



REPUBLIC OF KENYA

IN THE HIGH COURT

AT SIAYA

CIVIL APPEAL NO. E002 OF 2021

DANIEL DISHON ANYANZAWA OLUCHULA.....APPELLANT

VERSUS

JACKSON OYIENGO AMERE.....RESPONDENT

(An appeal from the ruling of Hon. J. Ong'ondo, Senior Principal Magistrate delivered on the 10/12/2020 in Siaya Magistrates Court Succession Cause No. 213 of 2019)

JUDGMENT

Introduction

1. The appellant herein **DANIEL DISHON ANYANZAWA OLUCHULA** was one of the protestors in the succession Cause before the lower court where the Respondent herein was the Petitioner/Administrator. The appellant and his brother Hezekiah Oluchula had protested the confirmation of grant issued to the Respondent who is their nephew, claiming that the land subject of the succession proceedings was family land and that other persons especially Hezekiah Oluchula, was beneficially entitled to a portion thereto as per the decision of the Land Disputes Tribunal as confirmed by the Appeals Committee and adopted as judgment and decree of the Court by the Magistrate's Court at Siaya; and not solely belonging to the deceased who was his brother. The lower court after hearing the protest dismissed it and proceeded to confirm the grant in favour of the Respondent. It is that ruling dismissing the protests and confirming the grant in favour of the respondent that gave rise to this appeal. Vide his memorandum of appeal dated 22/12/2020 and filed on the even date, the appellant sets out the following grounds:

- a. The Learned Magistrate erred in law and in fact by treating the appellant's evidence and the appellant's advocates submissions superficially and without adequate weight and thereby grossly misdirected himself and consequently arrived at an erroneous decision
- b. The Learned Magistrate erred in law and in fact by failing to understand that the main issue for determination was whether the only parcel of land forming the subject matter of the estate of the deceased was the free property of the deceased available for distribution solely to his family or other persons had beneficial interest in the same.
- c. The Learned Magistrate erred in law and in fact by failing to appreciate that there is uncontroverted evidence on record confirming that the deceased had been registered as proprietor of the subject parcel by his father and such registration was in trust for his younger siblings.
- d. The Learned Magistrate erred in law and in fact by failing to appreciate that the protester had presented the protest on behalf of his brother Hezekiah Wanyanga Oluchula in his capacity as the administrator of the estate of their deceased father.
- e. The Learned Magistrate misdirected himself on the pleadings and the evidence before him and thereby totally failed to make a finding on whether Hezekiah Wanyanga Oluchula was entitled to a share of the subject land.
- f. The Learned Magistrate erred in law and in fact by relying on extraneous factors and or issues not before court and the Ruling was based on wrong considerations.
- g. The grant as confirmed by the Learned Magistrate was contrary to the application for confirmation of grant and therefore unlawful.
- h. The Learned Magistrate erred in law and in fact by proceeding to confirm the grant notwithstanding that there was material defect in the application for confirmation of grant.

- i. The Learned Magistrate erred in law and in fact by failing to take into account and consider the evidence adduced by the protestor.
- j. The Learned Magistrate failed to appreciate the submissions of the learned counsel for the appellant by finding in favour of the respondent herein.
- k. In all circumstances of the case, the findings of the Learned Magistrate are insupportable in law or on the basis of the evidence adduced.

2. Unusually, the Respondent **JACKSON AYIENGO AMERE** who is self-represented filed a response to the to the Memorandum of Appeal by way of a replying affidavit sworn on the 25th day of April 2021 and filed on the 2nd June 2021 in which he deposes amongst others that the appeal was an abuse of the court process and ought to have been dismissed as it lacked merit.

3. The respondent further deposed that the appellant was not a beneficiary of the estate of the deceased, Shadrack Oluchula, and was therefore not entitled to benefit from the distribution of land parcel North Gem/Got Regea/276 and further that the appellant had been adequately provided for in land parcel No. North Gem/Got Regea/275.

4. A brief history of the dispute is that the appellant herein and his brother Hezekiah Oluchula had filed a protest against the confirmation of grant in favour of the respondent on the grounds that they had not been provided for as beneficiaries in the distribution of land parcel No. North Gem/Got Regea/276. The trial magistrate ruled in favour of the respondent on the grounds that the appellant was not a beneficiary of the estate of the deceased Shadrack Oluchula and further that the appellant had been provided for in land parcel North Gem/Got Regea/275. It is worth noting that the impugned ruling did not deal with the protest filed by Hezekiah Oluchula. There is also no evidence that Hezekiah Oluchula withdrew his protest.

