REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

Civil Appeal 51 of 200

1. MATHIAS KONG'ANI RUPIA

2. JULIANA W. KONG'ANI } ……..……. APPELLANTS

V E R S U S

1. ROSELYNE WESONGA SHIYUKA

(suing on behalf of the estate of ROMANO SHITANDA WESONGA)

2. MAURICE WESONGA

suing thro' next of Kin ROSELYNE SHIYUKA) ... RESPONDENTS

(Appeal arising from the Judgment of {MS. P. K. SULTAN, SRM} in Mumias Senior Resident Magistrate's Court in Civil Suit No.206 of 2003)

J U D G M E N T

In a judgment dated **27th June, 2005**, the learned trial magistrate, **Hon. P.K. Sultan,** Senior Resident Magistrate, Mumias, ordered the cancellation of the sub-division of **L.R. No. N/WANGA/KOYONZO/558** and of the subsequent transfer of **L.R. No.N/WANGA/KOYONZO/1527** to the 1st Appellant herein. The learned trial magistrate also ordered that the names of the appellants herein be cancelled from the accounts which they held at Mumias Sugar Company Limited. Finally, the trial court awarded costs of the suit to the respondents herein.

Being dissatisfied with the judgment, the appellants lodged an appeal to the High Court. In their memorandum of appeal, the appellants raised the following grounds of appeal;

"1. The learned trial magistrate erred in entering judgment in favour of the plaintiffs in the light of the evidence on record.

2. The learned trial magistrate erred in failing to find that the plaintiff did not have locus standi to institute MUMIAS SRMCC NO.206 of 2003.

3. The learned trial magistrate erred in not finding the respondents suit was fatally defective and ought to have dismissed and/or struck out. (sic!).

4. The learned trial magistrate erred in finding that the respondent was duly appointed personal representative of the deceased in the light of the proceedings produced as exhibit.

5. The learned trial magistrate erred in conferring upon MAURICE WESONGA a status of unsound mind contrary to medical evidence to the contrary.

6. The learned trial magistrate erred in allowing ROSELYNE WESONGA SHIYUKA to act as "next of kin" of the MAURICE WESONGA a capacity not applicable in the circumstances of this case.

7. The learned trial magistrate failed to find that ROSELYNE WESONGA SHIYUKA did not fulfill the requirements for acting as next friend of MAURICE WESONGA as required by law.

8. The trial magistrate erred in finding the appellants liable for a fraud in the absence of evidence in support thereto.

9. The trial magistrate erred in failing to find that the particulars of fraud cited had not been proved.

10. The learned trial magistrate erred in applying lower standard and shifting burden of proof to the appellants to prove fraud.

11. The learned trial magistrate erred in not considering that weight of evidence was in favour of the appellants.

12. The trial magistrate failed to be guided by the applicable principles of law and this led to a wrong finding.

13. There was general denial of natural justice to one MAURICE WESONGA."

When prosecuting the appeal, the appellant first took issue with the capacity in which the respondents brought the action.

First, the appellants submitted that a suit that is filed on behalf of a person of unsound mind should be filed by a "*next friend'*, as opposed to a "*next of kin."*

There is absolutely no doubt that suits filed on behalf of persons adjudged to be of unsound are to be brought by the "*next friend."* That is provided for by **Order 31 rule 15** of the Civil Procedure Rules.

"*Barron's dictionary of Legal Terms*" defines the phrase "*Next Friend"* as follows;

"***a competent person who, although not an appointed guardian, acts on behalf of a party who is unable to look after his or her own interests or manage his or her own lawsuit; one who represents an infant or other party, who by reason of some disability, is not sui juris. A next friend is not considered a party to the suit, but is regarded as an agent or officer of the court to protect the rights of the disabled person."***

In the light of that definition, I hold the considered view that, if the 2nd respondent herein was deemed to be the next friend to **MAURICE WESONGA**, the learned trial magistrate was perfectly entitled to have declined to have the said **MAURICE WESONGA** testify as a witness for the defendants, as that would have implied that the said gentleman was testifying against himself.

Meanwhile "*Barron's Dictionary on Legal Terms*" gives the following definition for the phrase "*Next of kin*";

"***the term is used generally with two meanings: (1) nearest blood relations according to the law of***

consanguinity, and (2) those entitled to take under statutory distribution of intestates estates. In the latter case, the term is not necessarily confined to relatives by blood, but may include a relationship existing by reason of marriage and may well embrace persons who, in the natural sense of the word, bear no relation of kinship at all."

Clearly therefore, those two phrases, "*Next Friend"* and "*Next of Kin"* cannot be used interchangeably, as they do not have the same meaning.

