Ogwara v Mangera & 4 others (Civil Appeal 18 of 2017)
[2021] KECA 117 (KLR) (22 October 2021) (Judgment)

Neutral citation: [2021] KECA 117 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 18 OF 2017

W KARANJA, AK MURGOR & S OLE KANTAI, JJA

OCTOBER 22, 2021

BETWEEN

ERNEST MOTURI OGWARA ..... APPELLANT

AND

CONRAD MANGERA ..... 1ST RESPONDENT

SUSAN N. ANGWENYI ..... 2ND RESPONDENT

JOHN MOMOIMA ONYIEGO ..... 3RD RESPONDENT

PETER ANGWENYI ..... 4TH RESPONDENT

NICHOLAS ANGWENYI ..... 5TH RESPONDENT

(An Appeal from the Judgment and Decree of the High Court of Kenya at Kisii (Okwany, J.) delivered on 15th August, 2016 in Succession Cause No. 273 of 2008)

JUDGMENT

1. Onyiego Ogwora (hereafter the deceased), died intestate on the 22nd August, 1991. On 10th May, 2000 Christopher Obwagi (not a party to the appeal), Conrad Mangera (1st respondent) and Susan Angwenyi (2nd respondent) were issued with a grant of letters of administration intestate over the estate of the deceased in their capacities as the sons and daughter-in-law of the deceased respectively. Prior to his death, the deceased was the registered owner of several land parcels as listed below:- LR.NO 5/18 Kisii MunicipalityLR.NO 958 Mwamosioma Central KitutuLR.NO 111/151 Kisii MunicipalityCentral Kitutu/Mwamosioma/1052

2. The subject of this appeal is land parcel No. Central Kitutu/Mwamosioma/1052 (hereinafter "the suit land").

3. On 23rd February, 2011 the appellant, Ernest Moturi Ogwara filed summons for revocation of grant and rectification of register seeking, inter alia, orders as follows:-

> " 1 ...
>
> 2 ...
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> 3. That this court be pleased to make a declaration that the sale and transfer of LR No. Central Kitutu/Mwamosioma/1052 without confirmation of grant of letters of administration from the names of the deceased is null and void.
>
> 4. That this Honorable Court be pleased to rescind, recall, vary and/or null the transfer and registration of LR Nos. 2728, 2729, 2730, 2731, 2732, 2733, 1231, 1232 and the suit land in the names of the 4th, 5th and 6th respondents in lieu and/or in place of the deceased.
>
> 5. That the Honorable Court be pleased to grant an order directing rectification of the register in respect of LR No. Central Kitutu/Mwamosioma/2728, 2729, 2730, 2731, 2732, 2733, 1231 and 1232 by deleting the name of the 4th, 5th and 6th respondents and restoring the names of the deceased herein, as the legally registered owner in respect of the subject land pending the confirmation of the grant for equal distribution of the estate.
>
> 6. That this Honorable Court be pleased to revoke/annul the grant of letters of administration intestate issued to the petitioners herein on the 10th May 2010.
>
> 7. That this Honorable Court be pleased to make such other and/or further orders as may be just and expedient in the circumstances."

4. The application was supported by his affidavit sworn on his own behalf and also with the authority of Paskalia Nyangara (not part of the appeal), in which he deponed that Paskalia and himself were the beneficiaries of the deceased's estate and they did not give consent to the 1st and 2nd respondents herein to file succession proceedings in respect to the deceased's estate.

5. He further deponed that the 4th and 5th respondents had caused the subdivision and transfer of the estate of the deceased before the confirmation of grant; that the petitioners had sought and obtained grant of letters of administration in respect to the deceased's estate by concealing material facts and that at the time of his death the deceased was the registered owner of LR No. Central Kitutu/Mwamosioma/1179, 1178, 1173, 1148, 1152 and LR No. Kisii Town/block III/151.

6. The appellant's case was that on 15th March, 2006 and 12th June, 2006 the 3rd, 4th and 5th respondents transferred the suit land from the name of the deceased into their names before the confirmation of grant in respect of the deceased estate; that the subdivision and transfer of the suit land was fraudulent and amounted to intermeddling with the estate of the deceased since no confirmation of grant of letters of administration had been issued so as to entitle the petitioners or any other person to appropriate or alienate the estate of the deceased before the confirmation of grant.

7. Lastly, that the said subdivision, transfer and registration of the suit land in favour of the 3rd, 4th and 5th respondents ought to be recalled, rescinded and/or nullified.

8. The application was opposed by the respondents through the 4th respondent's replying affidavit in which he stated that the appellant lacked capacity to file any proceedings relating to the estate of the

deceased as he (appellant) was not a beneficiary entitled to intestacy and that the appellant's allegations of fraud had not been particularized.

9. He deponed that the appellant was a grandson of the deceased by virtue of being the son of one Dr. Charles Peter Angwenyi (deceased) who was the first born son of the deceased, Onyiego Ogwora (respondent's father) and that land title No. Central Kitutu/Mwamosioma/1231 (hereinafter parcel 1231) was given to him and his younger brother, Nicholas Angwenyi (the 5th respondent herein) by the deceased in 1991.

10. He further deponed that the transfer form in respect to the suit property"1231" was signed by the deceased at a time when the deceased was still alive, and it was the subsequent registration of the title that was done later in 2006 and the title documents issued in his name and that of his younger brother.

11. It was his case that given the fact that Parcel No. 1231 was given to him and his brother by the deceased before his death, the said title did not form part of the deceased's estate and was therefore not the subject of the succession proceedings herein; that the delay in processing of his title did not in any way negate the fact that the land was a gift from the deceased and that it was the deceased's intention to gift it to them; that the said parcel 1231 did not form part of the assets of the deceased in the succession cause since it was property that the deceased had already gifted to them.

12. The 3rd respondent John Momoima Obwagi also swore a replying affidavit in which he deponed that the deceased had, prior to his death, sought and obtained the requisite land control board consent from the Municipality Land Control Board to subdivide the suit land into two (2) portions namely LR No. Central Kitutu/Mwamosioma/1231 and 1232; that upon subdivision, the deceased prepared or executed the transfer forms in favour of the 5th and 6th respondents in respect to LR No. Central Kitutu/Mwamosioma/1231.

13. He contended that after executing the transfer instruments, the same were handed over to M/s Mitema Mogaka & Company Advocates to facilitate their presentation and lodgment at the land registry, at Kisii for registration but that the said registration did not take place because the said advocate died soon thereafter; that to the extent that the deceased had executed the transfer documents in respect of LR Nos. Central Kitutu/Mwamosioma 1231 and 1232 prior to his death, the two (2) parcels of land did not form part of the estate of the deceased and this explained why they were not included in the schedule of assets in the succession proceedings.

14. He further deponed that in November 2010, he sought and obtained consent to subdivide LR No. Central Kitutu/Mwamosioma/1232 into (6) portions thus culminating into LR Nos. Central Kitutu/Mwamosioma/2728, 2729, 2730, 2731, 2732 and 2733 and that to the extent that those parcels arose from LR No. Central Kitutu/Mwamosioma1232 hitherto registered in his name, the same did not form part of the estate of the deceased.

15. The 2nd applicant before the High court, Paskalia Nyanginyi Onyiego who was not part of the appeal swore a "protest affidavit" in which she denied having granted the 1st applicant the authority to use her name in the application for revocation of grant.

16. She confirmed that the deceased subdivided the suit land during his lifetime and transferred portions thereof in favour of the 4th, 5th and 6th respondents and that she witnessed the said subdivision by surveyors and consequently, the resultant parcels of land being LR Nos. Central Kitutu/Mwamosomia/1231 and 1232 did not form part of the estate of the deceased as at the time of his death. She disassociated herself from the summons for revocation of grant and the allegations contained in the supporting affidavit.

17. Parties agreed to canvass the application by way of viva voce evidence. The appellant herein testified that the deceased had 5 wives and he was a grandson from the 1st wife's house while the 2nd applicant, who had since died, was the 4th wife.

18. He produced several copies of certificates of official search to attest to the fact that at the time of his death, the deceased had several parcels of land and since no certificate of confirmation of grant had been issued to anyone so as to allow the distribution of the property, the estate of the deceased ought to be reinstated to its status as at August 1991.

