



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**[CORAM: OUKO(P), MUSINGA & KANTAI, J.J.A]**

**CIVIL APPEAL NO. 30 OF 2005**

**BETWEEN**

**ELIZABETH WANJIRU NJENGA.....1<sup>ST</sup> APPELLANT**

**DAVID KARANJA NJENGA.....2<sup>ND</sup> APPELLANT**

**AND**

**MARGARET WANJIRU KINYARA.....1<sup>ST</sup> RESPONDENT**

**KEZIA MUTHONI WAINAINA.....2<sup>ND</sup> RESPONDENT**

**PETER NJENGA WAINAINA.....3<sup>RD</sup> RESPONDENT**

*(Appeal from the Ruling and Order of the High Court at Nairobi (Koome, J.)*

*dated 17th September, 2004*

**In**

**Succession Cause**

***IN THE MATTER OF THE ESTATE OF PETER NJENGA KINYARA (DECEASED)***

**JUDGMENT OF THE COURT**

**Mzee Kinyara Nagi** of Kangemi near Nairobi had three wives, **Margaret Waithera Kinyara** (the 1<sup>st</sup> wife), **Joyce Njoki Kinyara** (the 2<sup>nd</sup> wife) and **Wajuhi Kinyara** (the 3<sup>rd</sup> wife). With the first wife Margaret, he had a son **Peter Njenga Kinyara**. The second wife Joyce had no children. He begat two children with the third wife, Wajuhi, being **Elizabeth Nduta** and **Margaret Wanjiru Kinyara**. He died intestate on **16<sup>th</sup> August, 1972** but left some wishes as it will later appear in this judgment. He left some properties being **Dagoretti/ Kangemi/81, Dagoretti/ Kangemi/ S.111 and Dagoretti/ Kangemi/T.194**. It would appear that these properties had not been registered in his name by the time of his death.

Upon his death a Succession Cause **No. 12 of 1973** was lodged in the District Magistrate's Court at Nairobi from which an appeal was preferred being **SRM Civil Appeal No. 13 of 1973** whose particulars are not in the record. From the record it was the third wife, **Wajuhi Kinyara**, and her daughter **Margaret Wanjiru Kinyara**, who filed the case in a subordinate court from which an appeal was filed by the two ladies in the Resident Magistrates' Court. The appeal was heard by **J.H.H Todd**, Senior Resident Magistrate, who in a Judgment which was delivered on a date which is not clear, upheld the decision of elders as recorded and adopted by the District Magistrate. The Magistrate found in the appeal that:

***“It appears therefore that a widow cannot be considered as any sort of proprietor to the land of her deceased husband and her only rights are full rights of use and cultivation during her life time as long as she remains a widow of the deceased and remains with the deceased's family.***

***It would appear that the land over which the widow has a right of use during her life time is inherited as follows:***

*(a) In equal shares by her sons, including any sons which the widow may have had through a levirate union after her husband's death, or*

*(b) In the absence of sons by the deceased father, then full brothers, etc."*

The Senior Resident Magistrate upheld the decision of the District Magistrate whose effect would be that **Wajuhi Kinyara** and **Margaret Wanjiru Kinyara** lost the case that they had filed before the District Magistrate and the appeal before the

Senior Resident Magistrate. A further appeal was filed to the High Court of Kenya at Nairobi being High Court **Civil Appeal No. 90 of 1974** where the appellants were the third wife **Wajuhi Kinyara** and **Margaret Wanjiru Kinyara** against **Peter Njenga Kinyara**, son of the first wife. The parties appeared before Justice **Chanan Singh** on **10<sup>th</sup> December, 1976** where after the hearing, the following order was recorded by consent:

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 90 OF 1974**

**(Against the Judgment of R.M. Nairobi in Appeal 13 of 1973 and the Judgment of D.M. Nairobi in Nairobi D.M. Land Succession case 12 of 1973)**

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**WANJUHI KINYARA**

**MARGARET WANJIRU KINYARA .....APPELLANTS**

**WANJUHI KINYARA**

**MARGARET WANJIRU KINYARA.....APPELLANTS**

**v e r s u s**

**PETER NJENGA KINYARA ..... RESPONDENT**

**IN COURT: ON THE 10<sup>TH</sup> DECEMBER, 1976**

**BEFORE: THE HONOURABLE MR. JUSTICE CHANAN SINGH**

**ORDER**

**THIS** appeal coming for hearing before the Honourable Mr. Justice Chanan Singh on the 10<sup>th</sup> day of December, 1976 in the presence of Counsel for the Appellants and Counsel for the Respondent **AND UPON** hearing both Counsel

**IT IS ORDERED BY CONSENT**

1. **THAT** Land Title Number Dagoretti/Kangemi/81 do remain registered in the name of the son Peter Njenga Kinyara, the respondent herein, as at present.
2. **THAT** the three widows of the deceased namely Margaret Waithira Kinyara, Joyce Njoki Kinyara and Wanjiru Kinyara do have right to continue to occupy and use separate portions of the land as at present and that each widow is entitled to occupy and is occupying one third of the total area.
3. **THAT** an inhibition is hereby granted under Section 128 of the Registered Land Act (Cap. 300) against any dealing (which includes sale, lease and charge) with the portion of the land occupied by any of the widows during the lifetime of that widow.
4. **THAT** on the death of any of the widows, the inhibition in so far as it relates to the portion of land occupied by her shall be deemed lifted.
5. **THAT** each party do bear its own costs.

**GIVEN** under my hand and the Seal of the Court this 10<sup>th</sup> day of December, 1976.

ISSUED thisSECOND day of MARCH 1978.

SIGNED

The three widows died at various times in the course of time.

The three properties were eventually registered in accordance with **Mzee Nagi's** wishes where Dagoretti/Kangemi/81 was registered in the name of his son **Peter Njenga Kinyara**, Dagoretti/Kangemi/S.111 was similarly registered while the property Dagoretti/Kangemi/T.194 was registered in the name of **Margaret Wanjiru Kinyara**, daughter of the third wife who was unmarried at the time of Mzee Nagi's death. Peter Njenga Kinyara later died and his widow **Elizabeth Wanjiru Njenga** and their sons **David Karanja Njenga** and **John Wainaina Njenga** applied for letters of administration in respect of the estate of Peter Njenga Kinyara. They were issued with a grant on **26<sup>th</sup> September, 2000**. Margaret Wanjiru Kinyara (daughter of the third wife) filed Objection proceedings objecting to the issue of that grant stating in the Summons that the grant was obtained by concealment of material facts from the court and that the grant was obtained fraudulently by making of false statements. In the supporting affidavit, Margaret further deposed that the applicants in the application for issue of grant had deliberately concealed from the court the fact that the assets listed as forming part of the deceased's estate were held by the deceased (Peter Njenga Kinyara) in trust and that she was one of the persons beneficially entitled to share in the listed assets; that the applicants had deliberately concealed the fact that the people listed as having survived the deceased who were the deceased's widow, sons and daughters were only entitled to a portion of the assets listed as forming part of the deceased's estate; that the applicants had deliberately failed to disclose that the assets listed as belonging to the estate of the deceased actually belonged to the estate of the deceased's late father and the deceased was only a beneficiary like herself; that the deceased was her step brother and the applicants in failure to disclose to the court her interests in the assets listed as belonging to the deceased was an attempt to deprive her of her lawful property and that she resided on one third (1/3) of the property, Dagoretti/Kangemi/81 which she had developed extensively.

There followed an application to strike out that Objection and this was heard together with the objection proceedings by **Koome, J** (as she then was). The Judge took *viva voce* evidence from three witnesses. The objector, Margaret Wanjiru Kinyara stated *inter alia* that Peter Njenga Kinyara was her step brother and she was a daughter of Mzee Kinyara Nagi, that she lived on her father's land and did not know when its title had been changed to the name of her step brother who had since died and that the land on which she resided had been divided into three portions each occupied by her father's three widows. Further that she had not been married but had two children one of who had since passed away. She had developed two permanent houses one of which she had built for her late mother and that she had rental houses on the land from which she derived her income. According to her, her father had inherited the land and it was ancestral land. She denied being party to the suits we have referred to earlier in this Judgment. She admitted that she had been given a different portion of land which had been registered in her name. She was claiming her mother's portion of Dagoretti/Kangemi/81. She denied in cross-examination that the effect of court cases was that her step brother Peter Njenga Kinyara was to inherit her mother's portion of that piece of land upon her mother's death.

**Elizabeth Wanjiru Njenga**, widow of **Peter Njenga Kinyara** in testimony before the Judge stated that her late husband had informed her how the estate should be distributed; that the objector Margaret was given a parcel of land as part of the inheritance and that the whole family had been involved in the cases that were filed in court where agreements were reached on sharing out the three parcels of land. She denied that Margaret was entitled to any part of Dagoretti/Kangemi/81 and, asked why she did not stop Margaret from developing the land, she answered that the High Court had allowed the three widows a life interest in the land. Further; that:

***“Elders met and said that the shamba should belong to Njenga and that Margaret who was not married should take the plot to settle there with her son. The decision of the elders was adopted by the court. Margaret has not moved to her plot. She used to live with her mother. This decision by the elders was reached at after the deceased had passed away....”***

**James Njenga Kinyanjui**, son of **Peter Njenga Kinyara** testified that **Margaret Wanjiru Kinyara** (the Objector) had filed cases in court culminating in High Court Civil Appeal No. 90 of 1974; that after the death of his father, the parcels of land were registered as we have stated and Margaret was meant to move to the plot registered in her name.

In addition to that evidence various documents were tendered before the Judge who after taking submissions delivered a ruling on **17<sup>th</sup> September, 2004**. In respect of the application for revocation of grant it was the learned Judge's view that provisions of Sections 7 and 87 of the Civil Procedure Act did not apply as the matter before her was a Succession Cause governed by the Law of Succession Act Cap. 160 Laws of Kenya. According to the Judge, the Law of Succession Act was a self-sufficient law in respect of administration of estates where the Civil Procedure Act did not apply. The Judge considered the provisions of rule 63 of the Probate & Administration Rules which made provision for when Civil Procedure Rules under the Civil Procedure Act could apply to the Law of Succession Act and found that other provisions not provided for in rule 63 were inapplicable in administration of estates. She therefore held that the provisions of the Civil Procedure Act as relate to *res judicata* could not apply to the matter before her as the Civil Procedure Act was inapplicable to the matter relating to an estate.

On the second issue framed by the Judge, whether the objector Margaret Wanjiru Kinyara was entitled to a share of the property Dagoretti/Kangemei/81, the Judge found that the objector was a daughter of the third wife and therefore had a beneficial interest in the portion of land that was occupied by her late mother. The Judge also held that the (repealed) Constitution and International Conventions did not allow discrimination on grounds of gender and the objector was thus entitled to the land. In the end the Judge found that:

***“ In this regard therefore I find that the applicant has beneficial interest over the approximately one third of Dagoretti/Kangemi/81 which was occupied by her late mother and the same should have been reflected in the application for the grant of Letters of Administration. Since the grant of Letters of the Administration (sic) were issued to the deceased's widow and children, I find they have the priority in law and therefore subject to the beneficial interests of the applicant being noted, the grant of Letters of Administration need not be revoked. However the respondents are directed to proceed to confirm the grant as soon as possible and not later than three months from this ruling while noting the applicant's interests”.***

Those are the findings that provoked this appeal originally by **Elizabeth Wanjiru Njenga**, widow of **Peter Njenga Kinyara** and her son **David Karanja Njenga** as appellants against the objector **Margaret Wanjiru Kinyara** as 1<sup>st</sup> respondent, **Kezia Muthoni Wainaina** as 2<sup>nd</sup> respondent and **Peter Njenga Wainaina** as 3<sup>rd</sup> respondent. Upon the death of the 1<sup>st</sup> appellant, **Elizabeth Wanjiru Njenga**, her son, **James Njenga Kinyanjui**, joined his brother, **David Njenga Kinyanjui**, as appellants. Upon the death of **Margaret Wanjiru Kinyara**, **Margaret Wanjiru Wainaina** and **Eunice Wangare Mwangi** were substituted upon leave and became the 1<sup>st</sup> respondents.

There are eleven (11) grounds of appeal set out in the Memorandum of Appeal drawn by the appellants' advocates **M/s Okoth & Kiplagat Advocates**. It is stated that the learned Judge erred in law and fact in finding that the 1<sup>st</sup> respondent was not a party to the earlier court cases **Succession Cause No. 12 of 1972**, Civil Appeal No. **13 of 1973** and **Civil Appeal No. 90 of 1974** when records available showed that the 1<sup>st</sup> respondent was a party. It is also said that the Judge erred in law and fact in holding that the 1<sup>st</sup> respondent had a beneficial interest in the land **Dagoretti/Kangemi/81**; that the Judge erred in finding that **Mzee Kinyara Nagi** was the original proprietor of Title No. **Dagoretti/Kangemi/81**; that the Judge erred in inferring a trust relationship from a court order; that the Judge erred in holding that the suit before her was not *res judicata* and erred in not upholding the doctrine of estoppel under the Civil Procedure

Act; that the Judge erred in not recognizing that the 1<sup>st</sup> respondent had received her full entitlement out of the estate of **Mzee Nagi** and that the matters relating to the estate had been settled by consent; that the Judge erred in not recognizing that the 1<sup>st</sup> respondent could only apply to set aside **Justice Chanan Singh's** decision for her to be entitled to any other interest in the estate; that the Judge erred in not distinguishing the Civil Procedure Act from the Civil Procedure Rules and, finally, that the Judge erred in law and fact in holding that the objector was being discriminated against on grounds of gender, a ground not pleaded. For all that we are asked to allow the appeal and set aside the ruling in effect upholding the grant issued on **26<sup>th</sup> September, 2000**.

When the appeal came up for hearing before us on **22<sup>nd</sup> January, 2019**, **Mr. G.B. Akello**, learned counsel for the appellants, referred us to the written submissions filed in court on **22<sup>nd</sup> January, 2016** and a list of authorities and supplementary list also filed in court. **Mr. P.R. Amuga**, learned counsel for the 1<sup>st</sup> respondent, had not filed any written submissions and preferred to give oral submissions as did learned counsel **Mr. Lucas Murage** for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

In the written submissions the appellants fault the Judge for finding that the 1<sup>st</sup> respondent had a beneficial interest in the property and for inferring a trust relationship from a court order where, according to the appellants, there was none. According to the appellants, the objector was a party in the previous court cases and the objection filed was similar in all respects to the position taken in the previous cases. The appellants submit that Sections 7 and 8 of the Civil Procedure Act apply to all civil proceedings including proceedings under the Law of Succession Act. They further submit that the estate of **Mzee Kinyara** was upon his death distributed by the District Magistrate in District Magistrate's Court Land Succession Cause No. 12 of 1973 and that summons had been issued to all persons claiming an interest in the estate. The appellants further submit that the objector and her mother filed the various cases culminating in Civil Appeal **No. 90 of 1974** where all the parties reached a consent adopted by the court. It is further submitted that any claim by the 1<sup>st</sup> respondent was barred by Sections 7 & 8 of the Civil Procedure Act for being *res judicata*, the matter having been determined in the said Civil Appeal **No. 90 of 1974**. The case of **Kalipada vs. Dwijapada [1930] 57 EA 24**, a decision of the Privy Council, is cited in support of the proposition that when a question of the relationship of parties has been decided in a probate proceeding, a subsequent suit between the same parties involving the same question is barred by the rule of *res judicata*.

On the issue of trust, the appellants submit that there was no express or implied intention to create a trust in the order recorded by **Chanan Singh, J.** The case of **Ayoub v. Standard Bank of SA [1963] EA 619** is cited for the proposition that courts will not imply a trust save in order to give effect to the intention of the parties and that the intention of parties to create a trust must be clearly determined before a trust is implied.

On the Judge's findings that the objector could not be discriminated against, the learned Judge is faulted for making findings on issues not pleaded or raised before her. To fortify that submission the appellants cite the case of **Captain Harry Gandy v. Caspar Air Charters Ltd [1956], 23, EACA 139** where it was held that:

***“cases must be decided on the issues on record; and if it is desired to raise other issues, they must be placed on the record by amendment. In the present case, the issue on which the judge decided was raised by himself without amending the pleadings, and in my opinion he was not entitled to take such a course.”***

**Mr. Murage** for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents supported the appeal and relied on the submissions made by the appellants.

