



REPUBLIC OF KENYA  
**IN THE HIGH COURT OF KENYA**

**AT MERU Civil Appeal 93 of 2006**

**MARTHA MWONJARU ..... APPELLANT**

**AND**

**M'RUNYARU M'KIRICHIA ..... DECEASED**

**VERSUS**

**M'ATAYA M'AKWALU AKWALU ..... RESPONDENT**

*(An appeal against the judgment of the Hon. Mr. D. Morara (RM) in Maua PM's L.D.T. Case No. 7 of 2005 delivered on 23<sup>rd</sup> August 2006)*

**JUDGMENT**

The Land Dispute Tribunal Meru North determined the dispute between M'Ataya M'Akwalu Akwalu, the plaintiff and M'Runyaru M'Kirichia, the defendant. The decision of the Land Dispute Tribunal was sent to Maua Magistrate Court for purposes of reading the award. It was read on 16<sup>th</sup> June 2005 in the presence of the plaintiff and the defendant's counsel. It is not disputed that the defendant died after the reading of the award but before the tribunal decision was adopted by the Maua Magistrate Court as a judgment of that court. The plaintiff made an application dated 29<sup>th</sup> August 2005 seeking to have the order appointing Martha Mwonjaru M'Runyaru as the legal representative of the deceased defendant. The plaintiff in support of that application deponed that Martha was the wife of the deceased defendant. The Maua Magistrate Court on 15<sup>th</sup> December 2005 granted orders as prayed in that application notwithstanding that no grant had been obtained over the estate of the deceased defendant. The plaintiff further made another application dated 22<sup>nd</sup> July 2005 which was granted as prayed on 15<sup>th</sup> March 2006. The orders that were granted were for the surveyor to fix the boundary over parcel *Tigania/Atwanduru/21* and on doing so if the defendant was to be found to be on the plaintiff's land, he was to be removed. That order in effect put into place the tribunal's decision. Martha made an application dated 20<sup>th</sup> June 2006. By that application, she sought to stay orders joining her in the proceedings to represent the deceased defendant and to stay orders allowing the tribunal's decision to be executed. The magistrate court rejected that application and dismissed it. It is that dismissal that is the subject of this appeal. The whole appeal, in my view, hinges on whether the magistrate court was right to appoint Martha as the legal representative of the deceased defendant when her grant of representation had not been issued. Section 80 (1) and (2) of the

Law of Succession provides as follows:-

**“80. (1) A grant of probate shall establish the will as from the date of death, and shall render valid all intermediate acts of the executor or executors to whom the grant is made consistent with his or their duties as such.**

**(2) A grant of letters of administration, with or without the will annexed, shall take effect only as from the date of the grant.”**

As can be seen, the grant of letters of administration takes effect from the date the grant is issued. It is only on being appointed as legal representative that a party can:-

**“Enforce, by suit or otherwise, or causes of action which, by virtue of any law survive the deceased or arises out of his death for his estate.”**

Those are the provisions of Section 82 of the Law of Succession Act. That being the law, there is no basis for the order issued by the learned magistrate to join Martha as a legal representative in the lower court action. The orders granted by the learned magistrate were a nullity *abi nitio*. In this regard, I wish to rely on the case **Nyandarua District Land Disputes Tribunal & Ano. Vs. Meshack Mwangi Maina & Ano.** Misc. Application No. 314 of 2004 where Justice Nyamu as he then was, had this to say which is very pertinent to this case:-

**“The irregularities mentioned above notwithstanding this court cannot countenance nullities under any guise. This court would like to apply the principle enunciated in the landmark case of Animitic Vs. Foreign Compensation 1969 2 AC 147 “If a tribunal mistook the law applicable to the facts as it had found them, it must have asked itself the wrong question i.e. One into which it was not empowered to inquire and so had no jurisdiction to determine its purported determination” not being a determination within the meaning of the empowering legislation was accordingly a nullity.”**

**It follows that both the award and the purported entering of the judgment in terms of the award were nullities. This is so because the maximum *ex nihilo nilil fit* applies – “out of nothing comes nothing”. The High Court has a supervisory role to play over inferior tribunals and courts and it would not be fit to abdicate its supervisory role. In my view, it has powers to strike out nullities as held in R. Vs. Attorney Goldenberg Commission ex parte Hon. Mwalulu at pages 26– 33.”**

The order of the learned magistrate was a nullity and I echo the words in the above case. I too would say, “*out of nothing comes nothing.*” Since there was no legal basis to appoint Martha, the orders granted by the learned magistrate both for her appointment and for the adoption of the tribunal award have no effect in law. That being so, the applications in the lower court dated 22<sup>nd</sup> July and 29<sup>th</sup> August 2005 filed by the plaintiff who is the respondent in this appeal must fail. I find that the appeal does succeed and the court does hereby set aside the order made on 23<sup>rd</sup> August 2006 in PM Maua LDT Number 7 of 2005 and does substitute the same with an order dismissing the applications dated 22<sup>nd</sup> July and 29<sup>th</sup> August 2005 with costs being awarded to the appellant. The PM Maua LDT Number 7 of 2005 is hereby stayed until a legal representative is appointed in the estate of M’Runyaru M’Kirichia deceased. The costs of this appeal are awarded to the appellant.

Dated and delivered at Meru this 19<sup>th</sup> day of March 2010.

MARY KASANGO

JUDGE