



REPUBLIC OF KENYA

IN THE HIGH COURT

AT EMBU

CIVIL APPEAL NO. 66 OF 2001

LUCIANA WANGIGE

KARUA.....APPELLANT

VERSUS

LEAH WANJIKU

KARUA.....RESPONDENT

RULING

This is the ruling in respect of the ruling dated 19th June, 2001 of Mr. Njagi Principal Magistrate in Kerugoya succession cause No. 162 of 1999.

The Appellant herein one Luciana Wangige Karua was the petitioner in the succession cause. The deceased Edward Karua Murage was her husband. In the petition, she listed herself and the children as the beneficiaries of the late husband's estate. After filing the petition, the Respondent herein one Leah Wanjiku Karua filed an objection on 2.9.1999 and also cross-petitioned for a grant in respect of the same estate. She stated that she was doing so in her capacity as a widow to the deceased. The record shows that her advocate then on record did serve the petitioners counsel on record with a notice of appointment showing that he was appearing for the objection. It is not clear whether the objection and cross-petition was served on the petitioner or her counsel.

Before the objection could be heard, the petitioner moved the court for a letter of administration. There was no mention of the objection and the letters were therefore issued to the petitioner. The said grant was issued on 6.4.2000. Subsequently, the petitioner applied for a confirmation of the grant of letters of administration. The same was confirmed and the estate distributed as per the certificate of confirmation of the grant dated 27.2.01.

Upon realizing that the grant had already been confirmed in spite of the objection having not dealt with, the objector moved to court under D XLIU Rule 1 & 6 seeking review orders.

The objector was relying on the ground of error on the face of the record. The Learned Magistrate after hearing both counsel made his ruling dated 19.6.01 which now forms the subject matter of his Appeal. In his ruling, the learned trial magistrate observed

“I am in agreement with the Applicant that when the court confirmed this grant on 10.2.01 it overlooked the fact that a protest had been filed.

This was an oversight on the part of the court.

The court observed that no objection had been filed when it had in fact been filed”.

He therefore found that there was an error on the face of the record and reviewed the earlier orders confirming the grant. He set the orders aside and ordered that the status quo obtaining before the said confirmation be preserved pending the hearing and determination of the protest to be filed by the objector. It is against those orders that the petitioner has appealed. She relies on 2 grounds as hereunder

1. That the learned magistrate went wrong and erred in law in holding that the provisions of order XLIU Rules 1 and 6 were available to the Respondent.
2. The learned Principal Magistrate misdirected himself in holding that an error of law committed by himself could be cured by himself sitting on a review and thereby erred in law in constituting himself an appellate court in his own cause.
The appeal proceeded by way of written submissions. I have read and carefully considered the said submissions and the law applicable in the matter.

On grounds of appeal, I need not say much. Clearly the law of succession act by its rule 63(1) of the P & A Rules has incorporated Order XLIU of the Civil Procedure Rules as one of the Rules applicable to the law of Succession Act. That order was therefore rightly relied invoked and relied upon by the applicant/objector.

On the second ground, the only issue is whether the learned magistrate was in order to set aside the earlier orders on the basis that there was an error on the face of the record. Was this an error or was it the wrong exposition of the law. According to the learned magistrate, he proceeded on the premise that there was no objection in the court file – yet there was one that was still pending and had never been dealt with. In finding that his oversight was an error apparent on the face of the record, did her error in law?

My finding is that he did not error. He did not misapprehend the law. He failed to notice that there was a pending objection that had never been disposed of. The existence of the said objection though clearly within the knowledge of the Applicant’s counsel was not brought to the attention of the court. Had the magistrate noted the existence of the objection, I am certain that they could have disposed of it first in order to clear the way for the issuance of the grant of the letters of administration and also the confirmation of the same.

Issuing the grant of the letters of administration while there was already an objection pending was not a misapplication of the law but an error apparent on the face of the record. It fits the description given by the court of appeal in **Nyamogo and Nyamogo Advocate versus Kogo (EALR) 2001 EA 170**, when it stated

“There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law states one in the face, and here could reasonable be no two opinions, apparent on the face of the record would be made out.....”

The grant in question was confirmed in error as the objection had not been heard or even dismissed for non prosecution. This was a glaring mistake which actually if left unattended could have caused great injustice to the objector and her children. The learned trial magistrate did not sit on Appeal on his ruling. He had the jurisdiction to correct the glaring error that he had made by failing to note that the objection filed by the Respondent herein was still on record.

Having considered the grounds of Appeal and submissions before me, I am satisfied that this appeal has no merit. The same must therefore fail. I dismiss it with costs to the Respondent, and uphold the learned magistrates Ruling of 19.6.01.

Orders accordingly.

W. KARANJA

JUDGE

SIGNED BY THE ABOVE BUT DELIVERED AND DATED AT EMBU THIS 30TH DAY OF MARCH 2011 BY THE UNDERSIGNED.

M. WARSAME

JUDGE

In the presence of:- Plaintiff and Defendant in Open Court.