In opposing the appeal, **Mr. Amuga** submitted that the matter before the Judge was not *res judicata*. According to him, the 1<sup>st</sup> respondent was not a party to Succession Cause No. 12 of 1972 and Civil Appeal No. 13 of 1975. Counsel submitted that the High Court in Civil Appeal No. 90 of 1974 affirmed the right of the 1<sup>st</sup> respondent's mother to have a life interest to a portion of the land. According to counsel, the owner of the land died before enactment of the Law of Succession Act and that the 1<sup>st</sup> respondent as a non-married daughter of the home was entitled to a share of inheritance. In further submissions, it was counsel's view that the 1<sup>st</sup> respondent was a dependant of the estate in respect of the portion she occupied exclusively and she should be let to continue occupying the land.

We have considered the whole record and the submissions made before us. There are various issues raised in this appeal and we shall proceed to address and determine them.

One issue relates to the application of the Civil Procedure Act to administration of estates under the Law of Succession Act. It is the appellant's case that the objector was barred by the doctrine of *res judicata*, the complaint she was raising in the objection proceedings having been raised and determined in previous proceedings.

The learned Judge in the proceedings before her recognized that previous cases had been filed but that the original court files could not be traced and it was difficult for her to tell whether the 1<sup>st</sup> respondent was a party in the proceedings or whether it was the 1<sup>st</sup> respondent's mother agitating rights for herself and those of the 1<sup>st</sup> respondent. The Judge stated:

***“Whichever the case, I find that those proceedings related to the estate of Mzee Kinyara Nagi who died in 1972 whereas the present proceedings relate to the late Peter Njenga Kinyara who died in 1995.***

***The applicant herein is seeking to revoke the grant made on 26<sup>th</sup> September, 2000 that was issued to the respondents. To that extent, I am of the humble view that the provisions of Section 7 and 87 of the Civil procedure do not apply in this matter. Moreover, this matter falls under the provisions of Cap. 160, the Law of Succession. This statute is sufficient law (sic) as relates to the Administration of the deceased estate.....”***

The Judge went on to find that under rule 63 of the Probate & Administration Rules, provision was made on which the Civil Procedure Rules could apply in matters under the Law of Succession Act and that apart from those provisions, the Civil Procedure Act was not applicable to the proceedings on administration of estates under the Law of Succession Act. She further found that the matters raised before her were not *res judicata* and that the principle of estoppel could not apply. The appellants fault the learned Judge for those findings.

Although it would appear that the record before us is incomplete as some of the proceedings in the cases we have referred to are not on record, it is discernable from the record that after the death of Mzee Kinyara Nagi and after elders had mediated over the issue of inheritance of his estate, proceedings were taken before a District Magistrate, **Mr. J. H Mbaka**, who delivered a judgment on the **7<sup>th</sup> September, 1975** as is indicated in the judgment of the Senior Resident Magistrate, **Mr. J. H.H. Todd**, in Civil Appeal No. 13 of 1975. In the proceedings before the District Magistrate the applicants were Wajuhi Kinyara and Margaret Wanjiru Kinyara (Margaret was the objector in the proceedings before the Judge subject of this appeal). The Senior Resident Magistrate agreed with the District Magistrate that the decision arrived at by elders and the family of the late Mzee Kinyara Nagi was fair and reasonable in accordance with Kikuyu customs. In those proceedings it had been agreed that the three properties that belonged to Mzee Kinyara Nagi but which were not registered in his name be registered as follows:

1. **Dagoretti/Kangemi/81** in the name of **Peter Njenga Kinyara**
2. **Dagoretti/Kangemi/S.111** be also registered in the name of **Peter Njenga Kinyara** and
3. **Dagoretti/Kangemi/T.194** be registered in the name of the 1<sup>st</sup> respondent **Margaret Wanjiru Kinyara**.

That was the decision adopted as a Judgment of the court by the District Magistrate in the said proceedings that became the subject of Civil Appeal No. 13 of 1975. Other proceedings followed leading to the consent order in Civil Appeal No. 90 of 1974 which we have reproduced in full in this judgment, where the parties agreed by consent how the property **Dagoretti/Kangemi/81** was to be dealt with. Each of Mzee Nagis' widows acquired a life interest over the property which interest would lapse on the death of each widow and it was agreed that the property would eventually belong to **Peter Njenga Kinyara**.

The parties in High Court of Kenya Civil Appeal No. 90 of 1974 were Wajuhi Kinyara (widow of Mzee Kinyara Nagi) and her daughter Margaret Wanjiru Kinyara (the 1<sup>st</sup> respondent) as appellants and Peter Njenga Kinyara as respondent. When those parties appeared before Justice Chanan Singh, it was recorded in respect of Dagoretti/Kangemi/81 that the property would remain registered in the name of Peter Njenga Kinyara but the three widows of the deceased, Margaret Waithera Kinyara, Joyce Njoki Kinyara and Wajuhi Kinyara would continue to occupy and use the separate portions they occupied during their lifetime. An inhibition was placed on the title to the property to protect those life interests and it was ordered that the inhibition would be lifted upon the death of the widows. Those orders were made by consent of the parties.

When the 1<sup>st</sup> respondent, Margaret Wanjiru Kinyara filed objection proceedings to revoke or annul the grant issued in respect of the estate, she said, amongst other things, that the applicants in the application for grant had concealed material facts from the court and had obtained the grant fraudulently by making a false statement. She further stated that the assets listed as forming part of the deceased estate were actually held by the deceased in trust and that she was one of the persons beneficially entitled to share in the listed assets. She repeated that information in her testimony before the Judge, stating further that she was not aware of previous cases filed in court and that she had not participated in the same. This forms a core of the grounds taken in this appeal.

The 1<sup>st</sup> respondent filed objection proceedings on **1<sup>st</sup> March, 2001** and testified before the Judge on **24<sup>th</sup> March, 2004**. Although the judgment of the Senior Resident Magistrate in Civil appeal No. 13 of 1975 is not dated, it is shown that the District Magistrate had delivered the judgment and issued orders on **7<sup>th</sup> September, 1975**. The orders of the High Court following the consent were issued on **10<sup>th</sup> December, 1976**. The 1<sup>st</sup> respondent while filing the application for revocation of grant and in the testimony before the Judge was therefore less than candid when she feigned ignorance of proceedings that had taken place before her application for revocation of grant. The 1<sup>st</sup> respondent with her mother filed proceedings before the District Magistrate and then appealed to the Senior Resident Magistrate and finally filed Civil Appeal No. 90 of 1974 where the orders we have stated were given. Could she therefore turn around to say that material facts had been concealed in the matter? We do not think so. The 1<sup>st</sup> respondent had participated fully in the proceedings before the two subordinate courts and in the High Court where orders were issued by consent of the parties. She was one of the appellants in the appeal at the High Court.

It was the learned Judge's finding that the Civil Procedure Act did not apply to proceedings under the Law of Succession Act.

Rule 63 of the Probate & Administration Rules recognizes certain provisions of the Civil Procedure Rules to apply to proceedings under those Rules. That is not to say, and with respect the learned Judge was wrong to reach the finding which she did in this respect, that the Civil

Procedure Act has no application in proceedings under the Law of Succession Act. The Civil Procedure Act has universal application in civil proceedings and it so says in its preamble:

***“An Act of Parliament to make provision for civil procedure in civil courts.”***

It is only certain rules under the Civil Procedure Rules that are excluded in proceedings under the Law of Succession Act as is stated in Probate and Administration Rules. The Civil Procedure Act applies to proceedings on administration of estates which are in the nature of civil proceedings. That therefore brings in the issue of *res judicata* and estoppel which issue has been taken by the appellants in this appeal.

The 1<sup>st</sup> respondent participated fully in the proceedings before the District Magistrate and in the appeal before the Senior Resident Magistrate. She was a party in Civil Appeal No. 90 of 1974. Determinations were made in those proceedings in respect of the property **Dagoretti/Kangemi/81**. The orders of those courts and particularly the orders of the High Court in Civil Appeal No. 90 of 1974 subsist and have not been set aside. We agree with the appellants that the 1<sup>st</sup> respondent, having been a party in all those proceedings and the subject of the disputes being the same, she was barred by the doctrine of *res judicata* from instituting the proceedings that were before the Judge, subject of this appeal. As long as the orders of the court subsisted, she was and is estopped from instituting other proceedings relating to the subject **Dagoretti/Kangemi/81**.

That should really bring an end to this appeal but we may say in respect of other grounds raised in the memorandum of appeal that the submissions by the appellants that the learned Judge was wrong to hold that Mzee Kinyara Nagi was the original registered proprietor of **Dagoretti/ Kangemi/81** is merited. There was no material before the Judge to show that that parcel of land had previously been registered in any way at all. The evidence tendered through the land certificate issued on **17<sup>th</sup> November, 1973** under the Registered Land Act showed that the title No. **Dagoretti/Kangemi/81** measuring approximately 1.2303 hectares was registered in the name of **Peter Njenga Kinyara**.

We also agree with submissions by the appellants that the learned Judge could not infer a trust relationship where the court order was clear on its terms. The court order made by consent of parties gave each of the three widows a life interest over portions they occupied of the parcel of land **Dagoretti/Kangemi/81** which life interest was to lapse upon each widow's death. The court order did not create any trust relationship and none could be inferred. The learned Judge erred in finding existence of a trust relationship in the matter before her where the sole issue was whether the grant issued in respect of the estate of Mzee Kinyara Nagi should be revoked.

On findings on issues not pleaded or raised before the Judge, it is the appellant's case that the Judge was wrong to make findings in relation to discrimination against the 1<sup>st</sup> respondent, an issue the appellants submit was not raised before the Judge.

In the ruling appealed from the learned Judge held:

***“Consequently, I am of the firm view and agree with the applicant's counsel's submission that the applicant should not be excluded from this portion of land merely on the basis of her gender. The constitution of this country, Section 70 outlaws all forms of discrimination and sex is included and no one should be afforded differential treatment on the basis of their sex.***

***This constitutional provision is also in tandem with the other international conventions and treaties on human rights that Kenya has signed and ratified.***

***I particularly wish to refer to Article 1 of the convention on the elimination of all forms of discrimination of Act Forms of Discrimination against Women (LEDAN) which provides:***

***“For the purposes of the present convention, the term “discrimination against women” shall mean any distinct, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status, on a basis of equality of men and women of human rights and fundamental freedom in the political, economic, social, cultural, civil and any other field”.***

The Judge found that the 1<sup>st</sup> respondent was entitled to the 1/3 portion of land (**Dagoretti/Kangemi/81**) which had been occupied by her late mother.

The Judge recognized in the ruling she delivered that the matter before her was the application by the 1<sup>st</sup> respondent to revoke the grant made on 26<sup>th</sup> September, 2000.

Order 21 Rules 4 and 5 of the Civil Procedure Rules on ***“contents of judgment”*** provides that:

***“4. Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.***

***5. In suits in which issues have been framed, the court shall state its finding or decision, with the reasons therefor, upon each separate issue”.***

The 8<sup>th</sup> Edition of Black's Law Dictionary defines Judgment as:

***“A Court's final determination of the rights and obligations of the parties in a case”.***

Central to the delivery of a judgment or ruling are the pleadings and evidence presented by parties to a case as is illustrated by the findings in the case of **Attorney General vs. Halal Meat Products Limited [2016] eKLR**:

*“It is trite that a court should only determine issues raised before it by way of pleadings. See Nairobi City Council vs. Thabiti Enterprises Limited [1997] eKLR. However, the exception to the foregoing was set out in Odd Jobs vs. Mubia [1974] E.A. 476 wherein it was held that a court may base its decision on an unpleaded issue where it appears from the course followed at the trial that the issue has been left to the court for determination”.*

In the case of **Independent Electoral and Boundaries Commission & Another vs. Stephen Mutinda Mule & 3 others [2014] eKLR**, this court stated:

*“As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce. The learned Judge, no matter how well-intentioned, went well beyond the grounds raised by the petitioners and answered by the respondents before her and thereby determined the petition on the basis of matters not properly before her. To that extent, she committed a reversible error, and the appeal succeeds on that score”.*

In the case before the learned Judge there was no pleading or evidence adduced on the issue of gender or discrimination at all. The 1<sup>st</sup> respondent applied to court to revoke a grant on the basis that the same had been obtained fraudulently or on the basis of concealment of material facts. The appellants are right in faulting the Judge for making findings on issues that were not pleaded at all; issues that were not before her.

It is for all these reasons that we find merit in this appeal which we hereby allow. The ruling made on **17<sup>th</sup> September, 2004** is hereby set aside. The appellants will have costs here and below as against the 1<sup>st</sup> respondent only. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents shall bear their own costs of the appeal.

**DATED and Delivered at Nairobi this 5<sup>th</sup> day of April, 2019**

**W. OUKO (P)**

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**JUDGE OF APPEAL**

**D. MUSINGA**

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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.

**DEPUTY REGISTRAR**