Nyanchongi & 4 others v Nyanchongi & 2 others (Environment and Land Appeal E029 of 2022) [2024] KEELC 3983 (KLR) (25 April 2024) (Judgment)

Neutral citation: [2024] KEELC 3983 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ENVIRONMENT AND LAND APPEAL E029 OF 2022

M SILA, J

APRIL 25, 2024

BETWEEN

JOSPHAT NYABUTO NYANCHONGI ..... 1ST APPELLANT

RONALD AYUNGA NYANCHONGI ..... 2ND APPELLANT

PETER OMWERI NYANCHONGI ..... 3RD APPELLANT

ALFRED MAINA NYANCHONGI ..... 4TH APPELLANT

ERNEST NYANCHONGI ..... 5TH APPELLANT

AND

JOSEPH AYUNGA NYANCHONGI ..... 1ST RESPONDENT

GEORGE PETER OMWERI ..... 2ND RESPONDENT

NATHAN ONDUSO ONDUMA ..... 3RD RESPONDENT

(Being an appeal against the judgment of Hon. Paul Biwott, Senior Principal Magistrate, delivered on 16 November 2022 in Ogembo PMCCELC No. 24 of 2019)

JUDGMENT

(Respondents being sons of the 5th appellant from the first house and half brothers of the 1st – 4th appellants who are from the second house; 5th appellant owning certain land which he subdivided and issued titles to the 1st – 4th appellants and retained one portion in his name; respondents filing suit against the appellants because their father did not consider them in the subdivision and only gave land to sons of the first house; respondents arguing that the 5th appellant ought to have given them the land because their mother is buried there; evidence showing that the land was not ancestral land but land purchased by the 5th appellant; respondents residing in the ancestral land; trial court holding that the subdivision was unfair, inter alia because the sons of the first house were not

considered, and proceeding to order a fresh subdivision with the respondents taking more than half the land; on appeal; court holding that the 5th appellant as owner of the land had full discretion to subdivide the land and give it out to whomever he pleased; mere burial of the respondent's mother not sufficient to make a case that the respondents must be given the land; trial court erred in taking away the power of the 5th appellant to deal with his land as he wished; children of proprietor not having any right to oppose how their parents deal with their free property during their lifetime; judgment set aside and respondent's case dismissed with costs)

1. Ernest Nyanchongi Makori, the 5th appellant, had two wives who are now both deceased. The first wife was Sabina whereas the second wife was Keremensia. Sabina had three sons, Joseph Ayunga Nyanchongi (1st respondent), George Peter Omweri (2nd respondent), and one Michael (now deceased) whose son is Nathan Onduso Onduma (the 3rd respondent). The respondents thus consider themselves to be from the first house of the 5th appellant. Keremensia, the 5th respondent's second wife had four sons, that is Joseph Nyabuto Nyanchongi, Ronald Oyunga Nyanchongi, Peter Omweri Nyanchongi, and Alfred Maina Nyanchongi, respectively the 1st – 4th appellants. They are therefore from the second house.

2. The 5th appellant owned the land parcel South Mugirango/Boikanga/1622 (herein sometimes simply referred to as parcel No.1622) which was wholly registered in his sole name. In the year 2018 or thereabouts, he subdivided this parcel of land into the land parcels South Mugirango/Boikanga/3453, 3454, 3455, 3456 and 3457 (herein sometimes also referred to simply as parcels No. 3453 – 3457). He retained for himself the land parcel No. 3453 and transferred the parcels No. 3454, 3455, 3456 and 3457 to the 1st – 4th appellant who it will be noted are all sons of the second house. He did not specifically make any apportionment to the children of the first house who comprise the respondents herein. Miffed by this action, the respondents commenced suit through a plaint filed on 12 July 2019 before the Environment and Land Court at Kisii, and the case was registered as Kisii ELC No. 24 of 2019. On 31 July 2019, Mutungi J, transferred the suit to the Ogembo Magistrate's Court as it was said that the value of the subject matter fell within the pecuniary jurisdiction of the Magistrates' Court. Upon transfer, the file was registered as Ogembo SPMCC/ELC Case No. 29 of 2019. When they filed suit, the respondents (as plaintiffs) were acting in person and I am being polite in saying that the plaint was not elegantly drafted. Nevertheless, it is discernible that they were complaining about the manner in which the land parcel South Mugirango/Boikanga/1622 was subdivided to bring forth the parcels South Mugirango/Boikanga/3453, 3454, 3455, 3456, and 3457. The contention of the respondents was that the 1st – 4th appellants, who are from the second house, capitalized on the age of the 5th appellant and compromised him in order to have him subdivide the land parcel No. 1622, so that they can acquire the subdivided titles thereto. They claimed that as a result they have been unfairly deprived of their inheritance. They averred that their late mother was buried in this parcel No. 1622 as her portion of land. In the plaint, they asked for the following orders which I copy verbatim :

    a. An order of injunction restraining the defendants from preventing the defendants and their children, servants, agents from entering, interfering with LR South Mugirango/Boikanga/1622.

