



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

HIGH COURT CIVIL APPEAL NO. E001 OF 2021

IN THE MATTER OF THE ESTATE OF GUJE GUYO (DECEASED)

ADAN CHUDA SODE.....APPELLANT

VERSUS

MADINA OSHE JIRA.....1ST RESPONDENT

KOISE IBRAHIM KOISE.....2ND RESPONDENT

(Being an appeal from the rulings of Hon. M.S. Kimani, Principal Magistrate,

in Moyale PM's Court Succession Cause No. 3 of 2018

dated 12th October 2020 and 14th December 2020)

JUDGMENT

1. The appellant has filed this appeal contesting the dismissal of two of his applications by Hon. M.S. Kimani, Principal Magistrate at Moyale Law Courts. The grounds of appeal are that:

1. The learned Principal Magistrate S.M. Kimani erred in law and fact in dismissing the objector's objection on 12th October, 2020, for want of prosecution when the objector and his Advocate were in court and subsequently ignoring the pertinent issues raised in the objection dated 23rd October, 2019.

2. The trial Principal Magistrate S.M. Kimani erred in law and fact by not taking judicial notice of civil suit No.2 of 2008 involving the same subject matter which had been brought to his notice through annexures in the objection and that he subject property had already been adjudicated hereby rendering the subject matter res judicata.

3. The trial magistrate S.M. Kimani erred in law and fact by not declaring the Hon. Court as functus officio by virtue of the decision made in civil suit No.2 of 2008 by the same court and that the matter had proceeded to appeal in Misc. application No.512 of 2008, which was way beyond the power of the trial lower court to review or interfere.

4. The trial Principal Magistrate S. M. Kimani erred in law and fact by presuming that the deceased ever existed without proof, as there was no identification or passport or any document of registration or identification of the person called Guje Gayo.

5. The trial Principal Magistrate erred in law and fact by receiving defective petition, which was incomplete in form and not executed by parties as required by law and in particular the objector who is the applicant.

6. The learned trial Principal Magistrate S.M. Kimani erred in law and fact by allowing execution of documents by the law firm of Mugambi Kiogora & Co. Advocates, after a preliminary objection had been argued and pending ruling but the objector did not sign any.

7. The trial Principal Magistrate erred in law and fact in ignoring the procedures Cap. 160 Laws of Kenya.

8. The trial Principal Magistrate S.M. Kimani showed an open interest and corruption by allowing documents for petition that were not witnessed by any advocate, to be witnessed during the pendency of the ruling as to regularize them but forgot that the objector could not sign his part as to regularize the petition and as such the petition is still defective in form and incompetent.

9. The trial Principal Magistrate S.M. Kimani erred in law and fact to assume that the subject property existed then.

Background Facts of the Case –

2. The respondents who are the petitioners in the succession cause that is pending before the Principal Magistrate had filed the succession cause in respect to the estate of the late Guje Guyo who was the purported owner of an unregistered parcel of land said to be situated at Heilu location in Moyale Sub-County. The appellant subsequently filed an objection dated 22nd August 2019 against the inclusion of the said land parcel as the estate of the deceased on the grounds that he was the exclusive owner of the land. The petitioners on the other hand filed summons for confirmation of grant dated 22nd August 2019. The objection came up for hearing on the 12th October 2020 when **Mr. Mokaya**, counsel holding brief for the advocate for the objector/appellant, sought for stay of proceedings of the succession cause on the grounds that the advocate for the objector/appellant, **Mr. Ogeto**, had filed another suit over the same subject matter at the Embu Land and Environment Court which suit had since been transferred to Meru ELC Court. That on that particular day Mr. Ogeto was attending Meru court to prosecute an application for injunctive orders against the respondents/petitioners. Mr. Mokaya hence sought for stay of proceedings pending the hearing and determination of the ELC matter.

3. The application was opposed by the counsel for the respondents/petitioners, **Mr. Owade**, on the grounds that he was not aware of the new suit as Mr. Ogeto had not served him with any suit papers. Further that there were no stay orders from the superior court and hence the application for stay was unwarranted.

4. The application was dismissed by the trial magistrate vide a ruling delivered on the same day. The court thereupon ordered that the objection proceeds to hearing but by that time Mr. Mokaya was not present in court. Mr Owade then sought for the objection to be dismissed for want of prosecution. The trial magistrate acceded to the request and the objection was dismissed accordingly on the grounds that no stay of proceedings had been obtained from the superior court. That the application was a casual one that amounted to an ambush on the other party. That stay of proceedings is a serious matter that ought to be granted on sound reasons that were not forthcoming in the application that was before him.

5. After the dismissal of the objection, the petitioners fixed a hearing date for the summons for confirmation of grant on the 22nd November 2020. On that date Mr. Ogeto appeared in court and strongly protested the hearing of the summons for confirmation of the grant on the grounds that he had perused the court file and noted several irregularities in the petition. Firstly, that the petition was defective in that Forms P & A 12 and 57 were missing from the court file and that Forms P & A 5 and 11 were not dated, signed and commissioned as required. Secondly, that there was no certificate of death attached to the petition to prove the death of the deceased nor was there an order of the court declaring that the deceased was presumed dead. That the letter from the chief that was attached to the petition could not suffice in proof of death. Thirdly, that there was no title deed or other document of title to show that the subject land belonged to the deceased.

6. The application was opposed by M/s Kinyua, counsel holding brief for Mr. Owade. She stated that the contested documents were duly filed. That the letter from the chief was sufficient to prove death of the deceased. That the issues alluded to by Mr. Ogeto were mere technicalities that could be cured by the application of Article 159 of the Constitution of Kenya 2010.

7. The trial magistrate dismissed the latter application on the reasons that he had perused the court file and confirmed that forms P & A 12 and 57 were indeed filed which was confirmed by the court assessment receipt dated 12/6/2019. That he had also confirmed from the court file that form P & A 5 was duly signed and was commissioned by Mr. Kiogora Mugambi though it was not dated. That form P & A 11 was duly signed and dated as well as commissioned by Mr. Mugambi Kiogora. The learned magistrate held that failure to date form P & A 5 was not fatal to the petition as it was curable by application of Article 159 of the constitution of Kenya 2010.

8. On the issue of the certificate of death the learned magistrate held that it was not mandatory for the same to be attached to a petition as other documents that can prove death are admissible. He made reliance on paragraph 2 of form P & A 5 that states that:

“2. The deceased died on the.....,at.....(name of the place) as appears from the attached certificate (or photocopy of the certificate) of death (or other document) marked “CD1” upon which I have written my name at the time of swearing hereof.”

Therefore, that the letter from the chief was sufficient proof of death.

9. The magistrate further held that it was not mandatory to attach documents of ownership of title of a property to a petition for grant of letters of administration though this has become the practice. That there are situations where some assets are without registration and documents of title cannot be produced. That there is no requirement in the P & A Rules 1980 that documents of ownership be attached to form P & A 5.

Submissions in the appeal -

10. Mr. Ogeto submitted that the documents he referred in court were defective as at the time when he made his submissions. That the trial magistrate must have colluded with Mr. Mugambi Kiogora to regularize the documents during the pendency of the ruling.

11. Counsel submitted that there was no proof of death of the deceased by way of documentation such as a certificate of death in the absence of which an order of the court on the presumption of death of the deceased ought to have been produced. He made reliance on section 118A of the Evidence Act and Rule 11 of the Probate and Administration Rules, 1980.

12. Counsel further submitted that only the “free property” of a deceased person can be the subject of his estate as defined in section 3 of the Law of Succession Act, Cap 160 Laws of Kenya. That there was no evidence that the subject land was the free property of the deceased.

13. It was further submitted that the succession cause is *res judicata*.

14. Mr. Owade on the other hand submitted that the appeal against the order made on 12th October 2020 is incompetent as the time allowed for appeal against the said order had lapsed and no application for extension to file the appeal out of time was ever filed.

15. Counsel submitted that the argument by Mr. Ogeto that the succession cause is *res judicata* is based on evidence that was not produced in court. That there has been no application by the appellant to adduce new evidence on the issue. That that submission should therefore be dismissed.

16. It was submitted that the appellant is estopped from challenging the death of the deceased as the same was not raised in his objection nor was a written preliminary objection filed in court to object to the same.

17. Counsel further submitted that the record of appeal as prepared by the appellant does not include the lower court’s typed proceedings. That there is nothing to guide this court on how the lower court arrived at its findings. That the appeal out to be struck out.

Analysis and Determination –

18. This being a first appeal the duty of the court is to analyze and re-evaluate the evidence adduced at the lower court and draw its own conclusions -see *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123.

19. Mr. Owade argued the appeal should be struck out as the record of appeal did not include the typed proceedings of the lower court. It is however clear that the original file of the lower court together with typed copies of proceedings and judgment were forwarded to this court vide a letter dated 5th February 2021. The file was available to me for perusal. There is then no substance in this argument.

20. The first ground of appeal as per the appellant’s memorandum of appeal filed in court on 11th January 2021, is in respect to the application that was dismissed on 12th October 2020. Section 75G of the Civil Procedure Act provides that an appeal from a subordinate court to the High Court should be filed within 30 days from the date of the order or decree. The time granted for appeal against the ruling of the court dated 12th October 2020 had therefore lapsed when the instant appeal was filed on 11th January 2021. The applicant did not seek for enlargement of time to file appeal out of time. The appeal against the ruling delivered on 12th October 2020 is therefore incompetent. The grounds of appeal that are properly before the court are the ones in respect to the ruling made on the 14th December 2020 that arose from the oral application of Mr. Ogeto made on 2nd November 2020.

21. The argument in grounds 2 and 3 of the memorandum of appeal is that the material succession cause is *res judicata* as there has been a previous suit over the subject property the outcome of which went in favour of the appellant. I have gone through the proceedings of 2nd November 2020. Nowhere in those proceedings did Mr. Ogeto raise the issue of the succession cause being *res judicata*. The judgment of the magistrate also did not touch on the issue. Mr. Ogeto therefore cannot raise new issues in this appeal that were not canvassed by the parties during the hearing of the application. In so holding I am guided by the decision of the Court of Appeal in ***Republic V Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto & Others ex-parte Tom Mbaluto*** [2018] eKLR (as cited in ***Frera Engineering Company Limited v Morris Mureithi Mutembei***(2020)eKLR) where the court stated that -

...It is in the discretion of the Court to allow a party to raise a new point on appeal, depending on the circumstances of the case. (See also *George Owen Nandy v. Ruth Watiri Kibe*, CA No. 39 of 2015 and *Openda v. Ahn* [1983] KLR 165). In this case we have stated that the appellant never raised the issue in his judicial review application, neither party addressed the issue in the High Court, the learned judge, quite properly did not address the issue and, to make the matters worse, the appellant did not raise the issue in his memorandum of appeal in this Court.... As has been stated time and again, there is a philosophy and logical reason behind our appellate system, which except in exceptional cases and upon proper adherence to the prescribed procedure, restricts the appellate court to consideration of the issues that were canvassed before and decided by the trial court. If that were not the case, the appellate court would become a trial court in disguise and make decisions without the benefit of the input of the court of first instance.”

In the premises, I decline to consider grounds 2 and 3 of the memorandum of appeal.

22. The remaining grounds of appeal are that the trial magistrate failed to consider that the documents filed in support of the petition were defective in substance; that the magistrate failed to consider that there was no valid document filed to prove the death of the deceased and that there were no documents filed to prove that the land that was the subject of the succession cause was the free property of the deceased.

23. On the first issue Mr. Ogeto submitted that the documents filed in support of the petition were defective as at the time when he made his submissions in court and that the documents must have been regularized during the pendency of the ruling. He alleged that the magistrate must have colluded with Mr. Mugambi to commission the documents during the pendency of the ruling. I consider these to be serious allegations coming from counsel. However, Mr. Ogeto’s statements were not made on oath. The same were mere statements made from the bar and were therefore of no probative value. There is no evidence that the documents complained of were defective.

24. Moving to the second issue, Mr. Ogeto submitted that the death of a person can only be proved by the production of a death certificate or an order of presumption of death. That in the absence of these two there is no proof of death of the deceased in this matter and therefore that the court cannot in any eventuality confirm the grant.

25. Mr. Owade on his part argued that the appellant is estopped from challenging the death of the deceased as the issue was not raised in his objection and there was no written objection filled in court over the same.

26. Mr. Ogeto raised the issue of the death of the deceased in his oral application made in court on the 2nd November 2021. The advocate who was holding brief for Mr. Owade on that day never made any objection to the oral application. She instead made a reply to the application. It is then too late in the day for Mr. Owade to argue that the application should have been made in writing. Nothing therefore turns on this argument.

27. The learned magistrate held that it is not necessary to attach a certificate of death to a petition for grant of letters of administration. That other documents can be produced where the death certificate is unavailable. He held that the chief's letter that was attached to the petition is sufficient proof of the death of the deceased herein.

28. Rule 7(2) of the Probate and Administration Rules, 1980, provides that:

There shall be exhibited in the affidavit (affidavit in support of a grant of letters of administration) a certificate or a photocopy of a certificate of death of the deceased or such other written evidence of the death as may be available.

29. It is clear from the provisions of this rule that there are two types of documents that can be produced under it in proof of death of a deceased person –

i. a certificate of death or a photocopy thereof; and

ii. other written evidence of death.

30. Apart from that, the death can also be proved by production of an order of presumption of death as provided under Rule 10 of the P & A Rules that provides that:

An application for an order presuming the death of a person of whose death there is no sufficient written evidence and to whose estate a grant is sought shall be made by summons to the court and shall be supported by an affidavit setting out the grounds of the application.

31. It is then clear that the death of a person in a succession cause can be proved by production of a certificate of death, an order of presumption of death or some other written evidence of the death as may be available. In my view, the phrase “**such other written evidence of death as may be available**” would include such documents as a doctor's certificate of death, postmortem report, burial permit and such other documents. The qualification to be attached to such other documents is that they must be credible. The question then is whether a chief's letter passes the test of a document that can be used to prove the death of a deceased person. I do not think so. It is a well-known fact that at most times chiefs write such letters based on information given to them by other people. A question as to the death of a person is such a grave matter that it cannot be left to speculation or conjecture. In the instant case, the chief's letter indicates that the deceased died and was buried in Ethiopia. The letter does not disclose whether the chief personally knew the deceased nor does it disclose the source of the information that the deceased died in Ethiopia. In my view the letter is not credible proof of the death of the deceased herein. The learned trial magistrate erred in holding otherwise. However, my finding on the issue is not fatal to the petition as the respondents can still apply for a certificate of presumption of death.

32. The last ground of the appeal is on the question of proof of ownership of the estate property of the deceased. The subject land is described in the petition form P & A5 as “unregistered land measuring approximately five acres.”

33. The learned magistrate held that it is not necessary to attach documents of ownership of property to a petition as it is not a requirement of the law. Mr. Ogeto submitted that it is only the free property of the deceased that should be taken as forming part of his estate.

34. Section 3 of the law of Succession Act defines an “estate” to mean the free property of a deceased person, while “free property” in relation to a deceased person is defined to mean the property of which that person was legally competent freely to dispose during his lifetime and in respect of which his interest has not been terminated by his death. In **In re Estate of Job Ndunda Muthike (Deceased)** (2018) eKLR the court (Odunga J) while expounding on the said section stated that:

It is therefore clear that any property which the deceased was not legally competent freely to dispose during his lifetime and in respect of which his interest had been terminated by his death cannot form part of his estate and cannot be the subject of an application for confirmation of grant.

35. In my considered view, I would think that “free property” of a deceased person such as land can be proved by documents such as a title deed, allotment letter, lease agreement, sale agreement etc. The question in this case is whether unregistered land constitutes free property of a deceased person.

36. The answer to this question can be determined by examining the duty of a probate court. The duty of a probate court is to identify the estate of a deceased person, identify the lawful beneficiaries to the estate and distribute the same to the beneficiaries. In **Re Estate of Alice Mumbua Mutua (Deceased)** [2017] eKLR Musyoka J. elucidated this role as follows:

“...The Law of Succession Act, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with

beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.

37. The duty of a probate court ends at distribution of the estate and the process is then taken over by other bodies who have the mandate to transmit the property to the beneficiaries. The process of distribution is therefore the beginning of other processes geared towards transmission of the property from the deceased to the beneficiaries. In **re Estate of Reuben Mugesani (Deceased)**(2020)eKLR Musyoka J. explained the process that follows after the court has distributed the property amongst the beneficiaries as follows:

7. After a grant is confirmed, and a certificate of confirmation of grant issued, the process that follows is known as transmission, of the property from the name of the deceased to that of the beneficiaries named in the certificate of confirmation of grant. That would involve, where the property has to be shared amongst many persons, the subdivision of the property, before the resultant subtiles are registered in the names of the beneficiaries. Transmission is not provided for under the Law of Succession Act, nor under the Probate and Administration Rules. It has nothing to do with the probate court, and it is carried out at the lands registry. It is, therefore, a process under land legislation. The principal legislation is the Land Registration Act, No. 3 of 2012, and the Land Act, No. 6 of 2012. The Land Registration Act and the Land Act carry complementary provisions on transmission of property upon the death of an owner after the grant has been confirmed.

38. What it means in the whole of this process is that the property to be distributed by a succession court has to be identifiable and clearly defined. Where the property involved is land, it has to be identified by a land reference number. Otherwise where the land is not registered as in this case, a succession court would be engaging in an exercise in futility in dealing with such land as the process of transmission cannot be completed at the lands office. Courts of law do not act in vain. In my considered view, unregistered land cannot be construed to mean “free property” of a deceased person. Distribution of such land does not fall within the mandate of a succession court.

39. There is no vacuum in law in dealing with transmission of unregistered land. Section 32 of the Law of Succession Act excludes the application of the rules of intestacy in relation to agricultural land, crops and livestock in certain counties named in the said section that includes Marsabit County. Section 33 provides that the law applicable to the distribution on intestacy of the categories of property specified in section 32 is the law or custom applicable to the deceased’s community or tribe as the case may be. The subject land is in Marsabit county. Since the land is unregistered the applicable law of transmission is the customary law of the deceased. The transmission of the subject land should therefore be dealt with in accordance with the customary law of the deceased’s community.

40. The upshot is that the appeal is upheld for the reason that the land which is the subject of the succession cause is unregistered and does not fall within the mandate of a probate court. In the premises, the petition is struck out.

41. This being a family matter each party to bear its own costs.

DELIVERED, DATED AND SIGNED AT MARSABIT THIS 19TH DAY OF OCTOBER 2021.

JESSE N. NJAGI

JUDGE

In the presence of:

N/A for Appellant

Mr. Owade for Respondents

Parties:

Appellant Absent

Respondents – Absent

Court Assistant Mr. Godana