

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
Succession Cause 282 of 2005

IN THE MATTER OF THE ESTATE OFLAWRENCE K. ISIGI
(DECEASED)

A N D

FLORA MUHALIA ISIGIPETITIONER/
RESPONDENT

V E R S U S

SAMMY INGUUVU

ISIGI

ROSELINE AGIZA ISIGIOBJECTOR/
APPLICANT

R U L I N G

The Petitioner, FLORA MUHALIA, made on 14.12.01 an application by way of Notice of Motion of that date premised on Order 44 Rule 1(1) of the Civil Procedure Rules seeking review of this court's judgment delivered on 30-11-01 by the Honourable Lady Justice R. Nambuye. If I understood the Applicant correctly, she contends firstly that the directions in the cause were given by a Deputy Registrar and that that vitiated the rest of the process including the judgment sought to be reviewed. Secondly, she faults the judgment of this court on the ground that it was delivered in her (petitioner's) absence. Thirdly, the Petitioner complains that the court distributed the estate without her participation.

No formal decree or order appears to have been extracted from the judgment or was annexed to the application. The applicant was correct in her contention that the Deputy Registrar should not have given directions. Although the Petitioner's Counsel did not amplify it, it is explicit in the proviso to section 48(1) of the Law of Succession Act, Cap.160 ("the Act") that in any place where both the High Court and a Resident Magistrate's Court are available, the High Court shall have exclusive jurisdiction to make all grants of representation and determine all disputes under the Act. In any place where the High Court is not available, a Resident magistrate has jurisdiction to entertain any application other than an application for revocation or annulment of Grant under section 76 of the Act, and to determine any dispute under the Act and to pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed the stated sum.

In the present cause, the Deputy Registrar did not engage in making of a grant of representation or determine any dispute under the Act, which exclusively falls within the purview of the High Court's jurisdiction. The directions given did not touch on or attempt to determine any dispute or any of the rights of the parties. For this reason, it cannot be said that any of the parties was prejudiced by such direction which would ordinarily be given by a Resident Magistrate Court where there is no High Court. It is too long a shot to say that such directions vitiated the proceedings or the subsequent judgment of the High Court. There is no prohibition under the law to the High Court in adopting the directions by the Deputy Registrar and it is safe to assume the High Court adopted the directions as they were not at variance with the proviso to section 48(1) of the Act in that they did not encroach on the jurisdiction reserved exclusively to the High Court under section 76 of the Act. That disposes of the first point.

With regard to the second point, to wit, that the judgment was delivered in her absence, that does not vitiate or render the judgment bad in law. I do not understand the Petitioner to say that she was late in appealing as a result of learning late that judgment had been delivered. Nor did she indicate why, if the judgment was sound, it should be set aside merely because she was not present at the time of its delivery. It is not clear however, why the Applicant was not notified of the date of the delivery of the judgment. The Petitioner was represented by counsel. Section 25 of the Civil Procedure Act stipulates that judgment shall be pronounced after the case has been heard save where the claim is for a liquidated sum. Under Rule 1 of Order XX, after hearing a suit, the court is enjoined to pronounce judgment and to give prior notice to all the parties or their advocates of the date of the delivery of the judgment.

But sight must not be lost of the fact that the Petitioner had participated in the hearing and on the day of the delivery of the judgment, she had no role except that it was her right to sit in court and listen to the judgment to which she could appeal if such appeal was provided for. The fact that the judgment was delivered in her absent could not vitiate it and as there was no issue of appeal raised, it cannot be said that she suffered grave prejudice. The gravamen of her complaint from her affidavit in support of the application is that she was aggrieved by the judgment. The right cause for her should have been to apply for leave to appeal against it and to seek a certificate of delay. In the circumstances of this case, there are cogent reasons in support of such application for leave to appeal out of time. It is still grey area whether an appeal to the Court of Appeal lies from decisions of the High Court under the Act in view of section 50 of the Act.

But no matter. The application was premised on Order 44 Rule 1(1) of the Civil Procedure Rules. The parameters on which the court will review its decrees and orders are set out explicitly in that rule. The Petitioner did not attempt to bring herself within any of these parameters. In these circumstances, I am constrained to, which I hereby do, dismiss the application. Each party shall bear its own costs.

Dated, signed and delivered at Kakamega this 5th day of May, 2006.

G. B. M. KARIUKI

J U D G E