



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

[CORAM: MRIMA, J]

CIVIL APPEAL NO. 21 OF 2018

MARY NKIROTE MITHIKA & 2 OTHERS.....APPELLANTS

-VERSUS-

PETER MWENDA & ANOTHER.....RESPONDENTS

(Being an appeal from the ruling and order by Hon. O. Wanyaga, Resident Magistrate in Maua Chief Magistrate's Misc. Succession Case No. 41 of 2017 delivered on 13/02/2018)

JUDGMENT

1. The appeal herein arose from the ruling delivered on 13/02/2018. It was a short ruling allowing the citation.
2. The citation had been filed by the Respondents herein against the Appellants on 26/07/2017. The Citation was dated 20/07/2017. It was supported by the Affidavit of Timothy Mugambi, the Second Respondent herein.
3. The Citation was opposed by the Appellants. They filed their appearance through **Messrs. Meenye & Kirima Advocates** on 24/08/2017. They also filed Grounds of Opposition dated 23/08/2017 on 24/08/2017. They further filed a Replying Affidavit through Mary Nkirote Mithika on 24/08/2017. The affidavit was sworn on 23/08/2017.
4. The Citation was fixed for hearing at the registry. According to the record Mwenda for Mbogo Advocate appeared at the registry on 18/01/2018 and fixed the hearing on 05/02/2018.
5. The hearing proceeded *ex parte* on 05/02/2018. The ruling under appeal was then rendered on 13/02/2018.
6. Dissatisfied with the ruling, the Appellants lodged an appeal. They preferred the following 5 grounds of appeal: -

1. THAT the trial Magistrate erred in law and fact by dismissing the appellant's grounds of opposition and the replying affidavit dated 23/08/2017 without giving sufficient reasons hence, rendering him to arrive at a unfair findings and ruling.

2. THAT the trial Magistrate erred in law and fact by failing to consider the fact that the appellant counsel was not served with the hearing notice and relied on a false affidavit of service.

3. THAT the trial Magistrate erred in law and fact by failing to take into account that the Appellant had a pending land matter with the respondents in the same court same being Maua ELC No. 94 of 2010 whereby the appellant had sued his husband alongside with the respondents for entering into a forgery sale of family and/or matrimonial land agreement over the suit land same being parcels No: Akirang'ondu 'A' adj. section/8507 but unfortunately the 1st appellant's husband namely MITHIKA M'IMUNYA M'ITUTI died before the matter was concluded, hence, arrived at unfair ruling.

4. THAT the trial Magistrate erred in law and fact in failing to take into account the material facts placed before the Court by the appellants against the respondents application and gave out very unfair ruling when the said trial magistrate lacked jurisdiction to establish and determine ELC matters.

5. THAT the trial magistrate erred in both law and facts failing to note that the respondents application was brought in dirty hands and the same was a short cut to own the appellant's late husband's estate, since, the annexed memorandum of sale agreements formed the general cause of action in Maua ELC 94 of 2010 as the same have been in dispute which needs determination after establishing and determining the MAUA ELC 94 of 2010.

7. Directions were taken, and the appeal was disposed of by way of written submissions where both parties duly complied.
8. In urging this Court to allow the appeal, the Appellants *inter alia* vehemently protested the way the matter was heard. They contended that the matter was heard without notice to them. They also submitted on all the grounds in details. The decision in ***Malindi ELC Civil Case No. 233 of 2013 Kadzo Mukutano v. Mukutano Mawmboje Kadoshu & 2 Others (2016) eKLR*** was cited in support of the appeal.
9. The appeal was opposed. The Respondents submitted against each of the grounds. They urged this Court to dismiss the appeal with costs.
10. The duty of the 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***). The Court must nevertheless appreciate that it will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the appellate Court is shown demonstrably that the trial court acted on wrong principles in reaching the findings. That was the holding in ***Mwanasokoni - versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278*** and ***Kiruga -versus- Kiruga & Another (1988) KLR 348***.
11. I have carefully and keenly read and understood the proceedings, the ruling and order appealed against as well as the Record of Appeal, the grounds thereof and the parties' submissions.
12. I will start with how the citation was heard. I have already dealt with the steps taken by the parties towards the hearing of the citation. The Respondents did not contend the ground of appeal to the effect that the citation was heard *ex parte*.
13. The record is clear. On 18/01/2018 one Mwenda for Mbogo Advocates for the then Applicants (now Respondents) appeared at the registry and fixed the citation for hearing. There was a Kamau for CM but the record did not indicate whether the said Kamau was also present or which Advocate he represented. Based on the uncontroverted position by the Appellants and the record I find that the hearing of the citation was fixed *ex parte*. That being so there was need for service of a hearing notice upon the Appellants' Counsels on record.
14. There is however no evidence of service on record of a hearing notice for the citation. That was even the case on 05/02/2018 when the citation was heard *ex parte*.
15. Further, the Respondents' Counsel submitted before the subordinate court that the citation was not opposed.
16. The court rightly found that the citation was opposed. However, in the impugned ruling the court held that despite the opposition the Appellants did not attend the hearing of the citation. The court further held that Appellants did not indicate whether they intended to file a succession cause.
17. As a starting point, a Court must always satisfy itself of service. That is because all parties in a dispute must be accorded an opportunity to present their cases. That can only be achieved when the parties are duly and timeously informed of the proceedings.
18. In this case although the court noted that the Appellants did not attend the hearing, it did not satisfy itself that the Appellants were duly notified of the hearing date. With tremendous respect, that was a departure from the rules of natural justice. The Appellants were hence condemned unheard. As a result, their cardinal right to be heard under **Article 50(1)** of the **Constitution** was contravened.
19. I have noted that the impugned ruling granted leave to the Appellants to take out succession proceedings within 30 days' failure to which the Respondents were to file such proceedings. The court further ordered service of the order upon the Appellants personally and their Counsels. That was quite commendable on the part of the court. The Appellants did not contend that they were not served with the order. As a cautionary measure in securing the Appellants' first priority to take out the succession proceedings the court ought to have made a further order that time would only start running upon service of the order and filing a return of service in court.
20. I therefore note that despite the contravention of the Appellants' right to be heard under **Article 50(1)** of the **Constitution** the Appellants were still granted the first priority to take out the succession proceedings. That was the right approach by the court.
21. A citation is intended to accord a first priority to the closest people to a deceased in terms of consanguinity to take out succession proceedings on behalf of the estate of that deceased. Therefore, once served with the citation a citee should not await the determination of the citation proceedings. The citee must move with speed and take out a succession cause if that citee intends to defend the citation the pendency of the citation notwithstanding. That is the only way matters will move with speed in Courts. Had the Appellants done so in this matter high are chances that even the substantive succession cause would be finalized two years down the line.
22. I therefore do not find the appeal merited. The appeal is hereby dismissed. For clarity I order that the 30 days' period within which the Appellants were granted to file the succession cause on behalf of the deceased shall start running from the delivery of this judgment. In the event the Appellants or both parties are absent at the delivery of this judgment the Respondents shall only file the succession proceedings on service of a decree arising from this judgment upon the Appellants and filing a Return of Service in this matter.
23. Since the parties shall litigate further over the estate each party shall bear its own costs of the appeal.
24. Those are the orders of this Court.

SIGNED BY:

A. C. MRIMA

JUDGE

DATED, COUNTERSIGNED and DELIVERED at MERU this 30th day of October, 2019.

A. MABEYA

JUDGE

Judgment delivered in open Court and in the presence of: -

.....for the Appellants.

.....for the Respondents.

.....Court Assistant