



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, SICHALE & J. MOHAMMED, J.J.A)

CIVIL APPEAL NO. 123 OF 2018

BETWEEN

SARAH WANGARI KANG'ARI.....APPELLANT

AND

SERAH MWERU MUHU (Administratrix) of the

Estate of the late JAMES MUHU KANG'ARI.....1ST RESPONDENT

MUHU HOLDINGS LTD.....2ND RESPONDENT

(An appeal from the Ruling and Order of the High Court of Kenya at Nairobi

(W. Musyoka, J.) delivered on 12th May, 2017 in HC Succ. Cause No. 1027 of 1989)

JUDGMENT OF THE COURT

1. Sarah Wangari Kang'ari (the appellant), is the administratrix of the Estate of her late husband, Joseph Kang'ari Muhu, who was a son to the late James Muhu Kang'ari.
2. Sera Mweru Muhu (the 1st respondent) on the other hand is the widow and executrix of the Estate to her late husband James Muhu Kang'ari, who died testate on 26th March, 1989 leaving behind a vast estate. Part of the properties bequeathed to the appellant's husband was **plot No. Dagoretti/Ruthimitu/302** which was a different property from the one where the deceased (Joseph) and the appellant were living as at the time of the appellant's husband's death.
3. From what we can gather from the record before us, the appellant's husband was the only son of the deceased James Muhu Kang'ari. When he got married to the appellant herein, the couple continued living in the same property i.e **Dagoretti/Ruthimitu/177** where the parents' home was. According to the respondent, the appellant's late husband was accommodated in a guest wing but according to the appellant, they actually constructed a house that was separate from their parents' house. She is calling it her "matrimonial home".
4. When the appellant's husband died, he was buried in plot No. Dagoretti/Ruthimitu/302 but after the burial she continued to stay in her house in plot No. Dagoretti/Ruthimitu/177 which she says is the only place she called home. For some reason or other, which is not relevant for purposes of this appeal, the relationship between the appellant and the 1st respondent deteriorated to a point where they found it difficult to continue living in the same compound, with the 1st respondent asking the appellant to vacate her residence at plot No. Dagoretti/Ruthimitu/177 to go and live in Plot No. Dagoretti/Ruthimitu/302 which had been bequeathed to the appellant's late husband.
5. The 1st respondent moved to court vide an application dated 12th February, 2015 seeking *inter alia* an order that the appellant herein be restrained from interfering with the 1st respondent's occupation and enjoyment of Dagoretti/Ruthimitu/177 and that she be ordered to move her matrimonial home to Dagoretti/Ruthimitu/302.

6. The appellant resisted the application and in an affidavit sworn on 11th May, 2015 insisted that her home was in plot No. 177, where her husband had left her after living on the property with her for 35 years. She also asserted that her children had been born and raised on that property and they knew no other home.

7. After hearing the parties on the said application, the learned Judge (W. Musyoka, J.) delivered the Ruling dated 12th May, 2017, which is now the subject of this appeal. In the Ruling, the learned Judge allowed the application dated 12th February, 2015 and gave the appellant three (3) months from the date of the Ruling to move out of Dagoretti/Ruthimitu/177 to Dagoretti/Ruthimitu/302, in default of which the 1st respondent would be at liberty to forcibly remove her.

8. Being aggrieved by the said orders, the appellant moved to this Court on appeal, raising six grounds of appeal. The appellant faults the learned Judge for: misinterpreting the Will dated 22nd July, 1986; failing to find that the disputed Dagoretti/Ruthimitu/177 is the matrimonial home for both the appellant and the 1st respondent and none of them have any superior right to the other; and for directing the appellant to vacate her matrimonial home within 3 months.

The appellant asks the Court to set aside the impugned Ruling and also issue a declaration confirming that the appellant and her children have equal rights over Dagoretti/Ruthimitu/177 and they should not therefore be evicted therefrom.

9. When the appeal came up for case management, directions were given for parties to file written submissions. The appellant, through Laichena Mugambi & Co. Advocates filed her submissions on 31st October, 2018 and list of authorities but the respondent did not file any submissions. At the plenary hearing however, Mr. Njuguna, learned counsel for the respondent sought leave of the court to respond to the appeal orally, a request that was allowed.

10. The said submissions revolve around the issue of whether or not the house located in Dagoretti/Ruthimitu/177 is the appellant's matrimonial home. According to the appellant, she and her family have nowhere else to go, and her late husband had constructed several houses on the said property for his adult sons who also live on the plot.

11. On whether the learned Judge misinterpreted the late James Muhu Kang'ari's Will, counsel submitted that the property in question was not bequeathed to any of the beneficiaries under the said Will and neither the appellant nor the respondent can claim superior rights over the other in respect of the property, and the 1st respondent cannot therefore evict the appellant. He cited the case of **Rupal Shah & Another = v = Ramesh Bhagwani Shah [2015] eKLR**, where the Court quoted the learned author of "the Law and Practice of Administration of Estates 4th Edition page 107 where the author states:-

"The executor acts upon his responsibility, but he is not free to deal with the assets of the estate in any manner he pleases. His position is a fiduciary one and therefore he must act not only in good faith but also legally. He must act in terms of the Will and in terms of the law, which prescribes his duties and his method of administration and makes him subject to the supervision of the master in regard to a number of matters."

Counsel reiterated that the said property was not bequeathed to anyone and was supposed to be transferred to the 2nd respondent and the 1st respondent has no right to evict the appellant therefrom. Learned counsel submitted that by saying that the deceased bequeathed plot No. 302 to the appellant's husband so that he could live there, the learned Judge was trying to rewrite the deceased's Will, which he was not sanctioned by the law to do. He urged us to allow the appeal.

12. Opposing the appeal Mr. Njuguna, learned counsel for the respondent submitted that the appeal turns on only one issue. He told the Court that the property in question was the 1st respondent's matrimonial property and there is only one house on the property which belongs to the 1st respondent. He acknowledged that the succession cause has not even been completed and the property in question has not therefore been transferred to anybody. He maintained that the appeal has no merit and urged for its dismissal.

13. In rejoinder, Mr. Laichena reiterated that the appellant had filed the suit and the appeal in her capacity as the administratrix of her late husband's estate and that her late husband was also a share holder in the 2nd respondent. He said that there was no house on plot No. 302 and the appellant and her children had been rendered destitute. He entreated the Court to allow the appeal.

14. This being a first appeal, we are called upon to reappraise the evidence presented before the trial court and make our independent conclusions. See **Rule 29(1)(a) of the Court of Appeal Rules** and **Selle & Another v. Associated Motor Boat Co. Ltd & others [1968] EA 123**.

Having considered the entire record before us, along with the written and oral submissions by counsel, we are of the view that stripping this matter of all emotional and sentimental feelings that usually accompany succession matters, particularly between a mother and daughter in law as in the present case, this appeal raises a very straightforward issue. The issue is two sided. On the one hand is whether the appellant herein is entitled to what she refers to as her matrimonial home in Plot No. 177; and on the flip side is whether the 1st respondent has a right to claim the property to the exclusion of the appellant and to evict her therefrom.

15. There is no dispute that the appellant lived on plot No. 177 during the lifetime of her late husband. She also birthed and brought up her children in that property which they must have called home. Things however appear to have changed after the death of the appellant's husband and the 1st respondent now wants to sever links with her. It is common ground that the property in question was not bequeathed to either the appellant or 1st the respondent in James Muhu Kangari's Will.

Although the copy of the said Will does not form part of the record before us, it is not disputed that as per the said Will, any property that was left out of the Will was to be transferred to the 2nd respondent (Muhu Holdings Limited).

16. It follows therefore that plot No. Dagoretti/Ruthimitu/177 was to be transferred neither to the appellant nor to the 1st respondent, but to

the 2nd respondent. This position is supported by the “Declaration of Trust” made on 31st January,1995 which was signed by among others the appellants’ late husband and the 1st respondent. Clause 3 of the said Trust is instructive. The same provided as follows:-

“By clause 4 of the said Will the Testator directed that save for the specific bequests made in clauses 1, 2, and 3 thereof, all the properties or shares of the properties registered in the Testator’s name or jointly in the name of the Testator and any Declarant or Declarants hereof which was held in Trust for the Testator, and all his movable properties and business be transferred to MUHU HOLDINGS LIMITED. Dagoretti/Ruthimitu/177 is listed as No. 12 in the said schedule”.

We note further that in the schedule of properties filed by the 1st respondent following a court order, the said property was supposed to be transferred to Muhu Holdings Limited (2nd respondent). The same Trust at Clause 4.1 declares as follows:-

“1. That all the properties specified in the schedule hereto are now held and shall henceforth be held by the Declarants for the absolute use and benefit of MUHU HOLDINGS LIMITED and the Declarants hereby divest themselves and all persons claiming under them of all their rights, title or interest in the said properties.”

(Emphasis added)

17. What this means in plain language is that neither the 1st respondent nor the appellant (claiming through her late husband), can claim any rights or interest over the property in question to the exclusion of the other beneficiaries. By the said Trust, the 1st respondent “divested” herself of all her rights, title or interest in the said property, and so did the appellant’s late husband. In other words, neither the appellant nor the 1st respondent can now turn around and wave the banner of matrimonial property to the exclusion of all the others. In our view, the 1st respondent cannot, even in her capacity as executrix of her husband’s estate claim exclusive right over the property in question. She has no legal standing in view of the above trust to evict the appellant from the said property. The property belongs to the 2nd respondent, a juristic person, but in which the appellant (through her husband), and the 1st respondent own shares. (See page 39 of the record of appeal).

18. As it is not within our remit to discuss properties belonging to the 2nd respondent and how the same should be shared, it not having been determined by the learned Judge in the impugned Ruling, we shall stay clear of that area. From our above analysis and in view of the contents of the Declaration of Trust and our interpretation of the clause therein, we arrive at the conclusion that the 1st respondent does not have any superior right to the property in question, having divested herself of any such rights through the said Trust. She cannot therefore, even in her capacity as the executrix of her late husband’s estate purport to evict the appellant from the said property.

19. We find that the learned Judge failed to consider the issues arising from the said Trust. Had he done so, he would not have issued the impugned orders of eviction as against the appellant. Accordingly, we find merit in this appeal and allow it in terms of prayer No.2 in the memorandum of appeal. For purposes of clarity, neither the appellant nor the 1st respondent should be evicted from the said property until the Estate of the late James Muhu Kang’ari is distributed and the rights of all the beneficiaries over the property in question are determined.

20. We order that each party bears its own costs of this appeal and in the court below for the reason that the parties are family members.

Dated and delivered at Nairobi this 22nd day of May, 2020.

W. KARANJA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR