



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MARAGA, MUSINGA & GATEMBU, JJ.A)

CIVIL APPEAL NO. 234 OF 2011

BETWEEN

RAMADHANI MUSUMBA CHEMIETI.....APPELLANT

AND

JAMIN WASIKE CHEMIETI RESPONDENT

(Appeal from Judgment of the High Court of Kenya at Bungoma (Muchemi, J.) dated 13th day of July, 2011

in

H.C.C. SUIT NO. 91 OF 2005)

JUDGMENT OF THE COURT

1. This is an appeal from the judgment of the High Court at Bungoma (Muchemi, J.) delivered on 13th July, 2011 declaring that two properties known as title number East Bukusu/South Kanduyi/489 and title number Bungoma Township/228 (the properties) belonging to Sila Chemiati, deceased, were illegally, fraudulently and unlawfully sold to third parties after his death but that the same could not *“be taken back to form part of the estate of the deceased and be distributed in the pending succession cause.”*
2. The appellant faults the learned judge for holding that title number Bungoma Township/228 cannot be restored to form part of the estate of the deceased to be distributed to bona fide beneficiaries. She also complains that the learned judge’s finding prejudiced her pending suit against the respondent and against the purchaser seeking rectification of the register in respect of title number Bungoma Township/228 with a view to restoring the name of the deceased as the proprietor of that property.

Background

3. Sila Chemiati (the deceased) died on 26th August 1980. He was survived by one of his wives, Hadija Nanjala Chemiati (the appellant) and their children. The deceased’s first wife predeceased him, leaving behind their only child, Jamin Wasike Chemiati (the respondent),

who also survived the deceased.

4. The appellant and the respondent are in agreement that at the time of his death, the deceased owned the properties. Title number East Bukusu/South Kanduyi/ 489 was described as an undeveloped plot while title number Bungoma Township/228 was described as a developed commercial plot with three shops and four residential rooms.
5. On 6th June 1983 the appellant entered into an agreement for sale with one Ramadhan Machio Tabuche under which she purported to sell the deceased's property, East Bukusu/South Kanduyi/ 489, for Kshs. 17,000.00. She did so without first obtaining a grant of letters of administration with respect to the estate of the deceased. She stated that she was compelled to do so in order to raise money to redeem title number Bungoma Township/228 that was under threat of auction due to an outstanding mortgage.
6. On 31st January 1986, without the knowledge or concurrence of the appellant, the respondent obtained a grant of letters of administration for the estate of the deceased from the Senior Resident Magistrate's Court in Bungoma in Probate and Administration cause number 25 of 1985.
7. By an agreement dated 26th June 1986, the respondent purported to sell the deceased's property, Bungoma Township/228, to George Muroki Njuguna for Kshs. 115,000.00. The respondent stated that he was also compelled to sell that property in order to liquidate the deceased's debt with ICDC.
8. By an application presented to the High Court of Kenya at Kakamega in Succession Misc. Application No. 25 of 1992, the appellant applied for the revocation or annulment of the grant of letters of administration issued to the respondent by the Magistrate's Court in Bungoma contending that the respondent obtained it fraudulently.
9. By an order given on 16th January 1997 by the High Court of Kenya at Bungoma in Civil Misc. No. 38 of 1994, the court allowed the appellant's application and revoked the grant issued to the respondent on the grounds that the same had been obtained without the consent of the appellant and that under section 66 of the Law of Succession Act, a surviving spouse takes preference, as an administrator, over all other beneficiaries.
10. Subsequently on 28th October 1998, the parties recorded a consent order in the High Court of Kenya at Bungoma in Civil Misc. No. 38 of 1994, for their appointment as "**joint administrators of the deceased's estate.**" They also agreed, and an order was made, that "**leave to apply for confirmation before the lapse of six months hereby granted.**"
11. When the appellant applied for the confirmation of the grant by a chamber summons dated 30th November 1998, the respondent disputed the appellant's identification of the assets of the estate and the schedule of distribution in a replying affidavit filed in response to that application. The parties then agreed to have the application for confirmation of grant determined through oral evidence.
12. The task of hearing and determining that application fell upon Serگون, J. who heard witnesses from both sides, received submissions from the advocates for the parties, after which he reserved judgment. However, for reasons that are not apparent from the record, the learned judge did not determine that application. In his ruling dated and delivered on 16th September 2005 the learned judge had the following to say, and it is necessary to quote him at length:

"The sum total of the dispute here revolves (sic) around the identification and distribution of the assets of the estate of Sila Chemiati (deceased). The main issue which was thrown to this Court to decide is whether or not there are still property (sic) available for distribution. This issue is so

pertinent that the grant cannot be confirmed before it is determined. I have intentionally refused to make a conclusion over these issues because I am of the view that it is not convenient to determine at this stage. Consequently I direct the parties to this dispute to cause the matter to be determined (sic) as per the provisions of Order XXXVI rule 1 of the Civil Procedure rules. It is further directed that the application for confirmation of grant be postponed pending the outcome of the determination of the matter under Order XXXVI rule 1 of the Civil Procedure rules.

To enable the parties move with expediency, it is further directed that the exhibits produced in evidence before this Court be released to the parties.”

13. The result was that the appellant instituted suit by way of originating summons in the High Court at Bungoma in Civil Suit No. 91 of 2005(OS) in order to have the very question of the extent of the deceased's estate determined.

14. Meanwhile, the appellant had also commenced suit by a plaint dated 24th August 1999 in the High Court of Kenya at Bungoma, being High Court Civil Suit No. 96 of 1999 against the respondent and George Njuguna Ng'ang'a and Joseph Ng'ang'a as defendants seeking nullification of the transfer to them of the deceased's property Bungoma Township/228. That suit was yet to be heard and determined by the time Muchemi, J. delivered the impugned judgment on 13th July 2011 in which she determined and declared that:

“a) That the deceased left behind two assets for distribution namely Bungoma township/228 and East Bukusu/South Kanduyi/489;

b) That plot No. 489 was illegally disposed of by the Plaintiff while plot No.228 was fraudulently and unlawfully disposed of by the Defendant;

c) That in the interests of justice the two plots cannot be taken back to form part of the estate of the deceased and be distributed in the pending succession cause;

d) That save for the proceeds of sale for plot No. 228, there are no other assets for distribution to the heirs of the deceased's estate;

e) That the Plaintiff as a beneficiary should benefit from the sale proceeds of plot No. 228 or alternatively be compensated for the loss of her beneficial share taking into consideration the inflation rate or interests on her share since 31/6/1986;

f) That the Defendant instituted the succession cause for his own benefit and with the intention of fraudulently denying the other heirs their rightful inheritance;

g) That due to the fraudulent act of the Defendant, he is hereby condemned to pay costs of this suit.”

15. As already mentioned, the appellant is aggrieved by that decision hence the present appeal.

The appeal and submissions by counsel

16. Based on the memorandum of appeal, the appellant's specific complaints against impugned judgment are that:

“(a) The learned trial judge erred in law and fact when she held that Land Parcel No. Bungoma Township/228 cannot be recovered to form part of the estate of the deceased for distribution to bona fide beneficiaries.

(b) The learned trial judge erred in law and fact when she made a finding that prejudiced and/or disposed of the appellant's suit against the 3rd parties, without the same being heard

and determined on merit.”

17. The appellant has accordingly urged us to set aside the judgment of the High Court to that extent and order that property Bungoma Township/228 is recoverable to form part of the estate of the deceased for distribution to bona fide beneficiaries of the estate of the deceased and that the same is “recoverable from the 3rd parties, upon the plaintiff successfully prosecuting her case against them.”
18. At the hearing of the appeal before us learned counsel for the appellant Mr. Ocharo Kebira submitted that having correctly found that the property Bungoma Township/228 was fraudulently transferred, the learned judge erred in holding that the property could not be traced so as to form part of the deceased’s estate; that if the property was transferred in breach of trust by the administrator of the estate of the deceased or if the purchaser was privy to the fraud by the administrator then, and in those circumstances the property is traceable. Counsel further submitted that the observations by the learned judge to the effect that she believed the buyers took possession of the properties immediately upon purchase and that the buyers may have developed the properties extensively over the years considering the transactions relating to the properties took place in 1983 and 1986 respectively were not based on any evidence and amounted to surmise; that the findings by the judge prejudiced and compromised Bungoma High Court Civil Suit No. 96 of 1999 that is still pending determination.
19. Counsel urged us to allow the appeal and to declare that there is an estate of the deceased remaining and capable of being distributed after property Bungoma Township/228 is traced up to the hands of the third parties and the same should be restored to the estate.
20. Opposing the appeal, Mr. Elvis Majani, learned counsel for the respondent, submitted that the plea that we should direct that Bungoma High Court Civil Suit No. 96 of 1999 to proceed is not part of the prayers by the appellant in this appeal; that there are innocent purchasers for value who should not be affected and against whom there was no evidence of fraud; that the appellant’s remedy lies in damages under section 24 of Registration of Titles Act and the High Court duly provided the appellant with relief by ordering payment of compensation for the loss of her beneficial share thereby satisfying her claim.
21. In his brief reply Mr. Kebira urged that the appellant did not seek damages and maintained that the impugned decision is prejudicial to the pending proceedings in Bungoma High Court Civil Suit No. 96 of 1999.

Determination

22. We have considered the appeal and the submissions by counsel. The issue that arises for our determination is whether the learned judge of the High Court erred in declining to grant the order that had been sought by the appellant for the tracing of the property.
23. In a recent decision in the case of **Musa Nyaribari Gekone and others vs. Peter Miyienda and Another, Civil Appeal No. 2 of 2014**, this Court reaffirmed that estate property transferred by an administrator may in certain circumstances be traced. We cited, with approval a decision of the High Court in Meru in **Adrian Nyamu Kiugu vs Elizabeth Karimi Kiugu and Anor [2014] eKLR** where the court stated:

“Whereas the above section states that a transfer by person to whom representation has been granted shall be valid notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act, I am of the considered view that such transaction can only be relied upon where the legal representative is entitled to grant of representation but not where one is not and where one has obtained the grant fraudulently. The purchaser in this cause came from the neighborhood of the objector and it is not possible that he did not know of the objector herein. I therefore find and hold the sale to be invalid. “

24. In Jecinta Wanja Kamau vs. Rosemary Wanjiru Wanyoike and Another [2013] eKLR this Court sitting at Nyeri stated that it would be illegal for an administrator to purport to sell and transfer estate land before confirmation of grant. In Jane Gachoki Gathecha vs. Priscilla Nyawira Gitungu and another [2008] eKLR where a purchaser claimed that he was not aware of, and was not a party to, the fraudulent dealings with the title in issue and was therefore not only protected under *section 93 (1)* of the Law of Succession Act (Cap 60) but also *section 143* of the Registered Land Act, this Court stated this:

”We think, with respect, that there is a fallacy in invoking and applying the provisions of *section 93(1)* of the Law of Succession Act and the superior court fell into error in reliance of it. The section would only be applicable where, firstly, there is a “*transfer of any interest in immoveable or moveable property*”. Kabitau had no interest in plot 321 or any part thereof and therefore he could not transfer any. A thief acquires no right or interest which is transferable in stolen property. The transaction would be void *ab initio* and the property is traceable.”

25. Based on those authorities, there are circumstances when estate property transferred by an administrator may be traced.

26. In the present case, however, it would be necessary to grant all persons who may be affected by a determination regarding the question whether the properties should be traced, an opportunity to be heard. The lower court was made aware that one of the properties, Bungoma Township/228, was the subject of litigation in Bungoma High Court Civil Suit No. 96 of 1999 initiated by the appellant as plaintiff against the respondent and George Njuguna Nganga and Joseph Nganga as defendants, seeking to nullify the transfer of that property to them.

27. To the extent that the determination by the learned judge that properties left behind by the deceased were illegally, fraudulently and unlawfully disposed of by the appellant and the respondent respectively had ramifications beyond the two parties, it was necessary to accord the parties affected by that determination an opportunity to be heard before reaching that conclusion and before determining whether the properties could be traced.

28. We accordingly allow this appeal and hereby set aside the judgment and decree of the High Court given on 13th July 2011 in its entirety and substitute therewith an order dismissing the originating summons dated 3rd November, 2005.

29. We further direct that the application for confirmation of grant pending before the High Court in Bungoma be fixed for hearing and be heard together with Bungoma High Court Civil Suit No. 96 of 1999 (before a judge other than Muchemi, J. or Sergon, J.) upon giving all parties affected or who may be affected by the decision of the court an opportunity to be heard.

30. Each party shall bear its own costs of the originating summons and of the appeal.

Dated and delivered at Eldoret this 29th day of October, 2015.

D. K. MARAGA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

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

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DEPUTY REGISTRAR