5. The appeal was canvassed by way of written submissions.

The Appellant's Submissions

6. It was submitted on behalf of the appellant that the appellant, who was one of the protesters before the trial court, and who was the administrator of the estate of his father Richard Oluchula's estate had presented uncontroverted evidence that though the parcel of land North Gem/Got Regea/276 was registered in the names of the deceased Shadrack Amere Oluchula, the said title included interests of other persons either beneficially or legally entitled to the estate.

7. The appellant's counsel further submitted that his failure to annex an order obtained in Siaya Senior Resident Magistrate Court Misc. Civil Case No. 41 of 2001 was not fatal to his case as the trial court ought to have taken judicial notice of the same as provided for in Rule 41 (1) of the Probate and Administration Rules and as such, the trial court ought to have executed the orders recognising their interest in land parcel North Gem/Got Regea/276 and upheld their protest against the confirmation of grant.

8. The appellant further submitted that the petition by the respondent was presented by a sole petitioner whereas one of the beneficiaries was a minor and as such the petition ought to have been presented by at least two petitioners and accordingly, the petition was defective ab initio and ought to have been struck out.

9. It was the appellant's submission that this court has jurisdiction to entertain this appeal as it is not being asked to determine the ownership of the suit land herein but rather it is being asked to give effect to the valid order of the Land Disputes Tribunal adopted in Siaya Resident Magistrates Court Misc. Civil Case No. 41 of 2001 which order was not challenged by the respondents.

Respondent's Submissions

10. It was submitted by the Respondent acting in person that one Hezekiah Wanyanga Oluchula, the administrator of the estate of Richard Oluchula Akhonya has never filed any protest regarding the suit land herein and that the appellant herein failed to disclose on whose behalf he filed the protest before the trial court as well as the instant appeal.

11. It was further submitted that the appellant is not a beneficiary of the estate of the deceased Shadrack Oluchula, and as such does not rank in priority as against the respondent and thus cannot benefit from the deceased's estate or institute succession proceedings to inherit at the expense of the respondent and his co-heirs. The respondent relied on the case of **Nairobi Succession Cause No. 2015 of 2012, In the Matter of the Estate of Joshua Orwa Ojode (Deceased)** where the court discussed the order of priority in succession where a deceased is survived by a spouse and children.

12. It was submitted that the appellant has been adequately provided for in land parcel no. North Gem/Got Regea/275 which is jointly registered in the names of the appellant and Elda Ayoti Oluchula.

Analysis & Determination

13. This being a first appeal, the role of this court is to revisit the evidence on record, re-evaluate it and reach its own independent conclusion in the matter. (See the case of **Selle & Anor. v Associated Motor Boat Co. Ltd (1968) EA 123**). 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 evidence or facts 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**.

14. I have carefully perused the succession documents filed before the lower court and the proceedings therein, the record of appeal and the

submissions and authorities relied on by both parties. In my humble view, the following issues arise for determination;

- a. Whether this court has jurisdiction to entertain this appeal**
- b. Whether the appellant has capacity to institute this appeal and the protest before the subordinate court and if so,**
- c. Whether the appellant is a beneficiary of the suit land, North Gem/Got Regea/276 and if so,**
- d. Whether the appellant should get a share of the suit land, North Gem/Got Regea/276**
- e. What orders should this court make**
- f. Who should bear costs of this appeal?**

Jurisdiction

15. Both the appellant and the respondent herein claim to be beneficiaries of the suit land forming the estate of the late **Shadrack Amere Oluchula**. The land subject of the protest filed is North Gem/Got Regea/276. It is the appellant's case that the suit land was registered in the names of his brother, the deceased **Shadrack Amere Oluchula**, who is the respondent's father but that the said title included interests of other persons either beneficially or legally entitled to the suit land.

16. Conversely, the respondent contends that the appellant is not a beneficiary of the deceased Shadrack Amere Oluchula and therefore he has no interest or right to inherit the aforementioned deceased's estate and that in any event, the appellant already benefited from by inheriting land parcel North Gem/Got Regea/275.

17. The function of this court, exercising its jurisdiction over probate matters is to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets. The court is not involved in the determination of who owns land as the same falls under the domain of the Environment and Land Court.

18. From the record, it is the appellant's case that his and the deceased's father, Richard Oluchula registered the suit land in the name of **Shadrack Amere Oluchula - deceased** whilst the deceased was still a minor and that his father's intent was to have the deceased hold the suit land in trust for the appellant and their other siblings.

19. Evidence was adduced before the subordinate court that the appellant's father had instituted proceedings before the then Land Disputes Tribunal to have the deceased (father of the respondent) share the suit land with his other siblings which claim was upheld by the Land Disputes Tribunal both sitting in the First Instance and on appeal with the Appeals Committee holding that both the suit land and North Gem/Got Regea/275 be distributed among the four sons of Richard Lichula. I observe that the trial Magistrate in his ruling which is impugned herein stated that the appellant had not produced proceedings from the Land Disputes Tribunal.

20. However, a perusal of the lower court record shows that the said proceedings from the LDT and Appeals Committee as well as the application for adoption orders by the Magistrate's Court at Siaya in Misc. Civil Case No. 41 of 2001 were produced in evidence as annexures to the protest DAA1&DAA2 as filed in the Principal Magistrate's Court on 2nd February 2019 by the appellant herein and therefore it clearly emerges that the trial magistrate may not have seen and did not take into account the said evidence which was on record, its merits notwithstanding.

21. It was the appellant's case that an order was obtained in Siaya Senior Resident Magistrate Court Misc. Civil Case No. 41 of 2001 adopting the Appeals Committee decision that the suit land North Gem/Got Regea/276 and North Gem/Got Regea/275 be distributed among the four sons of Richard Oluchula Akhonya which order has not been appealed or set aside to date. (this court did not see the actual order of adoption. However, exhibit DDA1 is a copy of letter written to the said court asking for access to the judgment in the Mic 41/2001 file and a check with the Magistrate's Court registry revealed that the file in question is in the National archives and could not be availed before this court before delivery of this judgment)

22. Up to this point, it clearly emerges that the question of who owns the suit land North Gem/Got Regea/276 is not for determination as the same was determined as demonstrated above, by the Land Disputes Tribunal whose determination was filed in the Magistrate's Court for adoption. The Tribunal determined that the land which is subject of these proceedings should be shared between the father of the respondent and his brothers and the appellant herein is one of them, although the deceased Shadrack and his father died before causing the subdivisions and the sharing of the said parcels among the beneficiaries of the decision by the Land Disputes Tribunal.

23. Accordingly, I find that this court has jurisdiction to entertain this appeal and that further, the magistrate's court sitting as a probate court was well versed with the powers to determine as much.

The Appellant's capacity to lodge this appeal and the protest before the subordinate court

24. It was submitted by the respondent that the appellant lacked capacity to institute the instant appeal as well as the protest at the trial court as he was not a beneficiary to the estate of Shadrack Amere Oluchula and further that Hezekiah Wanyanga Oluchula, the administrator of the estate of Richard Oluchula Akhonya had never filed any protest regarding the suit land herein.

25. Locus standi is basically the right to appear or be heard in court or other proceedings. That means if one alleges the lack of the same in

certain court proceedings, he means that party cannot be heard, whether or not he has a case worth listening to. The issue herein is whether the Appellant lacked the requisite locus standi to seek relief from the trial court as well as this court.

26. The position in law as regards *locus standi* in succession matters is well settled. A litigant is clothed with locus standi upon obtaining a limited or a full grant of letters of administration in cases of intestate succession. In Otieno v Ougo [1986-1989] EALR 468, the Court stated:

“... An administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception.”

27. Under Section 76 of the Law of Succession Act, any person interested in the estate of the deceased may bring the application contemplated under that section and/or Rule 2 as read with Rule 17(1) of the Probate & Administration Rules. Rule 17(1) of the Probate & Administration Rules provides that: -

“Any person who has not applied for a grant to the estate of a deceased and wishes to object to the making of a grant which has already applied for by another person may do so.”

28. The evidence on record irrefutably show that the appellant herein is the administrator of the estate of his late father Richard Akhonya Oluchula and a brother to the deceased father of the respondent, with whom they have a beneficial interest over any property that vested in the deceased father Richard Akhonya. As determined by the Land Disputes Tribunal and adopted by the Court in Siaya SRM’s Court Misc. Case No 41 of 2001, Hezekiah Oluchula and Shadrack Oluchula were to share Parcel No 276. That being the case, the instant Appeal as well as the objection before the trial court are and were properly before court. In addition, Hezekiah Oluchula who is the brother to the appellant and the respondent’s father too was a protestor in the lower court, albeit he is not a party to this appeal, nonetheless, as the appellant is the administrator of their late father’s estate, and this being a one family matter, he has the capacity to advance the interests of Hezekiah Oluchula. This position is well captured under section 26 of the Law of Succession Act which provides:

“Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased’s estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased’s net estate.”

29. The same emphasis was laid in James Maina Anyanga vs. Lorna Yimbiha Ottaro & 4 others [2014] eKLR where court held that:

‘Failure to make provision for a dependant by a deceased person in his will does not invalidate the will as the court is empowered under Section 26 of the Law of Succession Act to make reasonable provision for the dependant.’

30. Musyoka J had this to say on the role of personal representatives of the estate of the deceased in re Estate of Julius Mimano (Deceased) [2019] eKLR

“58. The personal representative of a deceased person holds a unique position in law. The property of the dead person is vested in them by virtue of section 79 of the Law of Succession Act. The effect of section 79, read together with section 82 of the Act, is that the same puts the personal representative on the same footing with an owner of the property, in the sense that he exercises the powers that the legal owner of the property would have exercised were they alive, and suffered the same burden of duties and obligations over the property as the legal owner would have been under were they to be alive. Yet, the property, although vested in them by law, would not be theirs. Although the personal representative has legal title akin to that of an owner, the property does not belong to them. They only hold it in trust for the eventual beneficiaries thereof, that is those named in the will, in cases of testate succession, and those identified at confirmation of grant, in cases of intestacy. They would also be holding it for the benefit of creditors and any other persons who might have a valid claim against the estate. That would mean that they are trustees of the estate, and, indeed, the Trustee Act, Cap 167, Laws of Kenya, defines trustees to include executors and administrators. In the circumstances, therefore, the personal representative would stand in a fiduciary position so far as the property is concerned, and owes a duty to the beneficiaries to render an account to them of their handling of the property that they hold in trust for them. The duty to render accounts to beneficiaries arises from the trust created over estate property when the same vests in the personal representative to hold on behalf of the beneficiaries.

59. Secondly, personal representatives administer estates on the strength of legal instruments made to them by the probate court. The vesting of the estate of the deceased on the personal representatives by virtue of section 79 of the Act, flows from the instrumentality of the grant of representation. Upon representation being made, the grant holder then becomes entitled to exercise the statutory powers conferred upon personal representatives by section 82 of the Act and incurs the duties imposed on them by section 83 of the Act. Additional powers flow from and duties are imposed by other statutes, such as the Trustee Act. Under section 82 of the Act, there are powers to enforce and defend causes of action on behalf of the estate, to sell or convert estate assets, to assent to vesting of bequests and legacies on the beneficiaries, among others. Acts done or actions taken on behalf of the estate or for the benefit of the estate would have to be accounted for. In other words, the personal representatives are bound to account for every action they take on behalf of the estate, for they exercise the powers on delegation.

Whether the appellant is a beneficiary of the suit land, North Gem/Got Regea/276

31. It is the appellant’s case that the deceased Shadrack was registered as the proprietor of the suit land as he was the oldest son of their

father when adjudication was being done and therefore he held the suit land in trust not only for his own benefit but also for the benefit of his siblings. This fact of beneficial ownership was determined by the Land Disputes Tribunal-Appeals Committee, Nyanza. It is however important to note that the Tribunal determined that both parcels of Land Nos 275 and 276 were to be shared among the four sons of the deceased, including Shadrack, Hezekiah and the appellant herein together with their other deceased brother who has since died and is survived by a minor whose interests are said to be catered for by the appellant's mother Elda AYOTI Oluchula in the succession proceedings No.219 of 2019 where the appellant is the administrator of the estate of the late Richard Oluchula Wahonya (Akhonya). .

32. The rejoinder by the respondent was that his father, Shadrack Oluchula was the registered proprietor over the suit land and as such, the appellant who was his uncle did not rank in priority as a beneficiary of the suit land.

33. As earlier discussed herein and from the material placed before this court, the Land Disputes Tribunals up to the appellate level determined that the appellant and the deceased Shadrack Amere Oluchula who was the father to the respondent herein were some of the sons of the late Richard Oluchula Akhonya and were therefore beneficiaries of the two parcels of land 275 and 276.

34. This court has indeed established, from the trial court record that the suit land herein was registered in the name of the deceased Shadrack Amere Oluchula whilst he was still a minor and as determined by the Land Disputes Tribunal in the case where the late Richard Oluchula Akhonya ventilated his claim against his son, Shadrack Amere Oluchula, Shadrack was supposed to hold the suit land not only for his benefit but also in trust for his siblings. This evidence which was adduced by the appellant and which is to be tested on a balance of probabilities, has not been shaken by any contrary evidence by the respondent. There is also no evidence to show that the decision of the Provincial Land Appeals Committee was ever challenged or overturned by a superior court.

35. In the circumstances, it is my humble view that the decision by the Tribunal to the effect that the deceased Shadrack Amere Oluchula held the suit land not only for his benefit but also for the benefit of his siblings who included the appellant herein still stands. For that reason, the appellant is a valid beneficiary over the suit land.

Having said that, the question is whether the appellant should get a share of the suit land, North Gem/Got Regea/276

36. From the evidence adduced both before this court and the trial court it is noteworthy that the late Richard Oluchula Akhonya during land adjudication caused land parcel no. North Gem/Got Regea/275 to be registered in his name whereas land parcel no. North Gem/Got Regea/276 was registered in the name of his eldest son, the deceased herein Shadrack Amere Oluchula, who was then a minor.

37. It is not in dispute that the appellant is a co-registered proprietor over land parcel no. North Gem/Got Regea/275 together with one Elda Ayoti Oluchula. I also note that the respondent and their family occupy the suit land North Gem/Got Regea/276.

38. From the pleadings filed before both the trial court and this court, I observe that at no time did the appellant claim or demand for a share of land parcel No. North Gem/Got Regea/276 as it is Hezekiah Wanyangu whom the tribunal ordered should get a share of parcel 276 together with the respondents father Shadrack Amere. The appellant herein claims that the respondent should therefore share out the land No.276 to Hezekiah Wanyanga Oluchula. This is so because the appellant is already provided for in land parcel no. North Gem/Got Regea/275 and therefore he is not entitled to benefit from land parcel No. North Gem/Got Regea/276.

39. Hezekiah Oluchula on the other hand, has no share provided for him in Parcel No. 275 because the decision of the land Disputes Tribunal provided for him, which decision was never executed by Shadrack and his father Richard before their demise. That being the case, it is obvious that Hezekiah would be disinherited from the estate of his late father who originally owned both Parcels 275 and 276, as per the tribunal's decision which was never challenged.

Determination

40. There is no evidence to show that Hezekiah Wanyanga Oluchula has been provided for in the estate of the late Richard Oluchula Akhonya. Regrettably, the protest Ruling in the lower court did not make any mention of Hezekiah Wanyanga Oluchula as far as his entitlement or protest was concerned. In other words, the trial court did not address the interest of Hezekiah Wanyanga Oluchula. This offends Article 50(1) of the Constitution on the right to a fair hearing.

41. The decision of the Nyanza Land Disputes Appeals Committee in Appeal Case No. 41 of 2001 was that both North Gem/Got Regea/275 & 276 belonged to the late Richard Oluchula Akhonya and were to be subdivided among his four sons, with the claimant remaining on parcel No 275 with his father and other brother who is now deceased, Daniel Shisha Oluchula, while parcel No 276 was to be subdivided between Hezekiah Oluchula and Shadrack A Amere Oluchula.

42. No evidence was adduced to show that this position changed on appeal or otherwise. The question that this court asks itself is why the appellant's brother Hezekiah Wanyanga Oluchula who was the beneficiary of the LDT decision and who also filed a protest in the lower court was not mentioned by the trial court. The omission by the trial court denies the protestor who had approached the court seeking for a remedy being a share in the land subject of succession proceedings by virtue of being a beneficiary, since the decision of the Provincial Appeals Committee had not been set aside. Land is an emotive issue and therefore all parties who approach the court must be accorded a fair hearing. Failure to do so denies them access to justice as guaranteed in Article 48 of the Constitution.

43. In the circumstances, I find that the order that commends itself to this court to issue, in the interest of justice, is to allow this appeal and set aside the orders of 10th December, 2020 dismissing the protest by the appellant and confirming the grant issued to the Respondent. Pursuant to the provisions of section 78 of the Civil Procedure Act, I further order for a rehearing of the protest before the Magistrate's Court by way of viva voce evidence to enable the protest by Hezekiah Wanyanga Oluchula be considered on its own merit. The rehearing shall be had before any other Magistrate with jurisdiction other than Hon. James Ongondo whose ruling is impugned in this appeal.

44. In addition, pending expeditious determination of the issues herein, the Respondent and any other beneficiary who may have been provided for through the impugned proceedings leading to confirmation of the grant herein shall not dispose of any portion of the shares of the land in issue.

45. This appeal is allowed to the extent stated in paragraph 43 above and each party shall bear their own costs of this appeal as the dispute is among family members.

46. Orders accordingly.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 28TH DAY OF JULY, 2021

IN OPEN COURT

R.E.ABURILI

JUDGE

In the presence of:

Mr Ooro Advocate for the Appellant online

Respondent present

CA: Modestar and Mboya