b. Issuance of court summons to OCS, Kisii Central Police Station so to charge defendants on forcibly entry, forcible detainers, false assumption to authority as he provision of law requires (sic).

c. Costs and interest of this suit (sic).

d. Any other relief this Honourable Court shall deem fit to and expedient (sic).

3. The appellants (as defendants) appointed counsel and filed a joint statement of defence. It was pleaded that the land parcel No. 1622 was under the proprietorship of the 5th defendant, and that he did not require the consent of anyone to subdivide his land as he was the sole registered proprietor, with absolute right to use and abuse the said land, and gift it to anybody as he did to the 1st – 4th appellants. The 5th appellant pleaded that he was an adult of sound mind and disposition and he was not at any time manipulated to subdivide the land and he breached no law by undertaking the subdivision. It was pleaded that at no time was the constitutional rights or any rights of the respondents violated. They averred that there was no cause of action demonstrated and asked that the suit of the respondents be dismissed.

4. It is on the basis of the above pleadings that the matter proceeded for hearing, first before Hon. Mikoyan, who took in the evidence of PW-1 and the evidence in chief of PW-2,and later before Hon. Biwott, who completed the evidence of PW-2 , PW-3 and the defence evidence, and eventually wrote the impugned judgment.

5. PW-1 was Joseph Ayunga Nyanchongi, the 1st respondent, who mentioned that he is the second born of the first house. He testified that the land parcel No. 1622 was purchased before he was born and that his mother was buried in it when he was still young. They were thereafter taken care of by his father's second wife. He complained that their father, the 5th appellant (sued as the 5th defendant in the plaint), subdivided and transferred the land to his step brothers (of the second house) without involving them (i.e the first house). He stated that he wants this land returned since their father had given it to their mother (i.e Sabina, the first wife). Cross-examined, it emerged that he was 51 years old at the time he testified and is married with children. He was not depending on his father to feed his family. He admitted that the land parcel No. 1622 was registered in the name of his father and not not his mother. He acknowledged that their father had ancestral land (not the land in dispute) and that he had given a piece of it to their mother and that it is on this ancestral land where he lives.

6. PW-2 was Peter George Omweri, the 2nd respondent, who also said that he is the second born (there must have been a confusion on the order of birth) of the first house. His evidence was that the land parcel No. 1622 was purchased in 1968 and that he was born and raised on this land. His mother, Sabina, died in 1982, and was buried on this land. Their father then took them to the ancestral home where the 2nd wife stayed. He stated that their father was a caretaker of the land as they were minors. Their step-mother died and was buried in the ancestral land but not in the disputed land parcel No. 1622. They returned to the ancestral land and awaited their father to subdivide to them the disputed land. They discovered that he had subdivided and sold the land in the year 2018 (to children of the 2nd house) and they therefore filed suit. He was of opinion that their father discriminated against them and could not understand why they did not

benefit. He stated that he subdivided the land without their involvement and that his mother's portion was not accounted for. Cross-examined, he acknowledged that the land parcel No. 1622 was bought by their father. It is not his ancestral land. He stated that the ancestral land has also been divided. He affirmed that the land parcel No. 1622 is no more as it has already been subdivided.

7. PW-3 was Nathan Onduma Osumo. He confirmed that he is son of Michael Nyanchongi (deceased) who was also a son of the first house. He is therefore a grandson of the 5th appellant. He was 32 years old when he testified. His evidence was that his grandfather and grandmother purchased the land parcel No.1622 without participation of the second wife. He testified that his grand step-mother and his grandfather used the land after the death of his grandmother. He stated that they have come to court because they want the land subdivided between their grandmother and grandfather as the 2nd wife was not there when it was bought. Cross-examined, he confirmed that he was not present when the land was bought. He did not have a grant of letters of administration in respect of his late father.

