



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT SIAYA**

**ELC APPEAL NO.41 OF 2021**

**MARY APONDI YINDA AND SELINE AWUOR YINDA**

**(Suing as administratrix of the Estate of the late**

**LINUS YINDA OPONDO).....APPELLANTS**

**VERSUS**

**JOICE ACHIENG OKUMU.....1<sup>ST</sup> RESPONDENT**

**EMILY APONDI MURENDE.....2<sup>ND</sup> RESPONDENT**

**JOHN OTIENO MADEDE.....3<sup>TH</sup> RESPONDENT**

**DISTRICT LAND REGISTRAR UGENYA /UGUNJA DISTRICT.....4<sup>RD</sup> RESPONDENT**

***(Being an appeal from the judgment and decree of the Senior Resident Magistrate Hon.C.N. Sindani***

***on 18/11/2020 in Ukwala Senior Resident Magistrate's Court ELC Number 14 of 2018)***

**JUDGEMENT**

**Introduction**

1. The background to the dispute giving rise to this appeal, as expressed in the pleadings, may briefly be stated thus: by dint of a plaint dated 10/8/2016, the appellants filed suit against the respondents for fraudulently transferring land parcel numbers **NORTH UGENYA/DOHO/1073** and **NORTH UGENYA/DOHO/1071** (**“the suit properties”**) from one Linus Yinda Opondo who died on 27/10/2004 to the 1<sup>st</sup> respondent on diverse dates of 13/6/2013 and 20/5/2012 and subsequently from the 1<sup>st</sup> respondent to the 2<sup>nd</sup> and 3<sup>rd</sup> respondent on 13/6/2013 and 17/6/2014 respectively without obtaining grant of letters administration of the Estate of Linus Yinda Apondi. The 4<sup>th</sup> respondent was sued for failing to ensure that due legal process was undertaken in the alleged suspicious transactions.

2. In their plaint, the appellants prayed for; a permanent injunction against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents, a declaration that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents title documents were null and void and that they be cancelled and for the suit properties to be registered in their names. The 4<sup>th</sup> respondent neither entered appearance nor filed a defence.

3. The 1<sup>st</sup> defendant filed a defence dated 12/10/2016 in which she denied the averments in the plaint and averred that her dealings with the 2<sup>nd</sup> respondent were transparent and with the knowledge of the appellants and that the suit properties were a subdivision of **NORTH UGENYA/DOHO/913** which was registered in the names of Linus Yinda Opondo and her deceased husband one Bernard Okumu Yinda and that upon her husband's death, Linus Yinda Opondo held the suit properties in trust for her. It was her contention that she did not fraudulently deal with the suit properties because at the time of transfer to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, the suit properties were registered in her names. She urged the court to dismiss the suit with costs to her.

4. The 2<sup>nd</sup> respondent filed a defence dated 18/04/2018 in which she denied the averments in the plaint and she contended that **NORTH UGENYA/DOHO/1073** was sold to her by the 1<sup>st</sup> respondent for value without notice of fraud since the suit property was registered in the name of the 1<sup>st</sup> respondent at the time of purchase. She urged the court to dismiss the suit with costs to her.

5. The 3<sup>rd</sup> respondent filed a defence dated 28/09/2016 in which he denied the averments in the plaint and averred that the 1<sup>st</sup> respondent had capacity to transfer **NORTH UGENYA/DOHO/1071** to him and if at all, she had not undertaken probate proceedings, then the property had devolved to her by operation of law. He urged that court to dismiss the suit with costs to him.

6. Upon hearing the appellants and the 1<sup>st</sup> to 3<sup>rd</sup> respondents and considering the evidence and submissions, the trial court by its judgment dated 18/11/2020 found that the appellants had not produced grant of letters administration of the Estate of Linus Yinda Opondo during trial and therefore, the appellants did not have locus to institute suit against the respondents and declined to determine the claim on merit. It proceeded to dismiss the appellants claim with costs.

7. Aggrieved by the decision, the appellant has appealed to this court by filing a memorandum of appeal dated 16/12/2020.

### **Memorandum of appeal**

8. The appellant's memorandum of appeal set out the following three grounds of appeal:

*a) THAT the trial magistrate erred in law and in fact by dismissing the entire suit on the ground that the plaintiffs/appellants had no locus to institute and/or prosecute the suit against the defendants/respondents.*

*b) THAT the trial magistrate erred in law and in fact by dismissing the plaintiffs/appellants case in utter disregard of the fact that the grant ad litem which was issued to the appellants on 3/12/2018 vide succession cause no.271 of 2018 at Ukwala had been availed/sent to the court user email being "ukwalacourt@court.go.ke on 23/10/2020 (3 weeks) prior to the delivery of the said impugned judgement upon his own request.*

*c) THAT the trial magistrate erred in law and in fact by dismissing the plaintiffs/appellants case without ascertaining and confirming that the said grant ad litem had been tendered before court during the hearing of the plaintiffs' case and the same was marked as "P Exh 1" consequently, the dismissal of the appellants case amounts to a miscarriage of justice.*

9. The appellant prayed that the appeal be allowed and the judgment of the trial be set aside, an order be made that the trial court do render a judgment on its own merits and they be awarded costs of the appeal.

