



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

S UCCESSION CAUSE NO. 228 OF 2010

I N THE MATTER OF ESTATE OF KOMBO MULINGE ALIAS BERNARD MULINGE

RULING

1. The hearing of this cause was closed on 2nd November, 2020 and directions were given for the parties to file their respective submissions with the mention for purposes of reservation of a judgement date slated for 17th December, 2020.

2. However, on the very date for the mention, an application dated 15th December, 2020 was filed on behalf of the Protestors seeking the following orders:

1. THAT this Honourable Court do enlarge time for making the application herein.

2. THAT this Honourable Court grants leave to the Protestors to file a Survey Report together with a Ground Report of the estate of the deceased, KOMBO MULINGE alias BERNARD MULINGE KOMBO

3. THAT cost of this application be in the cause.

3. The application was based on the following grounds:

1. The deceased left a vast estate.

2. The warring parties herein both acknowledge and agree that the deceased bequeathed to his two sons parcels of land, however the acreage of the said parcels of land is in dispute. Thus a survey report is critical to confirm the acreage.

3. The warring parties further do not agree on the extent of the deceased's estate and it would be paramount and in the interests of justice for a ground report to be filed in court to confirm the true position on the ground.

4. The warring parties in the suit herein are not in agreement as to the occupation of some of the deceased's estate and as such a ground report would be instrumental to give a clear picture to court as to what is existent on the ground.

5. None of the warring parties herein filed either a survey report or a ground report to demonstrate and /or give credence to their averments in the applications.

6. It would be in the interest of justice for the Honourable court to make its final decision having to its benefit all facts relevant to the suit herein.

7. The application herein has been filed in good faith and is no way intended to derail the determination of the suit but rather to have a just conclusion to this long standing matter.

4. According to the Protestors, having had the opportunity to read and understand the Summons for Confirmation of Grant and Supporting Affidavit sworn on 9th September, 2019 thereto by the Administrators together with the witness statement by **Regina Nthenya Kombo Ndeto** dated 15th October, 2020 and the supporting documents thereto and to compare the documents filed by the administrators to the documents filed by the protestors and to testify before this Court together with listening to what the protestors had to say with regard to this suit, he formed an opinion that the extent of the estate of the deceased is in dispute. He was also of the view that the acreage of what is considered as the homestead together with the parcels both the protestors and the administrators acknowledge to be land bequeathed to them

by the deceased is also in dispute.

5. In addition, he averred, that it is in dispute who has possession of what part of the deceased estate. That is, what part of the estate had been sold prior to the hearing of the suit and who occupies what portions of land.

6. Based on legal advice, he formed the view that it is paramount that a Survey Report and a Ground Report of the deceased's estate is filed with this court in order for the court to appreciate the true position on the ground and also for the court to be appraised of all the relevant facts to this suit. Such a report, according to him, has not been filed by any of the parties to the suit hence it would be in the interest of justice that the parties herein are allowed to procure a surveyor to do a report of the deceased estate in order for the court to make a decision while having all the relevant facts to the case.

7. According to the Protestors, the application has been filed in good faith and in no way intended to derail the determination of the suit herein but rather to have a just conclusion to this long standing matter.

8. In opposing the application, it was averred by the Petitioners that this application is an afterthought and whose real objective is to have the case re-opened so that the protestors can fill gaps in their case and to frustrate and derail the conclusion of this case which has been closed by both the parties. It was averred that both the protestors and the petitioners were afforded an opportunity to present their cases, which they did. Since the protestors already knew what the petitioners were going to present from the witness statements filed, if they thought that what they had was inadequate, or that it was necessary to present some additional evidence to counter that which the protestors proposed to present, they could have sought for time to find and adduce it but they never did that.

9. The Petitioners were amazed that protestors who filed their protest to the confirmation of grant on 19th February 2020 did not produce any single document in evidence in support of their case and had to largely depend on the documents tendered by the petitioners. While appreciating that there is always a window for disclosing additional evidence, it was averred that this need to be done before trial commences. In this case the protestors had all the opportunity to present all evidence they had in support of their case when the protestors' case was heard on the 19th October 2020; that the protestors had an opportunity to produce whatever evidence they deemed fit to assist their case but failed to do so. It was their view that the protestor's request to call for more evidence purportedly in form of a survey report together with a ground report of the estate of the deceased is a belated move meant to further delay the conclusion of this matter which has protracted in court for now over ten (10) years since no reason whatsoever has been advanced by the protestors as to why the documents they now want to produce were not produced at the hearing of their case and no explanation has been tendered as to why the protestors could not produce the said survey report or ground report before the close of the protestors' case. According to them, allowing the protestors to give further evidence in form of a survey report or ground report as the protestors are seeking is meant to fill the gaps in their evidence after hearing the petitioners' case and this is prejudicial to the petitioners and should be frowned on and ought to be discouraged.

10. According to the Petitioners, contrary to what is alleged by the protestors that the extent of the estate of the deceased is in dispute, the extent of the estate is not in dispute as the petitioners exhibited copies of official searches of all the properties belonging to the deceased which clearly indicate the acreage of each and every property and which searches were produced in evidence by the petitioners in their list of documents. Further, during the hearing hereof, evidence was led by the petitioners as to what was sold by the deceased during his lifetime and the protestor's request for a ground report to show who occupies what portion of land is meant to hoodwink the court on the properties illegally sold by **Simon Muhia Kombo** without consent of other beneficiaries.

11. It was averred that a survey and ground report allegedly to show the true position on the ground will not aid **Simon Muhia Kombo** with his own admission in court that he sold substantial part of the estate without the consent of other beneficiaries; the people who illegally bought any parcels of land in the estate will be at liberty to pursue whoever illegally sold any part of the estate.

12. It was therefore the Petitioners' position that the protestors have not laid any reasonable and justifiable basis to enable the court exercise its discretion to allow the re-opening of the case in their favour and this is an abuse of the court process since trial should not be used as a fishing ground for new evidence to fill in gaps that the petitioners may have created as no evidence has been tendered to show that the new evidence in form of ground report or survey report could not be available to the protestors after exercise of due diligence as this would be encouraging the protestors to go on a fishing expedition and the hearing will never end.

13. It was the Petitioners' case that this application is made in bad faith and no justifiable grounds have been advanced by the protestor for the grant of the orders sought in the application and that the application is untenable in law, lacks merit and is a wild shot in the darkness squarely calculated to further delay the conclusion of this case and the same should be dismissed with costs.

14. In their submissions, the Petitioners, reiterated the foregoing and relied on **Hannah Wairimu Ngethe vs. Francis Mungai Ng'ang'a & Another {2016} eKLR, Malindi HCCC No. 46 of 1999 - Hassan Hashu Sirwas vs. Swalahudin Mohhamed Ahmed, Humprey Muhako Efetha vs. Virginia Gathoni {2016} eKLR, Michael Kiplangat Cheruiyot vs. Joseph Kipkoech Korir {2019} eKLR, Samuel Kiti Lewa vs. Housing Finance Co. of Kenya Ltd and Another {2015} eKLR, Simba Telcom –vs- Karuhanga & Anor {2014} UGH98.**

Determination

15. I have considered the issues herein. The issue before me is the determination whether this Court should instead of proceeding to deliver its judgement, reopen the matter for what in effect would amount to adducing further evidence. In **The Matter of the Estate of George M'boroki Meru HCSC No. 357 of 2004, Ouko, J** (as he then was) expressed himself *inter alia* as follows:

“The Law of Succession Act, like section 3A of the Civil Procedure Act has a saving provision as to the court's jurisdiction under section 47 which is affirmed by rule 73 of the Probate and Administration Rules. It is therefore accepted that the court retains certain intrinsic authority in the absence of specific or alternative remedy, a residual source of power, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due

process of law, to prevent abuse of its process, to do justice between the parties and to secure a fair trial between them.”

16. Similarly **Kimaru, J** in **Rev. Madara Evans Okanga Dondo vs. Housing Finance Company of Kenya Nakuru Hccc No. 262 of 2005** held:

“The court will always invoke its inherent jurisdiction to prevent the abuse of the due process of the court. The jurisdiction of the court, which is comprised within the term “inherent”, is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of the substantive law; it is exercisable by summary process, without plenary trial, it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of the court. The inherent jurisdiction of the court enables the court to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process. In sum, it may be said that the inherent jurisdiction of the court is virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.”

17. In **Meshallum Wanguhu vs. Kamau Kania Civil Appeal No. 101 of 1984 1 KAR 780 [1987] KLR 51; [1986-1989] EA 593, Hancox, JA** (as he then was) emphasised that it is a residual jurisdiction, which should only be used, *in special circumstances* in order to put right that which would otherwise be a clear injustice.

18. One of the instances in which the court exercises this residual power is in the fulfilment of its obligation to ensure that the orders it issues are not issued in vain. This was recognised by the Court of Appeal in **Nicholas Mahihu vs. Ndima Tea Factory Ltd & Another Civil Application No. Nai. 101 of 2009** where it was held that the Court has the duty to ensure that its orders are at all times effective.

19. Dealing with inherent powers of the Court it was held in **Republic vs. The Public Procurement Complaints, Review and Appeals Board & Another Ex Parte Jacorossi Impresse Spa Mombasa HCMA No. 365 of 2006** that the Court has power under its inherent jurisdiction to make orders that may be necessary for the ends of justice and to enable the Court maintain its character as a court of justice and that this repository power is necessary to be there in appreciation of the fact that the law cannot make express provisions against all inconveniences.

20. In **Ryan Investments Ltd & Another vs. The United States of America [1970] EA 675** it was held that section 3A of the *Civil Procedure Act* is not a provision that confers jurisdiction on the court but simply reserves the jurisdiction which inheres in every court and that the court has inherent jurisdiction not created by legal provisions, but which only manifests the existence of such powers.

21. It follows therefore that the inherent jurisdiction as the name suggests is not donated to the Court by any legislation but underlie the very nature of the Court as a seat of justice which the Court ought to draw upon whenever necessary and when all else fails in order to ensure that justice is attained.

22. Accordingly, it is my view that in appropriate cases, the Court is entitled to arrest the delivery of a decision in order to do justice if circumstances warrant it. However, that is a jurisdiction which cannot be exercised in a superficial and casual manner. Arresting a judgement and any judicial process for that matter is a power which ought not to be exercised lightly. In this respect, **Sir Udo Udoma**, CJ in **Musa Misango vs. Eria Musigire and Others Kampala HCCS No. 30 of 1966 [1966] EA 390**, expressed himself as follows:

“Now it is unquestionable that, both under the inherent power of the court, and also under a specific rule to that effect under the Judicature Act, the court has a right to stop an action at this stage if it is wantonly brought without the shadow of an excuse, so that to permit the action to go through its ordinary stages up to the trial would be to allow the defendant to be vexed under the form of legal process when there could not at any stage be any doubt that the action was baseless. But from this to the summary dismissal of actions because the judge in chambers does not think that they will be successful in the end lies a wide region, and *the courts have properly considered this power of arresting an action and deciding it without trial as one to be very sparingly used, and rarely, if ever, excepting in cases where the action is an abuse of legal procedure.* They have laid down again and again that this process is not intended to take the place of the old demurrer by which the defendant challenged the validity of the plaintiff’s claims as a matter of law. It is evident that our judicial system would never permit a plaintiff to be “driven from the judgement seat” in this way without any court having considered his right to be heard except in cases where the cause of action was obviously and almost incontestably bad.” [Emphasis added].

23. Therefore, whereas the powers to arrest the decision may be invoked, it is a power which ought to be invoked very sparingly and in exceptional circumstances and not to assist a person who is intent upon abusing the process of the Court. Being a discretionary power, as held in **Shah vs. Mbogo [1967] EA 116 at 123B**, the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.

24. In this case, it is contended that the reason for seeking to have the delivery of the decision arrested is because based on the evidence on record, this Court would not be in a position to effectually determine the rights of the parties to this suit. It has not been disclosed at what stage the Protestors realised this position. The parties exchanged their documents and witness statements well in advance before the hearing. Each of the parties knew the exact case the other side was intending to present and the documents they intended to rely upon. A party who, as a result of the evidence adduced, realises that based thereon his case might not go the direction he intended, applies for adduction of further documents will not be allowed to do so particularly where the case has been closed as to do so may well give the case a completely different complexion from what was pleaded. It may also prejudice a party to the suit. Cases ought not to be prosecuted in instalments. That was the

position adopted by **Omondi, J** (as she then was) in **Hassan Hashi Shirwa vs. Swalahudin Mohamed Ahmed [2011] eKLR** where the Court appreciated the view expressed in **A.I.R. commentaries on the Code of Civil Procedure** 8th Edition pg 359 that:

A court has a duty to find out the truth, the fact that it is shrouded in mystery and the parties have allowed it to remain so, should not prevent the court from playing its part in guiding the parties to take such steps as may be necessary, to unearth the mystery and to ascertain the truth.

25. The learned Judge however expressed herself as hereunder:

“Re-opening a case is NOT an impossibility, but there must be cogent reasons for re-opening, and not because a party has suddenly had a brain wave and spotted a loophole in its case, which it can now seal by re-opening the case. The only reason given by Mr. Kiarie as to why the plaintiff’s case should be re-opened is that Mr. Gethi is a crucial witness who will clear the air. I wonder at what point that realization dawned on him. Surely defence had not indicated at any time their desire to call Mr. Gethi as a witness. The impression I get from Mr. Kariuki’s application is that he now wishes to patch up the plaintiff’s case and pull the rug from right under the defendant’s feet. I am keenly alive to the need of truth being unearthed and the duty of the court to find out the truth, yet in a rejoinder to AIR’s commentaries I would say this:

‘A court has a duty to ensure parties are fair to each other and not conduct trial by ambush. The role of the court in this shroud of mystery is to be an impartial umpire ensuring that there is no rough tackle and offside play. Litigants are not in a game of chess where for every one move made, there must be a counter move and re-introduction of the checkmate. If the court allowed that, litigation would never end.’

My view is that in the present situation, allowing the application will not only be prejudicial to the defendant, but it amounts to an abuse of the court process and I decline to grant the prayer sought.”

26. Similarly, in **Michael Kiplangat Cheruiyot vs. Joseph Kipkoech Korir [2019] eKLR**, the Court expressed itself as hereunder:

“There is a window for disclosing additional evidence but this needs to be done before trial commences. Save for the above, I know of no other provision for recalling a witness or allowing a party to re-open their case to present new evidence not disclosed before. It would thus fall within the discretion of the court whether or not to allow a party to re-open his/her case to adduce additional evidence, but this is a power that needs to be used with lots of restraint for the reason that the rules do set out that parties need to disclose their evidence before trial commences, and it is the duty of a party to ensure that he/she is satisfied with the evidence they wish to present before trial commences. A trial should not be used as fishing ground for new evidence to fill in the gaps that the opposing party may have created, for this negates the very essence of pre-trial disclosure. It must be clear that the new evidence could not be available to the applicant even after exercise of due diligence. The position should not be for one party, after the other has tabled his evidence, to now start looking for evidence specifically to counter what the other party has said. That would be encouraging parties to go on a fishing expedition and a hearing will never end. Indeed, the structures in the Civil Procedure Act, and the Civil Procedure Rules, provide what would pass for a fair trial of a civil suit and it would need exceptional and/or extraordinary circumstances for a court to depart from them. This is what the applicant asks me to do but I am not persuaded to exercise my discretion in his favour. It is not said that the evidence that the applicant now wishes to introduce could not be made available to him before the trial commenced. The applicant already knew what the respondent was going to present at the pre-trial stage, and if he thought that what he had was inadequate, or that it was necessary to present some additional evidence to counter that which the respondent proposed to present, he could have sought for time to find and adduce it. He never did. What is now sought to be introduced could certainly have been made available all this time and of course we are not dealing with a situation where it is said that the respondent had hidden this evidence so that it could never have been available to the applicant there before. It is clear to me that it is an afterthought by the applicant to seek the mentioned additional evidence after the respondent has already closed his case. Such practice should be frowned on and ought not to be encouraged.”

27. In **Manzoor vs. Baram [2003] 2 EA 580 (SCU)**, it was held that a party seeking a relief from the Court must present his case fully and not piecemeal or in instalments since the Court ought not to postpone a matter before it and direct investigation of any issue in order to enable it arrive at a just decision, where a party fails to adduce necessary evidence.

28. In this case the Protestors have not even attempted to explain why the instant application, which, with the exercise of due diligence, could have been made even before the hearing commenced, was not made until the close of the case. It is not sufficient to simply contend that there is some evidence that has not been adduced but which is necessary for the purposes of arriving at a decision. The Applicant must go further and explain what the nature of the inadvertence was and what made it difficult or impossible to adduce it earlier on in the proceedings in order for the Court to appreciate whether it was in fact an inadvertence or merely an attempt to delay and obstruct the course of justice.

29. The High Court of Uganda in **Simba Telecom vs. Karuhanga & Anor (2014) UGHC 98** in dealing with a similar application referred to an Australian case **Smith –vs- New South Wales [1992] HCA 36; (1992) 176 CLR 256** where it was held:

“If an application is made to reopen on the basis that new or additional evidence is available, it will be relevant, at that stage, to enquire why the evidence was not called at the hearing. If there was a deliberate decision not recorded, ordinarily that will tell decisively against the application. But assuming that that hurdle is passed, different considerations may apply depending upon whether the case is simply one in which the hearing is complete, or one which reasons for the judgment have been delivered. In the latter situations the appeal rules relating to fresh evidence may provide a useful guide as to the manner in which the discretion to reopen should be exercised.”

30. In Simba Telecom (supra) the Court agreed:

“...with the holding in the case of Smith Versus South Wales Bar Association (1992) 176 CLR 256, where it was held that the question of whether additional evidence should be taken at the trial is considered separately from the question of whether the case should be reopened. Consequently even after the case has been reopened, the court retains its discretionary powers whether to admit any piece of evidence or not.”

31. Where a party has been afforded ample opportunity to put forward his case but fails to do so, he cannot be heard to say that his evidence or any other evidence is insufficient to enable the Court arrive at a just decision. The Court of Appeal in Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998 restated the law as follows:

“Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it.”

32. In this case the respondents are very economical with the reasons which gave rise to the default in their adducing the alleged survey report.

33. This being an exercise of judicial discretion, like any other judicial discretion must be exercised judicially. Accordingly, it has to be exercised on fixed principles and not on private opinions, sentiment 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.

34. I have considered the material relied upon by the Protestors to in effect reopen the case and I am not satisfied that it meets the threshold for doing so. The reasons now being adduced ought to have been relied upon earlier on in the proceedings. I am not satisfied that this application has been brought to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error. The Petitioners’ position that it is designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice, cannot be farfetched.

35. I agree with the position adopted in Samuel Kiti Lewa vs. Housing Finance Co. of Kenya Ltd & Another [2015] eKLR where the Court expressed itself as hereunder:

“The court retains discretion to allow re-opening of a case. That discretion must be exercised judiciously. In exercising that discretion the court should ensure that such re-opening does not embarrass or prejudice the opposite party. In that regard re-opening of a case should not be allowed where it is intended to fill gaps in evidence. Also such prayer for re-opening of the case will be defeated by inordinate and unexplained delay. In this case Plaintiff’s counsel stated that the Plaintiff if allowed to re-testify would show that the charge document, which he did not produce in evidence, was diametrically different to the one produced by 1st Defendant’s witness, in evidence. In my view if the Plaintiff was allowed to re-open his case to so prove it would amount to allowing the Plaintiff to fill the gaps in his evidence. That would be prejudicial to the defendants. But more importantly the Plaintiff did not submit in evidence a charge instrument to be compare to the one produced by 1st Defendant. The Plaintiff also slept on his rights to apply to re-open his case. He should have made that application in August, 2010, when he obtained leave to re-amend his plaint. Having slept on his rights, the unexplained delay defeats his prayer.”

36. Consequently, the application fails and is dismissed with costs.

37. It is so ordered.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 27TH DAY OF SEPTEMBER, 2021

G. V. ODUNGA

JUDGE

Delivered in the presence of:

Mr Kingoo for the Petitioner/Respondent

Mr Ambala for the Protestor/Applicant

CA Martha