19. He further testified that the parcels of land had been irregularly subdivided in following manner:- Central Kitutu/Mwamosioma 1231 measuring 0.63ha in the names of Peter Angwenyi and Nicholas Angwenyi (the respondents) registered on 12th June 2006. That before the registration the title was in the name of the deceased.Central Kitutu/Mwamosioma/1232 Green card opened 15/9/2004.That 1st entry is the name of deceased.That the 2nd entry is the name of John Momoima Onyiego a son to the deceased and 4th respondent. That he was registered on 15/3/2006 long after the deceased had died. That the 4th respondent proceeded to subdivide the title into 6 pieces i.e "EMO2 f-k" exhibit 2 f-k. He further stated that the 6 sub-divisions were currently registered in the name of the 4th respondent before confirmation of the grant.

20. It was the appellant's case that the deceased's estate should not have been distributed before the grant was confirmed and that the court should rectify the register by cancelling the titles issued before the grant is confirmed; that to date, the family had not appointed anyone to apply for the grant of letters of administration so that the correct procedure for subdivision of the estate could be carried out.

21. He testified that the activities of the respondents were likely to prejudice other beneficiaries and it was therefore necessary that an administrator be appointed so that the estate could be distributed in accordance with the law. On cross examination he stated that he was a grandson to the deceased from his 1st wife and that his father did not tell him about the subdivision of the suit land when he was alive.

22. John Momoima Onyiego, the 3rd respondent testified that the deceased, who died on 22nd August, 1991 was the registered owner of the suit land and that before his death, the deceased had subdivided the suit land into two portions namely; LR Central Kitutu/ Mwamosioma/1231 and 1232 which he on 17th June, 1991 transferred to the 4th and 5th respondents respectively by executing the requisite transfer forms. He produced the copies of the said transfer forms and contended that the deceased never complained that his signature had been forged and neither did the appellant, in his testimony, present any evidence to the effect that the transfer forms were forged.

23. The 3rd respondent's case was that he was not able to process the titles on time because soon after the deceased executed the transfer forms, he (3rd respondent) handed over the duly signed transfer forms to his lawyers for presentation and registration at the lands registry before proceeding to America, but unfortunately his said lawyer died before processing the titles and it was only upon his return to the country in 2006 that he was able to follow up on the registration.

24. He added that he was allocated land parcel number 1232 which he later subdivided to create 6 parcel numbers namely; Central Kitutu/Mwamosioma/2728, 2729, 2730, 2731, 2732 and 2733. He produced copies of official search in support of the subdivision; that land parcel No. 1232 did not form part of the estate of the deceased because the deceased had already gifted the land to them before his death; that the deceased had prior to his death subdivided his land among all his 21 sons, the father of the appellant included.

25. The Court framed the issues for determination as follows;

(i) Whether the appellant had capacity to petition for revocation of grant in relation to the deceased estate?

(ii) Whether the suit land formed part of the assets of the estate of the deceased?

(iii) Whether the appellant had established the grounds for revocation of the grant issued to the petitioners?

26. The court found that the appellant had locus standi to file the objection proceedings and the issue of whether or not his father had already received his share of the deceased's estate before the deceased died were issues to be determined at the confirmation and distribution of the estate, in the presence of all the beneficiaries.

27. On the issue of nullification of grant, the court found that the appellant had not made out a case for the revocation of grant issued to the respondents as he had not demonstrated that the respondents had been at fault or had committed any actions specifying the circumstances under which a grant can be nullified.

28. The court found that the deceased had done everything that was required to be done in relation to the transfer of the suit land to his son and grandchildren as the suit parcels of land were now registered in the names of the 3rd ,4th, 5th respondents under the Registered *Land Act* Cap 300 Laws of Kenya.

29. The court further held that the land given by the deceased to the respondents was a gift to them during the lifetime of the deceased therefore it no longer formed part of the estate of the deceased and was not free property that was now available for distribution; that the evidence as presented by the 3rd respondent was not rebutted by the appellant as he proved, on a balance of probabilities, that the deceased had distributed his estate inter vivos amongst his sons and this explained why the two parcels of land 1231 and 1232 were not included in the schedule of assets of the estate of the deceased and that the appellant did not prove his case against the respondents on a balance of probabilities and dismissed the application.

