In re Estate of Njau Ndugo (Deceased) (Civil Appeal 16 of 2019) [2023] KEHC 3366 (KLR) (25 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3366 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CIVIL APPEAL 16 OF 2019

FR OLEL, J

APRIL 25, 2023

BETWEEN

JAMES NJAU NJOGU .... APPELLANT

AND

VIODORA WAMIRU NDAMBIRI .... 1ST RESPONDENT

RAPHAEL MBUI NDAMBIRI .... 2ND RESPONDENT

(Being an Appeal from the Ruling of Hon G. Mutiso (P.M.) Delivered on 12th March 2019 in Wanguru PMCC Succession Cause No 14 of 2016)

JUDGMENT

Introduction

1. This appeal arises from the ruling of Honourable G Mutiso (PM) dated March 12, 2019, where he revoked the grant issued and confirmed by the court in favour of the Appellant Mr James Njau Njogu to administer his grandfather's Estate being Estate of the Late Njau Ndugo(Deceased).

2. The deceased herein died on July 23, 1982. The Appellant petitioned for grant in May 2016 on the basis that he was the deceased grandson and every person who had equal right or prior right to a grant of representation had consented to the same. A Certificate of confirmation of grant was issued on October 30, 2017 to the Appellant James Njau Njogu. The only estate property being Ngariama/Lower/Ngariama/720 was wholly given to him.

3. The Respondents, who are the daughters of the deceased filed a Summons for revocation of grant dated January 23, 2018 on the grounds that the Appellant is a grandson of the deceased and had no rights to apply for the letters of administration directly without involving members of the family as listed in the said application.

4. The Respondents deponed that the chief's letter used by the Appellant was from from Tebera location instead of Nagriama, Tongonye location, where the family resided and hence had direct jurisdiction on issuance of the said letter. This demonstrated mischief and concealment of material facts by the Appellant. In addition, they deponed that no consents were obtained from them and thus the said grant was obtained by fraudulent means and by making of false statement.

5. The Appellant filed a replying affidavit dated July 9, 2019 in which he stated that the Respondents are strangers to him. The surname they used was Ndambiri instead on Njau and that he had already executed the relevant transfer forms and the suit parcel registered in his name. Further he stated that his grandfather had made his intention of him inheriting his property known in the presence of elders before his demise and thus contended that the court lacked jurisdiction to determine this matter. He also alleged that there was a another succession cause pending being Kerugoya Succession cause No 541 of 2015 regarding the same estate which was yet to be determined.

6. The Respondents filed a further Replying Affidavit on March 13, 2013 reiterating the contents of the affidavit in support of the summons for revocation/annulment of grant. They further contended that the court had jurisdiction to handle matters of this nature. They denied that there was a meeting with the elders and if it took place there should have been written minutes confirming the same.

7. On February 5, 2019, the matter came up for hearing in the absence of the Appellant and/or his advocate. The trial Magistrate opted to proceed with the matter and further delivered his ruling on March 12, 2019, where he annulled the grant on the basis that it was obtained by fraud and misrepresentation of facts. Further the court declared that all dealings the Respondent might have had on the strength of the fraudulently and now revoked letter of administration as null and void.

8. Aggrieved by this ruling, the Appellant filed a Memorandum of Appeal on April 11, 2019, seeking to have the ruling set aside, there be a retrial at the lower court before a different Magistrate and costs of this Appeal on the grounds that;

   a. The learned Magistrate erred in law and fact when it's made its ruling without granting the Appellant an opportunity to be heard.

   b. The learned Magistrate erred in law and fact when he failed to adjourn the matter due to the absence of counsel for the Appellant.

   c. The learned Magistrate erred in law and fact in failing to recognize the Appellant's constitutional right to a fair hearing.

   d. The learned Magistrate failed to exercise his judicial powers and discretion judiciously and failed to consider relevant facts.

9. The Appellant prayed that the ruling delivered on March 12, 2019, and all consequential orders be set aside and the matter be retried at the lower court before a different Magistrate.

Appellants Submissions:

10. The Appellant filed submissions on July 8, 2022, in which he submitted on two grounds. On whether the Appellant was given an opportunity to be heard, it was submitted that there was no evidence that the Appellant or his advocate were served with a hearing notice. He contended that he was condemned unheard, as they were not aware of the hearing date and no affidavit of return of service was filed to prove proper service upon them. The Appellant relied on The *Hulsbury's law of England* 5th Edition. Vol 61 page 545 para 640.

11. Further the Appellant submitted that, the record indicated that Mrs Kimuto was present for the Plaintiff while at the same time noted that one Wangechi informed the court that Ms Abuluzalea had informed her she could not make it. The Appellant questioned who Ms Wangechi and Ms Abuluzalea were in the case and what their interest was. The trial Magistrate wrongly proceeded to refuse an adjournment and proceeded with the matter. Reliance was placed on the *Evidence Act* Section 112 and the case of *Richard Nchapai Leiyangu v IEBC & 2 Others* [2013] eKLR.

Respondents submissions:

12. The Respondents filed submissions on August 4, 2022, where they submitted that on several occasion between June 2018 and October 2018, the Appellant sought and was granted several adjournments. He was clearly unwilling to proceed for one reason or the other and even the court noted his delaying tactics.

13. On September 4, 2018 and December 2, 2018, the firm of Magee and Magee were present and one Mrs Kimuto held their brief and sought more time to familiarize herself with the matter as they had just come on record. It was opined that occasionally as it happens that the first counsel holds brief, when the counsel on record are not in court, and when the matter is called again another counsel holds brief in the same day's quorum. Hence the Appellant's contention that they were not represented was baseless. Reliance was placed on the case of *Board of Management of Pumwani Girls Secondary school v Joseph Mbulula Mutwike* [2020] eKLR.

14. The decision not to adjourn the matter by the Magistrate was exercised in the interest of justice, while aware of the Appellant's tricks of delaying the matter. The court properly balanced the interest of both parties and hence his discretion cannot be faulted.

Analysis and determination:

15. I have considered the lower court record and the submissions of the parties herein. I find that the issue for determination is whether the ruling of the court should be set aside and matter sent back for fresh hearing before a different Magistrate.

16. Order 12 Rule 2 of the *Civil Procedure Rules* provides that;

    When the Plaintiff attends;

    If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the Plaintiff attends, if the court is satisfied-

    a. That notice of hearing was duly served, it may proceed ex parte.

    b. That notice of hearing was not duly served, it shall direct a second notice to be served; or

    c. That notice was not served in sufficient for the Defendant to attend or that for other sufficient cause the Defendant was unable to attend, it shall postpone the hearing.

17. Looking at the court record, the firm of Magee was Magee came on record on August 22, 2018. Mrs Kimuto appeared for the firm on behalf of the Appellant on September 4, 2018, Ms Kiragu on October 23, 2018. On December 4, 2018, there was no appearance for the Petitioner and notice was to issue to the Petitioner.

18. The On February 5, 2019, the record is as follows;

    " Before: Hon GM Mutiso- Principal Magistrate

Court Assistant: Beatrice

Magee wa Magee Advocate for the Plaintiff. Mrs. Kimuto present

Viodora Wamiru Ndambiri the 1st Applicant.

Rapharla Mbui Ndambiri the 2nd Applicant.

Wangechi : Ms Abubakar told me he could not make it for today's hearing.

1st Applicant: We Want the application dated January 25, 2018 heard.

2nd Applicant: We want the application heard.

Court: No clear reason have been given as to why counsel could not attend court. I therefore order the application do proceed for hearing in the absence of the Petitioners counsel notwithstanding,"

19. I have had the occasion to peruse the entire record of appeal and the lower court file. No affidavit of service was filed to prove that indeed the Appellant or his advocate had been served with a hearing notice to attend court on February 5, 2018.

20. In the *Halsbury's law of England*, 5th Edn vol 61 page 545 at para 640, which the Appellant referred to stated that;

> " The audi alteram partem rule requires that those who are likely to be directly affected by the outcome should be given prior notification of the action proposed to be taken, of the time and place of any hearing that is to be conducted...... similar notice ought to be given of a change in the original date and time, or of an adjourned hearing.......The particulars set out in the notice should be sufficiently explicit to enable the interested parties to understand the case they have to meet and to prepare their answers and their own cases....... Notification of the proceedings or the proposed decision must also be given early enough to afford the person concerned a reasonable opportunity to prepare representation or put their own case. Otherwise the only proper course will be to postpone or adjourn the matter."

21. In a concurring opion, Njoki Ndungu, SCJ in the decision of *Evans Kidero Odhaimabo & 4 others v Ferdinand Ndugu Waititu & 4 others* in Petition No 18 of 2014 as consolidated with Petition No 20 of 2014 eKLR elaborated on the right to fair hearing as follows:

> (257) "Fair hearing in principle incorporates the rule of natural justice, which include the concept of audi alteram partem (hear the other side or no one is to be condemned unheard) and nemo judex in causa sua (no man shall judge his own case) otherwise referred to as rule against bias. Peter Kaluma Judicial review law procedure and practice 2nd edition (Nairobi: 2009) at page 195, referred to procedural fairness in decision making. Further he analyses the two concepts of rules of natural justice and states (at pages 176 and 177) that it is the duty of the courts, when dealing with individual cases, to determine whether indeed the rules of natural justice have been violated and noting that "although the necessity of hearing is well established, its scope and contents remain unsettled."

22. What are the norms or components of fair hearing? The supreme court of India, in *Indru Ramchand Bharvani & others v union of India 7 others*, 1988 SCR Supl (1) 544, 555 found that a fair hearing must be given and (ii) the opportunity must be reasonable (citing Bal Kissen Kejriwal v collector of customs Calcutta & others AIR 1962 , 460).

23. Finally right to fair hearing is also provided for under provisions of Article 47 & 50(1) of *the constitution of Kenya 2010*. The same provides that;

Article 47 (1) of *the Constitution of Kenya 2010*

Provides that;

> " Every person has a right to administrative action that is fair, expeditious, efficient, lawful, reasonable and procedurally fair."

Article 50(1) of *the Constitution of Kenya 2010* provides that;

> " Every person has a right to have any dispute that can be resolved by the application of law decided in affair and public hearing before a court or , if appropriate, another independent and impartial tribunal or body."

24. The Appellant contends that he was not given an opportunity to be heard and he was not served with a hearing notice. A perusal of the court file and proceeding does confirm that on 4th December 2018, when the matter was initially called out the Appellants advocate, Ms Kimuto was present but later when the file was later called out again, only the Respondents were present, a hearing date was issued. It was thus necessary pursuant to Provisions of Order 12 Rule 2 of the *Civil Procedure Rules* to ensure service was effected in the proper manner upon the Appellant before proceeding with hearing on February 5, 2010.

25. The proceeding of February 5, 2019, indicates that one Ms Kimuto is present for Mugee wa Mugee advocate. In the same proceedings it is indicated that one "Wangechi" informs court that Ms Abuluzalea told me he could not make it for today's hearing. "Unfortunately the court proceedings do not correctly capture representation on the said date as Ms. Kimuto is indicated as present but does not take part in the proceedings, while, Ms Wagechi is also indicated also as holding brief for Ms Abuluzalea. The court further describes Ms Abuluzalea as "he" which is not correct.

26. The proceedings clearly are not accurate and does not conclusively capture the right representation. One is left wondering if indeed Ms. Kimuto was present on the said date or Ms wagechi had proper instructions to hold brief for Ms Abuluzalea for the firm of Mugee wa Mugee for the Appellant. In the absence of clear proceedings, this court must therefore fall back to the issue of proper service, which undoubtedly was not effected.

27. In the Court of Appeal citation of *Murtaza Hussein Bandali T/A Shimoni Enterprises v PA Wills* [1991] KLR 469; [1988-92] held that;

> " There is inherent power to restore a case for hearing after it has been dismissed. However, the decision whether or not to reinstate a dismissed appeal is no doubt an exercise of discretion. This being an exercise of judicial discretion, like any other judicial discretion must be based on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the supplicant for such orders. See Gharib Mohamed Gharib v. Zuleikha Mohamed Naaman Civil Application No. Nai. 4 of 1999"

28. Having analyzed the entire proceedings, particularly what transpired on February 5, 2019, this court comes to the inescapable conclusion that this is a proper and fit case to exercise its discretion to set aside

the proceeding and allow the Appellant to have his day in court. No doubt from the proceedings he might not have the strongest of defence against the objection proceedings but it is in the greater interest of justice that he too must be heard and a decision made on its merit.

Disposition:

29. Consequently, the Appeal succeeds and the ruling of March 12, 2019, is set aside on the following conditions;

    a. The file be returned to the Wang'uru Principal Magistrate Court for hearing of the objection proceedings afresh.

    b. The status quo be maintained and no transfer, alienation or any transaction be done on the estate property being Ngariama/Lower/Ngariama/720 pending re-hearing and determination of the Summons for revocation of grant dated January 23, 2018.

    c. This being a family matter, there shall be no orders as to costs.

30. It is so ordered.

WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 25TH DAY OF APRIL, 2023.

RAYOLA FRANCIS

JUDGE

Delivered on the virtual platform, Teams this 25th day of April, 2023.

In the presence of:

.... for the Appellant.

.... for the Respondent.

.... Court Assistant.