



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, KIAGE & ODEK, J.J.A)

CIVIL APPEAL NO. 364 OF 2018

BETWEEN

MARY WANGARE MBUGUA, PETER MIRURU MBUGUA, JOHN

KIARIE MBUGUA (appealing as the Administrators of the estate of

the late Mbugua Miruru).....APPELLANT

AND

MARGARET NDUTA CHEGE.....RESPONDENT

(An appeal from the ruling of the High Court of Kenya at Nairobi (M. Muigai, J),

dated 20th July, 2017 in Succession Cause 2555 of 1997)

JUDGMENT OF KIAGE, J.A

At the heart of this long drawn out dispute over some land in Kiambu County is the sad tale of selfishness and greed where two brothers turn a covetous eye and seek to gobble up their dead kin's land, wresting it from his widow and children.

The dispute concerns a property known as Dagoretti/Waithaka/181 (suit property). The suit property belonged to the late Karubichu Kiarie (Karubichu) who was survived by two widows; Wangari Karubichu (Wangare), the first and Wanjiku

Karubichu (Wanjiku), the second, who had pre-deceased him. Out of the suit property, Wangare was bequeathed by Karubichu 2.10 acres while Wanjiku was awarded 1.60 acres. Wangare subdivided her share of the property in the following manner; 0.50 acres to herself, 0.80 acres each of her sons Chege Macharia (Chege) and Mbugua Miruru (Mbugua). Since Wanjiku was deceased, her only son Kamau Karubicho (Kamau) inherited her entire share.

Upon the death of Chege on 23rd July 1989, Mbugua who is also now deceased and is represented by the administrators of his estate, together with Kamau petitioned the High Court in **Succession Cause 2555 of 1997** for letters of administration in their capacities as the brother and step-brother of Chege. In their documents, they listed the suit property as an asset belonging to Chege. They also listed Veronica Njeri (Veronica) and Margaret Nduta Chege (Margaret), the respondent herein as the surviving widows of Chege together with their children.

A grant of letters of administration was issued in favour of Mbugua, Margaret, Veronica and Kamau on 12th January 1998. Further a certificate of confirmation of grant was issued on 14th January 1999 with a schedule of distribution concerning the suit property was as follows;

Name	Share
Mbugua Miruru	0.80acres
Kamau Karubicho	1.60acres

Margaret Nduta Chege 0.50acres

Veronica Njeri Chege 0.30acres

Another Petition was filed by Mbugua in **Succession Cause No. 2554 of 1997** in Nairobi. He was subsequently appointed the administrator over the estate of Wangare which comprised of the 0.50 acres. The confirmation of grant on record dated 14th January 1999 indicates that the same was to be subdivided as follows;

Name	Share
Margaret Nduta	0.2acres
Veronica Njeri	0.1acre
Mbugua Miruru	0.2acres

Prior to this, Margaret and her son Joseph Kamua, filed a revocation of the grant issued on 12th January 1998 in **Succession Cause 2555 of 1997**. It was deposed that Mbugua and Kamau unilaterally subdivided the suit property contrary to an agreement that was entered into prior to the death of Chege between himself, Mbugua and Kamau. The said agreement was in form of a letter addressed to the District Officer of Dogoretti, dated 22nd June 1981 (agreement). The three brothers pursuant to an agreement made by the Council of elders agreed to distribute the suit property as follows; Chege 130 points, Mbugua 80 points and Kamau 160 points. Margaret therefore sought that subdivision be done in accordance to that agreement.

Mbugua and Kamau also filed two applications, also in **Succession Cause 2555 of 1997** under **Rule 49** and **73** of the **Probate and Administration Rules**. Among other orders they sought that the Deputy Registrar be authorised to execute forms to effect certain transactions over the suit property. These applications were jointly considered by Visram, J (as he was then) who gave an Order on 10th July 2000 that the suit property be subdivided in accordance with the agreement that was entered into during the lifetime of Chege. Therefore the family of Chege was awarded the 130 points.

In a rather strange twist of events, another order was issued on 19th July 2004 by Kamau, J altering the above order. It purported that in as much as the court order dated 10th July 2000 stated that Chege's family be awarded 1.30 acres, pursuant to a survey, the 1.30 acres awarded be reviewed and corrected to read 1.10 acres.

A subsequent order was issued on 9th October 2006, by Rawal, J (as she was then) pursuant to an application filed by Mbugua and Kamau and as follows;

1. That property known as LR Dagoretti/Waithaka/181 be registered as follows;

- (a) Mbugua Miruru 1.00acres**
- (b) Margaret Nduta Chege 0.70acres**
- (c) Veronica Njeri Chege 0.40acres**
- (d) Kamau Karubichu 1.60acres**

2. That the beneficiaries do today execute forms RL7 and RL19 within one month.

Pursuant to the above order, Mbugua filed yet another April 2007 under **Rule 49** and **73** of the

Probate and Administration Rules. He sought for an order allowing the Deputy Registrar to sign transfer forms for and on behalf of Margaret and Veronica. In response thereto, Margaret and Veronica filed similar replying affidavits dated 13th December 2007. They deposed that they had no opposition to the Deputy Registrar signing form RL7 and RL19 on their behalf. They also deposed that by consent their share allocation of the suit property be altered to grant Veronica 0.10 acres off of Margaret's share so that; Veronica was to get 0.50acres while Margaret was to remain with 0.60acres. Upon hearing the matter Onyancha, J gave yet another order dated 18th December 2007 allowing the Deputy Registrar to sign RL19 and RL7 on behalf of Margaret and Veronica. He also altered the distribution in the following manner;

Mbugua Miruru Margaret Nduta Chege Veronica Njeri Chege Kamau Karubichu

1.00 acres

0.70 acres

0.40 acres

1.60 acres

Margaret then filed the application, subject of this appeal, a Chamber Summons dated 27th January 2014 brought under

Section 76(a) & (c) of Law of Succession Act and Rules 49, 63 & 73 of Probate and Administration Rules seeking orders;

2. That pending the hearing and determination of this Application, this Honorable Court may be pleased to grant the Applicant Orders restraining Mbugua Miruru the Respondent herein by himself, and/or interfere (sic) with the

Applicant's quiet possession of L.R. No.

Dagoretti/Waithaka/2771, 2772 and 2773 which were hived from L.R. No. Dagoretti/Waithaka/181.

3. That the Honorable Court be pleased to grant the Applicant:-

a. An Order to set aside and/or vary this Court's Order given on 19.7.2004

b. An Order to set aside all Orders consequent upon the grant of the Orders of 19.7.2004.

c. Orders nullifying Title Deed Numbers L.R. No. Dagoretti/Waithaka/2771, 2772 and 2773 that emanated from L.R. No. Dagoretti/Waithaka/181.

d. An Order that the sub-division of L.R. No. Dagoretti/Waithaka/181 be done in accordance with the written wishes of the late Chege Macharia, the late Kamau Karubichu and Miruru and Title Deeds accordingly.

e. An Order that the Certificate of Confirmation be rectified so as to incorporate those wishes.

In her supporting affidavit, she deposed that Mbugua had threatened to evict her via a notice dated 23rd January 2014. She claimed that prior to the death of Chege, he had a land dispute with his brothers, Mbugua and Kamau over the suit property in **DMIS Case No. 16 of 1968**. The dispute was resolved amicably and the settlement was captured in (the agreement) signed by the three brothers. The brothers then applied for Consent from the Land Control Board on 11th June 1988 in the proportions that were agreed upon.

Margaret contended that the alterations made by the order dated 19th July 2004 giving her family 1.10 acres did not honour the terms of the agreement. The same was obtained without her knowledge as she was never informed of the proceedings. She also did not participate in the proceedings before Onyancha J and she did not sign the affidavit dated 13th December 2007 where she purportedly agreed to donate 0.10 acres of her share to Veronica.

Furthermore, she had filed an application protesting the manner in which Mbugua intended to sub-divide the suit property and the court gave a ruling on 10th July 2000 in her favour. It therefore did not add up that she would act contrary to her wishes and willingly disinherit her children.

In reply Kamau deposed that the suit property was sub-divided in the year 2012 pursuant to the orders issued by Kamau J, in 2004 and by Onyancha J in 2007. The sub-division was into 4 portions L.R. No. Dagoretti/Waithaka/1987-1990 in consultation with all the parties. Margaret was allocated L.R. No. Dagoretti/Waithaka/1988 measuring 0.60 acres or thereabouts. Kamau was allocated L.R. No. Dagoretti/Waithaka/1986 measuring 1.6 acres, which he subdivided into 6 pieces; L.R. No. Dagoretti/Waithaka/2163-2168.

He contended that since Margaret had received her share of the suit property, she had no basis clinging on his land and ought to be evicted.

In a further affidavit, Margaret contended that the sub-division was done without her knowledge for the benefit of Mbugua who took away all the prime portions that were facing the road and assigned her a portion that had 7 graves on it. She claimed that she did not sign nor thumb print any consent forms and was never aware that consent was granted by the Land Control Board. Mbugua's Advocates wrote her a letter dated 5th October 2005 requesting her to sign the RL7 and RL19 forms, which she declined.

She asserted that when Chege passed away, Mbugua took the keys to his safe and stole; the death certificate of Chege's mother; Chege's identification card; all of Chege's title documents and education certificates for their children. Despite a demand being made by her Advocates through a letter dated 24th February 2004, Mbugua refused to return them.

The latest round of litigation was precipitated by the aforementioned eviction notice from Mbugua's advocates dated 23rd January 2004. The letter demanded that Margaret remove her illegal structures and crops from Mbugua's property known as L.R. No. Dagoretti/Waithaka 2771, 2772 and 2773 or else she would be forcefully removed. She claimed that the court had been misled to believe that she was occupying Mbugua's property. Further, Mbugua had been harassing her and she had been forced to seek

intervention of the OCS Riruta Police Station. She was convinced that Kamau and Mbugua wanted to disinherit her and her children.

M.W Muigai, J considered the pleadings, testimonies and submissions before the court and gave the following orders;

1. The application filed on 27th January 2014 is granted. The grant is revoked and annulled under Section 76 (a) of Law of

Succession Act Cap 160.

2.The eviction notices and demands are null and void.

3.The administrators of the deceased's estate Mbugua Miruru, Kamau Karubichu, Margaret Nduta Chege and Veronicah Chege shall jointly agree and subdivide the suit property Dagoretti/Waithaka/181 as per the agreed portions as shown by letter of 22nd June 1981 during the deceased's life as follows;

- a. Chege Macharia 130 points**
- b. Mbugua Miruru 80 points**
- c. Kamau Karubichu 160 points**

4.The 4 administrators shall file for rectification of confirmed grant to include the stated portions and with consents of all beneficiaries.

5.The subdivision of the suit property Dagoretti/Waithaka/181 shall be by consents and participation of all beneficiaries in appointment of surveyor, sharing of expenses and be present or represented during the subdivision.

6.The subdivision shall ensure as much as possible preservation of permanent structures and developments of each beneficiary residing on the suit property

The appellants were dissatisfied with the judgment and filed the instant appeal containing 9 grounds, which, condensed, are that the learned judge erred in law and in fact by;

- a. Holding that the grant could be revoked and rectified.
- b. Holding that the appellant was not entitled to his mother's share of the property.
- c. Setting aside orders issued by a court of similar jurisdiction when no appeal had been preferred.
- d. Issuing orders affecting parties that were not privy to the proceedings.
- e. Issuing orders not sought by the parties.
- f. Taking up the role of a document examiner.

During the hearing of the appeal, learned Counsel **Mr Kinyanjui** appeared for the appellant, while learned Counsel **Mr Mogikoyo** appeared for the respondent. Both parties had filed written submissions which Counsel highlighted before us.

Mr Kinyanjui argued that **Sections 35 and 38** of the **Law of Succession Act (LSA)** provide that surviving children shall get equal shares of an estate. Therefore the learned judge's act of allocating the entire 0.50 acres that was owned by Wangare to

Chege was synonymous to completely disinheriting the appellant and denying him the opportunity to share in his biological mother's estate.

Counsel contended that the final orders given by the learned judge were not enforceable. He maintained that the orders were specific to the suit property which was not in existence when the judgment was pronounced. In the same breathe, Counsel argued that the learned judge erred by giving orders that were not sought by Margaret yet the law is clear that decisions cannot be based on grounds outside the pleadings of parties.

It was complained that the court further aided Margaret in her bid by playing the role of a document examiner and concluding that the signatures purported to be hers were forged. Since Margaret did not give further proof other than of her oral testimony then a similar fate should have befallen the appellant when he claimed not to have signed the agreement dated 22nd June 1981.

Mr. Kinyanjui reasoned that the superior court erred by arrogating itself jurisdiction it did not have and purported to set aside the orders made by the court subsequent to those of Visram, J when there was no proper application placed before the court.

Counsel continued that once a grant has been issued, the entire process is legitimized but when the same is revoked everything collapses and a fresh Petition has to be made. Therefore the learned judge erred by issuing both revocation and a rectification of the same grant. He urged the court to set aside the judgement in its entirety with costs.

In response **Mr Mogikoyo** submitted that the learned judge did not err in holding that the grant as issued by the court and the subsequent confirmation of the same was defective due to concealment of facts. This was undoubtedly confirmed by the testimonies of Kamau and Mbugua that they did not inform Margaret of their intent to Petition the court.

The argument based on **Section 38** of the LSA, is not applicable on the instant matter as the agreement on the subdivision of the suit property was done during the lifetime of Chege. Kamau confirmed the same in his testimony and he could not explain why he never challenged the issue of his allocation of 50 shares while Chege was still alive. Thus, this argument is an afterthought and ought to be dismissed.

Regarding re-subdivision of the suit property, **Mr Mogikoyo** contended that the learned judge did not err as the application before her challenged the manner in which the letters of administration were obtained and confirmed. Once it was held that the same was irregular as it was tainted with fraud, misrepresentation and concealment of material facts, their reversal was inevitable. The resultant orders as given by the court were prayed for in specific terms and fully enforceable.

Counsel continued that the invoked **Rule 73** of the **Probate and Administration Rules**, granted the court inherent powers to make such orders as may be necessary for the ends of justice and to prevent abuse of the court process. Thus, Kamau J's orders, which were procedural and dependant on the validity of the grant of the letters of administration, had to be set aside as a matter of course once the process of obtaining the grant was found wanting.

Regarding fraud, the learned judge relied on the testimonies of Margaret, the appellant and other witnesses. Kamau, confirmed both in examination in chief and in cross-examination that he secretly petitioned for the impugned letters of administration. The learned judge could not be fairly faulted for relying on the available evidence and ordering revocation which is provided for under **Section 76** of the LSA.

I have carefully considered the rather convoluted record of this appeal and the laboured submissions made before us. The main issues for consideration are whether the learned judge erred by; setting aside orders issued by a court of similar jurisdiction; holding that the appellant was not entitled to a share of Wangare's property; and issuing both revocation and rectification orders. I shall consider these issues whilst keeping in mind the mandate on

a. first appeal to freshly re-evaluate and re-analyse the evidence and draw its own conclusions. I caution myself and allow that unlike the learned Judge I have not seen nor heard the witnesses. See

SELLE -VS- ASSOCIATED MOTOR BOAT CO [1968] EA 123.

I am unable to agree with **Mr. Kinyanjui's** reasoning that the learned Judge erred by setting aside orders by judges of similar jurisdiction, and his lament that there was no proper motion before the court for such orders. It is patently clear from the record, that the application in part 3 (a) and (b) expressly sought the setting aside of the orders given on 19th July 2004 and all subsequent Orders.

The said Order by Kamau J, altered the favourable Order issued by Visram, J and reduced Margaret's share to 110 points from the initial 130 points. A subsequent order was issued on 9th October 2006, by Rawal, J which further directed the beneficiaries to execute forms RL7 and RL19 within one month. Another Then Onyancha, J on 18th December 2007 allowed the Deputy Registrar to sign RL19 and RL7 on behalf of Margaret and Veronica.

Margaret sought to set aside those orders since they were all unfavourable to her and were contrary to the holding by Visram, J that the distribution be maintained in accordance with the agreement. The holding by learned Judge and the final orders she gave effectively restored the earlier findings of Visram, J.

I have perused the record and ascertained that the agreement upheld by the learned Judge was in form of a letter dated 22nd June 1981 signed by the three brothers. It was a settlement entered into by the trio over the suit property in **DMIS Case No. 16 of 1968**. It was addressed to the Office of the District Officer and read as follows;

“Since the case started from 29/11/80 to 19/6/81. The council of elders agreed on the following on 19/6/81 that is the land to be shared as following among the three brothers.

- 1. Chege Macharia 130 points**
- 2. Mbugua Miruru 80 points**
- 3. Kamau Kurubichu 160 points**

Also the three brothers agreed with the council of elders the land to be shared as above. ”

Kamau in his testimony confirmed the authenticity of the agreement. He stated that the application, which was made by all three of them, for Consent from the Land Control Board on 11th June 1988 was made according to the proportions that were indicated in the agreement. The said application is on record and indicates the said portions. In the eight years before Chege died on 23rd July 1989, Mbugua never brought any action concerning his entitlement over Wangare's share of the suit property, or otherwise challenging the agreement. The learned Judge duly and rightly opined it that the subsequent manoeuvres amounted to harassment and vindictiveness on the part of the surviving brothers.

The actions of the duo goes to confirm their vindictiveness and harassment towards Margaret and her family. She deposed that Mbugua stole Chege's Identity Card and the title documents. He went ahead and processed the death certificate to enable him to secretly obtain the grant without her consent nor knowledge. This was confirmed by the testimony of Mbugua himself, when he said;

“Chege was hit by a motor vehicle. I went to the scene and I took the key to the place where the title was in the house and I took the title deed and ID card.”

Kamau in his testimony confirmed that they did not obtain Margaret's consent before petitioning for the letters of administration. In my own assessment the conduct of the brothers bear the signature and loudly proclaim their maliciously and greedy intent to disinherit Margaret, a widow, their brother's widow her most vulnerable. Their complaints were an afterthought and the learned judge did not err in reasoning that if there was any dispute as to portions of land amongst the brothers over the suit property; the same ought to have been resolved amongst them while Chege was alive.

It seems rather obvious that, Mbugua and Kamau fraudulently concealed the fact that they had an agreement about the distribution of the suit property. They also excluded Margaret in the Petition yet she was a beneficiary. The learned Judge properly held that the grant issued on 12th January 1998 and confirmed on 14th January 1999 was for revocation as the proceedings were defective in substance. The grant was obtained fraudulently by the concealment of material facts from the court. I concur with that holding and find no reason to depart from it.

This Court pronounced itself as follows in **MUSA NYARIBARI GEKONE & 2 OTHERS V PETER MIYIENDA & ANOTHER** [2015] eKLR as it upheld a Judge's decision to revoke a grant due to concealment of material facts;

“Based on that evidence, we think the learned judge was right to hold as he did that the 1st appellant should have disclosed, when applying for the grant of letters of administration or when seeking its confirmation, that the 1st respondent had an interest in the property. At the very least, the 1st respondent should have been considered a creditor of the estate, having paid part of the purchase price with respect to the property to the deceased and the balance of the purchase price to the deceased's mother subsequent upon the death of the deceased.”

The learned Judge set aside the unfavourable Orders issued against Margaret and I see no fault in that. It is trite the courts have inherent powers under **Article 159** of the **Constitution** as read together with **Rule 73** of the **Probate and Administration Rules** make orders as may be necessary for the ends of justice or to prevent abuse of the process of the court without undue regard to procedural technicalities. This Court recognised the inherent power of the courts in **ANSAZI GAMBO TINGA & ANOTHER V NICHOLAS PATRICE TABUCHE** [2019] eKLR;

“We are cognizant that a P&A court under Rule 73 of the Rules is given powers to issue orders as it deems fit in the interest of justice.”

It is my considered view that substantive justice will be done by ensuring that the suit property is sub-divided in accordance with the agreement that was entered into during the life time of Chege. Further, the substantive **Section 47** of the LSA gives the High Court jurisdiction to determine disputes under it and to pronounce such decrees and make such orders therein as may be expedient. This Court pronounced itself on the same in **FLORIS PIERRO & ANOTHER V GIANCARLO FALASCONI (AS THE ADMINISTRATOR OF THE ESTATE OF SANTUZZA BILLIOTI ALIAS MEI SANTUZZA)** [2014] eKLR;

“We have no doubt at all that the Law of Succession Act gives the Court wide jurisdiction in dealing with testamentary and administration issues of an estate. Indeed section 47 of the said Act gives the Court jurisdiction to entertain any application and determine any dispute under the Act and to pronounce such decree and orders as may be expedient.....In other words, were are of the firm view that section 47 of the Act gives the Court all-embracing powers to make necessary orders, including injunctions where appropriate to safeguard the deceased's estate. This section must be read together with rule 73 of the Probate and Administration Rules which further emboldens Court's jurisdiction to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of Court.”

Mr Kinyanjui argued that the appellant was entitled to a share of Wangare's estate by virtue of **Section 38** of the LSA which provides;

“Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.”

It is clear that the section concerns itself with the equal distribution of an intestate estate of a deceased to the surviving children. However, in the instant matter, the estate of Wangare is not the subject matter. Rather, the parties herein are contesting over the portion that belonged to Chege pursuant to the death of Wangare. The said section of the LSA does not apply as Mbugua is not a child of Chege but rather a brother. The provision would have applied had he brought the case during the lifetime of Chege to challenge Wangare's estate.

What I have said so far is wholly dispositive of this appeal which ultimately is devoid of merit and I would dismiss it but with orders as to costs.

As Warsame, JA is of the same view, these shall be the orders of the Court.

This judgment is delivered under **Rule 32(3)** of the **Court of Appeal Rules**, our learned brother Odek JA having died before signing it.

Dated and delivered at Nairobi this 24th day of July, 2020.

P.O. KIAGE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, KIAGE & ODEK, J.J.A)

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CONCURRING JUDGMENT OF WARSAME, J.A

I have had the advantage of reading in draft the judgment of my learned brother Kiage, J.A. I entirely concur with his findings and I have nothing useful to add.

Dated and delivered at Nairobi this 24th day of July, 2020.

M. WARSAME

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JUDGE OF APPEAL