IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: GITHINJI, WAKI & VISRAM JJA)

BETWEEN

ROSE KAIZA ………………………………………………………..APPELLANT

AND

ANGELO MPANJU KAIZA ……………………..……………..……RESPONDENT

(An appeal from the ruling and order of the High Court of Kenya at Mombasa

(Maranga, J.) dated 16th January, 2008

in

H.C.C.C. NO. 155 OF 2005 (OS)

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JUDGMENT OF THE COURT

The appellant herein is **Rose Nanjema Kaiza** (Rose), a resident of Nairobi in the business of buying and selling hides and skins. The respondent, **Angelo Mpanju Kaiza** (Angelo) is her younger brother, residing in Switzerland where he has worked for many years with UBS – Union Bank of Zurich. Both of them are the children of **Mariam Nakaiza Abdalla** (the deceased) who died on 5th May, 2004. The deceased had another son, **Suleiman Mugenyi** (Suleiman) who died in Uganda where he was resident.

During her lifetime, the deceased had a one acre plot of land in Muyenga Tank Hill in Kampala, Uganda; a block of 10 flats on **LR. No. Mombasa/Block XXI/166**; and a bank account with Barclays Bank of Kenya in Mombasa. It would appear that in 1988, the deceased bequeathed and transferred the Uganda plot to her first born son, Suleiman, absolutely on agreement that the said son would be excluded in the final Will of the deceased. It would also appear that the deceased sold and transferred the Mombasa plot to Angelo in 1996. As for Rose, it seems that her relationship with the deceased was strained apparently because Rose regarded her as a witch and was unhappy that her own mother, the deceased, forced her into prostitution at a young age. The deceased on the other hand regarded Rose as being disrespectful and abusive to her. So in 1996, the deceased sold and transferred the Mombasa plot and the developments made and being thereon to Angelo for a consideration of Shs.4 million and the transfer was registered in Angelo's name on 1st February, 1996. Six years later on 3rd October, 2002, the deceased made her last Will in which she bequeathed any money left in her Barclays Bank account in Nkrumah Road Branch, Mombasa as well as all her personal belongings to Angelo. She fell sick two years later and died of diabetes and hypertension on 5th May, 2004.

Rose then appeared on the scene after receiving information that her brother Angelo, had the property of their mother registered in his name and was in possession of a Will purporting to bequeath all their mother's property to himself. She concluded that the transfer was fraudulent and the purported Will was a forgery. She reported to the police and Angelo was arrested. It seems however that he was never prosecuted for the alleged offences. Instead, Rose went before the superior court on 1st October, 2004 and took out an Originating Summons seeking orders, *inter alia,* that the Will of the deceased dated 3rd October, 2002 be declared null and void or be revoked or annulled since it was a forgery, false and fraudulently in existence; and a declaration that the purported registration of Angelo as the sole proprietor of the Mombasa plot was fraudulent. She sought an order for rectification of the land register. In her affidavit in support of the Originating Summons, she deponed:

"*14. That the basis of the fraud on the said transfer and Will is that the signature purporting to be that of my mother is not hers and the same is a forgery."*

The main issue therefore, which was also framed by the superior court, was whether the signature on the transfer dated 25th January, 2006 and the Will dated 3rd October, 2002 were forgeries. The superior court heard *viva voce* evidence which was tested in cross-examination by learned counsel on both sides. Rose testified and called one handwriting expert and one police officer who investigated the complaints she had made to the police. Angelo also testified and called two different lawyers who drew up the Transfer and the Will respectively and also the witnesses present when those documents were executed by the deceased. Another handwriting expert also testified. In the end, the superior court, Maranga, J. believed the lawyers who drew up the Transfer and the Will together with those who witnessed the execution of those documents by the deceased. He preferred the evidence of the eye witnesses over opinion evidence given by the two handwriting experts and upheld the validity of the Transfer document and the Will of the deceased. All the claims made by Rose in the Originating Summons were dismissed with costs.

The judgment was delivered on 29th September, 2006 and Rose says she filed a notice of appeal to challenge it. But there is no evidence of such notice and it is conceded that no appeal was ever filed to challenge the decision. Instead, Rose returned to the superior court on 28th November, 2007 and took out a notice of motion seeking an order that the judgment delivered more than one year earlier, be reviewed and set aside. The basis for that application was said to be:-

> "*a) That there are now (sic) facts that have come to the attention of the plaintiff which were not in her knowledge and were not therefore brought to the attention of the court.*
>
> *b) That it is clearly apparent to the plaintiff that the signature of the Land Officer appearing in the transfer document was forged.*
>
> *c) That the transfer apart from being forged in the manner afore-stated does not comply with the requirements of Cap 300 Laws of Kenya.*
>
> *d) That the plaintiff has acted with due diligence from the moment that the aforesaid facts came to her knowledge."*

The new facts discovered were revealed in the affidavit in support and were basically that after the judgment, she was informed by a conveyancing clerk, one **Mwashena**, that the signature appearing on the Transfer registered in favour of Angelo was not that of the Land Registrar, one **Kenneth Kariuki Githu**, at the time the transfer was registered in February, 1996. She had then reported to the police who took specimen signatures and obtained an opinion from a document examiner confirming that the signature was a forgery. She was also informed that the transfer was not in the prescribed form. The Land Registrar whose signature was being impugned, however, swore an affidavit refuting the allegations and confirming that the signature was his and that the transfer was validly registered by him. Out of abundant caution, and because as stated by him, the application presented an unusual phenomenon, the learned Judge decided to summon the Land Registrar for cross-examination on his affidavit. He also summoned the document examiner who in his affidavit questioned the signature. Both witnesses were cross-

examined at length by counsel on both sides. In the end, the learned Judge preferred and believed the evidence of the Land Registrar over the opinion of the document of examiner. The learned Judge also accepted the evidence that the form of the transfer used was approved by the Chief Land Registrar as contended by the Land Registrar, and in any event that was not a new matter. The learned Judge in dismissing the application for review concluded:

> "**The Transfer EX.3 was with the plaintiff long before she filed this case. She should have therefore noticed that it was not on the prescribed form. That apart the Land Registrar whose evidence I believe confirmed that that form of transfer had been approved by the Chief Land Registrar under Section 108 of the Registered Land Act (Cap. 300). The application cannot therefore succeed on that ground.**
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> **The application is also for dismissal even on the first ground. As I have said both the Land Registrar and the document examiner testified before me and were cross-examined at length. Though I have no reason to doubt the honesty of the document examiner, his opinion is clearly erroneous. The Land Registrar who registered the Transfer was categorical that on the material date he was on duty and he is the one who assessed the stamp duty on the transaction and after the same had been paid he registered the Transfer. Apart from signing on the Transfer signifying its registration he also signed against the entries in the Register relating to that Transfer as well as the Certificate of Lease issued to the defendant.**
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> **The Land Registrar went as far as showing the court documents relating to other pieces of land that he signed on the same day. I believe his evidence and accept the explanation he gave that his signature may have appeared different from his usual one due to the accidental injury to his right hand shortly before appending the disputed signature to the Transfer.**
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> **On the authorities cited in my judgment of 29th September, 2006 in this Originating Summons, I prefer the evidence of the Land Registrar to that of the document examiner."**

Rose was aggrieved by that decision, hence the appeal now before us which lays out 8 grounds. Learned counsel for her, Mr. Mwangi Kigotho, combined the grounds into four and argued on the main ground that the document examiner's opinion was rejected without reasons and was uncontroverted. On available authority in **Dhalay v Republic (1995 – 1998) EA 29** where a qualified expert gives an opinion and reasons therefor and there is no other evidence in conflict with such opinion, then such opinion is not for rejection. It can only be rejected where the court is satisfied on good grounds that the opinion is not soundly based. In this case, Mr. Kigotho submitted, the document examiner had testified that the known and specimen signatures of the Land Registrar were different and the Land Registrar had accepted the discrepancies pointed out in his signature. As such, there was no conflict to be resolved. In the event, the learned Judge ought to have believed the document examiner and declared the Land Registrar a liar. The explanation given by the Land Registrar for the different signatures should have been rejected as lies too. So also the explanation that the form of Transfer was approved by the Chief Land Registrar, simply because the letter seeking approval was dated 31st January, 1996 and the registration was made on 1st February, 1996. There was no time for such approval to be given and the Land Registrar had no authority to approve. For those reasons, Mr. Kigotho urged us to differ with the superior court. He also argued that the superior court did not re-examine the evidence on record and believed that the Land Registrar had injuries in the absence of medical evidence; that the transfer document which was not in the prescribed form did not confer any title to Angelo; and that at the end of the day, the findings by several document examiners that there were discrepancies in the documents presented in evidence should have raised the Judge's "*antenna*" about the fraud and forgeries as contended by the appellant.

In response to those submissions, learned counsel for the respondent, Mr. Mogaka, contended that the only issue that arose both in the Originating Summons and in the application for review was the authenticity of the signatures appearing on the transfer and Will, both of which were alleged to be fraudulent. The transfer document was always in the appellant's possession as she used it as a basis of the complaint to the police and as an annexture to her affidavit. It was not a new document and the appellant had at her disposal legal counsel throughout. Neither the appellant nor her counsel raised any

issue relating to the authenticity of the transfer, other than the signatures of the deceased thereon, and it cannot therefore be said to be a new matter when it was always available to the appellant. In support of those submissions, Mr. Mogaka cited this Court's decision in **D.J. Lowe & Company Ltd v Banque Indosuez Civil Appl. Nai. 217/98 (ur)** where the court stated as follows: -

> "**Where such a review application is based on fact of the discovery of fresh evidence the court must exercise greatest of care as it is easy for a party who has lost, to see the weak part of his case and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion. In such event, to succeed, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing."**

Citing another decision of this Court in **Simani v Magotswe [1989] KLR 20**, Mr. Mogaka submitted that the appellant was seeking to introduce new evidence which in any case was within her knowledge and could have been produced at the original trial and therefore ***order 44 rule 1*** of the Civil Procedure Rules did not apply. In any event, he added, even if the transfer was for scrutiny once again, a deviation from form was not fatal as provided for in ***section 72*** of the **Interpretation and General Provisions Act, Cap 2,** and ***section 108*** of the Registered Land Act envisages such deviation.

As regards the evaluation of the evidence on record, Mr. Mogaka reminded us that the allegation made by the appellant was fraud and the standard of proof was higher than a balance of probability. The evidence on record on the issue was conflicting and the learned Judge had a choice to make. He considered the opinion evidence as against other direct evidence and relied on the credibility and demeanour of the witnesses in resolving the conflict. On this, submitted Mr. Mogaka, the Judge cannot be faulted. Citing the ***Dhallay*** case (supra) Mr. Mogaka was of the view that the affidavit evidence of the Land Registrar and the affidavit evidence of the document examiner were in conflict and that is why the learned Judge, on his own motion, summoned them for cross-examination to resolve the conflict. The Judge accepted the explanation of the Land Registrar and was entitled to believe him on that explanation. He was right.

We have carefully considered the two decisions of the superior court, the application for review and the affidavits on record, the relevant law and submissions of counsel. The starting point is to appreciate the nature of the application before the superior court and the principles of law applicable in dealing with it.

Although the motion before the superior court was stated to have been under ***Order XLIX rule 15*** of the Civil Procedure Rules and ***section 3A*** of the Civil Procedure Act, it was in truth an application for review under ***Order XLIV (Order 44)*** of the Civil Procedure Rules made on the sole basis that there was discovery of new facts. The grounds on the face of the motion, the affidavit in support and the submissions of counsel before the superior court support that view. The two new matters said to have been discovered after the original judgment and decree were that the transfer, which, a year earlier, had been found by the court to have been authentic and properly executed by the deceased, was not signed by the Land Registrar and secondly, the transfer was not in the prescribed form.

An application for review under ***Order 44 r 1*** must be clear and specific on the basis upon which it is made. The motion before the superior court was based on the discovery of new facts. However, it is not every new fact that will qualify for interference with the judgment or decree sought to be reviewed. In the words of the rule itself, it is

> "………**discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed……."**

The construction and application of that provision has been discussed in many previous decisions but we shall take it from the commentary by ***Mulla*** on similar provisions of the Indian Civil Procedure Code, 15th Edition at page 2726, thus:

> "**Applications on this ground must be treated with great caution and as required by r 4(2) (b) the Court must be satisfied that the materials placed before it in accordance with the**

formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the Court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important *evidence* that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made."

The reason for the caution sounded in that commentary is evident from this Court's decision in the ***D.J. Lowe & Co. Ltd*** case (supra).

Take this case: there is no challenge to the findings made by the superior court in the Originating Summons that the Will of the deceased was authentic and was executed by her. It is in that Will that the property in dispute was bequeathed to the respondent. There is no challenge to the finding that the transfer of that property was executed by the deceased. Nor is there any averment that the transfer was a new discovery. It could not possibly have been, since it was the basis of the complaint laid by the appellant to the police and before the court. What was new and was said to have been discovered late was the evidence that the signature of the Land Registrar was forged and that the transfer itself was not in the prescribed form. The latter contention is for rejection outright, because the Transfer was in possession of the respondent long before the institution of the Originating Summons and it cannot be argued, in our view, that she or her advocates did not notice that it was not in the prescribed form. If any of them did, then they were not diligent enough to find out whether the form of the transfer was approved. We agree with the learned Judge that the Transfer was not a new matter and its authenticity ought to have been challenged in the Originating Summons but was not. There was no due diligence on the part of the appellant. In any event the learned Judge accepted the evidence before him that the form of the transfer was approved and we have no reason to fault him. We reject the appellant's line of argument on that score.

As for the signature of the Land Registrar, we stated earlier that there was conflicting affidavit evidence from the document examiner and the Land Registrar, and that out of abundant caution the learned Judge summoned the deponents of those affidavits for cross-examination. It was an unusual procedure in an application for review but in the circumstances of this case we think the learned Judge was entitled to subject the authors of the affidavits to cross-examination in an effort to resolve the conflict. There is no dispute about the law applicable in considering the opinion of document examiners or handwriting experts. Both counsel relied on the ***Dhalay*** case (supra) where this Court stated as follows: -

"**Where the expert who is properly qualified in his field gives an opinion and gives reasons upon which his opinion is based and there is no other evidence in conflict with such opinion, we cannot see any basis upon which such opinion could ever be rejected. But if a court is satisfied on good and cogent ground(s) that the opinion though it be that of an expert, is not soundly based, then a court is not only entitled but would be under a duty, to reject it."**

This Court also held in **Asira v Republic** **[1986] KLR 227** at page 228: -

"**6. The most an expert on handwriting can properly say is not that somebody definitely wrote a particular thing but that he does not believe a particular writing was by particular person or that the writings are so similar as to be undistinguishable.**

7. It is the duty of a court to make an examination and satisfy itself whether the handwriting expert's opinion can be accepted and the court cannot blindly accept such an opinion. The failure to demonstrate to the court the features of the so-called disguised handwriting meant that the court did not itself decide the issue."

In the course of the judgment in the ***Asira*** case the Court stated:

> “**The art of comparing handwriting is no doubt one in which time and thought are given to the formation of letters and words, and therefore expert status may be accorded to a person versed in such comparisons. But as has been accepted in Wainaina’s** ***case*** **(Namaina v Republic [1978] KLR 11)such an expert is not able to say definitely that anybody wrote a particular thing. The reasoning is based upon the knowledge that handwritings can very easily be forged. Moreover a person may not write in the same style all the time. The expert is therefore faced with trying to analyse forged writing as well as disguised writing. In cases where there is a problem about the writing it is the duty of the court to satisfy itself after examination whether the expert’s opinion can be accepted and cannot blindly accept such opinion. In these areas of conflict it is prudent to look for other evidence so that forgery can be excluded on the one hand, and mistaken identification excluded on the other.”**

We think the duty of the court in weighing the opinion evidence of an expert would be more onerous where such opinion is the only material for consideration, than where there is direct evidence on the author of the handwriting. In this case there was the evidence of the Land Registrar himself who swore that he signed the transfer. The acceptance by the Land Registrar that there were differences between some of his known and specimen signatures and the explanation given by him that he had an injury on his hand when he signed the impugned signature, hence the possible cause of the differences, was not, in our view, a confirmation that the document examiner was right and therefore his evidence ought to be accepted. The credibility of the two witnesses had to be weighed and on that the best judge was the person who heard and watched the demeanour of those witnesses. The Land Registrar was believed by the learned Judge on the basis of his credibility and we have no reason to interfere with that assessment.

The upshot is that this appeal is lacking in merits and we order that it be and is hereby dismissed with costs.

Dated and delivered at Mombasa this 16th day of October, 2009.

E.M. GITHINJI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

ALNASHIR VISRAM

……………………**..**

JUDGE OF APPEAL

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

DEPUTY REGISTRAR