8. With the above evidence, the respondents closed their case.

9. DW-1 was the 5th appellant. He testified that he worked in Kericho for 7 years and that he bought some cows which he sold so as to buy the disputed land. He confirmed that he has divided the land and distributed it to the sons of the second house. He testified that the respondents have land in the ancestral home which is 4 acres. He stated that his second wife was with him in Kericho and that is why he gave the land to her sons. Cross-examined by the 1st respondent, he confirmed that his first wife is buried on the disputed land. He claimed that she had been chased out of the ancestral land for insulting his relatives. Cross-examined by the 2nd respondent, he stated that the title deed for the ancestral land is in his grandfather's name and that he would divide it to him. He confirmed that the 2nd respondent was in occupation of the ancestral land. The ancestral land is divided into his two houses. He explained that he bought the land in dispute jointly with his second wife. The land was solely registered in his name.

10. DW-2 was Josphat Nyabuto Nyanchongi, the 1st appellant. He testified that his father divided the land parcel No.1622 and gifted it to them (of the second house). They now have titles in their name. He denied that they got titles by way of fraud. Cross-examined, he stated that their father knows why he did not gift any land to the first house and what he did was not to be challenged. His mother (second wife) is buried in the ancestral land and the mother of the respondents is buried in the disputed land. He stated that all wives lived in the parcel No. 1622 and that is why the mother of the respondents was buried here. He elaborated that the first house had 3 sons and 2 daughters whereas the second house had 5 sons and 2 daughters. He denied influencing their father to gift out the land.

11. DW-3 was Ronald Ayunga Nyabwengo. His evidence was more or less in line with that of DW-2. Cross-examined he stated that he has not received part of the ancestral land and was gifted the purchased land.

12. DW-4 was Peter Omweri Nyanchongi. His evidence was also similar to that of DW-2 and DW-3 though under cross-examination he stated that they also have a share in the ancestral land.

13. After DW-4 had testified, the defence closed their case and the court gave directions on filing of written submissions. At this juncture, an application dated 23 June 2022 to amend the plaint was filed. At this point in time the respondents had appointed counsel and I think it was apparent to him that the plaint as initially drafted was poor. There was more elaboration in the draft amended plaint of the cause of action and a proposal to change the prayers to the following :

    a. An order for cancellation of the titles South Mugirango/ Boikanga/3453-3457 and reinstate the title South Mugirango/ Boikanga/1622 in the name of the 5th defendant.

    b. A declaration be issued that the plaintiffs are entitled to a half share of the land parcel South Mugirango/Boikanga/1622 initially occupied by their deceased mother Sabina Kemunto Nyanchongi and currently occupied by the plaintiffs by virtue of them being first wife and sons to the 5th defendant respectively.

    c. An order be issued directing the 5th defendant to transfer a half of the land parcel South Mugirango/Boikanga/1622 to the plaintiffs and/or be held in trust by the 5th defendant for the plaintiffs.

    d. Costs and interest.

    e. Any other relief that the court shall deem fit and expedient to grant.

14. This application to amend the plaint was rejected in a ruling delivered on 16 September 2022. The court reasoned that the hearing of the matter was already closed and the matter was only pending judgment. The court was of opinion that allowing the amendment will alter the nature of the case that went for trial. The Court reasoned that "... still justice can be served to the parties as per the evidence produced before the court without no much consideration to technicalities."

15. The court delivered the impugned judgment on 16 November 2022. In his judgment, the trial Magistrate reasoned as follows :

> "From the evidence forwarded and not disputed the 5th defendant was a polygamist of 2 wives. He distributed his land parcel No.South Mugirango/ Boikanga/1622 unfairly. Having buried the 1st and 2nd plaintiffs' mother on this land, 5th defendant appreciated her and her children. He shoud not have left them out of the subdivision. For the sake justice and equity (sic) I declare the subdivision of the suit land unfair. The unfair distribution is hereby nullified. The Land Registrar, Kisii County ordered to recall the 5 titles issued to beneficiaries.
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> Equity should prevail here. The 5th defendant feels that the 2nd wife participated in the purchase of sut land when (the) plaintiffs' mum did not. That being the position, it is only fair that the original land be divided into 2 portions. One portion will go to the 2nd wife – Keremensia Moraa Nyanchongi and the other to the 5th defendant . The share to 5th defendant (not clear in the handwritten judgment, my reading being 'shall be shared between the 2 houses in equal sizes' though the typed judgment reads 'shall

not be shared between the 2 houses in equal sizes'). One half shall go to 1st wife Sabina Kerubo Nyanchongi (mother/grandfather) to the plaintiffs. This way justice will be served and the plaintiffs shall get portion where their mother is buried.

Having arrived at the above equitable remedy owing to explanation given by the 5th defendant, I find that prayers by the plaintiffs can't stand. None of the parties is stranger on that land. The sharing shall accommodate all of them.

Further to the above position, a thought should be given to 1st wife stay at home as 5th defendant went for work in Kericho with 2nd wife. The 1st wife was not idling. She was taking care of 5th defendant's children (the plaintiffs) and 5th defendant's property (home) in the village. The 2nd wife did not do that. She accepted 1st wife's rule and lived on the purchased land together. On this point the 2nd house should only get a ¼ of the share due to 5th defendant after their mother's share is separated.

Therefore the upshot of my decision is that the 5th defendant's distribution of his land is unfair. The same is hereby nullified and the original land be divided equitably between the 2 houses in the ratio of 1 ¼ to ¾ (sic). Thereafter each house shall retreat to share their portion. This way justice shall be served to the parties.

This order be served on the Land Registrar Kisii County for action. The parties shall share costs equally incurred in the subdivision they are related in matter. I urge each side to take or bear own cost.

None shall be condemned to pay costs to the other. Ordered accordingly."

16. Aggrieved by the judgment, the appellants have presented this appeal on the following grounds :-

1. The learned trial Magistrate erred in law in failing to appreciate the evidence submitted before him by the appellant and therefore failed to take relevant facts into consideration and thereby arrived at a demonstratively wrong finding of facts.

2. The learned trial Magistrate erred in law and fact in failing to consider and to hold that the respondent had not proven any beneficiary or otherwise right to the suit property land parcel South Mugirango/Boikanga/1622.

3. The learned trial Magistrate erred in law and fact in holding that the respondents could be given land which does not exist after subdivision.

4. The learned trial Magistrate erred in law and fact in failing to hold and find that on totality of evidence presented to him, the respondents had not proved existence of land parcel No. South Mugirango/ Boikanga/1622.

5. The learned trial Magistrate erred in law and fact by failing to consider the fact that the 5th appellant was the original registered owner/proprietor of land parcel No. South Mugirango/1622 before subdivision.

6. The learned trial Magistrate erred in law and fact by ordering the Land Registrar to cancel land titles No. South Mugirango/ Boikanga/3453-3457 which were not subject matter of the suit herein hence introducing a new suit.

7. The learned trial Magistrate erred in law and fact by ordering the distribution of the 5th appellant's land parcel South Mugirango/ Boikanga/1622 while he is still alive without any justifiable cause and being the sole proprietor.

17. The appellants wish to have the judgement set aside and the respondent's suit to be dismissed with costs. They also want the costs of the appeal.

18. The appeal was argued by way of written submissions and I have taken note of the submissions of Mr. Okemwa, learned counsel for the appellants, and Mr. Osoro, learned counsel for the respondents.

19. This is a first appeal and it is the duty of this court to analyze and re-assess the evidence on record and reach its independent conclusion as elaborated in the case of Selle & Another v Associated Motor Boat Company and Others, [1968] E A 123, where the court stated as follows at page 126:

> " An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E. A. C. A. 270)".

20. Though the above dicta was made on the basis of an appeal from the High Court to the Court of Appeal, the principles hold for any first appellate court with mandate to hear an appeal on both law and fact. I will therefore proceed to make my own assessment of the case that was before the trial court.

21. The first attack against the judgment is that the trial court proceeded to hear a case on land that did not exist since the land parcel No. South Mugirango/Boikanga/1622 had already been subdivided. In his submissions, Mr. Okemwa, submitted that the trial Magistrate decided to construct his own pleadings and inter alia issued orders to cancel the titles No. 3453-3457.

22. There can be no question that the plaint was very badly drafted. Indeed, the prayers sought in the plaint did not include cancellation of the titles No. 3453-3457. What the plaintiffs asked in the first of their prayers was for an order of injunction to restrain the appellants from entering or interfering with the land parcel South Mugirango/ Boikanga/1622. Of course, at the time of filing the pleadings and throughout the trial,

the land parcel No. 1622 did not exist and had already been subdivided into the parcels No. 3453 – 3457. An order of injunction could not be given in respect of the parcel No. 1622 which had ceased to exist. They did not, in their pleadings, ask for cancellation of the land parcels No. 3453 – 3457 or even demand for the reinstatement of the land parcel No. 1622 so that it can be subdivided afresh, or what manner of redistribution of the land that they wanted. It is clear that it dawned on the respondents that they had poorly drafted pleadings after evidence had been taken and that is why they moved to amend their plaint. The application to amend was rejected but it would appear that it is on the basis of the amended plaint that the court proceeded to write its judgment and not on the basis of the original plaint that was retained. That in my opinion was an error by the trial court. Having disallowed the amendment the court ought not to have proceeded on the basis of it. The court ought to have found that the pleadings as maintained were hopeless and dismiss the case of the respondents outrightly. There was no substance in the case of the respondents as pleaded and their case was for dismissal.

23. But even assuming that it can be argued that the dispute between the parties was clear and that it could be discerned that what the respondents wanted was a share of the land, I am not persuaded that even on that substance, the trial court was correct in making an order for the land parcel No. 1622 to be reinstated and to be subdivided afresh so that a portion of it is given to the respondents.

24. The position of the respondents was hinged on the contention that the land parcel No. 1622 was unfairly shared by their father, in that he only subdivided it amongst his sons from the 2nd house and he gave no share to the sons of the first house. They asserted that they are entitled to be apportioned the land because this is where their mother was buried. They seemed to contend that their mother had a share in the land which is what they wanted. The trial court agreed with them and was of opinion that their father unfairly subdivided the land. What the trial court then proceeded to do was to order a subdivision of the original parcel No. 1622 into portions which he thought would be fair to everyone. In my opinion the trial court was completely wrong in doing so.

25. First, if the case of the respondents was hinged on the contention that their mother was buried on the land and therefore the land must be shared to them, this was a non-starter. The burial of a parent on certain land, by itself, does not automatically confer on the children of that person the right to own the land where their parent is buried. There must be demonstration of something more, say, a customary right, or a trust. If this was not the position, then a person would cease to own land merely because he had allowed the burial of a relative or friend on his land and this cannot be the intention of the law. There can be many reasons why a person is buried in a particular parcel of land and it cannot be assumed that in all cases the person is buried there because it is recognized that she/he owns that land. It can even happen that sometimes a person offers to have a body interred on his/her land out of philanthropy. It cannot therefore be argued that the respondents had a right to own the land parcel No. 1622 merely because their mother was buried there. In fact that argument could very well be used against them by the 1st – 4th appellants saying that since their (1st – 4th appellant's) mother was buried in the ancestral land then the respondents must vacate it and cannot own any portion of it. I need not go further because it is clear that it is a flawed argument that because the mother of the respondents is buried on the disputed land then they must own it as of right.

26. Secondly, if the respondents were coming to court to claim what they thought was a share of their mother, then they needed to have letters of administration in respect of her estate which they clearly did not have. They were not therefore in court to claim any share that allegedly belonged to their mother and could only be taken to have approached the court claiming what they thought was their rightful share in the former land parcel No. 1622.

27. The main issue to be addressed is whether the respondents had any right to stop their father from dealing with the land parcel No. 1622 in the manner that he did, and whether it was a must for the respondents to be consulted, and/or mandatory for them to get a portion of the land parcel No. 1622.

28. At the outset, we need to appreciate that the land in dispute was never ancestral land. This is land that was purchased by the 5th appellant. The 5th appellant's explanation was that he sold some cows that he had accumulated when he was working in Kericho with his second wife and he bought the land with the proceeds thereof. He became the absolute registered proprietor and there is no indication that any of his two wives felt that his proprietorship was held in trust for them. Certainly no suit was filed by any of the two wives while they were alive to claim that this land ought to be subdivided, so that a separate portion of it can be wholly registered in their independent names. Since this is land that was purchased, and not part of the ancestral land, the respondents cannot allege that there existed any ancestral customary trust in their favour. This was simply land that was freely purchased by the 5th respondent and absolutely owned by him.

29. If a person purchases land with his own sweat, and he is the absolute proprietor thereof, he does not hold such land in trust for his children, and therefore there is no duty imposed upon him by law to consult his children when he wishes to dispose of his free land, and neither is there an obligation imposed upon him to share that land or the proceeds of that land to his children. There is certainly no legal burden, that if he opts to gift such land inter vivos, then he must gift all his children such land, or that he must gift the children in equal shares. A gift inter vivos is within the discretion of the property holder so long as such land is not held in trust. He can decide to gift no children, gift some children, or gift all children, in whatever manner and in whatever proportions he deems fit.

