



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL APPEAL NO. 80 OF 2002

JONATHAN WAFULA MBINGA APPELLANT

VS

KABAKA WABWILE WEKESA RESPONDENT

q A decision however wrong stands unless set aside
q Courts will consider the operative part of the grant when determining the locus standi of a grantee
q When time of doing an act expires on a Sunday or a day when offices are close

RULING

The Respondent raised a preliminary objection against the appellant's Notice of Motion dated 26th June 2003. The preliminary points were contained in the Notice dated 7th July 2003.

The first ground put forward by the Respondent is that the appellant did not have the necessary locus standi to institute this appeal. Mr. Onchiri who appeared for the Respondent took issue with the limited grant of letters of administration ad colligenda bona under Section 67 of the law of succession Act Cap 160 Laws of Kenya. It is the submission of the learned Advocate that the grant which was obtained by the appellant under S. 67 is only limited to the collection and preservation of estate property. He pointed out that the appellant should have obtained a grant under the provisions of section 54 of the law of succession Act. He referred to the case of **RANCHOD MORARJI MORJARIA ALIAS TAPOO & ANOTHER VS ADIJA HASSAN ABDALLA C.A. No. 1. 1982.**

The appellant's counsel resisted this ground by pointing out that the appellant has the necessary locus pursuant to grant given by the Hon. Mr. Justice Osiemo Mr. Makali who appeared for the appellant submitted to the effect that the grant issued by Justice Osiemo has not been set aside nor appealed against hence it is still a valid grant of representation.

The crux of the Respondent's objection is the grant of representation which was issued by Mr. Justice Osiemo on the 11th day of November 2002 pursuant to Section 67 of the law of succession Act. Similar objections were raised in the case cited by the Respondent's advocate of **RANCHOD MORARJI MORJARIA & ANOTHER VS ADIJA HASSAN ABDALLA C.A. No. 1 of 1982** in which the court of appeal stated as follows:

“However, we do not think that the appointment of a person ‘ad colligenda bona’ can possibly include the right to stand in the shoes of the deceased for the purpose of instituting an action, or, indeed, an appeal, especially where there is a specific provision, paragraph 14 of the fifth schedule, designed for this purpose. The Latin verb “colligenda” means to collect, bring together

or assemble, and we are satisfied that this form of grant is only to be used for the purpose we have indicated, and not for the purpose of representation in a suit or in an appeal.

.....Notwithstanding the foregoing, the grant of 24 February is specifically limited for “the purpose only” of representing the deceased, that is to say Ranchod, in the present appeal. In our Judgment, therefore, it is those words which should be looked at for the purposes of determining this part of the application. In themselves, they constitute a valid grant pursuant to rule 14 and we are prepared to regard them as such we would therefore consider that which we may call the operative part of the grant by Aganyanya J. on 24 February as a valid order enabling Bhavin and Lalita to represent Ranchod, who was a party in his own capacity, in appeal.”

The operative part of grant of representation in dispute issued by Justice Osiemo on 11.11.2002 provided as follows:

“Grant Limited only to purposes of filing an appeal against

the findings of the Tribunal in respect of case

No. Bungoma/C.M.C.C. LDT. 32 OF 2002.”

Pursuant to this grant the appellant filed this appeal. I think the appellant had the proper locus standi to commence this appeal. Consequently the Respondent objection is rejected as lacking in merit.

The second objection raised by the Respondent is that this appeal was filed out of time without leave. The appellant opposed this ground by relying on the provisions of order XLIX rules 3 and 7 of the Civil Procedure rules.

Under the land disputes tribunals Act an aggrieved party may appeal to the High court on points of law within sixty (60) days from the date of the decision. The decision of the Western Province Appeals committee was adopted on 10th September 2002 therefore the appellant was expected to have filed within 60 days from that date. The last day the appellant was expected to lodge the appeal was on 10th November 2002 which the calendar shows Order XLIX rule 3 of the Civil Procedure rules gives a party a chance to file the appeal the next day which was the case in this matter. It is my conclusion that this appeal was filed within time. Hence the objection is overruled.

In the end, the preliminary objection is dismissed with costs to the appellant.

DATED AND DELIVERED THIS 18th DAY OF June 2004

J.K. SERGON

JUDGE