already a caution lodged against the title on March 16, 2011, but they argued that the caution was not registered, as the mother title had already been closed. They also contended that the respondent had no locus to seek revocation of title as he was not part of the agreement for sale.

(1) The trial judge in determining the dispute identified 3 issues for determination:

- i. Whether the court had jurisdiction to issue orders sought;

An issue was raised both by the appellants who argued that the court did not have the power to cancel titles, as that fell within the jurisdiction of the Environment and Land Court (ELC); and that the respondent herein had no locus to seek orders against them as he was not party to the sale agreement between them and the respondent. In answer to this issue the trial court pointed out that although the ELC was a special court designated to hear disputes concerning the environment and land, the High Court retained jurisdiction in succession causes the transmission of the estate of the deceased to her rightful beneficiaries including land properties. The court further stated that any claims challenging the proprietary rights of the deceased over the property could only be determined by the ELC, so the appellant's claim that he was the owner of the property should have been made in the ELC, against the estate's administrators; and only after that court ascertaining the interest of the deceased, and whether the property constituted part of her estate, would the succession court oversee the transition of that interest to the beneficiaries. That in any event, the appellant implied that the suit property did belong to the deceased, as upon her death he instituted a succession cause seeking to be appointed administrator; listed the suit property as the sole property of the estate of the deceased, and he subsequently acquired title to the property by way of transmission in his capacity as beneficiary. The court found that this could reasonably be construed as an admission that the deceased was the rightful owner of the suit property, and that his only claim to it was as a beneficiary, and his assertion to the contrary contradicted the direct representation made to the court.

It was for all these reasons that the court found that: the suit property constituted the net estate of the deceased to be administered in accordance with the *Law of Succession Act*; the court had jurisdiction to oversee the same and cancel any titles taken in contravention of the *Law of Succession Act*; and that the legality of the titles of the 3rd parties was tied down to the legality of the appellant's title which the court had powers to inquire into.

- ii. Whether the claim is statute barred;

The appellants claimed that the suit was barred by virtue of section 20(2) of the *Limitation of Actions Act* as an action by a beneficiary may not be brought after 6 years from the time the cause of action accrued. The court pointed out that an application for revocation of grant may be brought at any time, and where fraud is alleged, or where a trustee converts the property to own use, that in this instance the appellant acted with



a clear intention to defeat the interest of the other beneficiaries, so the law of limitation did not apply, and the claim was therefore not time barred.

iii. Whether the interested parties are protected by the of the Law of Succession Act section 93(I) which provides:

1. All transfers of any 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 the commencement of this Act.

The 2nd - 8th appellants sought refuge under this provision, arguing that they were innocent purchasers for value, who had conducted due diligence and found that the respondent had a confirmed grant. The court noted that section 55 of the Act prohibits distribution of the capital assets of the deceased before grant is confirmed, however in exercise of powers confirmed under section 82 (b) the personal representative may sell some of the assets in order to settle the deceased's liabilities. The trial court agreed that whereas the said provision was intended to protect persons who acquire property in such circumstances, the personal representative must act in good faith for the interest of the estate and beneficiaries. The court noted that by the time of the sale, the estate had been wound up as grant had already been confirmed, therefore the protection under section 93 was not available to the appellants; that at the time the transfers were effected the grant issued to the respondent had already been revoked, therefore the 1st appellant did not have capacity to effect transfer nor did he have an interest he could transfer to the other appellants, and such disposal amounted to intermeddling.

12. The court held that the 1st appellant acted with the clear intention to defeat the interest of the rest of the beneficiaries when he transferred the suit property to himself fully aware that the other beneficiaries also laid claim to the estate as demonstrated by the correspondence between himself and Ministry of Lands, as well as proof of service of the application for revocation of grant; that allowing the sale to stand was tantamount to endorsing the fraudulent actions of the respondent. Consequently, the titles issued to the 2nd - 8th appellants were cancelled on grounds that the 1st appellant did not have capacity to effect transfer and/or interest; and the 2nd - 8th appellants could only claim that share which the appellant was entitled to.

13. Whether the appellant should be appointed as the administrator of the deceased's estate and proper mode of distribution.

All the parties, save for the 1st appellant did not object to the respondent being appointed the administrator; they also agreed to distribute the estate in the manner indicated in the consent to confirmation of grant dated September 9, 2015, which proposed to divide the properties equally between the children of the deceased including the appellant.

14. The trial court further noted that it was duty bound by article 159(2)(c) of the Constitution to promote alternative forms of dispute resolution, and when parties agree on mode of distribution the same ought to be adopted by the court. The court thus upheld the consent by the beneficiaries acknowledging that it was inclusive of all beneficiaries and it provided for an equitable mode of distribution. Thus both applications dated February 5, 2013 and April 14, 2015 were allowed.



15. The appellants were aggrieved with this outcome and filed this appeal challenging the ruling on 8 grounds, which we condense into the following issues; Whether the High Court had jurisdiction to cancel/ revoke the titles of the 2nd - 7th appellant; whether the 2nd - 8th appellant's were innocent purchasers for value; whether the court erred to the order distribution of the suit property as the estate had already been wound up as the property and whether the applications dated February 5, 2013 and April 10, 2015 were competent.
16. On the issue regarding jurisdiction, the appellant maintained that the High Court did not have jurisdiction as the ELC had the exclusive jurisdiction to deal with the use and occupation of, and title to land. Further, the appellant argued that section 101 of the Land Registration Act 2010 grants the ELC court the jurisdiction to entertain and determine disputes concerning use and ownership of land and as such the order for cancellation of title deeds was granted without jurisdiction. The appellant has relied on the case of Miwani Sugar Mills Ltd & Anor v Crossley Holdings Limited & 2 others [2020] eKLR, which in our considered view does not assist the appellant as the facts of both cases are not similar, the instant case being a succession matter and the cited one being a commercial one.
17. When the issue of jurisdiction is impugned, the court must make a determination as to whether it has the power to entertain the dispute. The Supreme Court in Samuel Kamau Macharia & another v KCB Ltd & 2 others [2012] eKLR expounds on this issue of jurisdiction stating that a court's jurisdiction flows from the Constitution, statute or both, thus a court of law can only exercise jurisdiction as conferred by the constitution or written law and cannot arrogate itself jurisdiction exceeding that which is conferred by law. See also the celebrated case of Owners of Motor Vessel 'Lilian S' v Caltex Oil (K. Ltd [1989] KLR 1.

A perusal of the judgment demonstrates the learned judge's reasoning as to why he had jurisdiction. At paragraph 33 of his ruling the learned Judge stated that although the ELC is a special court created under article 162(2) (b) of the Constitution, and section 4 (1) of the ELC Act to hear disputes concerning the environment, use and occupation of , and title to land, the High Court still retains jurisdiction over the succession of the estate of the deceased, and that the High Court's jurisdiction is limited to overseeing the transmission of the estate of the deceased to the rightful beneficiaries, hence revoking/cancellation of the titles to the 2nd to 8th appellants.
18. This court in the case of Floriz Piezzo & another v Giancarlo Falasconi (2014) eKLR, the court held that the Law of succession Act gives the court (High Court) wide jurisdiction in dealing with testamentary and administration issues of an estate. The court further stated that section 47 of the said Act gives the court jurisdiction to entertain any application and determine any dispute under the act and pronounce such decree and orders as may be expedient; that section 47 of the Act gives the court all-embracing powers to make necessary orders to safeguard the deceased's estate. The upshot is that the High Court, by dint of section 47 of the Act has the jurisdiction to oversee the net estate of the deceased in accordance with the Law of Succession Act and the High Court had the power to cancel any titles that may have been taken by third parties in contravention of the Act.
19. We find that the learned judge duly considered relevant factual issues and legal principles to arrive at a sound conclusion on the question of jurisdiction. We concur with the trial court that in this particular instance, succession of the estate must ensue first, then if there are any issues arising, and in particular to title, then the ELC becomes open for them to get redress.
20. As regards being innocent purchasers for value, the 2nd-8th appellants contend that although a court is empowered to cancel a title deed on basis of fraud, misrepresentation, or illegality, these must be specifically pleaded and strictly proved; that there was no evidence adduced and that the applications in the High Court were determined by written submissions by consent of the parties; that the respondent



- did not disclose the nature of fraud, so there was no reasonable cause of action to warrant the cancellation of the title deeds.
21. The 2nd- 8th appellants argue that they were innocent purchasers for value as they were shown the certificate of confirmation of grant; they carried out an official search before purchase; there was no existing caution and/or inhibition placed against the suit property; and they were shown the original title deed. Further, that no court order was served upon them to notify them that the certificate of confirmation of grant had been revoked.
 22. On this issue the learned judge underscored power of the court to revoke a grant at any time, and issue such orders as it deems necessary to meet ends of justice including cancelling of title and ordering the property reverts to the estate. The court noted that the action of the respondent registering the property which did not belong to him in his name, and thereafter selling it to the other appellants for his benefit, amounted to fraud.
 23. The 2nd - 8th appellants further argue that they are protected by section 93 of the Act which protects an innocent purchaser for value. We take cognizance that at paragraph 49 of his ruling the court acknowledged that section 55 of the *Law of Succession Act* prohibits distribution of capital assets of a deceased person before grant is confirmed. The court also noted that in exercise of powers conferred to the personal representative by section 82 (b) of the *Law of Succession Act*, he/she may sell assets of the deceased to settle liabilities of the deceased. The court was of the opinion that section 93 was to protect a third party who had purchased property in the circumstances envisioned by section 82 (b) of the Act.
 24. From the evidence on record, we concur with the learned judge that at the time of sale of the suit property, the estate had already been wound up, and as such the protection afforded by section 93 was not available to the 2nd - 8th appellants. In addition, between December 2014 and January 2015 when the transfers were effected, the grant issued had already been revoked, so the 1st appellant was a beneficiary without powers to deal with the assets of the deceased, and it follows that he did not have the capacity to effect transfer, nor did he have an interest he could transfer.
 25. The 2nd- 8th appellants' position was that when they entered agreements for sale of the suit property, they were not aware of any adverse interests, but admit that by the time they were issued with the title deeds between December 2014 and March 24, 2014, there was already a caution made against title on March 16, 2011, but that the caution was not registered as the mother title had already been closed.
 26. This court also concurs with the learned judge that the 1st appellant's conduct by transferring the suit property to himself while being aware that the beneficiaries also laid claim to the estate was fraudulent and that allowing the sale to stand would be endorsing this fraudulent action.
 27. The upshot of this is that the 2nd – 8th appellants can only claim the share which the 1st appellant is entitled to after distribution.
 28. The appellants contend that the two applications were incompetent in terms of the orders sought for i.e cancellation/revocation of title. We hold the view that the issue was settled once the court determined that it had jurisdiction to hear and determine the matters in question fully and competently.
 29. The appellants argue that the court erred on the order in respect of distribution of the suit property, as the estate had already been wound up, the property subdivided by the 1st appellant; and sold to the 2nd – 8th appellants. We think this is already water under the bridge, as we are in agreement with the learned judge's findings that the 1st appellant was a beneficiary without powers to deal with the assets of the deceased, and it follows that he did not have the capacity to effect transfer, nor did he have an



interest he could transfer. To that end this court finds that the two applications alluded to were not incompetent and it so holds.

30. On the issue of mode of distribution, this court is in agreement with the learned judge that the consent included all beneficiaries, and that the property was equally distributed among them, and as such, in the spirit of speedy determination and in terms of article 159 of the Constitution it was proper to allow the same.
31. From the foregoing we find the High Court's ruling sound and see no reason to disturb the same and we uphold it. We find that the appeal lacks merit and dismiss the same with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF NOVEMBER, 2022.

W. KARANJA

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JUDGE OF APPEAL

ASIKE - MAKHANDIA

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