30. And neither is there a right bestowed upon children to force their parents to subdivide land to them when their parents are still alive. In fact, this is more or less now a beaten path. The Court of Appeal emphasized this point by putting it in the first paragraph of its judgment in the case of Nahashon Karenge & another v Lawrence Karenge, Court of Appeal at Nyeri, Civil Appeal No. 222 of 2010, [2014] eKLR, where it stated as follows :-

> "There is no vested right to inheritance during the lifetime of parents. Let it be known that during the lifetime of their parents, and subject to beneficial and occupation rights, a child cannot force parents to sub-divide and distribute their land or assets unless the said land or assets were acquired and held in trust prior to the parents acquisition of title to the same."

31. The facts of the case were that the respondent was son of the 1st appellant (who died while the appeal was pending). The 1st appellant owned a parcel of land registered as Kagaari/Kanja/1368. During his lifetime he subdivided it into six plots. He gave out four to his sons and retained two plots. These two plots were registered as parcels Kagaari/Kanja/6391 and 6392. He sold the parcel No. 6391 to the 2nd appellant and retained the parcel No. 6392. His son, the 1st respondent sued him, seeking a declaration that the 1st appellant held the parcel Kagaari/Kanja/1368, in trust for the 1st appellant's immediate family. The respondent further sought a declaration that he is entitled to the area of 1 ¼ acre where his homestead is, or alternatively, that he is entitled to 1 ¼ acre of land in any part of Land Reference Kagaari/Kanja/1368, plus damages to his properties presently standing on his homestead, and the value of tea harvested and sold. The respondent also sought orders to compel his father, the 1st appellant, to sub-divide and register in his name the portion of land to which the respondent alleged to be entitled. The respondent sought an order rectifying the land register by cancelling the 2nd appellant's title to the Plot No. Kagaari/Kanja/6391, and replacing it with the respondent's name. The High Court judge held that the parcel No. 1368 was no longer in existence and could not make orders on it. She however declared that the 1st appellant held the parcel No. 6391 in trust for the respondent and any other of his family members who had not been given a share of the land. Aggrieved, both the father of the respondent and the purchaser preferred an appeal to the Court of Appeal. Inter alia it was urged that the sale of the land to the 2nd respondent was above board and his title could not be impeached. In allowing the appeal, the Court of Appeal pronounced itself as follows :-

> 1. The dispute in this case pitted the respondent and the 1st appellant who are son and father respectively. The respondent claims land from his father. When the suit was filed at the High Court and when this appeal was lodged, the 1st appellant was alive. In the case of Marigi –v- Muriuki & 2 Others, Civil appeal No. 189 of 1996 [2008] 1 KLR 1073, it was stated that the law recognizes the rights of children over their father's estate. These rights are inchoate and accrue upon the death of the father.
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> > 1. The inchoate rights of the respondent to the land owned by the 1st appellant had not accrued at the time of filing suit before the High Court and at the time when this appeal was lodged. If the respondent has any claim of land against his father, his inchoate rights accrued when his father (the 1st appellant) died. It is our considered view that the learned Judge erred in making a declaration in favour of the respondent against his father (the 1st appellant) and enforcing rights that were inchoate that had not accrued. We find that the learned Judge erred in law in failing to note that the respondent's right to claim any land from the 1st appellant were inchoate rights and she did not address this issue. Further, the learned Judge ignored the fact that the 1st appellant was the registered proprietor of the suit property and it was an error of law to restrain the 1st appellant from trespassing and dealing with his own land.

1. In the instant case, the learned Judge made a finding that the respondent's claim as against the 1st appellant must be looked at as a customary law trust claim. The Judge correctly noted that the respondent's interest in the suit property is not noted in the register. The Judge correctly observed that the 1st appellant was alive and he could not be compelled to transfer 1 ¼ of his land to the respondent who was his son. In the case of Muriuki Marigi –v – Richard Marigi Muriuki & 3 Others, (Civil Appeal No. 189 of 1996) this Court stated as follows:

"The appellant as the registered owner of the suit property is still alive. His property is not yet available for sub-division and distribution among his wives and children except if he personally on his own free will decides to sub-divide and distribute among them. He may not be urged, directed or ordered to do it against his will".

1. The dicta and law as stated in the above case of Muriuki Marigi –v – Richard Marigi Muriuki & 3 Others, (Civil Appeal No. 189 of 1996) still stands and is good law. Applying the dicta to the facts of the instant case, it is our considered view that the learned Judge erred in granting prayer (d) (i) of the re-amended plaint. In so granting prayer (d) (i) the learned Judge erred in law by restricting the free will of the 1st appellant as the registered proprietor of the suit property to do as he wishes with his property. The learned Judge further erred in law by issuing an order restraining a registered proprietor from entering and dealing with his own property and enforcing an inchoate right which had not accrued. Whereas a child cannot compel a parent to distribute his estate during his lifetime, we hasten to add that child who is in occupation of his/her parents' property that is held in trust has occupational rights that should be protected.

32. From the above, it will be observed that the Court of Appeal was emphatic that a child cannot compel his parent to subdivide and distribute land held freely by the parent to him/her during the lifetime of the parent. What a child has is an inchoate right to inherit which will only take effect upon the death of the parent and subject to any orders made in a succession cause. This will only be for any free property that is left by the parent and not for property disposed of by the parent.

33. In the above case of Karenge vs Karenge, reference was made to a previous Court of Appeal decision, that of Marigi vs Muriuki & 2 Others, Court of Appeal at Nyeri, Civil Appeal No. 189 of 1996 (1997)eKLR. In that case, the appellant had five wives and several children including the 1st and 2nd respondents who were his son and daughter, and the third respondent was his grandson. The appellant was the registered proprietor of the land parcel Magutu/Gatei/153.The respondents filed suit where they claimed that the appellant intended to subdivide and distribute his property in such shares that they will be disadvantaged, and that such subdivision and distribution was going to be contrary to Kikuyu Customary law, because it was inequitable and did not cater for the

2nd and 3rd respondents. They wanted the court to compel the appellant to share the land amongst his wives and children in an equitable manner. The matter was referred to arbitration where the panel directed the appellant to divide his land. He filed an appeal to the Court of Appeal. At the Court of Appeal, the Court held as follows :-

> " ...The appellant as the registered owner of the suit property is still alive. His property is not yet available for sub-division and distribution among his wives and children except if he personally on his own free will decides to sub-divide and distribute it among them. He may not be urged, directed or ordered to do it against his own will.
>
> In the result and for the foregoing reasons, to the extent that the respondents wanted the superior court to compel the appellant to share the suit property during his lifetime in a particular manner and in designated shares, they did not have a cause of action in law respecting which the Court would aid them to enforce. The dispute between the parties was, therefore, improperly referred to arbitration as on the face of the respondents' amended plaint there was no dispute capable of being referred. The award which was rendered was therefore, a nullity. We accordingly set it aside and in its place substitute an order striking out the original suit with costs.

34. On more or less the same issue, Kemei J, in the case of MMG vs JG & Another (2018) eKLR, addressed herself as follows :

> 22. I would like to address the question whether or not the Defendants are entitled to the land (be they children or adopted children by the Plaintiff). The Court of Appeal in the case of Nahashon Kerenge vs. Justus Thiru Zakayo Civil Appeal No 222 of 290 Nyeri had this to say;
>
> "There is no vested right to inheritance during the lifetime of parents. Let it be known that during the lifetime of their parents, and subject to beneficial and occupation rights, a child cannot force parents to sub-divide and distribute their land or assets unless the said land or assets were acquired and held in trust prior to the parents' acquisition of title to the same".
>
> Even if I were to assume that the Defendants are indeed Children (which is not assumed) of the Plaintiff, there is no law in Kenya that obligates parents to distribute land to their Children during their lifetime.

35. I also had occasion to address the same issue in the case of Edward Makori *Oganga & Another vs John Ayienda Orangi & Others, Kisii ELC No.466 of 2015* where I stated as follows :

> " It is time that children stopped having a notion, that what belongs to their parents also belongs to them in equal measure, and that their parents must subdivide and distribute land to them in a particular manner."