30. That Ruling is the subject of this appeal in which the appellant faults the learned Judge for, inter alia, dismissing the appellant's application without adequately analyzing the evidence; holding that the parcel 1231 and 1232 did not form part of the estate of the deceased; failing to appreciate that Parcel 1052 did not exist as at the time of the death of the deceased; holding that the deceased had obtained consent and transferred Parcel 1231 and 1232 to the 4th, 5th, respondents and another; failing to appreciate the fact that other properties of the deceased had been left out of the list of assets for administration and failing to appreciate that the administrators had failed to meet the provisions of Section 76 of the Laws of *Succession Act*, CAP 160.

31. The appeal is opposed through the 3rd respondent's written submissions in which he states that all the critical aspects of the appellant's complaints were duly addressed and/or considered by the Judge who thereafter rendered an elaborate judgment and/or decision on the salient aspects of the evidence tendered and on topical issues which were necessary, to enable her arrive at a fair determination, pertaining to and/or concerning the summons or revocation of grant.

32. He submits that parcel 1231 and 1232 were not free properties of the deceased and thus could not be factored in as part of the estate of the deceased; that upon execution of the transfer documents for Parcel 1231 and 1232 the said properties ceased to form part of the estate of the deceased and the Judge was right in finding and holding that the said properties ought not to have been included in the inventory of the assets of the deceased.

33. He further submits that though the appellant had raised the allegation that some of the properties belonging to the deceased had been omitted, he failed to tender credible evidence to vindicate the allegations even though the burden of proof lay squarely on the shoulders of the appellant; that the Law of Succession does not exclude and/or otherwise exempt a daughter in law from taking out grant of letters of administration either alone or with other beneficiaries, in respect of the estate of the father in law.

34. It was his case that it was evident that the respondents complied with all the ingredients of the Law of Succession Act including taking out citations and obtaining consents from beneficiaries of the estate of the deceased prior to applying and/ or obtaining the Grant of letters of administration; that the actions complained about by the appellant were done by the respondents and which actions were in any event lawful and carried out on the basis of the legitimate transfer instruments, that were executed by the deceased in his lifetime. He urged the Court to dismiss the appeal.

35. The other parties have not filed submissions.

36. At the plenary hearing of the appeal which proceeded virtually, learned counsel Mr. Nyambati appeared for the appellant while Ms. Ochwal appeared for the 3rd respondent. Both Counsel sought to rely on their written submissions and made brief highlights. We have considered the entire record along with the said submissions and relevant law.

37. This being a first appeal, the duty of this Court is as was stated in the case of *Abok James Odera t/a A. J. Odera & Associates vs John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR*, where this Court pronounced itself as follows:-

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority vs Kustron (Kenya) Limited 2000 2EA 212."

38. From a careful perusal of the record of appeal, parties' submissions and the authorities cited to us, we discern the main issue arising for determination to be whether the deceased made gifts inter vivos to the respondents; whether the transfer of the said land was valid and whether the allegations of fraud were proved.

39. It is trite law that for gifts inter vivos, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trusts. Gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing.

40. Gifts inter vivos must be complete for the same to be valid. In *Halsburys Laws of England* 4th Edition Volume 20(1) the leaned author at paragraph 67 states as follows with respect to incomplete gifts:-

> " Where a gift rests merely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where the donor's subsequent conduct gives the donee a right to enforce the promise. A promise made by deed is however, binding even though it is made without consideration. If a gift is to be valid the donor must have done everything which according to the nature of the property comprised

in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do." (Emphasis added)

41. The determinant issue here is whether the deceased had gifted the land in question to the 3rd respondent as at the time of his death. If he had done all that needed to be done to perfect the gift and all that remained was the donees' action to actualize or crystalise the gift, then such gift was complete. It is noteworthy that the appellant during his testimony in the High Court testified as follows:-

> " The purported transfer was done during the lifetime of my grandfather – the dates could have been inserted at any time. I am not convinced that 1232 is not part of the estate of the deceased. At the time the deceased passed on, it was part of the estate."

42. The Third respondent on the other hand testified that;

> "...Before his death, he sub divided 1052 into two portions LR Central kitutu/ Mwamosioma/ 1231 and 1232. He prepared transfer documents for the 2 new parcels. 1232 was transferred into the name of John Momoima Onyiego.
>
> The transfer forms for 1232 were executed on 17/6/1991. The deceased died on 22/8/1991.
>
> I was present when Earnest testified that the signatures on the transfer forms were forged. My father did not complain that the signatures were forged. Earnest did not bring a document examiner to prove the forgery.
>
> I did not proceed and process the titles to the land because I proceeded to the USA and the lawyer I had contracted to do the work had passed on. When I came back and learnt of the death of the lawyer, I was able to trace the documents took them to the Lands office and got registered..... 1232 did not form part and parcel of the estate of the deceased because he had given me the land as his son before he died."

43. In the case of *Registered Trustees Anglican Church of Kenya Mbeere Diocese vs David Waweru Njoroge [2007] eKLR* the Court cited the case of In Mascall vs. Mascall 50 P & CR 119, where the question was whether a Gift of land was completely constituted by delivery of the land certificate and a form of transfer. In that case, Brown Wilkinson L.J. held at page 126:

> " The basic principle underlying all the cases is that equity will not come to the aid of a volunteer. Therefore, if a donee needs to get an order from a court of equity in order to complete his title, he will not get it. If, on the other hand, the donee has under his control everything necessary to constitute his title completely without any further assistance from the donor, the donee needs no assistance from equity and the gift is complete. It is on that principle which is laid down in (Rose vs. Inland Revenue Comrs [1952] Ch 499) that in equity it is held that a gift is complete as soon as the settler or donor has done everything that the donor has to do that is to say as soon as the donee has within his control all those things necessary to enable him, the donee to complete his title."

44. In *SNELL'S EQUITY* 29th Edition, the authors, state at page 122 paragraph (3):

> "..... where however the donor has done all in his power according to the nature of the property given to vest the legal interest in the property in the donee, the gift will not fail even if something remains to be done by the donee or some third person. Thus, in Re Rose, Midland Bank Executor & Trustee Co. ltd. Vs. Rose [1949] Ch. 78 the donor executed a transfer of shares in a private company and handed it with share certificate to the donee who

died before it had been registered. Although the donee's legal title would not be perfected until the company had passed the transfer for registration or at least until the donee had an unconditional right to be registered, it was held that the gift was good because the donor had done all that was necessary on his part. Likewise a gift of registered land becomes effective upon execution and delivery of the transfer and cannot be recalled thereafter even though the donee has not yet been registered as proprietor." (Emphasis added).

From the foregoing, it is clear to us that unless it was proved that the transfer documents were forged, the gift of portions of land to the 3rd respondent was completed before the deceased died regardless of the fact that the transfer itself had not been registered at the Land's office. We are also satisfied that the reasons given by the 3rd respondent for the delay in registering the transfer of the suit land were plausible.

45. This brings us to the issue of fraud. In our view, the allegations of fraud by the appellant were not proved and remain unsubstantiated. The fact that he testified that the signatures could have been inserted any time after the deceased's death does not turn on much as he did not move an inch to prove his suppositions.

46. Sections 109 and 112 of the *Evidence Act* provides that:

> " 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
>
> ...
>
> 112.In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

47. The law is clear as buttressed in the case of *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR*, where Tunoi, JA. (as he then was) stated as follows:-

> " It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts." (Emphasis supplied).

We hold the view that other than alleging fraud, the appellant did not present any solid evidence to the court to prove to a degree above balance of probability but below reasonable doubt that the transfer forms in question were forged and that they were not executed by the deceased before his demise.

48. Our conclusion is that the deceased gifted the 3rd respondent the suit land before his death having executed all the documents necessary on his part to effect the said transfer. The suit land could therefore not form part of the deceased's free Estate for distribution to the other beneficiaries. These two issues dispose of this appeal and the other peripheral issues such as the learned Judge's failure to revoke the grant fall by the wayside.

49. Ultimately, we find this appeal devoid of merit and dismiss it accordingly. As this is a family matter, we order that each party bears its own costs of this appeal.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF OCTOBER, 2021.

W. KARANJA

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR