



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT SIAYA
CIVIL APPEAL NO. 4 OF 2020

CONSOLATA OCHIENG OGUTU.....1ST APPELLANT

FRANCIS OUMA OGUTU.....2ND APPELLANT

LUCAS OWINO OGUTU.....3RD APPELLANT

STEPHEN OTIENO OGUTU.....4TH APPELLANT

VERSUS

ADET ODONGO.....1ST RESPONDENT

FREDRICK OKOTH OWONGO.....2ND RESPONDENT

(Appeal from the Ruling of Hon. C.N. Sindani made on 18/9/2019 in Ukwala SRM Succession Cause No. 228 of 2018)

JUDGMENT

Introduction

1. The appeal herein arises from succession proceedings. The appellants filed this appeal on 9.03.2020 seeking to set aside the entire ruling of the trial magistrate delivered on 18th September 2019. The appellants relied on the following grounds:

- a. That the learned Magistrate erred in law by failing to take into account the applicants' submissions and thereby arriving at a grossly unfair decision.
- b. That the learned magistrate erred in law and in fact in failing to appreciate he did not have jurisdiction to revoke a confirmed grant in the subordinate.
- c. That the learned magistrate erred in law and fact by failing to appreciate that he was functus officio on the question or revoking the confirmed grant.
- d. That the learned magistrate erred in law and fact by failing to refer the respondents to the High Court for a revocation of the confirmed grant.
- e. That the learned magistrate erred in law and as a result arrived at a wrong decision and in all circumstances failed to do justice to the appellants.
- f. That the learned magistrate erred in law by failing to exercise his discretion in a judicial manner on the available evidence and his decision amounted to an error in principle.
- g. That the learned magistrate erred in law by failing to note that the Land Registrar, Ukwala cancelled the titles which were issued to the Protestors for reason that they were obtained fraudulently.
- h. That the learned magistrate erred in law in finding that the suit land is an ancestral land yet it is registered in the names of Ibrahim Odongo (Deceased).

i. That the learned magistrate erred in law and fact by failing to appreciate that the protestors had other parcels of land registered in their names which fact was brought to the attention of the court.

j. That the learned magistrate erred in failing in law and fact that the protestors stole the land and registered the suit land in their names and disinherited the appellants even without obtaining letters of administration as exhibited in the green card issued by the Registrar of Lands, Ukwala.

2. The parties agreed to dispose of the appeal by way of written submissions but only the appellants filed their submissions.

Appellant's Submissions

3. The appellants submitted that the magistrate's court lacked the jurisdiction to revoke the grant issued to them as such powers vested with the High Court and as such the trial magistrate ought to have referred the matter to the High Court. On the issue of a court exercising only the jurisdiction that has been donated to it, the appellants relied on the Supreme Court decision in **Samuel Macharia & Another versus Kenya Commercial Bank Limited & 2 others**. (Supreme Court Application No.2 of 2012).

4. The appellants also submitted that they could raise the issue of jurisdiction at any point even in appeal as they had done as was held in the case of **Adero & Another v Ulinzi Sacco Society Ltd [2007] eKLR**.

5. It was submitted that the trial magistrate misdirected himself in holding that the suit land was ancestral land and thus that the deceased held the land in trust for the respondents. It was submitted that the respondents lodged a caution over the suit land as licensees and could not be regarded as beneficiaries of the deceased as they did not have registrable interest over the suit land.

Analysis and Determination

6. This being the first appellate Court, its role is to revisit the evidence on record, evaluate it and reach its own conclusion. (See **In re Estate of Joash Arende (Deceased) [2019] eKLR**). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni v Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga v Kiruga & Another (1988) KLR 348**.

7. The issues for determination arising in the instant appeal are as follows:

- i. Whether the trial court had jurisdiction to revoke the grant issued to the appellants and if so,
- ii. Whether the application for revocation of grant was merited.

8. A brief history of this dispute is that the appellants had moved the trial court vide Ukwala Succession Cause NO. 228/2018 seeking for a grant of letters of administration intestate which were issued by the court on the 14th August 2018 and subsequently confirmed on the 15th March 2019. On the 14th August 2019, the respondents moved the trial court seeking among others, annulment of the grant issued and confirmed in favour of the appellants.

9. In support of the application for revocation of the grant, the 1st respondent testified that **LR No. North Ugenya/Masat/1190** (suit land) was ancestral land registered in the name of his and the deceased's grandfather and that each family had an equal share therein and equal usage over the land they had settled on. The 1st respondent further testified that their father, Odongo Mwangre, later subdivided the suit land to his sons, the deceased, Owongo Odongo and himself. The 2nd respondent testified that he was son of Owongo Odongo and that they stayed on the suit land and used to farm on it.

10. The appellants filed a replying affidavit on the 27th August 2019 in which they opposed the summons for revocation of grant and stated that they were the widow and sons of the deceased Ibrahim Odongo, who was the registered owner of the suit land and as such were the competent persons to administer his estate. It was the appellants' case that the respondents had caused the suit land to be transferred to their names on the 18th November 2013 but the Land Registrar had reversed the said registration to the deceased's name.

11. On the first issue of jurisdiction, the appellants' submit that the trial court lacked jurisdiction to entertain the application for revocation of grant as the same was a preserve of the High Court. It is trite law that where the question of jurisdiction is raised then the court must first and foremost investigate and establish whether it has the requisite jurisdiction to hear and determine the matter. This is so because jurisdiction is everything without which a court of law acts in vain. See **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR** where the Court of Appeal was clear that:

“ It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined.”

12. The law on revocation of grants, made by a magistrate's court, changed in 2015, to give jurisdiction to magistrates' courts to revoke grants that they have power to make. The Magistrates' Courts Act, No. 26 of 2015, which commenced on 2nd January 2016 amended the provisions of the Law of Succession Act, Cap 160, Laws of Kenya, which provided for jurisdiction of the Magistrates Courts in probate matters, that is to say sections 48 and 49. The changes were effected through sections 23 and 24 of the Magistrates Courts Act.

13. The amendments provide as follows:

“23. The Law of Succession Act is amended, by repealing section 48(1) and substituting therefor the following new subsection –

“Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49, a magistrate shall have jurisdiction to entertain any application and to determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed the pecuniary limit prescribed under section 7(1) of the Magistrates Courts Act, 2015.”

24. Section 49 of the Law of Succession Act is amended –

a) by deleting the words “Resident Magistrate” and substituting therefor the words “Magistrate’s Court”; and

b) by deleting the words “one hundred thousand shillings” and substituting therefor the words “the pecuniary limits set out in section 7(1) of the Magistrates Courts Act, 2015.”

14. To place the amendments in proper perspective, it would be necessary to cite the provision in the old section 48(1) of the Law of Succession Act that was amended by Act No. 26 of 2015. The old section 48(1) read as follows:

“48(1). Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49, a resident magistrate shall have jurisdiction to entertain any application other than an application under section 76 and to determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed one hundred thousand shillings:

Provided that for the purpose of this section in any place where both the High Court and a resident magistrate’s court are available, the High Court shall have exclusive jurisdiction to make all grants of representation and determine all disputes under this Act ...”

15. The effects of the amendments was that the pecuniary jurisdiction of the Magistrate’s Court was enhanced from Kshs. 100, 000.00 to a maximum of Kshs. 20, 000, 000.00. Secondly, where the High Court and the Magistrate’s court are situated within the same station, the High Court shall no longer enjoy exclusive jurisdiction, for it shall share jurisdiction in succession causes with the magistrate’s court, subject, of course, to the pecuniary ceilings and gazettelement by the Chief Justice. Finally, the exclusive jurisdiction of the High Court to determine revocation of grants applications, under section 76, was taken away, and the same was extended to the Magistrate’s Court, with respect to grants of representation that such Magistrate’s Court would have power to make.

16. Accordingly, under Act No. 26 of 2015, by virtue of the amendment of section 48(1) of the Law of Succession Act, a Magistrate’s Court now has power to revoke a grant of representation that it has power to make. There is now no need for one who wishes to have a grant made by a Magistrate’s Court revoked, to move the High Court to do so. All that that person needs to do is to file a summons for revocation of grant within the cause in which the grant was made by the Magistrate’s Court.

17. Act No. 26 of 2015 commenced on 2nd January 2016, and, therefore, the amendment of section 48(1) of the Law of Succession Act became effective from that date. The summons for revocation of grant herein were dated 14th August 2019 and filed on the same day, that is, after Act No. 26 of 2015 had commenced and the amendment to section 48(1) of the Law of Succession Act had become effective. There was no need for the respondents herein, in the circumstances, to have initiated a fresh cause for revocation of the grant made in Ukwala SRMCSC No. 228 of 2018, at the High Court. They were thus well within the law to file the summons for revocation of grant in Ukwala SRMCSC No. 228 of 2018, since, as I have stated herein, the Magistrate’s Court had, by then, been clothed with jurisdiction to revoke the grant made in Ukwala SRMCSC No. 228 of 2018. Accordingly, the ground of appeal on jurisdiction of Magistrate’s Court to revoke grants is hereby found to be devoid of merit and is dismissed.

18. Still on jurisdiction, the basis upon which the respondents filed their application for revocation of grant was that the deceased herein Ibrahim Odongo held the suit land in trust for them as the land was ancestral land. As a result, the respondents asserted that the grant obtained by the appellants herein was done by material concealment. The 2nd respondent went further to testify that his family was in occupation and usage of part of the suit land which fact remained unchallenged by the appellants.

19. The respondents moved the trial court on the basis that the suit land in question, although registered in the name of the deceased, was actually ancestral land passed onto the deceased, the 1st respondent and the 2nd respondent’s father by their father, Odongo Mwangre. It was their case that they ought to have been consulted prior to the institution of the succession proceedings. It is alleged from the trial court record that the respondents have settled and continue to till their respective shares of the suit land.

20. It is not in dispute that the suit land is registered in the name of the deceased herein. A certificate of official search on record indicates that the registration took place on 1st October 1977. The deceased herein died on the 6th February 1978 roughly about over 4 months later.

21. In the case of Peter Moturi Ogutu v Elmelda Basweti Matonda & 3 Others [2013] eKLR, It was stated that:

“Where a claim of trust has been raised, the Plaintiff had to establish the existence of a trust on which his case could be hinged or mounted.”

22. In the Court of Appeal cases of **Muthuita v Muthuita (1982-88) 1 KAR 42 at 44** & **Njenga Chogera v Maria Wanjira Kimani & Others [2005] eKLR**, it was held:

“Customary law trust is proved by leading evidence on the history of the suit property and the relevant customary law on which the trust is founded.”

23. From the above decisions, the question is whether the Succession Court has jurisdiction determine the question of the existence of a customary trust? Interests in land arising from customary law trusts are now expressly recognized under the provisions of Section 28 (b) of the Land Registration Act, No.3 of 2012 and the same can only be determined by the Environment and Land Court as the Court contemplated in Article 162(2) of the Constitution and established under section 4 of the Environment and Land Court Act to hear and determine disputes relating to the environment and the use and occupation of, and title to, land. Furthermore, Article 165(5)(b) of the Constitution expressly bars the High court from hearing and determining disputes which are exclusively reserved for the courts contemplated in Article 162(2) of the Constitution.

24. In light of the above and the sentiments in the locus classicus case of **Owners of the Motor vessels “Lillian S” (supra)** it is noteworthy that this Court's jurisdiction is to enforce the Law of Succession Act Cap 160 on administration of estates and intestate estates of deceased persons. In this regard, its mandate is to hear and determine issues of issuance of grants, summons for confirmation of grants where lists of beneficiaries, lists of assets and modes of proposed distribution of estates are agreed and consented to by all beneficiaries. Where there is contest, to hear and determine the Protests and revocation of grants applications.

25. Where there is dispute of what constitutes the net estate of the deceased available for distribution arising from contest as to deceased's title and ownership, then the distribution of the said asset is hived off and confirmation of grant of the undisputed assets may be granted to allow beneficiaries' beneficial interest over the said part of the estate. If the contested asset(s) is /are the only ones available for distribution as in the instant case, then the confirmation proceedings grind to a halt pending outcome of the ownership and title to the said properties first be determined by the Environment and Land Court.

26. Having said all the above, it is my humble view that the issue of jurisdiction goes to the root of the matter before Court and ought to be determined first. I reiterate that the mandate of the probate court under the Law of Succession Act is limited to Succession proceedings only and not determination of title or ownership of land. This is what the court held in **H.C Succession Cause No. 864 Of 1996 [2015] eKLR**.

27. It is therefore my humble view that the ruling of the trial court cannot stand. It must be set aside. In the same vein, the confirmation proceedings must be set aside pending determination of the ownership of and or the Respondents' allege entitlement to LR No. North Ugenya/Masat/1190 which is listed as the only asset of the deceased's estate.

28. Accordingly, for the reasons advanced herein, I hold that the Succession Court had no jurisdiction to determine ownership of or title to land. The parties to the succession proceedings and who claim to be rightfully entitled to the share of the suit land as being held in trust for them and others by the deceased Ibrahim Odongo must proceed and file a claim for ownership of or claim for trust land or title to the suit land and upon such determination of the said issues by the Environment and Land Court, the Succession court can determine issues relating to succession proceedings. Accordingly, the proceedings leading to the confirmation of grant before the succession court and the confirmed grant are hereby quashed and set aside and the grant revoked. As the Succession Court in this case is Ukwala Principal Magistrate's Court, Parties will have to elect to file their dispute before a different court with competent jurisdiction to determine the questions of ownership of land.

29. Each party to bear their own costs of this appeal.

30. Orders accordingly.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 30TH DAY OF MARCH, 2021

R.E. ABURILI

JUDGE