36. I still hold the same conviction. Children cannot suppose that land or any property that is owned independently by their parents must be shared out to them when their parents are alive. They cannot demand that they be consulted before their parents can make decisions on how to dispose of their free property. They cannot command

that if parents opt to gift certain children their property then each child must also be gifted from the same, or balanced by them being gifted an alternative property. It is shocking that some children are so beholden to this notion that parents must consult them before they dispose their free property, but you will never hear them say that before they (the children) dispose their property, then their mother or father must be consulted and must give consent, or that their mother or father must be given a share of the property or a share of the proceeds of sale. They of course have a right not to involve their parents when dealing with their free property, but in the same vein, their parents also have a right not to involve them when dealing with their free property. Indeed this is the whole essence of independent and absolute ownership of land as articulated in Section 24 of the *Land Registration Act*, 2012, which provides as follows :

> 24. Interest conferred by registration
> Subject to this Act—
>
> a. the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
>
> b. the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

37. In our case, the 5th appellant was the registered proprietor of the land parcel No.1622. It was common ground that this was land that was purchased by him. Nothing barred him from dealing with it as he desired. He was free to sell the whole of the land and even waste its proceeds if that is what he wished. He was also free to gift it to some of his children and not others as he eventually did. The decision that he made, to subdivide it into five portions, and gift some of his children four portions and keep one, was within his right and discretion. It was not for the trial court to now trash the wisdom of the absolute proprietor in disposing his free property and substitute it for what the court thought was a fair and equitable distribution. It was not for the trial court to determine that the subdivision and gifting by the 5th appellant was so 'foolish' that it needed intervention and correction by the 'wisdom' of the court. The trial court needed to appreciate that this was a gift inter vivos and was not a property that was being subjected to a succession proceeding. The court could not implant its own tenets of fairness and equity to deny the absolute proprietor his freedom to dispose his property as he preferred. There is no power given to any court to order a person to gift or deal with his free property in a particular way. There is no law, and none was quoted, which says that any person must share his free property equally to all his children. That freedom is wholly within the prerogative of the property owner. What the court did was to transplant itself to be the owner of the property that was in dispute which was erroneous.

38. In our case, the 5th defendant thought it fit that he should subdivide his land into five portions, gift four of the portions to the children of his second wife, and leave one portion for himself. Where is the illegality in doing that ? There is none and the trial court pointed at no law that made this illegal. In fact, it would appear to me that the 5th defendant was very clear in his mind as to what he was doing. It was not the business

of the trial court, and it is not the business of this court, to investigate the motivation that he had, but all the same I have looked at what he did and he seems to have been very clear in his mind, and appeared to know exactly what he was doing. I see that when he subdivided the five portions, he gave his sons portions measuring 0.33 ha, 0.36 ha, 0.29 ha, 0.19 ha, and he kept for himself 0.73 ha. It will be seen that even in his subdivision and gifting, not everybody got an equal share and he kept for himself the lion's share. He had the ancestral land where he had settled the respondents. He did not stop the respondents from residing and developing the ancestral land. He knows the circumstances of his family in a way that nobody does. His wisdom needed to be respected by the court, not for the court to transplant his wisdom with what it thought was a wiser decision. It is not the business of the court to make orders on how people should plan and settle their families. In fact even on the face of it, what the court ended up doing was extremely unfair and unwise. The end result of the court decision was that the second house was only to get ¼ of the land and the children of the first house to get the rest of the land. Even if the court had power to interfere with the prerogative of the 5th defendant where is the wisdom or fairness in its decision ? There is none whichever way you look at it.

39. The holding of this court is that the case of the respondents was hopeless. They had terrible pleadings. But they also had no right to stop their father from dealing with his property as he wished and had no right to claim any share in the suit properties. It was erroneous for the trial court to hold that the 5th defendant did anything wrong by dividing his land and distributing it in the manner that he did.

40. I therefore allow this appeal and substitute the judgment of the trial court with an order that the case of the respondents is dismissed. What this means is that the subdivision of the land parcel South Mugirango/Boikanga/1622 remains as done by the 5th appellant. What it also means is that the land titles Nos. South Mugirango/Boikanga/3453 – 3457 remain under the proprietorship of the 1st – 5th appellants.

41. The last thing that I will address myself to is costs. I know that the parties are relatives. But the respondents really had no case against their father or their siblings. They did not even live on the land that was subdivided. I would not wish to create precedent where children unnecessarily antagonize their parents and siblings for no reason. The respondents made their father and their siblings to engage counsel to defend their parcels of land and incur enormous costs both at the trial and on this appeal. I am persuaded that the appellants deserve to be paid costs. I see no reason to depart from the general rule that a successful litigant deserves the costs. This appeal is therefore allowed with costs to the appellants. The respondents will also shoulder the costs of the appellants at the subordinate court.

42. Judgment accordingly.

DATED AND DELIVERED THIS 25 DAY OF APRIL 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Mr. Okemwa for the appellants

Mr. Osoro for the respondents

Court Assistant – David Ochieng