**Moinde v Onywera (Sued as a personal representative of the Estate of Wilfred O Moindi Onywera - Deceased) (Civil Appeal 23 of 2023) [2024] KEHC 2838 (KLR) (7 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2838 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISII**

**CIVIL APPEAL 23 OF 2023**

**DKN MAGARE, J**

**MARCH 7, 2024**

**IN THE MATTER OF ESTATE OF MOINDI OKECHA ALIAS**

**MOINDE OKETCH - DECEASED**

**BETWEEN**

**RUSSIAH MOCHECHE MOINDE ..... APPELLANT**

**AND**

**SHEM OKORA ONYWERA (SUED AS A PERSONAL REPRESENTATIVE OF THE ESTATE OF WILFRED O MOINDI ONYWERA - DECEASED) ..... RESPONDENT**

**JUDGMENT**

1. On 1/1/1990, Moindi Okendi aka Moinde Oketch of Muua Sub location Kisii County rested. Since then his estate has not rested. Rusia Mocheche Moinde made are application for a grant of letters of the estate in her capacity as a wide. A notice to the public was issued dated 4/4/2019. As usual in this part of South Kavirondo all deceased persons have only sons. The chief wrote a letter directing the court that the said parcel was to be transferred to the Applicant.

2. It was later indicated that Wilfred Moindi and Ronald Onjura live on land parcel number South Mugingo Botatori South/485. After the cause was published in the Kenya Gazette, Wilfred Moindi Onjure appointed advocates to act on his behalf.

3. An application was filed by the said Wilfred. He stated that the objector was a grandson of the late Moindi Oketch.

4. She stated further that the first house was given to land parcel number South Mugingo Botatori South/1474 when the deceased was alive. The 2nd wife, Nyanchama Moindi had two sons both of whom are deceased. He stated that Charles Osindi was given Land Parcel No. South Mugirango Botabori South/1483. She graciously annexed maps.

5. None of the parties alluded to how many other dependents including daughters the deceased had. The Replying affidavit contracted the position taken when the letters of administration intestate were applied for. The Appellant applied for letters as a wife of a monogamous man.

6. Wilfred then went ahead to state that the applicant is considered a son since dowry was paid to from one of the deceased daughters. I shall not deal with these part of jokes. These can be easily dealt with at www.laughfactory.com or such other sites for these kind of jokes.

7. The 1st wife of Charles Onchieke gave a statement. By its order dated 22/1/2021, the court ordered that succession cannot be done on one parcel. The objector had also not been included. The court therefore directed that all beneficiaries of the estate be included and all parcels of land. The court did not name any party or any parcel. The parcels referred to in the succession cause were Land Parcel No. South Mugirango Botabori South/1483, Land parcel No. South Mugirango Botabori South/1475, Land parcel No. South Mugirango Botabori South/ 483, Land parcel No. South Mugirango Botabori South/484 and Land Parcel No. South Mugirango Botabori South/488.

8. The objector was recognized as a beneficiary. Though no appealable order was made, the appellant filed a homogenous 5 grounds of Appeal. The grounds are longer than the Rulings itself.

9. Order 42 Rule 1 of the *Civil Procedure Rules* provides are doth: -

> " 1. Form of appeal –
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> 1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading. (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.

10. The Court of Appeal had this to say about compliance with Rule 86 of the *Court of Appeal Rules* (which is pari materia with Order 42 Rule 1 of the Civil Procedure Rules) in the case of *Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat* [2020] eKLR: -

> " We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of *rule 86 of the Court of Appeal Rules*. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See *Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others [2013] eKLR*) and *Nasri Ibrahim v. IEBC & 2 Others [2018] eKLR*. In the latter case, this Court lamented:
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> > "We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs." The 18 grounds of appeal presented by the appellant, Robinson

Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues..."

11. In the case of *Kenya Ports Authority v Threeways Shipping Services (K) Limited* [2019] eKLR, the Court of Appeal observed that: -

> " Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether *Section 62 of the Kenya Ports Authority Act* ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. *In William Koross v Hezekiah Kiptoo Kimue & 4 others, Civil Appeal No. 223 of 2013*, this Court stated:
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> > " The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better."

12. The rest of the issues are ancillary, repetitive, prolixious and a waste of judicial time. The question this court will have to deal with is whether the magistrate's court had jurisdiction to hear and determine this dispute. This is the only issue addressed in submissions before the court below and before this court.

13. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

14. In the case of *Mbogo and Another v Shah* [1968] EA 93 where the Court stated:

> " ...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

15. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of *Selle and another v Associated Motor Board Company and Others* [1968] EA 123, where the law looks in their usual gusto, held by as follows; -

> " .. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

16. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

17. In the case of *Peters v Sunday Post Limited* [1958] EA 424, court therein rendered itself as follows: -

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

18. The duty of the first appellate court remains as set out in the Court of Appeal for *Eastern Africa in Pandya v Republic* [1957] EA 336 is as follows: -

> " On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

19. In *Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd* (2017) eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth: -

> " Courts adopt the objective theory of contract interpretation and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. This is what sometimes is called the principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it.
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> In *Prudential Assurance Company of Kenya Limited v Sukhwender Singh Jutney and Another, Civil Appeal No. 23 of 2005* the Court citing a passage in Odgers Construction of Deeds and Statutes (5th edn.) at p.106 emphasized that in construing the terms of a written contract;
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> > " It is a familiar rule of law that no parol evidence is admissible to contradict, vary or alter the terms of the deed or any written instrument. The rule applies as well to deeds as to contracts in writing. Although the rule is expressed to relate to parol evidence, it does in fact apply to all forms of extrinsic evidence."

20. The trial court and this court will similarly construct documents as there are no witnesses required to know the content of a document. Therefore, where the findings of the trial Court are consistent with the evidence generally, this Court should not interfere with the same.

21. The question herein is whether there is a valid appeal.

22. The question parties are dealing with is whether there were gifts inter vivos. This is within the province of the court dealing with confirmation. The issues raised in the Appeal do not raise any issue worthy

dealing with at Appeal level. in the Appeal. This is a matter that did not merit being admitted. It slipped through.

23. An order to include an admitted beneficiary as a beneficiary is not an appealable order. An order to have all assets listed is not an adverse order.

24. In the circumstances I will not waste Judicial time analyzing a vexatious appeal. The order made by the court was a proper one. Whether the beneficiaries are entitled to benefit after getting other parcels (did they?) is a completely different ball game. I find no merit in the Appeal and dismiss the same in limine with costs of Ksh. 75,000/= to the Respondent.

25. I direct that the court proceeds forthwith to give directions. All the administrators are to make an application for confirmation of the grant. All daughters of the estate be listed and served.

26. Though the matter is a family dispute the Appeal is vexatious hence the need to punish the Appellant with costs of 75,000/=.

27. This appeal file is closed.

**Determination**

28. In the circumstances, I make the following determination: -

    a. The Appeal lacks merit.

    b. Costs of Ksh. 75,000/= to the Respondent.

    c. File is closed.

    d. The lower court file be listed on 28/3/2024 for directions on hearing.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 7TH DAY OF MARCH, 2024 JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

In the presence of: -

Moerwa Omwoyo & Co. Advocates for the Appellant

T.N. Okwemwa & Co. Advocates for the Respondent

Court Assistant - Brian