



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 113 OF 2017

1. ALEX WAWERU KIBURA.....1ST APPELLANT

2. JOSEPH NDICHU KINUTHIA.....2ND APPELLANT

3. HANNAH MBITHE WANJIKU.....3RD APPELLANT

=VRS=

TERESIAH NYOKABI NJUGUNA.....RESPONDENT

{Being an appeal against the Judgement delivered by Hon. C. Oluoch – PM Kiambu on the 29th January 2014 in the original Kiambu Chief Magistrate’s Court Succession Cause No. 114 of 2003}

JUDGEMENT

This is an appeal against the judgement of the trial Magistrate by which she confirmed the grant of letters of administration intestate in the estate of Njuguna Waweru Mungai alias Njuguna Waweru, deceased, upon dismissing a protest filed by the appellants on the ground that the lower court is not seized of jurisdiction to adjudicate the issue of customary trusts. From the record the appellants’ protest was only in regard to one asset LR NO. Ndumberi/Ndumberi/392 which by the time the summons for confirmation was filed had been subdivided into Ndumberi/Ndumberi/2531 and 2532. The appellant’s claim in regard to this property was that whereas it was registered in the name of the respondent’s husband it belonged to the father of the deceased and was so registered for the benefit of the deceased’s siblings being Naomi Wanjiku Waweru and Janet Waweru who are also deceased and whose estates they now represent. Teresiah Nyokabi Njuguna, the Administratrix who is the respondent in this appeal on her part claimed that the property was acquired by the deceased and was therefore his free property and subject to distribution to his heirs.

After hearing the parties, the trial magistrate concurred with the submissions of Counsel for the respondent that the court was not seized of jurisdiction to determine the claim by the appellants and dismissed their protest and proceeded to confirm the grant even in respect of the property LR Ndumberi/Ndumberi/392 (LR 2532 and 2532).

On 19th November 2018 the court directed Counsel for the parties to file written submissions. However only those of the appellants were received. When Counsel for the appellants appeared before me on 6th August 2019 he intimated that Counsel for the respondent was well aware of the date fixed for hearing of this appeal, a fact I confirmed from the affidavit of service filed herein.

I have considered the submissions by Counsel for the appellants and also painstakingly perused the record of the lower court. in **Isaack M’inanga Kiebia v Isaaya Theuri M’lintari & Another [2018] eKLR** the Supreme Court Judges stated: -

“[52] Flowing from this analysis, we now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor is subject under the proviso to Section 28 of the Registered Land Act. Under this legal regime, (now repealed), the content of such a trust can take several forms. For example, it may emerge through evidence, that part of the land, now registered was always reserved for family or clan uses, such as burials, and other traditional rites. It could also be that other parts of the land, depending on the specific group or family setting, were reserved for various future uses, such as construction of houses and other amenities by youths graduating into manhood. The categories of a customary trust are therefore not closed. It is for the court to make a determination, on the basis of evidence, as to which category of such a trust subsists as to bind the registered proprietor.”

The trial Magistrate was well aware that the claim by the appellants was one of a customary trust when she stated: -

“The true position is that subordinate courts have no jurisdiction to deliberate on issues based on trust.”

That may be the position and the trial Magistrate cannot be faulted for arriving at that decision. My finding however is that having found that the court did not have jurisdiction the trial Magistrate ought not to have confirmed the grant in regard to the property the subject of the protest by the appellants. To the extent that she went ahead and distributed the property, that was a misdirection. More so as it had been brought to the court's attention that there were pending proceedings in the High Court in respect of the two properties. In my view the trial Magistrate ought to have postponed confirmation of the grant in regard to the two properties pending determination of the issue of the customary law trust in the matter before the High Court. This she could have done under **Section 71 (2 (d))** of the **Law of Succession Act** which states: -

“71 (2) Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may –

(d) Postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case.....”

Rule 41 (3) of the Probate & Administration Rules also clothed the trial court with power to delay confirmation in regard to the impugned property. Indeed, in the case of **Naomi Wanjiku Waweru & Another v Teresia Nyokabi Njuguna HCC 12 of 2010 (OS)** Musyoka J faced with a similar issue involving this same asset held: -

“The matter therefore ought to have been concluded in terms of Rule 41 (3) of the Probate and Administration Rules, by delaying the confirmation of Ndumbwi/Ndumberi/392 (sic) to await the determination of the instant suit or any other suit brought under Order XXXVI Rule (sic) of the Civil Procedure.....

Ideally, any issue on ownership of property should be addressed before a grant in respect of any estate comprising the property in question is confirmed. In most cases confirmation of the grant sets in motion processes that remove the property from the reach of any claimants, often resulting into transactions that are irreversible.”

In the instant case the trial Magistrate acted in defiance of the holding cited above. I am satisfied therefore that this appeal has merit. The certificate of confirmation of the grant in so far as it distributes the subject property is hereby cancelled, the protest by the appellants is reinstated and the cause is remitted to the lower court for hearing of the summons for confirmation subject to the decision of the superior court on the issue of the customary law trust. It is so ordered.

Signed and dated this 23rd day of September 2019.

E. N. MAINA

JUDGE

Dated and delivered in Kiambu this 26th day of September 2019.

C. W. MEOLI

JUDGE