



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CIVIL APPEAL NO. 9 OF 2017

(FORMERLY ELDORET HCCA NO. 37 OF 2011)

SARAH KOBILO CHEBII.....1ST APPELLANT

DINAH KANGOGO CHEBII.....2ND APPELLANT

VERSUS

DAVID K. CHESANG.....RESPONDENT

[An appeal from the Judgment and Decree of the Principal Magistrate's Court at Kabarnet RMCC. Suit No. 05 of 2005 delivered on the 16th day of February, 2011 by Hon. Nyaga, SRM]

JUDGMENT

Introduction

1. By a further Amended Plaint dated 7/2/2005 and amended on 2/2/2009, the Plaintiff/Respondent herein set up a case of claim against one Kangogo Chebii Peter, that he had “entered into an agreement and a subsequent partnership [with the said Kangogo Chebii Peter] and purchased part paid [the said Kangogo Chebii Peter] for the portion on the parcel of land known as plot no. 35 Kabartonjo.”

2. The original defendant Kangogo Chebii Peter having died, the Plaintiff successfully obtained an order of the substitution of his widow and daughter as 1st and 2nd defendants as his representatives, and consequently sought relief as follows:

“REASONS WHEREFORE the plaintiff prays that judgment be entered in his favour against the defendants jointly and severally for the orders:

a) An order that the 1st and 2nd defendants do effect transfer to include the plaintiff's name as a joint owner with the 2nd 1st and 2nd defendants on plot No. 35 Kabartonjo being partners and then interfering with or stopping the plaintiff from developing his portion on plot No. 35 Kabartonjo and on paragraph 16 above.

a) (I) That the 1st and 2nd Defendants and their servants, agent be permanently restrained from interfering or stopping plaintiff from developing his portion of plot No. 35 Kabartonjo.

b) In the alternative the defendants do pay Ksh. 119,120/= to the plaintiff as in paragraph 12 (a) above at Bank court rates.

c) Costs of this suit.

d) Interest on (a) (i) and (b) above at court rates

e) Any other or further relief that this Honourable court may deem fit to grant.

DATED at KABARNET this 7th February, 2005.

FURTHER AMMENDED at Nakuru this 2nd day of February 2009.”

The 3rd Defendant, originally 2nd defendant was the wife to the deceased son to whom the deceased that transferred the suit property.

3. Upon full hearing of the suit, the trial Court gave judgment for the Plaintiff against the Defendants as follows:

“I have given the matter anxious consideration. I don’t believe that the cause of action did not survive all alluded to by counsel for the defendants. The action was in respect of land still in existence. It is not an action in persona so it survived the death of KCP.

I have looked at the plaintiff’s case. He parted with Sh.100,000/= to purchase a portion of the plot 35. He has not received any portion. He has not received his money back. Surely there must be a remedy for him.

At this stage in time I don’t think that it is possible to grant the order that he be registered as a co-proprietor of the plot since its measurements and positioning is not clear.

What is clear to me is that the late K.C.P if he were alive, would have been liable to refund the money he received or he would have had to effect the transfer. I cannot now order specific performance against defendant 1 and defendant 2 the personal representatives of K.C.P.

My view is that the plaintiff is entitled to the alternative prayer of a refund the purchase price plus other expenses.

I therefore order that defendant 1 and defendant 2 as representatives of the Estate of K.C.P shall refund the sum of Kshs. 119,120/= to the plaintiff with interest from the date of filing suit. The estate of the deceased, through defendant 1 and defendant 2 shall also bear the costs of the suit.

As for the defendant 3, I agree with advocate for the defendant that there is no specific order directed at her. I will not grant any orders against her. Her costs shall be borne by the estate of K.C.P through the personal representatives namely defendant 1 and defendant 2.

To safeguard the interests of the plaintiff, no transfer of ownership shall be effected in respect of the said plot from the name of K.C.P any other person before the plaintiff has received his refund.

Orders accordingly.”

4. The Defendants were aggrieved and by Memorandum of Appeal dated 21/2/2011 challenging, principally, what the Appellants call the locus standi of the 1st and 2nd Defendants to be substituted for the deceased on the suit, having not been granted Letters of Administration to the Estate of the deceased defendant.

5. Counsel for the parties filed with submissions, respectively dated 6/12/17 and 1/3/2018, and Judgment was reserved.

6. It was urged for the appellants that:

*“Without grant of Letters of Administration the Appellants had no capacity to be joined in the suit. They are strangers to the said suit and had no locus standi. [The] fact was pleaded by the Appellants in their defence, during trial they testified that no Succession proceedings have been commenced as against the Estate of Kangogo Chebii Peter.” The authorities of **Mary Wanjela Mulahya v. Ambrose Kipruto** (2014) eKLR and **Esther Wagari Kihara v. Samuel Ntiba Senior & Anor** (2012) eKLR were cited, for the submission that “the Appellants had no capacity to be sued and enjoined in proceedings at the Lower Court since these are strangers to the proceedings.”*

7. For the Respondent, Counsel urged that:

“Before the amendment of the Plaint the 1st defendant Kangogo Chebii Peter had died and therefore an application to substitute was filed on 7/11/2008. This appears on page 94 of the Record of Appeal and on 21st January 2009 at page 117 of the Record Appeal the Court granted the application to substitute. This order by the Court was not appealed upon by the appellant. The application was made under Order XX III Rule (3) (1) (5) and (12) of the Civil Procedure Rules, Order XX III Rule (4) (5) of the Civil Procedure Rules read:

Where a question arises as to whether any person is or is not the Legal Representative of a deceased plaintiff or a deceased defendant such question shall be determined by the Court.”

*The Court having decided on the application, it is our submission in the absence of any application to set aside the decision, that Order of the Court which stated and I quote “**I therefore order that the 1st and 2nd Defendants as representatives of the Estate of K.C.P shall refund the sum of Kenya Shillings One Hundred and Nineteen Thousand, One Hundred and Twenty only (Ksh.119,120/=) to the Plaintiff with interest from the date of filing suit,” should be upheld.”***

Issue for Determination

8. The point for determination this appeal therefore is whether a person other than a Legal Representative of a deceased person appointed under the Law of Succession Act has lawfully be fixed as a party to suit to substitute a deceased plaintiff or defendant under the Provisions of Order XX III Rule 3 of the Civil Procedure Rules (New Order 24 Rule 4 of the Civil Procedure Rules 2010).

9. A procedural point order considering whether the Order of the Court not appealed from may be challenged on the appeal for the Judgment and Decree. The position of the Respondent is that *“the Court having decided on the application, it is our submission that in the absence of any appeal to set aside the decision, that Order of the Court stands and the Judgment of the Court should be upheld.”* Counsel for the appellant did not directly address this point other than to submit that the Order for *“the appellants has representatives of the Estate of Kangogo Chebii Peter to repay the Respondent the sum of Ksh.119,120/= by the learned Magistrate has the error and flagrant abuse of the law and process,”* citing section 2 of the Civil Procedure Act that defines *“Legal Representative has meaning a person who in law represent the estate of the deceased person.”*

10. With respect, a challenge may be taken on an Order of the Court on an Application during the appeal from the main Decree on Judgment in the circumstances set out in section 76 of the Civil Procedure Act, as follows:

“76. (1) Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction; but, where a decree is appealed from, any error, defect or irregularity in any order affecting the decision of the case may be set forth as ground of objection in the memorandum of appeal.

(2) notwithstanding anything contained in subsection (1), where any part aggrieved by an order of remand from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its corrections.”

Determination

11. In the present case, the Judgment of the Court awarding damages against the 1st and 2nd defendant is based on the Order of the Court allowing the substitution of the two as representatives of the deceased 1st defendant. The challenge on the ruling and order allowing the substitution may properly be taken up as a point in the Memorandum of Appeal in the appeal against the Decree of the Court. Indeed, the appellant listed the point of lack of capacity to be joined as Legal Representative of the deceased as ground number of the Memorandum of Appeal.

