



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, OKWENGU & J. MOHAMMED, J.J.A)

CIVIL APPEAL NO. 212 OF 2016

BETWEEN

MWANGI GAKURI.....APPELLANT

AND

BERNARD KIGOTHO MAINA.....1ST RESPONDENT

DANIEL KAMAU MAINA.....2ND RESPONDENT

(Being an appeal from the Ruling/Order of the High Court of Kenya

at Nairobi (L. Achode, J.) dated the 27th day of January, 2016 in

H.C. Succession Cause No. 2335 of 2011)

JUDGMENT OF THE COURT

[1] This is an appeal from the Ruling of the High Court (L. Achode, J) dismissing the appellant's summons for revocation or annulment of a Grant in respect of the estate of **Reuben Maina Elijah Heina** (deceased) who died on 28th February, 1997.

[2] On 27th October 2011, **Bernard Kigotho Maina** and **Daniel Kamau Maina**, the two of the sons of the deceased filed a petition for Grant of Letters of Administration intestate with consent of the beneficiaries of the estate. They indicated that the estate comprised of various assets including LR. No. 36/11/213. The Grant was issued by the High Court to the two petitioners on 19th March, 2012. Subsequently in 2013, the administrators filed summons for the confirmation of the Grant and the grant was duly confirmed and a certificate of confirmation dated 25th February 2013 issued. The schedule to the certificate of confirmation identified the beneficiaries and the share of each in respect of the estate. According to the schedule, LR. No. 36/11/213 was to be registered in the name of **Bernard Kigotho Maina** and **Daniel Kamau Maina** on behalf of themselves and in trust in equal shares for the nine named beneficiaries.

[3] On 19th August, 2014, the appellant filed summons for revocation of the Grant made to the administrators (respondents herein) on the ground that the grant was obtained by false statement or by concealment of the fact that LR. No. 36/11/213 is in fact jointly owned by the appellant and the deceased and is vide the doctrine of *jus accrescendi*, not available for distribution. The application was supported by the affidavit of the appellant in which he claimed that LR. 36/11/213 which is situated in Eastleigh, Nairobi was registered in his name jointly with the deceased. He annexed an indenture dated 7th November, 1967 showing that the property was transferred by **Santram Sharma** to **Reuben Maina** and **Mwangi Gakuri** as purchasers to hold as joint tenants.

[4] The respondents filed a joint replying affidavit deposing, *inter alia*, that;

- (i) Deceased and appellant were business partners and acquired several properties as tenants in common including Mbotela property and LR. No. 36/11/213 Eastleigh.
- (ii) Deceased and appellant agreed verbally that appellant would take Mbotela property exclusively while the deceased would take the Eastleigh property but both developed the two properties together.

(iii) Upon the death of deceased, the appellant called deceased's family and his family together and reiterated the verbal agreement and stated that the Eastleigh property belonged to the estate of the deceased.

(iv) In August 2011, the appellant took out a citation in High Court Succession Cause No. 1759/2011 requiring the dependants of the deceased to accept or refuse letters of administration in respect of the estate of the deceased leading to the respondents filing a petition for Grant of Letters of Administration which petition was served on the appellant's advocates.

(v) The Mbotela property was not included in the list of the assets of the deceased in the succession cause as the family of deceased had agreed with the appellant to exclude it and include the Eastleigh property exclusively belonging to the deceased.

(vi) Deceased and appellant together with other people also acquired LR. 209/2763/7 in Gikomba but the appellant and two other proprietors were not included in title document.

(vii) At the time of death of the deceased, the appellant was holding the original title documents for the three properties and he agreed to release the original title for LR. No. 36/11/213 on condition that the family of the deceased executed necessary documents to transfer LR. 209/2763/7 to the appellant but the family of deceased insisted that names of other proprietors should appear in the title documents but the appellant refused and started laying claim to Eastleigh property.

(viii) Since the death of the deceased, the appellant has never set foot in the Eastleigh property and it is the family of deceased which has been paying land rates electricity and water bills for the property.

