



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, AZANGALALA & SICHALE, JJ.A)

CIVIL APPEAL NO 140 OF 2006

BETWEEN

MARY WANJIRU KAPAITOAPPELLANT

AND

TERESIA NASIEKU KINEA.....1ST RESPONDENT

ROSE AGIZA NDEYI KEYONZO.....2ND RESPONDENT

(An appeal from the judgment and decree of the High Court of Kenya at Nairobi (Koome, J.) dated 10th June 2005 and the judgment and decree of the High Court of Kenya at Nairobi (Aganyanya, J.) dated 10th May 2001

in

High Court P&A Cause No 292 of 1991)

JUDGMENT OF THE COURT

This appeal concerns a succession dispute arising out of the estate of the Late Kapaito Ole Parimbai. Mary Wanjiru Kapaito, the appellant herein, is his widow, while Teresia Nasieku Kinea, the 1st respondent, is the deceased's daughter. On 14th March 1991, the 1st respondent had applied for a grant of letters administration in respect of the deceased's estate. The appellant on her part applied for a grant of probate for the estate of the deceased on the grounds that the deceased had left a will dated 6th April 1989. This later application served as an objection to the 1st respondent's application for grant of letters of administration. A notice of objection to the application for grant of probate was filed by the 1st respondent alongside other objectors. Eventually, a grant of letters of administration was issued to the respondent, but by a judgment dated 10th May 2001, Aganyanya J. (as he then was) revoked that grant and in its place issued a grant of probate of written will to the appellant. The learned judge made his ruling as follows:

“I am of the view that except for L.R. No Ngong/Ngong/4100 and Ngong/Ngong/10249 ... the deceased wishes in the will must be respected.”

It later emerged that in the intervening period after the grant of letters of administration, the 1st

respondent had sold and transferred the property known as Ngong/Ngong/10249 to Rose Agiza Ndeyi Keyonzo, the 2nd respondent. The property was subsequently registered in the name of the 2nd respondent on the 22nd July 1993. After the judgment revoking the grant of letters administration, the appellant again approached the court for an order against the land registrar to cancel titles over the suit premises, and issue the same in favour of herself. The application was served on the 1st respondent, but the 2nd respondent was not enjoined in the proceedings. That application was allowed and the orders prayed for were granted.

Thereafter, the 2nd respondent filed an application in court to review its previous ruling, and to set aside the order cancelling registration of Plot No Ngong/Ngong/10249 in her favour, and prayed that the court restores the title deed issued to her. That application was grounded on the fact that the order cancelling her registration was in conflict with the judgment of 10th May 2001, and further that this order was procured after the appellant had misled the court. This application was heard by Koome J. (as she was then), who rendered herself on the application as follows:

“The applicant in this present summons who had purchased the suit premises from the previous administrator was not enjoined in those proceedings which led to the cancellation of her title and the application was not served upon her. I have carefully read the judgment by Hon. Aganyanya J. especially page 18 where the court made the following observation:

“As regards plot number Ngong/Ngong/10249, though included in the deceased’s will it was agreed by both parties, 3rd objector included that it had been given to Ziporah Naigu (PW2), but that the respondent had sold it and given Naigu only Kshs 100,000/=. The petitioner herself agreed to have sold this plot at Kshs 350,000/= and that when she gets the balance she would pass it over to the said beneficiary. The issue must rest between the two.”

The Court therefore upheld the deceased wishes as expressed in the will except in respect of Title Number Ngong/Ngong/4100 and Ngong/Ngong/10249 (suit premises) which were not vested upon executrix. In view of the above judgment I am of the view that the applicants application dated 1st February 2005 that seeks to enjoin the applicant herein in these proceedings and were to review the orders made and issued on 28th July 2003 has merit. In this regard, I am of the humble view there is an error apparent on the face of the record arising from an omission as the attention of the court was not drawn to the said judgment. Having given careful thought to the said judgment, it is clear the judgment of the court allowed the will as drawn by the deceased but excluded two properties namely Ngong/Ngong/10249 and Ngong/Ngong 4100 from the properties to vest upon the Executrix. It is clear that when the executrix made the application seeking for orders of transfer of these properties, she definitely misled this court into issuing the orders over the two properties which were excluded from the will of the deceased by the court.

Consequently therefore in the interest of justice the order made on 9th July 2003 and issued on 28th July 2003 must be reviewed/ varied so that it is in tandem with the judgment of this court to the extent that parcel Number Ngong/Ngong/10249 and Ngong/Ngong/4100 should not have been registered in the name of Mary Wanjiku Kapaito. The title number Ngong/Ngong/10249 should revert to the previous registered owner Rose Agiza Ndeyi Keyonzo.”

