



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWILU, AZANGALALA & KANTAI, J.J.A)

CIVIL APPEAL NO. 241 OF 2007

SOPHIA SALIM GATHIAKA.....1ST APPELLANT

SALIM MOHAMED ABDALLAH KANIKI 2ND APPELLANT

VERSUS

1. MARIAM MBUVE ABDALLA ALIAS MAMA KANYANAYA

2. MOHAMED ALI

3. SALIM ALI MUCHOKI

4. HALIMA MUCHOKI

5. ASHA MUCHOKI

6. ABDALLA MUCHOKI

7. FATUMA NGORRO

8. HABIBA ABDALLA

9. ASHA ABDALLA ALIAS MAMA LELA

10. MOHAMED ABDALLA RESPONDENTS

(Appeal from judgment of the High Court of Kenya at Nairobi of Honourable Lady Justice K.H. Rawal dated 26th June, 2007)

in

P.A. SUCCESSION CAUSE NO. 1831 OF 1996

IN THE MATTER OF THE ESTATE OF HEMED ABDALLA KANIKI (DECEASED)

JUDGMENT OF THE COURT

1. This appeal arises out of the judgment delivered by High Court of Kenya at Nairobi issued on 26th June 2007 by Honourable Lady Justice K.H. Rawal (as she then was) in which the learned judge nullified the grant of representation in respect of property Block B2/4(A&B) (the suit property) Pumwani issued in favour of Sophia Salim Gathiaka & Salim Mohamed Abdallah Kaniki (hereinafter referred to as “**the appellants**”) following the application by Mariam Mbuve Abdalla alias Mama Kanyanya and 9 others, hereinafter referred to as “**the respondents.**”

2. The respondents had made the application for revocation or annulment of grant before the High Court on grounds that the appellants who had been appointed as Administrators by virtue of the impugned grant had made false statements in concealing the fact that the suit property is a family property of the late Abdalla Nzito Ndambo. Hemed Abdalla Kanini was the eldest son of the late Abdalla Nzito Ndambo and though was registered as sole proprietor of the suit property, it was the respondents case before the high court that the deceased herein was holding the property in trust for the family of the late Abdalla Nzito Ndambo.

3. The appellants on their part argued before the high court that there had been no fraud on their part and contend that the deceased herein bought the suit property and got the same registered to him as sole proprietor. The appellants further contend that the respondent’s interest has not been shown on the title as to entitle them to any rights over the suit property. The suit property had since been registered to the names of the appellants as administrators by the Nairobi City Council despite the letters of administration being confirmed.

4. Several witnesses testified before the trial court and documents adduced by the respective parties. In the end, the trial judge concluded that the deceased herein held the suit property in trust for the members of the two families by way of constructive trust despite the absence of its mention on the registered lease. The trial judge made this finding based on the evidence that Plot No.179 Pumwani was occupied by the family and the suit property used for the benefit of the two families of the late Abdalla Nzito. The trial judge also found that the deceased herein had not interfered with the rights of the two families and had neither resided nor collected rents from the tenants occupying the same under authorities of the representatives of the two families who also collect the rent. The trial judge also noted that neither the widow nor any other child of the deceased herein testified in the proceedings before the high court.

5. Ali Hussein Kiety testified as an interested party (hereinafter referred to as “**interested party**”). He is the grandson of the 1st appellant and produced documents in his possession left to him by his grandfather regarding the suit property. His testimony was asserting the claim that the suit property initially belonged to the late Abdalla Nzito Ndambu.

6. The appellants were aggrieved by the judgment of the High Court leading to this appeal. Attempts to settle the matter amicably out of court were unsuccessful. In addition, as per counsels on record for the respondents, five of the respondents have since passed on. Eventually the matter proceeded for hearing. The appellants are represented by **Mr. Bosire D.K** while the respondents are represented by **Mr. W. Khalwale. Mr. R. Wanga** appeared for the interested party.