### **The appellant's submissions**

10. The parties agreed to dispose of the appeal vide written submissions. The appellants filed their written submissions dated 20/12/2021. They condensed their grounds of appeal into one issue; whether the appellants at the trial court obtained a limited grant to proceed with the suit and if so, was the said grant availed to the court during the hearing of the suit and prior to the delivery of the impugned judgement.

11. It was their submission that before instituting suit, they obtained grant of letters of administration of the Estate of Linus Yinda Opondo in **Ukwala Succession Cause 13 of 2016** however, before the hearing of the main suit, the grant was revoked and as a result, the appellants obtained limited grant of letters of administration of the Estate of Linus Yinda Opondo in **Ukwala Succession Cause No.271 of 2018** on 3/12/2018.

12. That during trial, they produced the limited grant of letters of administration as "**P Exh1**" and that sometimes on 23/10/2020, the court's Executive Officer had called their advocates and requested them to avail a copy of the limited grant because it could not be traced in the court file; which they did vide a letter dated 23/10/2020. It was their contention that they had locus to prosecute the suit and the trial courts' decision was illegal, irregular, devoid of merit and an affront to their constitutional right to timely justice.

### **1<sup>st</sup> and 3<sup>rd</sup> respondents' submissions**

13. The 1<sup>st</sup> and 3<sup>rd</sup> respondent filed written submissions dated 25/01/2022. It was their submission that the grant of letters of administration that gave the appellants capacity to institute suit was revoked and that the appellants did not amend their pleadings or witness statements to reflect that they had obtained limited grant.

14. He submitted that before a document is produced in court, it has to be filed, a receipt issued and served on the parties and that a limited grant was never produced as "**P Exh 1**" as alleged by the appellants and that the finding of the trial court was proper. It was their submission that the appellants were attempting to introduce new evidence at an appellate stage. They contended that if at all such a document was ever produced, they would have objected to its production. In arguing their submissions, they placed reliance on the case **Shem Okore Ogola (suing as the administrator of the Estate of Pius Oyioko Ogola (Deceased) v Rispa Arum Akumu & 4 others [2017] eKLR.**

### **2<sup>nd</sup> respondent's submissions**

15. The 2<sup>nd</sup> respondent filed written submissions dated 26/01/2022. In which he framed 3 issues for determination. The 1<sup>st</sup> and 2<sup>nd</sup> issue was on the consequences of filing suits on behalf of deceased persons without grant of letters of administration and whether the appellants had locus to institute suit against the respondents. He contended that the appellants obtained grant ad litem after the suit had been filed, which would imply that they did not have capacity at the time they instituted suit. On this argument, he placed reliance on several authorities including **Hawo Shanko v Mohamed Uta Shanko [2018] eKLR, Nairobi Succession Cause 1732 of 2000 In the matter of the Estate of Moraii Bhanii Dhanak and Nakuru HCCC No. 464 of 2000 Law Society of Kenya vs Commissioner of Lands & Others.**

16. On the 3<sup>rd</sup> issue, he contended that the actions of the appellants of filing suit without obtaining limited grant amounted to intermeddling

with estate of a deceased persons contrary to the provisions of **Section 45** of the **Law of Succession Act**.

#### **4<sup>th</sup> Respondent's submissions**

17. The 4<sup>th</sup> respondent filed written submissions dated 25/01/2022 in which it framed 2 issues for determination by this court. It submitted that if at all, the appellants were granted limited grant in 2018, nothing could have been easier than for the appellants to seek leave of the court to amend their pleadings or withdraw their suit entirely. It placed reliance on the case of **Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR**. It was its submission that because the suit was a non-starter, the orders sought could not be granted.

#### **Analysis and determination**

18. This being a 1<sup>st</sup> appeal, it behoves this court to re-evaluate the evidence afresh, reassess the case and make its own independent finding and conclusions. See **Selle & Another v. Associated Motor Boat Co. Ltd & Others [1968] EA 123**, which was quoted by the case of **Barnabas Biwott v Thomas Kipkorir Bundotich [2018] eKLR**. However, in re-evaluating the evidence, the court must bear in mind that did not have the advantage of seeing the witnesses.

19. As a 1<sup>st</sup> appellate court, this court will rarely interfere with findings of fact by a trial court unless it can be demonstrated that the judicial officer misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration matters which he should have taken into consideration and in doing so, arrived at a wrong conclusion.

20. Having considered the original lower court record, memorandum of appeal, record of appeal and rival written submissions, this court will render its determination on two issues (i) Whether grant of letters of administration was produced in the trial court by the appellants and, (ii) Who shall bear the costs of this appeal. This court will make sequential pronouncements on the two issues.

21. The matter that is the subject of this appeal is convoluted with each party rendering varying versions on the circumstances of the production of the limited grant document in the trial court. According to the appellants, they produced the limited grant as “**P Exh 1**”, according to the 1<sup>st</sup> and 3<sup>rd</sup> respondents the appellants amended pleadings and amended list of documents were neither filed nor served upon them and on that basis, such a document was never produced in the trial court. The 2<sup>nd</sup> respondent contends that the limited grant dated 18/12/2016 was obtained long after the matter had proceeded for hearing. The 4<sup>th</sup> respondent who did participate in the lower court, contended that as demonstrated by the 1<sup>st</sup> to 3<sup>rd</sup> respondents, neither the court nor the parties were supplied with the limited grant. In its judgement the trial court found thus;

***“I agree with the defendants that no grant was produced nor listed in the amended list of documents...the plaintiff didn't (sic) cite any case file that the limited grant was applied. I took the liberty to go through succession cause no.13 of 2016...the only grant was revoked and no subsequent application for another grant was made. As the court record stands there is no grant of letters of administration issued to the plaintiff”.***

22. To determine the veracity of the varying submissions on the issue at hand, this court has had a chance to go through the handwritten and typed record of the trial court and I have narrowed down to the specific date of 31/7/2019 which was the date the appellants' witness one Seline Opondi Yinda testified and apparently produced the limited grant.

23. During her exam in chief, she testified that she had obtained a limited grant dated 18/2/2018. However, before she could proceed further with her testimony, counsel for the 1<sup>st</sup> and 3<sup>rd</sup> respondents objected to the production of this document on the ground that he had not been served with it. The court by virtue of **Article 159** of the **Constitution**, overruled the 1<sup>st</sup> and 3<sup>rd</sup> respondents' objection and held thus;

***“The issue before court is a land matter, the provisions of Article 159 overriding (sic) principles apply. If its capacity to sue, that anomaly has been cured by the limited grant attained by the plaintiff. Matter to be concluded on merit and not technicalities. The objection is dismissed”.***

24. At the conclusion of the exam in chief, the court marked the limited grant as having been produced as “**P Exh 1**” and the “greencards” as “**P Exh 2**” and “**P Exh 3**” respectively. The court record speaks for itself, the appellants duly produced the limited grant as an exhibit in accordance with the provisions of **Section 35** of the **Evidence Act**. They laid foundation for its authenticity and relevance to the facts of the case and it became part of the court record. Once it was admitted into evidence and produced, the court was expected to apply its judicious mind on the produced documents. In the Court of Appeal decision of **Kenneth Nyaga Mwigie v Austin Kiguta & 2 others [2015] eKLR**, the court held thus on the stages of filing, production and prove or disprove of documents;

***“First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence...Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case”.***

25. In the instant case, it is quite obvious that the trial court did not apply its judicious mind on the produced limited grant document and it is my finding that the trial court erred in finding that the limited grant was not produced as an exhibit.

26. Before I issue my disposal orders, I wish to make my observations on the lower court record. The produced limited grant is not in the

court record. The respondents' case was closed on 19/2/2020 and judgement was rendered on 18/11/2020. It must be appreciated that there was delay in the delivery of the judgement and this may have interfered with the learned magistrate's grasp of the appellants case and documents produced could have been misplaced. In such instances, the judicial officer has discretion within the provisions of **Section 146 (4)** of the **Evidence Act** and **Order 18 Rule 10** of the **Civil Procedure Rules** to recall a witness.

27. I find the appeal is merited and I allow it. It is trite law that costs follow the event in the absence of special circumstances, I award costs to the appellants. I set aside the judgement and decree appealed from and order that the suit be remitted back to the lower court for retrial. The costs of the impugned original trial shall be in the discretion of the magistrate who retries the suit. I express hope that the matter shall be expedited for hearing.

28. It is so ordered.

## **JUDGMENT DELIVERED VIRTUALLY.**

**DATED, SIGNED AND DELIVERED THIS 3RD DAY OF MARCH 2022.**

### **In the Presence of:**

Mr. Kakinja for the Appellant

Mr. Sala for the 2<sup>nd</sup> Respondent

M/s Nyangano for the 1<sup>st</sup> and 3<sup>rd</sup> Respondents

Mr. Kajo for the 4<sup>th</sup> Respondent

Court assistant: Sarah Ooro

**HON. A.Y. KOROSS**

**JUDGE**

**3/3/2022**