This ruling sparked the present appeal. The grounds in support of the appeal are contained in the memorandum of appeal dated 7th July 2006. The memorandum indicates that the grounds relate to the two decisions of the High Court, that is the decision of Aganyanya, J. and Koome J., and faults those decisions for: failing to find that the 1st respondent had intermeddled with the estate of the deceased and taking no steps to remedy the same; upholding the will and then excluding the two subject properties from the will; upholding the appellant as the proper executrix of the estate but denying her the power vested in an executrix of an estate according to the law; failing to find that the 1st respondent had fraudulently concealed material facts to the court; failing to recognise that the deceased had provided for all his children equally; and in giving a determination that was contrary to law.

In submissions, Ms Kwamboka, counsel for the appellant stated that there was inconsistency in the decisions of the court because on the one hand, the will was upheld but on the other hand, the court endorsed the sale of the property by the 1st respondent who was a person who had no title to the said property. According to counsel for the appellant, once the court found that the 1st respondent improperly procured the letters of administration, she could not pass title to the 2nd respondent. Therefore, the decisions of the court subsequently are against the weight of the law, and thus the appeal should be allowed with costs.

The appeal is opposed by Mr Getange for the 2nd respondent, who submitted first that there is no notice of appeal before this Court against the judgment of Aganyanya J. In addition, counsel submitted that there was no inconsistency between the decisions of the two judges in respect of the subject property. His position is that the decision of Koome, J. merely corrected an error committed by Justice Aganyanya. As such, the appeal has no merit and should be dismissed.

We must state from the outset that we have noted that the notice of appeal that was lodged in the High Court relates to the later ruling of Justice Koome. That notice indicates that ***“Mary Wanjiru Kapaito, the respondent herein being dissatisfied with the ruling of the Honourable Justice Koome given at Nairobi on the 10th day of June 2005 intends to appeal to the Court of Appeal against part of the said decision/Ruling.”***

Many of the complaints that the appellant has raised in the memorandum of appeal relate to the orders made by Aganyanya J., but these cannot be entertained in this appeal. It is trite law that the jurisdiction of this Court can only be triggered once a notice of appeal is filed, and there being none against the decision of Aganyanya J., we cannot purport to delve into issues that were decided therein. If the appellant was aggrieved with the orders that would arise out of that decision, then she was to file an appeal against those orders which she did not do. She cannot express this appeal to be an appeal against that decision when she did not file an appeal against it.

We will therefore consider this appeal, bearing in mind our duty as a first appellate court, to reappraise and re-evaluate the evidence and reach our independent conclusion, as an appeal from the ruling of Koome J.

Having carefully considered the two rulings of Justice Koome and that of Aganyanya J. before her, we find that the issues between the appellant and the first respondent were well captured in the decision of Aganyanya J. In essence the rights and obligations of the parties were settled conclusively by that decision. There is no inconsistency in the ruling of Koome J., with the earlier ruling of Aganyanya J.

It is not contested that the 2nd respondent had obtained a grant of letters of administration that was later revoked and a grant of probate of written will was given to the appellant. However, in granting probate of the will to the appellant, Aganyanya J., specifically excluded two properties: Ngong/Ngong/10249 and Ngong/Ngong/4100. In the period before the revocation the 1st respondent sold parcel number Ngong/Ngong/10249 to the 2nd respondent, and a title deed was issued in her favour. It was after this happened that the grant of letters of administration was revoked. To our minds, a party who is armed or in possession of a legal document who subsequently deals with an innocent third party does so in good faith, and it thereafter becomes absolutely difficult, in the absence of fraud, to render voidable any resulting relationship, rights and obligations. In this case, the 1st respondent was in possession of a valid grant of letters of administration granted by the court when she transferred the property to the 2nd respondent.

It was alleged that there is a portion of that ruling that is inconsistent. We have looked at it and do not find it to be inconsistent or contradictory. That ruling was on an application to review the earlier ruling that had cancelled the 2nd respondent's title, and the learned judge found it to have merit as the previous decision of Aganyanya J., had not been brought to the attention of the court. We agree with the learned judge that in the circumstances there was an error apparent on the face of the record. This Court in ***Nyamogo & Nyamogo Advocates v Kogo [2001] EA 173 (CAK)*** expressed itself on such an error and

stated that:

“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out.”

The error in the earlier ruling of Koome J was apparent in that it directly went against the decision of Aganyanya J. It is not lost on us that the 2nd respondent was not joined in the application that sought orders to cancel her title. Since the ruling of Aganyanya J. considered the matter and found that the property in question was excluded from the written will of the deceased, it would have been a conflict for the order registering the property in the name of the appellant. In our view, there is no basis for attacking the ruling and decision that restored the 2nd respondent’s title to the property Ngong/Ngong/10249. The appeal against that decision is therefore without merit, and hereby order it dismissed with costs to the respondent.

Dated and delivered at Nairobi this 19th day of June, 2015

M. WARSAME

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR