



REPUBLIC OF KENYA



KENYA LAW
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Gitiha v Njuguna (Civil Appeal 166 of 2019) [2024] KEHC 10154 (KLR) (28 June 2024) (Ruling)

Neutral citation: [2024] KEHC 10154 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL 166 OF 2019**

S MBUNGI, J

JUNE 28, 2024

BETWEEN

MONICA WANJIRU GITIHA APPELLANT

AND

SAMUEL GITIHA NJUGUNA RESPONDENT

RULING

1. This appeal arises from the Ruling delivered on 13th November, 2018 (“the Ruling”) in Miscellaneous Application no. 15 of 2016 (“the Application”) which sought inter alia to compel the Executive Officer to execute the necessary documentation to effect the transfer of Land Parcel No. Githunguri/Githunguri/3850 (“suit property”), hence precipitating the appeal herein where the appellant seeks the following orders:
 - a. That the appeal be allowed.
 - b. That the entire ruling of the Honourable magistrate Kutwa (Mr.) in Misc. Application no. 15 of 2016 be set aside.
 - c. That costs of the appeal and the court bellow be to the appellants.
 - d. That such further orders may be made by this Honourable Court.
2. The Appellant’s six grounds as stated in the amended Memorandum of Appeal dated 24th September, 2023 are:
 - i. That the learned Principal Magistrate erred in law and in fact in failing to consider the appellant’s submissions on grounds of Law to the effect that the application filed herewith was fatally defective.
 - ii. That the learned Principle Magistrate erred in law and in fact in failing to consider that the spousal consent was not sought at the time of making the agreement of sale of land parcel no.



Githunguri/githunguri/3850 and that the appellant put the consent after the respondent sold the first piece of land.

- iii. That the learned magistrate erred in law and in fact in relying on extraneous matters in dismissing the appellants application.
 - iv. That the learned magistrate erred in law in failing to find that the consent sought was false fully obtained without any knowledge of the appellant.
 - v. That the learned magistrate reached a conclusion in this matter and at No point was the appellant accorded an opportunity to be heard.
 - vi. That the whole ruling and order of the Senior Principal Magistrate is against the pleadings, submissions and the law.
3. The court on 21st September 2023 directed parties to file their submissions. Only the appellant complied. The appellant's written submissions dated 23rd October, 2023 were filed.
 4. There were no submissions filed on behalf of the respondent despite having been granted ample time to file since 21st September, 2023.

Appellant's Submissions

5. The counsel for the appellant submitted that the application whose Ruling is the subject of this appeal lacked legal foundation for the provisions of the Law relied on could not confer jurisdiction to the lower court to sufficiently grant the orders sought.
6. Secondly, the lower court failed to appreciate the meaning of section 28 of The Land Registration Act 2012 and section 12(1) of the Matrimonial Act 2013 which provides that any alienation of matrimonial property is subject to consent of both spouses given the fact that respondent acknowledged that the appellant was his wife.
7. Being a first appeal, the court relies on a number of Principles as set out in *Selle and another vs. Associated Motor Boat Company Ltd & others* (1968) 1 EA 123: "this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in this respect. In particular, this court s not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take into account particular circumstances or probabilities materially to estimate the evidence."
8. In *Gitobu Imanyara & 2 others vs Attorney General* (2016) eKLR the Court of Appeal stated that: - "An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect."
9. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles as was espoused in the case of *Mburu & another V Kinga Civil appeal 277 of 2023 (2024) KEHC 1889 (KLR)*.
 - i. That on first appeal, the Court is under a duty to reconsider and re -evaluate the evidence on record and draw its own conclusions;



- ii. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witness testify before it; and
 - iii. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.
10. I have looked at the memorandum of appeal, pleadings, proceedings of the lower court and submissions filed by the appellant.

Issues For Determination

11. From the above analysis, the issue is whether the lower court had jurisdiction to entertain the application and grant the orders sought.

Determination

12. I have looked at the summons dated 19th March, 2018 the summons are premised under Rules 49, 63 and 73 of the Probate and Administration Rules, Section 3A and 98 of the Civil Procedure Act Cap 21 and all enabling provisions of the law.
13. I have looked at the supporting affidavit of Samuel Gitihia Njuguna sworn on 19th March, 2018 clearly the issue is that his wife had refused to give spousal consent to him to sell land parcel no. Githunguri/Githunguri/3850 to one Francis Mberere.
14. In paragraph 5 of his affidavit, he says that he had sold the land before he sought the appellant's consent which was wrong. The consent should have been sought before, in line with Section 12(1) of the Matrimonial Properties Act 2016 which provides that "An estate or interest in any matrimonial property shall not, during the subsistence of a monogamous marriage and without the consent of both spouses, be alienated in any form, whether by way of sale, gift, lease, mortgage or otherwise".
15. On the other ground of the application on lacking legal foundation. I have looked at Rule 49, 63 and 73 of the Probate and Administration Rules 1980 ("Rules"). These Rules are subsidiary legislation from the Law of Succession Act ("Act") pursuant to section 2(1) of the said Act. Which provides "2. (1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons."
16. Rule 49 provides that "A person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in these Rules shall file a summons supported if necessary by affidavit".
17. Rule 63 provides that " (1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Order 5, rule 2 to 34 and Orders 11, 16, 19, 26, 40, 45 and 50 (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.
- (2) Subject to the provisions of the Act and of these Rules and of any amendments thereto the practice and procedure in all matters arising thereunder in relation to intestate and



testamentary succession and the administration of estates of deceased persons shall be those existing and in force immediately prior to the coming into operation of these Rules”.

18. Rule 73 provides that “Saving of inherent powers of court Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”
19. For the provisions of the Rules to be invoked, there must be a substantive cause or a suit anchored on the substantive provisions of the Succession Act dealing with an estate of a deceased person.
20. The record from the lower court has no such suit or cause.
21. The respondent in his supporting affidavit, sworn on 19th March 2018 has not deponed that any party in the proceedings was deceased such that the law of succession can be invoked.
22. From the above it is clear that the lower court proceeded to hear and determine an application which was wrongly brought before the court. There was no substantive cause or suit based on Succession Act or on Matrimonial Property Act and/or any other known statute on which the application could have been based on.
23. In conclusion, I do agree with the submissions of the appellant. That there is no nexus which has been established between the statutory provisions, the grounds and the evidence adduced in the application.
24. Therefore, I find that the lower court misdirected itself and misapprehended the applicable law thus I find the appeal has merit, I do allow it. The entire Ruling dated 13th November 2018 in Githunguri Misc. Application no. 15 of 2016 is hereby set aside.
25. The Respondent to bear costs of this appeal and the costs in the lower court.
26. Right of appeal 30 days.
27. Orders accordingly.

DATED, SIGNED AND DELIVERED ON 28TH JUNE, 2024 BY HON. MR. JUSTICE S. MBUNGI VIRTUALLY AT KAKAMEGA.

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S. MBUNGI

JUDGE

In the presence/absence of:

Appellant/advocate

Respondent/advocate

Court assistant

