Mololu v Kimetto (Civil Appeal 54 of 2022) [2024] KEHC 5422 (KLR) (3 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5422 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERICHO

CIVIL APPEAL 54 OF 2022

JR KARANJA, J

MAY 3, 2024

BETWEEN

ALEXANDER MOLOLU ..... APPELLANT

AND

PAUL KIMUTAI KIMETTO ..... RESPONDENT

JUDGMENT

1. This appeal arises from the ruling of the Senior Resident Magistrate at Kericho made on the 30th September, 2022 in Kericho Succession Cause No.99 of 2018, in which the respondent herein, Paul Kimutai Kimeto, was the petitioner respecting the petition for letter of Administration. Intestate filed therein on 4th June 2019 with regard to the estate of the late Tiangik Arap alias Tiongik Maina (deceased) who died as per the death certificate dated the 5th June 1987, on the 28th December 1986 at the age of seventy six (76) years.

2. The affidavit in support of the petition dated 30th May 2018 indicated that the deceased's assets comprised of a parcel of land described as parcel No.Kericho/Nyamanga/341 valued at Kshs.5 million.

   The affidavit also indicated that the deceased was married to two wives during his life time i.e Catherine Maina (deceased) and Martha Maina (deceased).

3. The first wife (Catherine) was the head of the first house and was blessed with three sons and one daughter. The appellant, Alexander Molulu, was the youngest son. Ahead of him were his brothers, Kipkoech Mololu (deceased) and Johnstone Molulu. Their only sister was Annah Chelangat.

4. The second wife (Martha) was the head of the deceased's second house and was blessed with three daughters and three sons. The daughter were Elizabeth Mololu, Selly Mololu and Edina Mololu. The respondent herein was one of the sons. His brothers were Samwel Kimeto eldest son and Henry Kimeto (youngest son).

5. The record indicates that pursuant to the respondent's petition, a grant of letters of administration intestate was issued on 1st August 2018. Thereafter, the petitioner (respondent) initially took out the summons for confirmation of the grant dated 12th March 2010, but this appears to have been abandoned in favour of a second application for confirmation of grant vide the summons for confirmation of grant dated 4th November 2019 and filed in court on 28th November 2019, for which an affidavit of protest against the proposed confirmation of granted dated 1st February 2020 was filed by the appellant on the 5th February 2020.

6. The protest proceed to hearing by oral or "viva-voce" evidence and on the 30th September 2022, the trial court delivered the impugned ruling in which it concluded thus:-

> "It is my findings therefore that the mode of distribution proposed by the protestor is not in accordance with the law as it is against the rule of equality in distribution of an intestate property. It is unfair and unjust as stated that the aim of succession is not to achieve perfect equality but to do equity. The protestors protest is without merit and this court makes an order that the total parcel of the deceased's to be sub-divided equally among the two houses and each house to get 21.48 acres each. This will be considered in law as equitable and just. If that is done, thus the grant will be ripe for confirmation. Hence the protestors protest is hereby dismissed. This being a family matter each party to share own costs."

7. Ironically, after this ruling the petitioner purported to file yet another application for confirmation of grant vide the summons for confirmation of grant dated 15th November 2022 and filed in court on 25th November 2022. Clearly, the application was misconceived and of no effect. Eventually, arising from the impugned ruling, the grant issued to the respondent on 1st August 2018 was confirmed and the certificate of confirmation of grant dated 22nd February 2023 was issued to that effect thereby distributing the estate of the deceased to the rightful beneficiaries in accordance with the schedule of distribution therein.

8. Being dissatisfied with the trials court ruling, hence the distribution of the estate as indicated in the certificate of confirmation of grant, the appellant preferred this appeal on grounds set out in the amended memorandum of appeal dated 14th November 2023 and filed herein on 24th November 2023. The grounds were argued by way of written submissions dated 29th April 2024 and filed herein on behalf of the appellant by J. K. Rono & Co. Advocates.

9. The respondent opposed the appeal as argued in the written submissions dated 1st May 2024 and filed on his behalf by Mwita & Co. Advocates.

   The rival submissions have been duly considered by this court as against the grounds of appeal and the record.

   The duty of this court was therefore to reconsider the evidence availed at the trial court and arrive at its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

10. However, before turning to the evidence it would be prudent for the court to consider the propriety or otherwise of the record of appeal. The respondent argued herein that the record of appeal as presented by the appellant is fatally and incurably defective for being incomplete in the sense that it does not contain a certified copy of the impugned judgement nor a certified copy of the decree upon which the appeal lies.

11. This argument would receive favour from this court which would add that the manner in which the record of appeal was prepared and presented to the court left a lot to be desired. Apart from certified copies of impugned judgment or ruling and the decree, the record does not also contain certified copies of the proceedings and any documentary exhibits that might have been produced during the trial. It is so sketchy and haphazardly done such that the court could not figure out where it starts and ends and had to resort to the trial court's original record to know and understand what transpired during the trial process.

12. It may therefore be stated that the record is not in keeping with the relevant rule of Order 42 of the *Civil Procedure Rules*, hence incompetent and defective before this court.

    Authorities abound on the consequences of failure to adhere to the set rules in the preparation and filing of a record of appeal. These include the authorities cited by the respondent in his submissions which can be summarized by the holding by the Supreme Court of Kenya (SCOK) in the case of *Bwana Mohamed Bwana v Silvano Buko Bonayo & Others* [2015]eKLR to wit:-

    > "Without a record of appeal a court cannot determine the appeal cause before it. If the requisite bundle of documents is omitted, the appeal is incompetent and defective, for failing the requirements of the law. A court cannot exercise its adjudicatory powers conferred by law, or *the constitution* where an appeal is incompetent. An incompetent appeal divest a court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues."

13. The same position would apply where the record of appeal is incomplete such as in this case. This reason alone qualifies this Appeal for dismissal for being incomplete and defective before this court.

    However, this Court would regard such incompetence and defect to be factors touching more on procedural technicalities rather than the substances of the matter and therefore curable by dint of Article 159 (2) (a) of *the Constitution* which behoves the Courts to administer Justice without undue regard to procedural technicalities. It is on account of this Constitutional Provision that this appeal will be left standing rather than being dismissed on arrival.

14. Be that as it may, the evidence availed by both the appellant and the Respondent in the Trial court was given due consideration by this court along with that availed by their respective witnesses. The basic issue which emerged was not with regard to the issuance of the impugned grant to the Respondent, but in the manner the estate property was to be distributed among the beneficiaries. The Appellant's protest was aimed at the distribution of the estate in the manner suggested or proposed by the Respondent as the administrator of the estate.

15. The Trial Court considered the protest on the basis of the applicable law and the evidence and dismissed it thereby allowing the Respondents application for confirmation of the grant and distribution of the estate in the manner proposed and impliedly approved by all the beneficiaries.

    It is imperative to note that although the question of jurisdiction arose during the hearing of the protest, it was only raised during the stage of final submissions but not prior to the start of the hearing.

16. It may therefore be opinioned that having accepted the jurisdiction of the Court from the very beginning the Appellant could not turn around in the last minute and shout "Jurisdiction" and having done so, his lack of good faith in challenging the Court's jurisdiction to hear the matter was clearly on display.

The question has again been raised in this appeal and all that this court can say in disposing it of is that the lower trial court had the power or jurisdiction to deal with the matter considering that the objection to the Court's jurisdiction was anchored on monetary jurisdiction which the trial court was conferred with regard being given to the fact that the estate property was at the time of the petition in the year, 2018 estimated to be worth 5 Million which therefore brought it within the jurisdiction of the trial court which was said to have a jurisdiction of seven (7) million shillings at the time.

