Imamati v M'Imunya (Civil Appeal E105 of 2021)
[2024] KEHC 2137 (KLR) (29 February 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CIVIL APPEAL E105 OF 2021

EM MURIITHI, J

FEBRUARY 29, 2024

BETWEEN

NKATHA CHARLES IMAMATI ..... APPELLANT

AND

FRANCIS MURUNGI M'IMUNYA ..... RESPONDENT

(An appeal from the Ruling of Hon. C. K Obara (P.M) in Maua CMC Succession Cause No. 96 of 2013 delivered on 19/10/2020)

JUDGMENT

1. On 17/12/2014, the Appellant filed Summons for Confirmation of Grant where she proposed that L.R No. Njia/burieburi/1864 (henceforth called the suit property) be distributed to herself, James Mwenda Muroki, Moses Thuranira Muroki, Joel Kaberia Muroki, Judith Kagwiria Muroki and Faith Karimi Muroki. The Respondent protested to that mode of distribution and proposed that he should get half of the suit property which the deceased held in trust for him.

2. In its judgment of 28/3/2017, the court held that:

> "Only one issue for determination as there is no dispute with regard to the mode of distribution of the other properties comprising the estate of the deceased. The beneficiaries executed some consent in support of the petitioner's proposed mode of distribution of all the listed properties. And the issue is whether the property known as Njia/Burieuri/1864 is wholly part of the estate of the deceased or whether it was being held in trust for the protestor in half share. The petitioner admitted that when she got married she found her husband and mother in law residing on this plot. As stated hereinbefore it is PW3 who undertook the construction at the request of the protestor who was then working in Kisumu in 1978. I do not think the protester would have financed that construction if he did not have a vested interest in the property. There is no suggestion from the petitioner that her late husband

during his lifetime protested the presence of the protestor on the plot. On a balance of probabilities, I find and hold the deceased was holding parcel Njia/Burieruri/1864 in trust for himself and his brother, the protester and the estate of the deceased is entitled to only half of this property. In the premises I shall confirm the grant of letters of administration intestate made to the Petitioner Nkatha Charles Ikamati and divide the estate of the deceased as follows:

d) Land Parcel Number Nia/Burieruri/1864

i. Nkatha Charles Ikamati – Half Share

ii. Francis Murungi M'munya – Half Share".

3. The Appellant moved the court on 14/12/2017 vide an application for review dated 6/11/2017 alleging discovery of new and important evidence and evidence which could not have been produced at the time of the hearing.

4. In dismissing the said application, the trial court rendered as follows:

> "A quick perusal of the record shows that at the time of filing the Petition for letters of Administration, the applicant annexed a title deed in the name of her late husband. She also annexed a search certificate issued on 9/9/2013 which indicated that her late husband was the absolute owner of parcel number 1864. The green card availed by the applicant and marked as annexture NCI-4 only shows how her late husband acquired the subject land. The applicant had a copy of the title and official search as at the time the case was heard but I note that she never produced the same in support of her case. In my view there is therefore no new and important matter as by the applicant.
>
> In fact, looking at the applicant's affidavit sworn on 24/6/2014 at paragraph 4 she stated; The petitioner visited the land offices and found the land was bought from Mworia Mutiani 0.70 Acres by her late husband David Muroki M'imunya Land No. Nkia/Burieruri/1708 0.60 points. This land was demarcated and sub divided into plots
>
> (i) Land No. Njia/Burieruri/1864 - 0.10 points the land in dispute
>
> (ii) Land No. Njia/Burieruri/1708 – 0.60 Points where currently the Petitioner lives with her family.
>
> Going by the said averment, it is clear that all along the applicant had knowledge on how her late husband acquired the suit property. In her testimony she stated that her late husband bought the land from one Mutigania M'thura. In any case, she had a copy of the title deed at the time of filing the Petition. Nothing barred her from producing it as evidence. It is my view that no good cause has been demonstrated to warrant review of the trial court's judgment. If the applicant has any remedy, the same can only be addressed by the High Court. In conclusion I find the applicant's application dated 6/11/2017 to be without merit and hereby dismiss it with no orders as to costs."

The Appeal

5. On appeal, the Appellant filed her memorandum of appeal on 6/8/2021 raising 5 grounds as follows:

1. "The Learned Magistrate erred in law and fact dismissing the appellant application in view of the evidence placed before the Court

2. The Learned Magistrate erred in law and fact in failing to find that the appellant discovered the evidence in the Green card and other registration documents upon the intervention of the International Federation of Women Lawyers (FIDA) after the Judgment had been delivered.

3. The Learned Magistrate erred in failing to find that the appellant had tendered a satisfactory explanation as to why the evidence of the green card and other registration documents were not available to her at the time of the proceeding of the cause.

4. The Learned Magistrate erred in holding that the details of the green Card and the other registration documents of the Suitland were within the appellant's knowledge at the hearing of the case.

5. The ruling of the Learned Magistrate was against the weight of the evidence before her in support of the review orders."

Duty of the court

6. This being an appeal from the exercise of discretion by the trial court, this appellate court is bound the principles for appellate interference of exercise of discretion as set out in Mbogo v. Shah EA 93, as follows:

> " [A] Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the misdirected himself in some matter and as a result arrived at a wrong decision, unless it is manifest from eh case as a whole that the judge was clearly wrong in the exercise of his discretion and that a result there has been misjustice."

7. In this case, having regard to the factors to be considered under section 80 of the *Civil Procedure Act* and Order 45 rule 1 of the Civil Procedure Rules, the court must determine whether the ruling of the court in exercise of its discretion thereunder on the application for review was wrong.

8. The appeal was urged orally in court and was judgment reserved.

Analysis and Determination

9. The sole issue for determination is whether the dismissal of the Appellant's application for review was justified, based on the correct on principles, and the evidence before the court and not extraneous factors, or it was plainly wrong.

10. One of the grounds for review under Order 45 Rule 1 of the Civil Procedure Rules is the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the Appellant's knowledge or could not be produced by her at the time when the order dismissing her application was made.

11. The question that begs is whether the letter from FIDA dated 6/7/2017 and the green card were discovery of new and important evidence within the meaning of Order 45 Rule 1 of the Civil Procedure Rules.

12. The Appellant contended at paragraphs 3, 4, 5, 16, 17 and 18 of her affidavit in support of her application that:

> " I verily believe that the said judgment was delivered under a mistaken belief that Land Parcel Number Njia/Burieruri/1864 was family land given to the deceased (my late husband) by

his mother and that the same was divided into two equal portions (between my late husband and the Respondent/Objector even though it was only registered in the deceased's name;

I have since discovered new and important facts and evidence in this matter which were not within my knowledge and which new and important facts and evidence even after the exercise of due diligence I could not have been able to produce in the course of the hearing and/or before the Judgment was delivered in the matter on the 28th of March, 2007;

During the proceedings, I relied on the information and/or documents that had been in my late husband's possession in order to support the assertion that my late husband wholly owned Land Parcel Number Njia/Burieruri/1864;

One Caroline W. Kamau was assigned my case and according to the advise she gave me and which advise I verily believe to be true, the green card and the documents attached thereto clearly show how Land Parcel Number Njia/Burieruri/1864 changed hands as follows:- The land was initially S/No. 615 belonging to Ithura Muoria. Thereafter, 0.70 was excised from the land and became S/No. 1708. S/NO. 1708 then was transferred to the late David Muroki M'Imunya under S/NO. 1864;

By tracing the various transfers, it is clear how my late husband became the owner of the disputed land, that is, through purchasing the property from one Ithura Muoria and this negates the allegation that the said land was family owned; The above stated information and documents were not within my knowledge at the time of the trial and/or before judgment was delivered in this matter."

13. The Respondent testified that the suit property was given to him and the deceased by their mother, and there was a mutual agreement that the deceased would hold it in trust for himself and the Respondent.

14. On her part, the Petitioner testified as DW1 as follows:

> " The disputed plot Njia/Burieruri/1864 belonged to my husband. He bought this land from one Mutigania M'thura. It was 0.70 acres. The land was 615/Njia/Burieruri. My husband subdivided the land into 2, Njia/Burieruri/1864 being 0.10 acres and Njia/Burieruri/1708 being 0.60 acres."

15. In its judgment, the court considered the issue of alleged trust asserted by the Respondent and alleged purchase by the appellant's husband as follows:

> " [T]he issue is whether the property known as Njia/Burieuri/1864 is wholly part of the estate of the deceased or whether it was being held in trust for the protestor in half share. The petitioner admitted that when she got married she found her husband and mother in law residing on this plot. As stated hereinbefore it is PW3 who undertook the construction at the request of the protestor who was then working in Kisumu in 1978. I do not think the protester would have financed that construction if he did not have a vested interest in the property. There is no suggestion from the petitioner that her late husband during his lifetime protested the presence of the protestor on the plot. On a balance of probabilities, I find and hold the deceased was holding parcel NJIA/BURIERURI/1864 in trust for himself and his brother, the protester and the estate of the deceased is entitled to only half of this property."

16. The evidence of the alleged purchase of the suit land by the appellant's deceased husband was already presented to the trial court by the testimony of DW1 set out above. What was sought to be introduced

were the green card on the parcel of land and comments showing the transactions thereon which the petitioner obtained after the hearing with the assistance of the FIDA.

17. The Respondent's case based on trust is clearly in direct opposition to the petitioner's case of outright purchase by her husband from one M'Ithura. It is not asserted by the Respondent that the land which he claims was given by their mother to both he and his brother was bought by the brother (petitioner's husband) using funds provided by the mother. If it is the brother who using his funds acquired the parcel of land which he later subdivided creating the suit land, how would the trust based on gift by the mother arise?

18. Although the Petitioner did testify on the fact of purchase of the land by her deceased husband, she did not have the green card register of the land to show the history of the transactions on the parcel of land in support of her case. The petitioner was able to secure the green card by intervention of FIDA, and when it was secured it was after the determination of the trial court proceedings and the court had already made its decision without the benefit of the evidence on the green card which might have affected the trial court's assessment of proof by balance of probability.

19. The rule of procedure on review of court decrees or orders provides as follows:

[Order 45, rule 1.] Application for review of decree or order.

1. (1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the 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 or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

[Order 45, rule 2.] To whom applications for review may be made. 2. (1) An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed."

20. When broken down to its ingredients the factors upon which an aggrieved party may seek review of a decree or order under Order 45 Rule 1 of the Civil Procedure Rules on the ground of discovery of new and important matter are two-fold, namely:

1. the discovery of new and important matter or evidence which,

a. after the exercise of due diligence, was not within his knowledge

b. or could not be produced by him at the time when the decree was passed or the order made,

Review may also be sought under the Rule on account of some mistake or error apparent on the face of the record, or for any other sufficient reason.

21. From the Notice of Motion dated 6/11/2017 was expressed to be brought among other under Order 45 rule 1 and 2 (1) and 5 of the Civil Procedure Rules. The grounds of the application reveal that the application was based on both limbs of the ground of discovery of new and important facts and evidence which was not within her knowledge and which could not be produced by the applicant at the time of hearing, as follows:

Grounds:

"1 . That the Judgement of 28th March, 2017 and mode of distribution as per the Certificate of Confirmation of Grant dated 1th April, 2017 were made under a mistaken belief that Land Parcel Number NjlaJBurieruri/1864 was family land given to the deceased by his mother and that the same was only registered in the deceased's name though it had been divided into two equal portions.

2. That there are new and important facts and evidence which I have discovered after the exercise of due diligence and which new and important facts and evidence could not be produced by the Applicant in the course of the hearing and/or before the Judgement was delivered in the matter on the 28th of March, 2017.

3. That during the proceedings and even as I read the judgement, I realised that the court did not have adequate information and/or documents to support the assertion that my late husband wholly owned Land Parcel Number Njia/Burieruri/1864 since I verily believe that the Respondent was not honest in Court.

4. That after reading the judgement, I made several visits to the lands office in order to obtain documents relating to Land Parcel Number Njia/Burieruri/1864 which could help me show that the Respondent was not truthful in his claims before this Honourable Court and in contrast, the disputed land was wholly owned by my late husband.

5. That I was advised by the land s office on numerous occasions that they could not give me any information without a court order and/or directive.

6. That at that juncture and with nowhere else to turn, I sought the assistance of the Federation of Women Lawyers-Kenya (FIDA-Kenya) in helping me to understand the purport and significance of the judgement and explained to them that my husband whole owned the disputed land.

7. That one of the advocates in the said FIDA -Kenya in an effort to understand the genesis of the matter wrote a letter to the Registrar of Lands in Meru to furnish me with a certified copy of the green card and any other document that they had in respect of the disputed land for the advocate's perusal.

8. That I was given certified copies of the green card and other documents kept in the file in respect of Land Parcel Number Njia/Burieruri/1864.

9. That the said documents attached to the green card clearly show how Land Parcel Number Njia/Burieruri/1864 changed hands and was transferred until my late husband became. the owner and this negates the allegation that the said land was family owned.

10. That all this was information that I did not have at the time of the trial and/or before judgement was delivered in this matter.

11. That from the time the judgement was delivered until the filing of this application, the Applicant herein has not been indolent and has been working to get the requisite documents and assistance in order to file this application.

12. That there are sufficient grounds to warrant review."

22. It is clear from the ruling of the trial court that the decision was only based on the first limb of the discovery of new evidence as follows:

> " Going by the said averment, it is clear that all along the applicant had knowledge on how her late husband acquired the suit property. In her testimony she stated that her late husband bought the land from one Mutigania M'thura. In any case, she had a copy of the title deed at the time of filing the Petition. Nothing barred her from producing it as evidence. It is my view that no good cause has been demonstrated to warrant review of the trial court's judgment. If the applicant has any remedy, the same can only be addressed by the High Court. In conclusion I find the applicant's application dated 6/11/2017 to be without merit and hereby dismiss it with no orders as to costs."

23. The Court did not advert itself to the issue of inability to be produce at the hearing because the documents were obtained subsequently. If the petitioner had a copy of title deed, but which she failed to produce, it still would not have revealed the information which is contained in a green card and the related transactions in the register. The evidence on the green card and the transactions on the parcel of land was not available to the petitioner and there is explanation how this was only obtained by intervention of counsel from the Federation of Women Lawyers who represented her. Surely, this piece of evidence is such evidence within the meaning of Order 45 rule 1 (b) of the Civil Procedure Rules as which "could not be produced by him at the time when the decree was passed".

24. This court finds that the dismissal of the Appellant's application for review was plainly wrong in the circumstances of this case as it failed to consider the factor that the new evidence could not be produced by the appellant at the hearing, and it resulted in the denial of fair hearing for the petitioner when the evidence in support of her case was shut out, and also, as urged by the Counsel for the Appellant, to the unjust enrichment of the Respondent from the asset of the deceased's estate.

25. On appeal, the appellate court may order a retrial under section 78 (e) of the *Civil Procedure Act*. Similarly, under Order 45 rule 5 of the Civil Procedure Rules a re-hearing is prescribed as follows:

> " [Order 45, rule 5.] Re-hearing upon application granted.
>
> 5. When an application for review is granted, a note thereof shall be made in the register, and the court may at once re-hear the case or make such order in regard to the re-hearing as it thinks fit."

26. The Court will, therefore, order a retrial, and the respondent shall not be prejudiced as he will have opportunity to rebut the petitioner's evidence availed by the green card and the related documents. This way the Court will have afforded both parties a fair hearing within the meaning of Article 50 (1) of *the Constitution*; otherwise it would be an injustice on the petitioner within the test of Mbogo v. Shah, supra.

Orders

27. Accordingly, for the reasons set out above, the Court finds that the appeal has merit and makes the following orders:

1. The ruling of the trial court made on 29th October 2020 in Maua CMC Succession Cause No. 96 of 2013 is set aside.

2. The Judgment of the Court delivered on 12th April 2017 is set aside.

3. Pursuant to section 78 (e) of the *Civil Procedure Act* and Order 45 Rule 5 of the Civil Procedure Rules, the court directs a retrial to be undertaken by the Maua Chief Magistrate's Court differently constituted.

28. There shall be no order as to costs.

Order accordingly.

DATED AND DELIVERED THIS 29TH DAY OF FEBRUARY, 2024.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S. Haron Gitonga & Co. Advocates for the Appellant.

Respondent in person.