12. It is clear that even though the Civil Court had under the division of the Order XX III of the Civil Procedure Rules (Order 24 of the Civil Procedure Rules, 2010), the power to substitute the Legal Representative of the deceased plaintiff or defendant such representative must be Legal Representatives within the meaning of the applicable law. In this regard section 2 of Civil Procedure Act that Legal Representatives means *“a person who in law represent the Estate of a deceased person”*, that is to say a Legal Representative in the technical acceptance of the term.

13. The applicable law contemplated by section 2 of the Civil Procedure Act is the law of Succession Act which defines a persona representation as *“a person to whom a grant to representation has been made and is still subsisting.”* Consequently, if a person has not been issued with a grant of representation in accordance to the Law of Succession such a person cannot lawfully be substituted in place of a deceased party to a suit for lack of capacity.

14. The absurdity of the holding is that the purported personal representatives cannot implement the Order of the Court by disposing off any of the assets of Estate as they would be intermeddles within the meaning of the Law of Succession. See section 45 of the Law of Succession Act which provides as follows:

45. No intermeddling with property of deceased person

(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall—(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.

15. Order 24 Rule 4 of the Civil Procedure Rules (formerly Order XXIII Rule 4) for the substitution of the Legal Representatives of a deceased defendant provides as follows:

Procedure in case of death of one of several defendants or of sole defendant.

4. (1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the Legal Representative of the deceased

Defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as Legal Representative of the deceased defendant.

(3) Where within one year no application is made under sub rule (1), the suit shall abate as against the deceased defendant.

16. The power of the Court under Order 24 Rule 4 is to cause, on an application made in that behalf, *“the Legal Representatives of the*

deceased defendant to be made a party....”

17. The person to join as a party to the suit must be “*the Legal Representatives of the deceased defendant*”. It has long been held as the correct position since the Court of Appeal decision in ***Trouistik Union International & Anor. v. Jane Mbeyu & Anor Civil Appeal No. 145 of 1990*** [1993] KLR 230 that the Legal Representative of the deceased is the person appointed as such by a Succession Court in accordance of the Law of Succession Act.

18. With respect, the power of the Court under Order 24 Rule 5 of the Civil Procedure Rules to determine a question has to whether any person is or is not the Legal Representative of a deceased plaintiff or defendant must be exercised in accordance with the law and the Court cannot be at liberty to appoint a person who is not a Legal Representative in accordance of the Law of Succession Act.

19. There is no conflict between the position of the Law of Succession Act as regards to personal representative and the provision of the procedure for substitution of the Legal Representative upon the death of party to a suit. It only means that the person appointed to substitute the deceased plaintiff or defendant must be legally appointed “*Legal Representative of the deceased*”, who can only so legally appointed when appointed in accordance with the law enacted for that purpose under the Law of Succession Act.

Conclusion

20. As there was no valid substitution of the 1st and 2nd defendant to the suit subject of this appeal, the Judgment of the Court decreeing the payment of damages in the sum of Ksh.119,120/= by the said 1st and 2nd defendant is null and void and the same is set aside.

Orders

21. Accordingly, for the reasons set out above, the Court makes the following Orders:

1. The Judgment of the trial Court is set aside.
2. The error precipitating the appeal was made by the trial Court and there shall, therefore, be no orders as to costs.
3. As in accordance with Order 24 Rule 4 (2) of the Civil Procedure Rules “*any person so made a party may make any defence appropriate to this character as Legal Representative of the deceased defendant*” “any validly appointed Legal Representatives may file a defence and proceed with the suit as he may be advised.
4. For this reason, the matter shall in exercise of the power of the Court under section 78 (b) of the Civil Procedure Act be remanded for hearing of the suit from the point prior to the invalid substitution of the 1st and 2nd Defendants as representatives of the deceased 1st defendant.
5. Needless to the state the Respondent is at liberty to move the Court for substitution of lawful Legal Representatives and for reinstatement of the suit against the deceased defendant in accordance with Order 24 Rule 7 (2) of the Civil Procedure Rules, if the same has since abated, as he may be advised by his legal advisors.

Order accordingly.

DATED AND DELIVERED THIS 26TH DAY OF MARCH 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Ledishah J.K. Kittony & Co. Advocates for the Appellants.

M/S G.A Ndeda & Co. Advocates for the Respondent.