



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 49 OF 2018

STEPHEN NGONDI MANGURE.....APPELLANT

VERSUS

VERAGISKA MURINGO NJERU.....RESPONDENT

JUDGMENT

A. Introduction

1. This appeal was instituted vide a memorandum of appeal dated 3/10/2018. The appeal is against the ruling of the Senior Principal Magistrate Court at Runyenjes in Succession Cause No. 53 of 2002. The appellant has raised six (6) grounds of appeal and which can be summarized as hereunder: -

1) That the learned trial magistrate erred in law and in fact by finding that the appellant was not entitled to a share of the deceased' land parcel by virtue of being a purchaser and finding that the appellant's evidence was insufficient.

2) That the learned trial magistrate erred in law and in fact by finding that the appellant was unable to prove that he bought land from the deceased despite sufficient evidence in that respect.

3) That the Respondent did not prove forgery of her signature in the trial court.

2. The appellant thus prayed that the ruling by the trial court be set aside and the costs of this appeal and the trial court be borne by the Respondents.

3. Directions were taken that the appeal be canvassed by way of written submissions and which directions were complied with.

B. Issues for determination

4. It is now well settled that the role of this court (first appellate court) is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**). In performance of the said role, this court ought not to ordinarily interfere with findings of fact by the trial Court unless the said findings 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. (See **Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga –versus- Kiruga& Another (1988) KLR 348**) and section 78 of the Civil Procedure Act). In re-evaluation of the trial court's evidence, there is no set format to which this court ought to conform to but the evaluation should be done depending on the circumstances of each case and the style used by the first Appellate Court and that what matters in the analysis is the substance and not its

length. (See Supreme Court of Uganda's decision in Uganda Breweries Ltd v. Uganda Railways Corporation [2002] 2 EA 634 and Odongo and Another vs. Bonge Supreme Court Uganda Civil Appeal 10 of 1987 (UR)).

5. I have perused and understood the contents of the pleadings, proceedings, judgment, grounds of appeal, submissions and the decisions referred to by the appellant. In a nutshell, **there is summons for confirmation of grant filed by the Respondent herein and wherein it was indicated that the appellant was to get 0.405 Ha. from Kyeni/Kigumo/2961. The Respondent then filed an affidavit of protest to the said application wherein she denied having filed the application for confirmation and further deposed that the appellant herein was not a beneficiary of the estate herein. The appellant replied to the said affidavit wherein he deposed that he is a beneficiary of the estate herein having bought one acre of LR Kyeni/ Kigumo/2961 from the deceased on 23/09/1987 at a total consideration of Kshs. 15,000/= and was given vacant possession. He denied having filed the summons for confirmation of grant and that the administrator (Respondent herein) was aware of the said transaction and that was why she listed him as one of the beneficiaries. The trial court found that the appellant was not a beneficiary of the said estate and hence the instant appeal. As such, it is my opinion therefore that the main issue which this court ought to decide is whether the appellant herein is a beneficiary of the estate?**

C. Application of the law and determination

6. As I have indicated above, the appellant's claim is that he is entitled to part of the estate based on a sale agreement. The said agreement was annexed to the replying affidavit. The Respondent in her written submissions raised an issue as to the jurisdiction of this court as the claim herein is on occupation of land. It is trite law that once an issue as to jurisdiction is raised, the same ought to be decided in limine. The Court of Appeal in the case of Kakuta Maimai Hamisi -vs- Peris Pesu Tobiko & 2 Others (2013) eKLR had the following to say on the centrality of the issue of jurisdiction: -

“So central and determinative is the jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings are concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cui-de-sac. Courts, like nature, must not sit in vain.” (See also Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & others (2012) eKLR).

7. The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. Its jurisdiction is over the net estate of the deceased being that which he was free to deal with during his lifetime and its purpose is to ascertain the assets, liabilities, if any, the beneficiaries and the mode of distribution of the estate. (See Muriuki Musa Hassan vs. Rose Kanyua Musa & 4 Others). Thus, where issues on the ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed.

8. Rule 41(3) of the Probate and Administration Rules provides that: -

“(3) Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71 (2) of the Act, proceed to confirm the grant.”

9. In Alexander Mbaka vs. Royford Muriuki Rauni & 7 Others [2016] eKLR the Court held that: -

“It is only where one has an established claim against the estate that has already crystallised that he can litigate it before a family court. The claim is to be considered as a liability to the estate.

This Court, in my view, cannot be called upon to ascertain whether or not one has a right to an estate of the deceased where such right has not yet crystallised. The right must be shown to have crystallised before the family court can entertain it.”

10. Musyoka J In re Estate of Stone Kathuli Muinde (Deceased) [2016] eKLR held that:

28. Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit properly brought before a civil court in accordance with the provisions of the Civil Procedure Act and the Civil Procedure Rules. This could mean filing suit at the magistrates’ courts, or at the Civil or Commercial Divisions of the High Court, or at the Environment and Land Court. If a decree is obtained in such suit in favour of the claimant then such decree should be presented to the probate court in the succession cause so that that court can give effect to it.

29. It is the failure to observe the foregoing, and allowing non-survivors or beneficiaries of the estate to prove their claims against the estate within the probate court that has often made succession causes complex, unwieldy and endless. It is by the same token that it had become necessary for the court to allow joinder of persons to the succession cause who ideally ought not to be party to the cause in the first place.

11. As I have noted above, the dispute between the Appellant and the Respondent is based on a sale agreement entered into between the deceased herein and the Appellant. The dispute being that relating to ownership of property as opposed to distribution, it is my considered view therefore that the claim by the Appellant herein against the estate of the deceased ought to be litigated in separate proceedings. The mandate of the probate court under the Law of Succession Act is limited and does not extend to determining issues of ownership of property. A party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land Court. The only path legally open to the applicants is to institute separate proceedings to articulate their claim/rights in the right forum and which is the Environment and Land Court. It is my opinion therefore that the trial court erred in law by abrogating itself of the jurisdiction it never had.

12. In the end, the court finds that the appeal has no merits and the same is hereby dismissed.

13. Due to the nature of the case, each party shall bear its own costs of the appeal.

14. Orders accordingly.

Delivered, dated and signed at Embu this 25th day of November, 2020.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent