



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CIVIL APPEAL NUMBER 93 OF 2018

MUNYOKI KITONGA.....APPELLANT

VERSUS

NZAMBI KITONGA SILA.....1ST RESPONDENT

RICHARD MUEMA KITONGA.....2ND RESPONDENT

QUEEN MWENDE MUNYOKI.....3RD RESPONDENT

(Being an appeal from the Ruling of Hon. A.S.Lesootia Senior Resident Magistrate's

Court made on the 30th August 2016 in Kitui Senior Resident Magistrate's Court Succession Cause 4 of 2012)

JUDGEMENT

1. This appeal arose from the ruling delivered by **Hon. J. Munguti Principal Magistrate** *vide* **Kitui Chief Magistrate's Court Succession Cause No.4 of 2012** delivered on 8th November, 2018. In that cause the court had determined a protests filed by **Nzambi Kitonga Sila** and **Richard Muema Sila (Respondents** herein) on the manner the Petitioner (Now the **Appellant** herein) had proposed to have the estate of the **late James Kitonga Sila (deceased)** distributed. The trial court found that the protest was merited and determined that the Appellant was entitled to parcel No.1935 and that he should surrender parcel No.1936 where he had put up a house contrary to the initial distribution done by the deceased. That decision was delivered on 30th August, 2016 and the same was not challenged.

2. On 1st November, 2018, the **2nd Respondent** *vide* a Notice of Motion dated 31st October 2016 moved the court to compel the **Appellant** execute necessary documents to facilitate distribution of the estate as per the judgment of the court and in addition moved the court to issue a certificate of confirmation.

3. As observed above the court agreed with the **Respondents** and found that the question of distribution having been determined, the **Appellant** had no other option other than to comply and in default the court directed the Court Executive Officer to execute all the necessary documents to implement the Judgment of the court.

4. The **Appellant** felt aggrieved by that ruling and filed this appeal raising the following grounds namely:

i. That, the Learned Trial Magistrate erred and misdirected himself in law and fact by issuing conclusive and final orders against the Appellant without giving the appellant a fair hearing that particular day.

ii. That the Learned Trial Magistrate erred and misdirected himself in law and fact by failing to appreciate that there was an application dated 31st October 2016 filed by the Respondents that raised new issues that called for a hearing and determination.

iii. That the Learned Trial Magistrate erred by failing to appreciate that their mother who was a beneficiary and a brother had passed on after the decision on distribution of the estate and as such it was necessary to determine the issue of distribution afresh and issue appropriate orders.

iv. That the trial magistrate erred by being impatient and ordering for the closure of the file prematurely when there were simmering issues emerging that required determination.

5. In his written submissions made through **M/s A.M. Kilonzi**, the **Appellant** submits that despite the compelling orders sought by the Respondents against him, there was an apparent problem that hindered transmission of the estate and in his view the lower court should have

appreciated the facts and move to rectify the grant due to the new developments.

6. He submits that even though the **Respondents** had not prayed for rectification of the grant or review to accord with the new developments of some beneficiaries having passed on, the response filed indicated the same and points out the affidavit of the **2nd Respondent** and **Queen Mwende Munyoki** expressed the new developments. The **Appellants** contends that **Queen Mwende Munyoki**, the **widow** to one **Benard Kasyula Kitonga** in Land Parcel No. **Kyangithya/Tungutu/1933** wanted necessary changes effected but that the trial magistrate never listened to her.

7. The **Appellant** further avers that their mother who was a beneficiary in parcel No.1936 had also passed on and it was necessary for her share to be shared out but that issue, in his view was not considered by the trial court.

8. The **Appellant** opines that the trial magistrate was reluctant to entertain any further discussion on the estate and that in view of that it lost the opportunity to listen to parties and rectify the mode of distribution.

9. The **Appellant** further contends that he would have faced problems in transmission of the respective parcel to beneficiaries who had passed on and would have been forced to go back to court for rectification. He faults the trial magistrate for locking out the advocates instead of given them a chance to be heard.

10. The **Respondents** have opposed this appeal insisting that the same is devoid of merits. The **Respondents** through written, submissions made through Learned Counsel **M/s J.K. Mwalimu & Co. Advocates** submit that their application dated 31st October, 2018, the subject of the ruling being appealed against, was not for rectification of grant but for execution of orders issued on 13th May 2015.

11. The **Respondents** submit that the trial court was not properly moved for rectification of grant and that any hearing towards that end would have been an exercise in futility.

12. The **Respondents** further aver that the **Appellant** sat on the grant issued on 13th May, 2015 for over 3 years without implementing the same and he was not the mover of the application dated 31st October, 2018. They contend that the demise of some of the beneficiaries could not stop the distribution because the dependants of those beneficiaries could succeed them.

13. This court has considered this appeal and the response made. The only issue for determination is whether the trial court erred in allowing the application dated 31.10.2018 on 8th November, 2018 and whether the **Appellant** or any of the parties was denied a chance to be heard.

14. This court has gone through the proceedings from the court below and I must point out from the onset that it is apparent that there are issues regarding specific dates when the ruling on distribution was made and when the ruling the subject of this appeal was made. This is because of the fact that the body of the 2 rulings inadvertently left out the dates of the rulings. The proceedings however are indicative that the decision on the distribution was delivered on 30th August, 2016 while the ruling the subject of this appeal was delivered on 8th November, 2018. The trial court of course should have done better by properly dating the decisions as required by law for ease of references.

15. Having said that, there is no contest on the fact that the application dated 31st October, 2018 was made by the **Respondents** and the nature of the said application was basically execution of the trial court's decision of distribution of the estate. That decision was supposed to be delivered on 13th May, 2015 as per proceedings of the lower court but it appears the same was not and was delivered on 30th August, 2016 as per the proceedings.

16. The ruling delivered on 8th November, 2018 due to some inadvertence referred to ruling of 13th May, 2015 when the ruling it was referring to was the one delivered on 30th August, 2016.

17. It is also apparent that the **Appellant** as the appointed administrator had not done anything to distribute the estate as per the said decision prompting the **Respondents** to move the court through their application dated 31st October, 2018. The apparent reluctance of the **Appellant** in my view was obvious and it had nothing to do with demise of two of the cited beneficiaries. One can deduce from his inaction that he was not eager to implement the court's decisions on distribution perhaps because he was not too pleased by fact that he had lost his attempt to be given parcel No.1936 in exchange of parcel No.1935 which his late father, the deceased in the cause had given him.

18. This court takes the position that the demise of a beneficiary is not a bar to distribution of an estate of a deceased person because the situation can easily be addressed through rectification or revision of a certificate of confirmation. In this appeal the **Appellant** has raised the fact that one **Queen Mwende Munyoki**, is entitled to a share of one **Benard Kasyula Kitonga** who is said to be deceased. This court however finds that this appeal is not the right forum to raise the issue.

19. In the first place, the said **Queen Mwende Munyoki** did not move the trial court for rectification of grant as provided by law. The **Appellant** cannot therefore say that she was denied an opportunity to be heard when she did not herself sought for such opportunity. In any event the said **Queen Mwende Munyoki**, should speak for herself and it is improper for the **Appellant** to appear like he is acting for her when in the real sense he is finding it convenient to use her cause to further his grievance about the decision reached by the trial court on distribution.

20. Secondly, the **Law of Succession Act** provides for the procedure to be adopted in the administration of an estate of a deceased person. In my considered view, it matters not whether the deceased person is a beneficiary himself or herself. The law is clear under **Section 29** of the **Law of Succession Act** as to who the dependants are. It was therefore expected that the dependant to the departed beneficiaries should have moved the trial court accordingly and there is nothing barring them from doing so even after confirmation or distribution of an estate of a deceased person. The **Appellant** should therefore fight his own battles and leave the dependants of the departed beneficiary/beneficiaries to

move the court if they so wish of course the **Appellant** is at liberty to also move the court if he has basis to claim a share that was meant to go to their mother but if he has no right, then those who were to benefit from the life interest of the mother by operation of **Section 35 of Law of Succession Act** should move the trial court accordingly. The **Appellant** has no basis to fault the trial court for not making orders that were not pleaded or argued before it.

21. In the premises and for the above reasons this court finds no merit in this appeal. The same is disallowed in its entirety but I make no order as to costs.

Dated, Signed and Delivered at Kitui this 23rd day of February, 2021.

HON. JUSTICE R. K. LIMO

JUDGE