



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**CIVIL APPEAL NO. 67 OF 2017**

**AWZ.....APPELLANT**

**VERSUS**

**SCK.....RESPONDENT**

(Being an appeal arising from the judgment of Hon. Ndeng'eri in Embu CMCC 341 of 2017 dated and delivered on 19.10.2017).

**JUDGMENT**

1. Vide a memorandum of appeal dated 17.11.2017, the appellant herein filed the instant appeal having been dissatisfied with the judgment at Embu CMCC Succession Case No. 341 of 2017 and thus set out the following grounds of appeal:

- i. That the learned magistrate erred in law and fact in dismissing the appellant's case on procedural technicality.
- ii. That the learned magistrate erred in law and fact in failing to consider that the respondent had admitted that both the appellant and him were siblings and thus were entitled to equal share of their parent's estate.
- iii. That the learned magistrate erred in law and in fact in failing to appreciate that article 22(3) and 159 (1) (d) of the constitution expressly eliminates gender discrimination in land.
- iv. That the learned magistrate erred in law and fact in failing to appreciate that the respondent has lived in the U.K for 55 years since his youth and his family of 4 adult working children cares for him.
- v. That the learned magistrate erred in law and in fact in failing to appreciate that the respondent in his affidavit admitted that the appellant was his sister and the suit land belonged to their late father and as such, there was no issue for trial and the right thing was to share the suit land equally between the appellant and the respondent.
- vi. That the learned magistrate erred in law and in fact and in failing to appreciate that the respondent after winning the suit has sold the land and gone back to the U.K.

2. The appellant sought for orders that the appeal be allowed and an order for revocation of the grant be issued.

3. It was the appellant's case that she had filed for summons for annulment of grant of letters of administration in regards to L.R. NGANDORI/KIRIGI/xxx for the reason that the grant had been obtained and confirmed fraudulently by making of a false statement or by concealment from the court of something material; and further, that the applicant being unmarried, she had been excluded from inheriting from the estate.

4. The respondent on the other hand averred that the appellant and himself lived in different places before they finally came back to their ancestral land, the suitland herein. That the deceased died intestate and had expressed that L.R. NGANDORI/KIRIGI/xxx be inherited by the respondent. It was his case that the appellant was married to one Nthiga in Laikipia sometime between 1979 and 1987 and that no one ever chased her away from her matrimonial home. That for reasons best known to the appellant, she ran away from her matrimonial home and stayed with her late mother as a guest. It was his case that the suit land belongs to him since the appellant already has her four acres of land at Laikipia.

5. The court upon considering the evidence and law, dismissed the matter relying on the case of **John Ongeri Mariaria & 2 Others v Paul Matundura Civil Application No.301 of 2003 [2004] 2 EA 163** where it was held that ...

**justice must look both ways as the rules of procedure are meant to regulate administration of justice and they are not meant to assist the indolent.**

6. It is this decision that is subject of the appeal herein.

7. I have considered the grounds of appeal together with the submissions of the appellant given that the respondent never filed his submissions. The issue for this court's determination is whether the appeal herein is merited.

8. It was the case of the appellant that the court erred in dismissing her case by not invoking article 159 of the constitution and further that the respondent never denied that the appellant was in fact a beneficiary to the estate herein despite having been married elsewhere. The court on the other hand was of the view that the appellant during trial in the **Succession No. 341 of 2017 Agnes WZ v SCK** failed to file her submissions within the stipulated time as had been directed by the court. As such, the court proceeded to determine the cause without any supporting documents and as such, found that the case of the appellant was never supported in any way by any evidence.

9. It is the appellant's submission that she should not be denied her constitutional right of being heard and that this Court should invoke its inherent jurisdiction and give her a chance to be heard in accordance with the provisions of **Article 159 (2)(d) and Article 50** of the **Constitution of Kenya, 2010**. She argued that the Rules of Natural Justice dictates that the court should hear and determine each case on its merits and that no litigant should be driven from the seat of justice without being heard.