17. Land is a commodity whose value always appreciates such that the current value of the estate may exceed way above the Kshs.20 Million mark reserved for the lower court at the level of a Chief Magistrate, or thereabout. That would not therefore mean that because the value of the property has since shot-up tremendously, that a trial court did not have the jurisdiction to deal with the matter at the material time.

18. In any event, the trial Court considered the issue of jurisdiction and dismissed the objection raised by the Plaintiff/Appellant in respect thereof for want of merit and for having raised it belately.

    For avoidance of doubt this Court observes that the matter before the trial court was purely a succession dispute in relation to an intestate succession where the deceased was a polygamist with two wives or households.

19. Any dispute that may have arisen after the confirmation of the grant pertaining to land ownerships or land boundary and related matters were no longer within the jurisdiction of a succession court but a Land and Environment Court.

    The material protest was on the distribution of the estate.

20. The Appellant and his witnesses attempted to convince the court that the distribution of the estate in the term proposed by the Respondent and eventually accepted by the Court was contrary to the wishes of the deceased who had already distributed the property among his two houses long before he departed from this world. This was the Appellant's narrative in prosecuting the protest. He therefore pleaded with the Court to reject the proposed mode of distribution and distribute the estate in accordance with the distribution effected by the deceased before his demise.

21. It is clear to this court that the protest proceeded on the assumption that this was a testate rather than an intestate succession. The Appellant implied that the deceased had left a will on how his property was to be distributed upon his demise and that is why he (Appellant) talked of his father's wish to distribute his property even before his demise and his alleged distribution of the property long before he died and even long before the Appellant was born.

22. The appellant undoubtedly misdirected himself by implying that his father left a Will, for that matter, on oral Will. He could not prove the fact and in any event, he conceded in the evidence that the deceased did not make a Will. What he was suggesting and strived to prove albeit, unsuccessfully was that the deceased subdivided his land and gifted his two houses in equal or unequal share the sub-divided portions. This fact was not and could not be proved by the appellant. He could not even state with certainty that their father gifted both houses portions of his land during his lifetime. His evidence was simply based on rumours and hearsays from people who claimed to ...know, yet they did not know or to put it in Kiswahili Language "Walijua hawajui".

23. It is the finding of this Court that the Appellant did not establish and prove his protest which was "Prima-Facie" unwarranted and a reflection of the Appellant wanting to eat more than he could swallow.

In sum, this court is in total agreement with the aforestated conclusions of the trial court which were arrived at after the court rightly observed and rendered itself as follows: -

> "It was the submission by Rono Advocate for the protestor that the deceased sub-divided his land in 1946 and that all the two houses have been living in harmony knowing the same. Nothing was produced in this Court to support the claim. As indicated by the three witnesses of the Petitioner and the submission by the Advocate that as family members and elders at that time, the deceased never notified them as was the tradition that he had sub-divided his land the way it is and that each house could take what they were occupying when he was a life (sic). The Chief was also not notified and any of his relatives and there was no any sub-division and as submitted by Bett for the Petitioner that he who alleges must prove that allegations as per Section 107 of the *Evidence Act*".

24. The trial further observed: -

> "In the case of *In the matter of the Estate of Zephania Avoni Anyoni* [2010] eKLR, The Court stated that "where the deceased bequeaths his property during his lifetime, he is said to have given a gift inter vivos to the done (sic), The same can be done by way of registered transfer or by way of declaration of trust in writing. Any gift as a principle must be backed by some memorandum in writing, and the gift be complete once title to the subject property transferred to the name of the beneficiary of the gift". This has not been seen in this case. Hence it is my finding that the land of the deceased was never sub-divide (sic) before be died. He had not distributed his estate before he died to his two houses."

25. For all the reasons foregoing all the eleven (11) grounds of Appeal are unsustainable thereby rendering this appeal devoid of merit. The Appeal is therefore dismissed with costs to the Respondents.

DELIVERED, DATED AND SIGNED AT KERICHO THIS 3RD DAY OF MAY, 2024.

J. R KARANJAH

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR