



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

(CORAM: CHERERE-J)

CIVIL APPEAL NO. 71 OF 2018

BETWEEN

SHEM NDIRANGU (suing as a legal representative of the estate of Rose Njoki Warui)...APPELLANT

AND

MONICAH NYAGITHII MATU t/a Nyaki Commercial Consultant.....RESPONDENT

(Being an Appeal from the Judgment and Decree in Thika CMCC No. 780 of 2011

by Hon. G.Omodho (SRM) on 30th May, 2018)

JUDGMENT

1. SHEM NDIRANGU (*hereinafter referred to as Appellant*) sued MONICAH NYAGITHII MATU t/a Nyaki Commercial Consultant (*hereinafter referred to as Respondent*) in the lower court for orders of injunction to restrain the Respondent from collecting rents or managing the property known as SS57/140; to render accounts for all monies collected from December, 2008 and to deposit the same as the court may direct.
2. The Appellant in her statement of Defence denied the Respondent's claim and urged the court to dismiss it with costs.
3. In a judgment delivered on **30th May, 2018**, the trial court restrained the Respondent from collecting rents or managing the property known as SS57/140 (*hereinafter referred to as the suit property*); granted costs but dismissed the prayer for an order to render accounts for all monies collected from December, 2008.

The Appeal

4. The Appellant being dissatisfied with the lower court's decision preferred this appeal and on 28th June, 18 filed the Memorandum of Appeal dated 27th June, 18 which sets out 4 grounds of appeal that:

- 1) **The Learned Magistrate misdirected herself in failing to appreciate that rents collected belong to the estate of the deceased**
- 2) **The Learned Magistrate erred in law in failing to appreciate that rents due to the estate can only be distributed by the court**
- 3) **The Learned Magistrate misdirected herself in failing to appreciate the law on proprietorship**
- 4) **The Learned Magistrate misdirected herself in alluding to facts not supported by any evidence**

5. This appeal was argued by way of written submissions. In further exposition of the appeal, both parties cited various authorities.

Analysis and Determination

6. This being the first appellate court, its duty is to re-evaluate the evidence and come up with its own conclusions but also bear in mind that it should not interfere with the findings of the trial court unless the same were based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings. (See **David Kahuruka Gitau & Another V Nancy Ann Wathithi Gitau & Another [2016] eKLR**). It then behoves this court to summarize the evidence that was tendered before the trial court.

7. I have perused the entire record of appeal and considered the submissions of counsels for both parties. The parties have identified the following issues for determination:

- a) **Who is owner of plot SSS4/170**
- b) **Whether respondent was wrongly enjoined in the suit**
- c) **Whether the Respondent should render accounts**
- d) **Who's liable to pay costs**

8. I will endeavour to analyze each of the issues as hereunder.

a) Who is owner of plot SSS4/170

9. The trial court after considering a letter dated 13.06.02 by **Rose Njoki Warui** (*hereinafter referred to as the deceased*) appointing the Respondent to collect rent from the suit property on her behalf; letter dated 14.06.02 by Respondent informing tenants of the suit property that it had been appointed to manage the suit property and collect rent and letter dated 29.06.09 by Wandugu Mwaura Advocates for Grace Wairimu, deceased's mother in which it was conceded that the suit property belonged to the deceased, settled the issue of ownership in favour of the deceased.

b) Whether respondent was wrongly enjoined in the suit

10. The trial court similar found as a fact that Respondent had been duly instructed by the deceased to manage and collect rent from the suit property and concluded that the Respondent was the proper party before the court and I therefore need not belabor the point.

c) Whether the Respondent should render accounts

11. There is no evidence that the property management contract between the deceased and the Respondent was terminated. In fact, the trial court questioned the basis on which Respondent entered into a new property management contract with Grace Wairimu and Stephen Warui.

12. in the case of **Trouistik Union International and Anor. vs. Mrs. Jane Mbeyu and Anor Civil Appeal No. 145 of 1990 [1993] KLR 230**, a five judge bench of the Court of Appeal expressed itself as follows concerning the person to whom the estate of a deceased intestate vests between the time of death and the time when the grant of whatever nature is issued" *inter alia* as follows:

“It is common ground that the deceased in this case did not die intestate and therefore, the only person who can answer the description of a personal representative is the administrator of the estate of the deceased. The next inquiry must answer the question, who is an administrator within the true meaning and intendment of the Act” Section 3 says “administrator means a person to whom grant of letters of administration has been made under this Act” ...At common law, death by itself automatically divests the deceased of his chose in action and the reason for this is because in law, the dead have no rights. But no legal right is without an owner so it must be vested in a person or entity. According to the English Law before the Judicature Act, 1873, the personal property of an intestate in the interval between death and the grant of letters of administration was deemed to be vested in the Judge of the Court of Probate and since, 1925, by the provision of the Administration of Estates Act of that year, the property of an intestate before the grant vests in the President of the Probate, Divorce and Admiralty Division. In some Commonwealth jurisdictions, such right is vested in the Chief Justice or some other statutory designated body or entity. Our Law of Succession Act, Cap 160, did not provide for the vesting of an intestate's property between the date of death and the grant of letters in any entity. So the suggestion that it will be vested in the courts conforms with the common law notions of the transmission of an intestate's right or estate. It ought to be remembered that all these temporary custodians of an intestate's rights are bare trustees only. But as soon as a grant is obtained, the right or estate vests automatically and by force of the grant in the administrator.”

13. The Appellant is the personal representative of the deceased by virtue of Grant of Letters of Administration issued to him on 24th January, 2011 and all the property of the deceased, since the date thereof, is vested on him by virtue of section 79 of the Law of Succession Act (*the Act*) which provides that:

The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.

14. For the purpose of administration, the Law of Succession Act, at **Section 83 of the Act**, has imposed certain duties on personal representatives. One such duty is to get in all the free property of the deceased. This is the duty to collect and gather the estate. Collecting rents is one such duty. **Section 83** should be read together with **Section 79**. Since the property of the deceased vests in the personal representative, the personal representative is entitled to collect any rents and profits accruing from such property, and **Section 83** reinforces this by making it a statutory duty for the personal representative to do so.

15. **Section 83(e)** imposes a statutory duty on a personal representative to render a full and accurate account of all dealings with deceased's estate. (See **Re Estate of Mary Ng'onde Mwanunga (Deceased) [2019] eKLR**) and this is the basis upon which the Respondent is legally required to account for rents collected from the deceased's estate to the Appellant who is the personal representative.

16. Before a grant is issued, the property of a deceased can only be dealt with pursuant to a court order. There is no court order authorizing the Respondent to deal with the rent collected from the deceased's estate other than for the benefit of the deceased. The new property management contract over the deceased's estate made between the Respondent on one hand and Grace Wairimu and Stephen Warui on the other hand has no force of law and the Respondent cannot rely on it to deny deceased's estate what it is lawfully entitled to.

17. The trial court having found that the suit property belonged to the deceased and that the Respondent had been collecting rent from therefrom should have been bold enough to order the Respondent to render accounts since failure to do so amounts to permitting the Respondent to get away with intermeddling of deceased's estate which the courts frown at. I therefore find that the trial court erred in failing to order the Respondent to render accounts for all monies collected from the suit property from December, 2008.

d) Who's liable to pay costs

18. Section 27(1) of Civil Procedure Act Cap 21 Laws of Kenya gives courts unfettered discretion to determine by whom costs are to be paid. It is trite that costs follow the event and a successful litigant ought to be fairly reimbursed for the costs that he has had to incur.

DISPOSITION

19. In view of the findings I have made, I make the following orders:

i. The Appeal succeeds

ii. the Respondent is hereby ordered to render accounts for all monies collected from the suit property from December, 2008 and to deposit all such sums in court within 60 days from the date hereof.

iii. Respondent shall bear costs of the Appeal and of the lower court

iv. This matter shall be mentioned before the Chief Magistrate Thika within a period of 60 days for further orders.

20. It is ordered.

DELIVERED AND SIGNED AT KIAMBU THIS 25th DAY OF *October* 2019.

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Nancy

For the Appellant - N/A

For the Respondent - Ms. Etole hb Mr. Muthomi