10. I am alive to the fact that setting aside an ex-parte order or judgment or decree is a discretion of court upon sufficient cause being demonstrated before court by the applicant. Sufficient cause is defined in the Black's Law dictionary; Tenth Edition on page 266 as follows:

**"Good cause is often the burden placed on a litigant (used by court rule or order) to show why a request should be granted or an action excused. Also termed good cause shown; just cause; lawful cause; sufficient cause..."**

11. On the other hand, it has been held in numerous decisions that courts will not tolerate excessive, prolonged and inordinate delays. There is always a need by all parties to abide by timelines set by the court and to promote expeditious disposal of cases. Lord Denning, in **Allen v Sir Alfred McAlphine and Son, (1968) 1 ALL ER 543 at p. 547** explained the fundamental reason behind this in the excerpt below;

**"The delay of justice is a denial of justice...To no one will we deny or delay right or justice. All through the years men have protested at the law's delay and counted it as grievous wrong, hard to bear. Shakespeare ranks it among the whips and scorns of time (Hamlet, Act 3, Sc. 1). Dickens tells how it exhausts finances, patience, courage, hope (Bleak House, c.1). To put right this wrong, we will in this court do all in our power to enforce expedition."**

12. The Supreme Court in **Teachers Service Commission v Simon P. Kamau & 19 others (2015) eKLR** reminds us that;

**"66] Article 159(2)(b) of the Constitution cautions Courts against permitting injustice through delays, in the following terms:**

**'In exercising judicial authority, the courts and tribunals shall be guided by the following principles—**

**(a) .....**

**(b) justice shall not be delayed.'**

**[67] Thus, the standpoint of the Constitution is that, delayed justice amounts to injustice: and the Courts, which are the dedicated mechanism for the delivery of justice, have an obligation to see to a steady pace of litigation, terminating within a reasonable time-frame. This is the context in which Article 259(8) of the Constitution is to be seen; it thus prescribes:**

**'If a particular time is not prescribed by this Constitution for performing a required act, the act shall be done without unreasonable delay, and as often as an occasion arises.'**

13. In determining civil rights and obligations, a person is entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law. A "speedy hearing" means conducting a trial within a reasonable time. For the realization of this right, all parties, including the court, have a responsibility to ensure that proceedings are carried out expeditiously.

14. Where a party is guilty of inordinate and inexcusable delay, giving rise to a substantial risk that a fair trial would not be possible, or will cause serious prejudice to the other party, the court is entitled to dismiss the proceedings. From the record before me, I note that on 24.08.2017, the parties agreed to dispose off the matter by way of written submissions which the court allowed and thereafter, the court issued a mention date (28.09.2017) to confirm compliance. On 28.09.2017, one Mr. Muruiki held brief for P.N. Mugo while there was no appearance for the respondent. The court thus proceeded to issue a ruling date being 19.10.2017 and on which date, the ruling was delivered dismissing the appellant's case. In the same breadth, the court observed that it was not supplied with the grant or any other documents in support of the petition by the respondent.

15. In the case of **Martha Wangari Karua v The Independent Electroral and Boundaries Commission & Others, Nyeri Civil Appeal No. 1 of 2017**, the Court held that;

**“the Rules of Natural Justice require that the court must not necessarily drive any litigant from the seat of justice without a hearing, however weak his or her case may be.”**

16. This was also reiterated in the case of **Mbaki & Others v Macharia & Another (2005) 2 EA 206**, at page 210, where the court stated that;

**“the right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”**

17. In regard to the inadvertent exclusion of the grant and other documents, the court in my view would have weighed the issues raised by the appellant/applicant before dismissing the matter.

18. It is my finding that Article 159(2)(d) of the Constitution of Kenya, 2010 provides that justice shall be administered without undue regard to procedural technicalities. As such it would not be in the interest of justice to dismiss this appeal. The matter before the trial court should be heard on merits and the appellant given a chance to ventilate her case by way of *viva voce* evidence. In light of the provisions of Article 50(1) of the Constitution, it is appropriate to give the appellant the right to be heard.

19. The justice of this case lies in granting the appellant a fair hearing; setting aside the ruling of 19.10.2017 and allowing the appellant to ventilate the issues in her suit.

20. In the circumstances, **the following orders are made:**

**i. The appeal is hereby allowed with no orders as to costs.**

**ii. The matter is hereby remitted to the lower court for hearing before a different magistrate.**

**21. It is so ordered.**

**DELIVERED, DATED AND SIGNED AT EMBU THIS 16<sup>TH</sup> DAY OF FEBRUARY, 2022**

**L. NJUGUNA**

**JUDGE**

.....for the Appellant

.....for the Respondent