[5] The appellant filed a supplementary affidavit essentially denying the facts stated in the replying affidavit. He particularly denied the alleged agreement between the deceased and the deceased family and the existence of Mbotela property. He implicitly admitted that he issued a citation but stated that it was in respect of another succession cause. The respondents filed a further replying affidavit and annexed a rates payment request in the name of the appellant in respect of LR. No. 209/4844/119 which the respondents claimed was in respect of the Mbotela property.

[6] The summons for revocation of grant was heard by way of written submissions. The High Court considered the affidavit evidence and the written submissions and stated at para. 19 and 20 of the Ruling;

“19. From the evidence, the Mbotela property is registered in the appellant's name solely and he has been managing it exclusively and paying the rates and bills thereon. On the other hand, the administrators produced evidence that all along they have managed and paid rates and bills on Eastleigh property without any interference from the applicant, since the passing of the deceased eighteen years ago.

20. For those reasons, I find that although the deceased and the applicant held the suit property under joint ownership, their intention as can be construed from their own interactions with the properties was for the applicant to own Plot No. LR. 209/4811/119 Mbotela exclusively while the deceased owned LR. No. 36/11/213 exclusively.”

[7] The main ground of appeal states:

“The learned Judge erred in law and fact in failing to find that the doctrine of jus accrescendi was applicable in the circumstances of the case and the property known as LR. No. 36/11/213 was not part of the deceased herein estate (sic).”

Mr. Macharia Kahonge learned counsel for the appellant submitted, amongst other things, that; the respondent made untrue statements that the Eastleigh property belonged to the estate or concealed the fact that the property was jointly owned; the learned judge ought to have revoked the grant; the learned judge failed to appreciate the law that upon the death of the deceased, the property ceased to belong to the deceased; since the doctrine of *jus accrescendi* is well established in law there was no room to invoke equity; and, that the learned Judge ignored the appellant's supplementary affidavit where he denied the alleged arrangements relating to Eastleigh and Mbotela properties.

[8] On the other hand, **Miss Irungu** for the respondents submitted in part that there was no fraud, false statement or concealment of true facts; that the evidence of the intention of parties was not refuted or controverted; that the appellant issued a citation and was served with the petition for grant which showed that the Eastleigh property was indicated as part of the deceased's estate; that the petition was gazetted; that the appellant did not file an objection in the succession proceedings; that the grant was served on the appellant, and that he communicated his intention to release the original documents.

[9] We have considered the appeal. The summons for revocation of grant was based on the ground that the grant was obtained fraudulently by making a false statement that LR. No. 36/11/213 belonged to the estate or by concealment of the fact that that property was jointly owned by the appellant and the deceased. The fact that the appellant and the deceased were registered as joint proprietors of the property is not controverted and is indeed supported by the conveyance dated 7th November 1967. The learned Judge appreciated the law on joint tenancy – the principle of right of survivorship that upon the death of a joint tenant, the property passes by operation of the law to the surviving joint tenant and that a joint tenancy cannot pass under the will or intestacy of a joint tenant as joint tenants are considered in law as single owner (See also ***Echaria v Echaria* [2007] 2 EA 139**).

In spite of this position in law, the respondents' case was in essence that the appellant and deceased were business partners who acquired and developed several properties jointly including the suit property and LR. No. 209/4844/119 the Mbotela property, and that by an agreement between the deceased and the appellant and later acknowledged by the appellant before family members, the appellant surrendered his proprietary right in suit property and was compensated for his right in Eastleigh property by a surrender of the deceased's proprietary right in Mbotela property to the appellant which arrangement the parties have honoured to date. If that is the case, then, there would be no fraud in

including the entire Eastleigh property as part of the estate.

[10] Disputes normally arise even in joint tenancy as to the exact share of each joint tenant if at all. In, ***In Kivuitu v Kivuitu [1991] KLR 248***, although the parties were registered as joint tenants of the property in dispute without specifying the share of each, the trial court shared the property in the proportion of $\frac{1}{4}$ and $\frac{3}{4}$. The appellate court reversed the decision and made a finding that each had made equal contribution to the acquisition of property and shared the property equally.

In this case, the deceased died 14 years before the respondents applied for Grant of Letters of Administration. For 14 years, the appellant had not applied to the Land Registrar to be registered as sole proprietor in exercise of right of survivorship. In those circumstances, evidence of oral evidence as to the existence of any distinct subsequent oral agreement to modify the joint tenancy was admissible pursuant to proviso (IV) of Section 98 of the Evidence Act to show that the appellant held a bare title and was a trustee for the deceased.

[11] The dispute which emerged upon the summons for revocation of the Grant was whether the appellant still owned the Eastleigh property jointly with the deceased and, if so, whether the entire property was in law transmitted to the appellant as sole proprietor upon the death of the deceased. The court had jurisdiction to determine that dispute. Upon consideration of the evidence the court in essence determined that the appellant had no proprietary right in Eastleigh property.

[12] This was a case dependent on affidavit evidence and documents. The parties elected not to adduce oral evidence. The appellant merely relied on the fact of registration and the legal consequences of such registration. The respondents set out the facts in their two replying affidavits which we have set out in para 4 above. The appellant in his supplementary affidavit denied all the essential facts. As regards the Mbotela property, he stated that the property does not exist and is not registered in his name. The respondents annexed to the further replying affidavit a property rates payment request from Nairobi City Council (as it then was) showing that LR. No. 209/4877/119 is registered in the appellant's name. In his written submissions before us, the appellant now says that the Mbotela property is exclusively owned by him. Indeed, there is no appeal against the finding that the appellant owns LR. 209/4844/119. The appellant in the supplementary affidavit denied that the petition for grant of letters of administration was served on him or his advocate. The appellant's present advocates, by a letter dated 28th November, 2011 requested the respondents' present advocates to serve him with the petition and by a letter dated 29th November, 2011 (following day), the respondents advocates sent a copy of the petition to him.

By a letter dated 25th June 2013, the respondents' advocates requested the appellant to release the original title for LR. No. 36/11/213 following their conversation in the presence of the appellant on 24th June 2013.

The appellant replied by a letter dated 8th July 2013 partly as follows:

“We have spoken to our client and he is of the view that your clients should first execute all the necessary instruments to ensure his name is in LR. 209/2763/7 in exchange of the title to the above captioned land.”

The appellant stated in part in para. 11 of the supplementary affidavit:

“THAT my advocates on record aforesaid have explained and confirmed to me that the request in the letter dated 8th July 2013, was for authentication and/or verification purposes. The said gesture was entirely on without prejudice basis and was made for the purposes of me entering into an agreement with the respondents on exchange of my interest therein with other properties they own...”

The letter speaks for itself.

It is clear from the above facts that the appellant has not been candid.

[13] It is the appellant who issued the citation leading to the filing of the petition. The petition was gazetted and served on him but he failed to object to the inclusion of the Eastleigh property as part of the deceased's estate. It can be inferred from the appellant's conduct that the appellant's intention was that a grant, including the Eastleigh property as part of the deceased's estate, would facilitate registration of Mbotela property in the sole name of the appellant. In addition, he entered into negotiations for release of title for the Eastleigh property after the Grant had been confirmed and filed the summons for revocation of the Grant a year later. For 14 years, he did not cause the Eastleigh property to be registered in his name. All this evidence shows that the facts stated in the replying affidavit and believed by the High Court relating to the exchange of the properties between the appellant and the deceased are true. The evidence shows that by subsequent oral agreement leading to exchange, the appellant ceased to have any interest in the Eastleigh property. In the circumstances, there was no fraud in the obtaining of the Grant of Letters of Administration.

[14] For above reasons, the appeal is dismissed with costs to the respondents.

Dated and Delivered at Nairobi this 9th day of February, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

H. M. OKWENGU

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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

DEPUTY REGISTRAR