Whereas the next of kin may be competent to file a suit on behalf of

his or her relative who was of unsound mind, such suit should however be brought by him or her in the capacity of next friend.

In my considered opinion, in so far as **ROSELYNE SHIYUKA** purported to bring this suit in her capacity as the next of kin to **MAURICE WESONGA**, she did not have the requisite legal authority. The phrase next of kin has a particular meaning in law. It is therefore not accurate to describe it as being nothing more than a misnomer, as the respondents have asked me to find.

Order 31 rule 15 of the Civil Procedure Rules provides as follows:-

"***The provisions contained in rule 1 to 14, so far as they are applicable, shall extend to persons adjudged to be of unsound mind, and to persons who though not so adjudged are found by the reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued."***

In other words, if a person has been adjudged to be of unsound mind, the court would not need to make an inquiry as to the said person's mental infirmity or unsoundness of mind, with a view to ascertaining if the person was incapable of protecting their interests when suing or being sued.

In this case, I have been unable to trace any evidence that **MAURICE WESONGA** had been adjudged to be of unsound mind. Therefore, the learned trial magistrate ought to have conducted an inquiry to ascertain whether or not **MAURICE WESONGA** was incapable of protecting his own interests, due to either unsoundness of mind or mental infirmity. The said inquiry ought to have been conducted at the outset of the proceedings.

Although, the inquiry was not conducted before the trial started, and even though there is no proof that **MAURICE WESONGA** had been adjudged to be of unsound mind, both the appellants did concede that the said **MAURICE WESONGA** had a longstanding mental problem.

DW4, Dr. Silas Omondi, testified that **MAURICE WESONGA** had "***psychiatric illness, on and off. He is normal in between illness. At times he is struck by it. The intervals are unpredictable, could be months to years …… During illness his judgment is impaired. He has had the illness since 1973."***

However, the doctor insisted that **MAURICE WESONGA** was not of unsound mind, as his illness was treatable.

In the circumstances of this case, I hold the view that even though an inquiry was not conducted at the outset, to establish whether or not **MAURICE WESONGA** was incapable of protecting his interests when suing, and even though he was not of unsound mind per se, the said **MAURICE WESONGA** was incapable of protecting his interests.

The 1st appellant herein said, inter alia, that;

> "***Maurice, He is not mentally stable."***

And the 2nd appellant testified thus;

"***MAURICE was sick but has now recovered and is now well. He was mentally unstable before."***

In a medical report dated 22nd November, 2001, **Dr. Wakhudu S.O.,** the S.M.O Psychiatry, at the Provincial General Hospital Kakamega said that **MAURICE WESONGA**;

"***has a recurring history of mental illness characterized by wandering and often talking unintelligently since 1973."***

Surely, someone who has had such a long and well known history of mental illness, and whose judgment was impaired during the times when he was ill, cannot be capable of protecting his own interests when suing or being sued because it was not known when or for how long he might remain lucid or unwell.

The suit had been brought by two people, namely **MAURICE WESONGA** (through his next of kin), and the ESTATE of the late **ROMANO SHITANDI WESONGA** (through its administrator).

In effect, even if the action brought by the next of kin were to be struck out, on the ground that a next of kin does not, by virtue of being a next of kin, have the requisite authority to sue on behalf of a person of unsound mind, the suit by the estate could still be sustained.

But then, the appellants' contend that the 1st respondent herein, **ROSELYNE WESONGA SHIYUKA**, was not an administrator to the estate of **ROMANO SHITANDI WESONGA** (deceased).

DW5, PASCAL WABUKO, is an employee of the Judiciary, based at Kakamega. He produced the court records for the case **IN THE MATTER OF THE ESTATE of ROMANO SHITANDA WESONGA, KAKAMEGA HIGH COURT SUCCESSION CAUSE NO.115 OF 1995.**

In his testimony, the 1st respondent, **ROSELYNE WESONGA SHIYUKA**, was one of the two administrators to whom a grant was issued. The other administrator was **SUSAN ATIENO SHIKUKU**.

DW5 nonetheless proffered the opinion that the 1st respondent's name was only squeezed onto the grant, as in his view, there were no proceedings to show how the 1st respondent was enjoined to the Succession Cause. Indeed, **DW5** said that when the grant was issued on 20th September, 1999, it was not issued to the 1st respondent.

I have carefully perused the record of the proceedings in the succession cause. It is true that the petition was filed by **SUSAN ATIENO SHIKUKU,** on 20th February, 1995.

On 18th December, 2001, Messrs **RACHABU OKUMU WAMUKOYA, MATHIAS KONGANI RUPIA** and **WELLINGTONE MANYASI** swore a joint affidavit of protest against the confirmation of the grant.

In the said affidavit, the three gentlemen deponed, inter alia, that **MATHIAS KONGANI RUPIA** had purchased 2 acres of land from **ROMANO SHITANDI WESONGA**, and that his said parcel of should;

"***be entrusted to SUSAN ATIENO SHIKUKU who was authorized by the family of the late ROMANO SHITANDI WESONGA to administrator (sic!) the Estate of the said deceased so that she may transmit our respective share to us in accordance to the agreement the deceased signed."***

That affidavit was filed in answer to the application dated 15th October, 2001, which had been filed by none other than **ROSELINE WESONGA**.

The fact that the 1st respondent had filed the application was confirmed by her co-administrator,

SUSAN ATIENO SHIKUKU, who also swore an affidavit in answer to the application by the 1st respondent herein. In that affidavit she acknowledged that the 1st respondent was her co-administrator, even though she expressed surprise at the manner in which the 1st respondent had attained that role.

The affidavit of **SUSAN ATIENO SHIKUKU** was sworn on 18th December, 2001.

The fact however remains that by 17th June, 2005 when the learned trial court delivered its judgment, there had been no application to annul or revoke the grant issued to both **SUSAN ATIENO SHIKUKU** and **ROSELYNE WESONGA SHIYUKA**. Therefore, the trial court could not shut its eyes to the signed grant which was duly signed by the Hon. Waweru J., and also sealed by the court.

The authenticity of the grant could only be challenged in the succession cause within which it had been issued. Until and unless the grant was revoked or annulled, the learned trial magistrate was entitled to accept, as a fact, that the 1st respondent was one of the two administrators to the estate of the later Romano Shitanda Wesonga. Therefore, the 1st respondent had the requisite locus standi to bring action on behalf of the estate.

The appellants submitted that the plaintiff did not have locus to sue on behalf of her father, who is said to have had ability to represent himself.

I have already held that **MAURICE WESONGA** was not capable of looking after his own interests in the suit. I would go further and say that if he had had the capability, nothing would have been easier than to procure a doctor's written confirmation of that fact, which he would then have used to take over the proceedings personally.

The case against the appellants was to the effect that they had fraudulently sub-divided **L.R. NO. N/WANGA/KOYONZO/588**, and that they thereafter transferred one resultant portion to the 1st appellant. Furthermore, the appellants were alleged to have planted sugar cane on the other resultant portion, without the administrators' consent.

However, the appellants position was that they had purchased the two parcels of land from **ROMANO SHITANDI WESONGA** in 1993. The appellants also alleged that they took possession of the properties in 1993: that is what is stated in the amended defence.

Yet during the trial, the 2nd appellant said that by the time Romano died in 1994;

> "***He left 558 and 559. No one sub-divided the land."***

That piece of evidence appears to fit in very well with the affidavit sworn by **Rachabu Okumu Wamukoya**, **Mathias Kongani Rupia** and **Wellingtone Manyasi** on 18th December, 2001, when they deponed that **Susan Atieno shikuku** was entrusted by the family, in her capacity as the administrator to the estate of the late **Romano**, to transmit their share, to them.

Exhibit 5 is the Title Deed for L.R. NO. **N./WANGA/KOYONZO/1527**. It is dated 31st July, 2002. As at that date, the 1st respondent herein was one of the two administrators to the estate of the late Romano, as appearing on the grant.

The appellants did concede their knowledge of the need to have whatever piece of land they may have purchased, transmitted to them by the administrator.

But the 1st respondent did not play any role in the said transmission of the property. To my mind, those facts, about which there appears to be no dispute, confirm the 1st respondent's contention that the sub-division and transfer was carried out without the knowledge or consent of the administrator. To that extent, I find and hold that the respondents did prove fraud.

Accordingly, I find that the learned trial court was entitled, as it did, to grant orders for the cancellation of the sub-division of **L.R. NO. N/WANGA/KOYONZO/558**, and the subsequent transfer to the 1st appellant herein of **L.R. NO. N/WANGA/KOYONZO/1527**.

Following the cancellation of the transfer and of the sub-division, the original title **L.R. NO. N/WANGA/KOYONZO/558** shall revert to the names of **ROMANO SHITANDI WESONGA**.

As a consequence thereof, the appellants' contracts with Mumias Sugar Company Limited will be without any foundation. The said contracts will automatically come to an end as they would be in relation to titles that had ceased to exist.

The proceeds of the **contracts should be held** by Mumias Sugar Company Limited, in an **interest earning account**, pending further orders as may be made in Succession Cause No.115 of 1995.

In the result, the appeal herein is dismissed with costs.

Delivered, dated and signed at Kakamega this 14th day of May, 2008

FRED A. OCHIENG

J U D G E