7. Through the amended memorandum of appeal filed in court, the appeal is premised on nine grounds. However during his arguments, Mr. Bosire counsel for the appellants consolidated the grounds into the error by the trial judge’s consideration of the evidence adduced by the appellants and the respondents during trial. It is noted that the dispute is mainly related to the status of the suit premises and not the rest of the estate of the deceased herein or the estate of the late Abdalla Nzito.

8. Mr. Bosire argued that the receipts and documents tendered in evidence on the appellants’ behalf

confirmed that the deceased herein was the rightful owner of the suit premises and the receipts tendered by the respondents were forgeries. To advance his argument, Mr. Bosire submitted that plot number 179 had no relationship with the suit property (B2/4 (A &B)). Mr. Bosire submitted that the evidence by Duncan Oyugi should have been contrasted with that of Ronald Omondi Achieng. These two witnesses originated from the Nairobi City Council as it then was gave contradictory testimonies in support of the opposing sides respectively. In essence, Mr. Bosire reiterated that the evidence on ownership was not properly analysed by the trial judge. Learned counsel also took issue with the interested party's assertion that he was not interested in the estate of the deceased yet he is the one who collects rent and exclusively enjoys the fruits of the suit property. Counsel pointed out that the interested party is a grandson of the first appellant and great grandson of the late Abdalla Nzito. Learned counsel therefore urged us to allow the appeal.

9. On his part, **Mr. Wang**, learned counsel for the respondent opposed the appeal arguing that no reason had been given to warrant this court to disturb the judgment of the trial court. He further argued that the appeal is incurably defective as the interested party was not joined as a party in the proceedings.

10. Mr. Khalwale counsel for the interested party submitted that the interested party was a party in the superior court and prayed for audience. Learned counsel however pointed out that he realized that he had no right thus abandoned his participation.

11. Though it was not raised by the parties, it was imperative to clarify that though **section 47** of the Law of Succession Act makes no mention of an appeal to the Court of Appeal from the decision of the High Court made in the exercise of the latter's original jurisdiction, decisions on this point have been varied both in the High Court and in this Court. The holding in the leading case of **Makhangu V. Kibwana [1996-1998] 1 EA 168** (Cockar, CJ, Kwach and Shah, JJ.A), which has been cited invariably in almost all the subsequent decisions is to the effect that an appeal does lie to the Court of Appeal from the decision of the High Court in probate matters. This is the position notwithstanding the provisions of **section 50** of the Law of Succession Act which is clear that decisions from the magistrate's courts are appealable to the High Court and the decision of the High Court is final. Decisions of the Kadhis Court, on the other hand are appealable first to the High Court and only with leave and in respect of point(s) of Muslim law, to the Court of Appeal. This is more so with the promulgation of the constitution 2010 and **Article 164(3)(a)** thereof which grants this court jurisdiction to hear appeals from the High Court. This position was more recently reiterated by the court of appeal in **Rhoda Wairimu Karanja & another v Mary Wangui Karanja & another [2014] eKLR** as follows:-

“In view of these and given the adversarial nature of litigation in our system of justice, it would be unconscionable to allow as final the decision of a single judge, and limit the right of appeal to the High Court, especially now when the court hierarchy has been opened by the creation of the Supreme Court as an apex court.”

12. Accordingly, our mandate on a first appeal is set out in **Rule 29(1)** of this Court's Rules namely to re-appraise the evidence and to draw inferences of fact. Where the exercise of judicial discretion is involved the exercise of which is called to our interrogation, we remain guided by the principles enunciated in **Selle v Associated Motor Boat Company Ltd [1968] EA 123**; that we will not interfere unless we are satisfied with the judge misdirected self in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the judge was clearly wrong in the exercise of discretion and occasioned injustice by such wrong exercise.

13. We remain mindful of the fact that the trial judge had the opportunity to interrogate and observe the parties and witnesses in arriving at her findings and making inferences of fact. As the dispute mainly relates to the status of the suit premises, we have found it necessary to re-appraise the evidence adduced before the trial court in that regard. The following is the summary of the evidence adduced before the trial court:

- *Exhibit 1 – Receipts by the Municipal Council of Nairobi Pumwani from 1932 relating to Plot Number 179*

- *Exhibit 2 – Receipt dated 6/12/1967 by the City Council of Nairobi in favour of Nzita Ndambo and Ahmed Kanikii in respect of Plot Number 179 Pumwani*
- *Exhibit 3 – Letter from City Council of Nairobi dated 27/09/1968 addressed to Nzitia Ndambo Plot No.179 Pumwani referenced Pumwani Urban Renewal and Relief Scheme*
- *Exhibit 4 – Letter from City Council of Nairobi dated 11/02/1970 addressed to Mr. Hemedi A. aniki c/o House No.B2/4 (a & b) New Pumwani Nairobi referenced Plot No.179 – Pumwani m/s Nzitia Ndambo and Another (Dec'd)*

14. The appellants contend that the exhibits numbers 1 to 3 were forged. In support of this, the appellants submit that the documents had revenue stamps affixed to them long before the Stamp Duty Act came into force and the documents bore names of different persons and could not therefore refer to one and the same person. We are mindful that the allegation of fraud in form of forgery of documents was also canvassed before the trial judge and put to witnesses during the trial. As this court has said before an allegation of fraud is grave. The onus is on the party alleging fraud to provide evidence to the court that rises to the standard of proof which was underscored by this Court in **Central Bank of Kenya Limited v Trust Bank Limited & 4 Others [1996] eKLR** as being beyond that of a balance of probabilities. In that appeal, the court rendered itself as follows:

“The appellant has made vague and very general allegations of fraud against the respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the appellant in this case than in an ordinary civil case.”

It is just not enough to allege fraud, but also lay a basis by way of evidence, upon which the court would make a finding.

15. The mere fact that revenue stamps were affixed on receipts before the enactment of the Stamp Duty Act does not in itself amount to fraud. It is not allowable to leave fraud to be inferred from the facts. It is trite law that most laws were imported into the country by the settlers and later through the reception clause on the applicability of the statutes of general application in force in England on the 12th August 1897 by virtue of **section 3(1) (c)** of the Judicature Act. The appellants did not consider and pursue this angle which may have led them to a different conclusion. As for the difference in names, we were not clear whether the appellant meant what we considered variations of the words Nzita, Nzitia, Ndambo, Ndibo or Ndabo but we can reasonably infer that there was little doubt as to who those names referred to being the late Abdalla Nzitia Ndambo and they all related to plot number 179.

16. The above exhibits having been presented by the interested party were eventually produced by Duncan Oyugi from the Nairobi City Council directorate of social services. The witness being a Housing Officer in charge of Pumwani estate confirmed under oath that the documents were genuine. Each party including the appellant was afforded an opportunity to cross examine the witness. From our perusal of the record, the witness appeared to be genuine and his testimony consistent as to be relied upon.

17. The appellant on their part brought Ronald Omondi Achieng as their witness. Ronald was working with the Legal Affairs department of the Nairobi City Council in the conveyancing department. On his part, this witness produced tenant purchase receipts and largely confirmed the appellants' documents. The other documents produced by his colleague were also shown to him and he could not disprove them as emanating from the council. Of note is that on cross examination by Mr. Khalwale for the Interested Party, this witness confirmed that social services department manages the housing schemes and that there are estate managers for those schemes who was the right person to know. Mr. Oyugi was one such person attached to the social services directorate. From the foregoing, we are unable to see any contradiction in the testimonies of these two officials from the Nairobi City Council. If anything, we find that their testimonies complemented and corroborated each other with each of them only limiting their testimony to their area of attachment within the city council.

18. We have also tried to trace the link between plot number 179 and the suit property. In doing this we

attempt to have a chronological summary as herein. There is common ground that the late Abdalla Nzita resided at plot number 179 situated in Pumwani together with his family comprising two households and initially had put up a semi permanent structure in form of a mud house. Though it remains unclear when exactly the late Abdalla Nzita died, it is generally agreed that it was somewhere in the mid 1930s.

19. It is also not in dispute that there was a redevelopment scheme in Pumwani estate for which the late Abdalla Nzita Ndambo was considered as was indicated in exhibit 3, letter dated 27th September 1968 for which a form was to be filled. Incidentally, it was on 2nd September 1969 that the deceased herein entered into a tenant purchase agreement in respect of Block B2/4 (a & b). It also came out in evidence from the Mr. Oyugi that the reason for designating the house as 'a' and 'b' was because there were two households factored in the property which in our view is consistent with the two households left behind by the late Abdalla Nzita. During this supervening period, there was sufficient evidence that the trial judge relied upon that the deceased herein Hemed Abdalla Kanikii was fetched from Mombasa by Hussein Ali, step cousin to the second appellant herein to come and stand in for his father, the late Abdalla Nzita Ndambo in the transaction. The witness recalled that all these happened at the time when Tom Mboya was assassinated which from our history points to the year 1969. The next correspondence that follows the tenant purchase agreement is the exhibit 4 which is the letter dated 11th February 1970 addressed to Mr. Hemedi A. Kaniki c/o House No.B2/4 (a&b).

20. As was quoted by the trial judge, the letter provides as follows:

I understand that you have taken a new house in the new Pumwani on behalf of the above named persons (M/s Nzitia Ndambo & Another) (emphasis supplied)

This letter is very specific that the addressee, Hemedi A. Kaniki (the deceased herein) had taken a new house in the new Pumwani estate on behalf of M/s Nzitia Ndambo & another. The letter continues as follows:-

“Before you moved to the new house, you failed to clear the outstanding...”(emphasis supplied)

In our contextualizing this letter, the new house in question is not any house but a specific one as buttressed by the use of the definite article “the” and indicated as the address for the said Hemedi A. Kaniki which is House No.B2/4 (a&b). Indeed the trial judge made a finding that the deceased herein or the administrators did not stay on the suit property or collect rent during the life time of the deceased herein.

21. It was also not lost on us that despite the appellants arguments, the appellants did not disprove the fact that plot number 179 was indeed B2/4 (a &b) or at the very least that the owner of the plot number 179 was entitled to plot number B2/4 (a & b). We expected the appellants to proffer an alternative parcel of land for which the late Abdalla Nzita Ndambo was entitled to in place of B 2/4 (a & b), it not being in dispute that the late Abdalla Nzita Ndambo was an initial inhabitant of plot number 179 before the redevelopment. This was however not forthcoming. The appellant’s instead procured witnesses who testified at as to other properties without direct relationship to the suit property. We took particular interest in the fact that the tenant purchase agreement adduced by the appellants was not preceded by any application form or offer letter lending credence to the respondents’ version of the situation.

22. Unfortunately since the witnesses have since died, we can only attempt to reconstruct what may have happened based on the evidence available. Just like in any civil proceedings, the standard of proof based on all evidence adduced is on a balance of probabilities. In the present case, we find the same to tilt in favour of the respondents. The appellants’ actions to protect the estate of the deceased herein may have been actuated by innocent mistake and not out of malice based on what they understood to be what transpired. However, as this court has previously held in **Samuel Wafula Wasike v Hudson Simiyu Wafula (1993) LLR (CAK)** a grant obtained on the strength of false claims and on the basis of facts concealed from the court, is liable to revocation or annulment in this case as the two are alternative remedies.

23. The consanguinity between the deceased herein and the late Adalla Nzita Ndambo not being in doubt, we agree with the trial judge's judgment of 26th June 2007 and see no reason to interfere. As we are largely in agreement with the trial judge's analysis and decision, we did not see the need to repeat her analysis and only sought to highlight instances we felt necessary for our input. In the end we dismiss the appeal with each of the parties to bear his/her own costs.

Dated and delivered at Nairobi this 29th day of January, 2016.

P. M. MWILU

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JUDGE OF APPEAL

F. AZANGALALA

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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

