



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO. 23 OF 2018

GEORGE KAMAU RURIA.....1ST APPELLANT

JOE NJERUY RURIA.....2ND APPELLANT

VERSUS

MICHAEL WAWERU M'WANDIA.....RESPONDENT

JUDGMENT

A. Introduction

1. This is a judgment in relation to the appeal against the judgment of the trial court (Hon. L.K. Mwendwa SRM) delivered on 24.05.2018 in Runyenjes PM's Court Succession Cause No. 100 of 2015 and wherein he found in favour of the respondent and in doing so, upheld the respondent's protest to the mode of distribution as was proposed by the appellants herein in their summons for confirmation of grant filed in the trial court. The Learned Magistrate ordered that fresh summons be filed taking into consideration the interests of the respondent herein. The respondent's claim was based on an alleged purchase of one (1) acre out of LR Kyeni/ Mufu/ 3224.

2. Aggrieved by the said judgment, the appellants herein filed the instant appeal which was commenced by way of a memorandum of appeal dated 21.06.2018 and wherein they raised ten (10) grounds of appeal.

3. The appeal was canvassed by way of written submissions. In support of the appeal, the appellants submitted that the trial court erred in finding that the agreement in issue existed and further that the respondent herein indeed fulfilled his part of bargain under the said agreement but which facts he did not prove. It was submitted that there was no valid sale agreement between the respondent and the deceased whose estate is subject of this appeal to warrant the respondent's inclusion of his interest in the said estate. Further that there was no evidence of payment of the purchase price to the deceased and that the agreement was invalid for want of land control board's consent and thus the sale was void. Reliance was made on the case of **Isaac Ngatia Kihagi –vs- Paul Kaiga Githui (2017) eKLR.**

4. The respondent on his part submitted that he bought one acre out of LR Kyeni/ Mufu/ 3224 and paid full purchase price and after which the said land was sub-divided and he took possession of the said one acre and has been in possession thereof since 1988 but the deceased died before he could transfer the same to him. He submitted that the trial court was right in finding that there was a valid sale agreement and that there was payment of the full purchase price and as a result of which, the deceased never demanded any money from the respondent until his demise in 1993.

5. This being the first appellate court, its duty is now settled and it is to revisit the evidence on record, re-evaluate it and reach its own conclusion in the matter. This court ought not to interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. (See **Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga –versus- Kiruga& Another (1988) KLR 348**). See also section 78 of the Civil Procedure Act, Cap 21 Laws of Kenya which requires a first appellate court "to re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions.

6. I have definitely analyzed the evidence which was tendered before the trial court. In a nutshell, the case before the trial court is that the appellant herein petitioned for letters of administration in relation to the estate of Joseph Ruria Mutugati (deceased) in Runyenjes PM's Court Succession Cause No. 100 of 2015 and after which a grant of letters of administration intestate was made to them on 10.11.2015. They then proceeded to file for confirmation of the said grant vide summons for confirmation of grant dated 5.08.2016 but which summons were opposed by the respondent herein vide an affidavit of protest sworn on 19.12.2016. The basis of the said protest was that the respondent herein bought one acre from land parcel No. Kyeni/Mufu/3224 from the deceased in 1988 for Kshs. 45,000/- and which amount the deceased acknowledged receipt of but died before he could effect the transfer thereof. That he had been in possession of the said one acre and had made extensive development in relation to the same and as such, he protested the mode of distribution by the respondents in that they did not

recognize his interests in the said estate.

7. The 1st appellant herein filed their replying affidavit to the affidavit of protest and wherein he deposed that land parcels Kyeni/Mufu/3222, 3223 and 3224 did not exist as forming part of the estate of his deceased father and that the deceased's estate was made up of LR Kyeni/ Mufu/ 2995. The 1st appellant further denied the existence of a sale agreement between the respondent herein and the deceased and deposed that the same was a forgery and a nullity as the same was not witnessed as required by law and neither was the consent of the Land Control Board obtained within six (6) months from the date of the agreement. The payment of the whole of the purchase price and occupation of the said one acre was further denied in the said affidavit and it was deposed that the protest ought to fail.

8. From the analysis of the above evidence which was before the trial court, the grounds of appeal filed herein and the parties' rival submissions, it is clear that the issue which I am invited to decide is on whether the trial court erred in its decision allowing the protest by the respondent.

9. As I have already noted, the respondent's protest is premised on a sale agreement entered into between the deceased and the respondent herein. The appellants in their response to the said protest deposed that the said agreement was not valid as the same was not witnessed (attested) as required by the law and further that the same was void for want of consent of Land Control Board. The respondent further opposed the protest on the basis that the protester (respondent herein) had not paid the whole of the purchase price. As such, the trial court was being invited to decide as to whether the said agreement was valid and then enforce the same and which invitation the trial court indeed accepted.

10. It has been held by the superior courts that the jurisdiction of a probate court is with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. For instance, Musyoka J in Re Estate of Alice Mumbua Mutua (deceased) (2017) eKLR held that (and which holding I find persuasive); -

“The Law of Succession Act, and the Rules made there under, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.

27. Disputes of course do arise in the process. The provisions of the Law of Succession Act and the Probate and Administration Rules are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who are neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the Law of Succession Act and the Probate and Administration Rules. Such have to be resolved through the structures created by the Civil Procedure Act and Rules, which have elaborate rules on suits by and against executors and administrators.

28. The Probate and Administration Rules recognize that, and that should explain the provision in Rule 41(3), which provides as follows –

‘Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or property comprising it to abide the determination of the question in proceedings under ... the Civil Procedure Rules ...’

11. In the instant case, the respondent herein is not a beneficiary of the estate as he is not a child of the deceased. He however claims having purchased part of the said estate and which claim makes him a creditor.

12. In my view, the trial court ought to have noted that the claim before it was not based on a settled claim but was a disputed claim of purchase of the suit property. Having noted the same, it ought to have further noted that the claim before it was based on an enforcement of a sale agreement for land.

13. The trial court upon having noticed the above ought to have proceeded in the manner as was set out by the court in Munyasya Muliliv's Sammy Muteti Mulili Succession Cause 265/2004 where the Learned Judge held that;-

“29. Clearly, disputes as between the estate and third parties need not be determined within the succession cause. The legal infrastructure in place provides for resolution elsewhere, and upon a determination being made by the civil court, the decree or order is then made available to the probate court for implementation. In the meantime, the property in question is removed from the distribution table. The presumption is that such disputes arise before the distribution of the estate, or the confirmation of the grant. Where they arise after confirmation, then they ought strictly to be determined outside of the probate suit, for the probate court would in most cases be functus officio so far as the property in question is concerned. The primary mandate of the probate court is distribution of the estate and once an order is made distributing the estate, the court's work would be complete. The proposition therefore is that not every dispute over property of a dead person ought to be pushed to the probate court. The interventions by that court are limited to what I have stated above.”

14. The respondent's claim could only have been adjudicated by the trial court (being a probate court) upon crystallization and the said claim having been ascertained by a court of competent jurisdiction and after which it would have been treated as a liability to the estate. (See

Alexander Mbaka –vs- Royford Muriuki Rauni & 7 Others [2016] eKLR). The trial court did not have jurisdiction over the issues raised in the protest and more so the validity of the sale agreement in question for want of attestation and further the issue of the lack of land control board’s consent. Those are issues which can only be determined in another forum.

15. It is my considered view that in the circumstances, the trial court proceeded in a matter wherein it had no jurisdiction and thus acted on the wrong principles of law and the said decision cannot stand.

16. Despite the parties having not raised the issue as to the jurisdiction of the trial court at the hearing of the protest and further having not raised the same in the instant appeal, it is trite that jurisdiction is everything and without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. (See **Owners of the Motor Vessel “Lillian S” –vs- Caltex Oil (Kenya) Ltd [1989] eKLR**). Further, the issue on jurisdiction can be raised by the parties or *suo moto* by the court. In **Hafswa Omar Abdalla Taib & 2 Others –vs- Swaleh Abdalla Taib [2015] eKLR** the Court of Appeal held that;-

“Unfortunately for the parties and despite their industry in ventilating the issue of goodwill, the determination of the appeal will disappoint them as it turns on the question of jurisdiction; that is, whether this Court has jurisdiction to entertain this appeal in the first place. We appreciate that it is an issue that was not raised by any of the parties. However, it is an issue of law that has long been settled and the parties and indeed their legal teams are deemed to know. Accordingly, this Court can suo moto raise and determine the same.”

17. The trial court ought to have acted *suo moto* and dismiss the protest for want of jurisdiction. It is my considered view therefore that its decision in relation to the same was a nullity and cannot stand. Further the merits of the said decision cannot be determined by this court on appeal as essentially there is no decision worth consideration on its merit.

18. However, I note that it is not in dispute that the respondent herein has been in occupation of part of the estate of the deceased and which forms part of land parcel No. Kyeni/ Mufu/ 3224. This court is bestowed with inherent jurisdiction to make orders so as to make the ends of justice meet. The said inherent jurisdiction should be exercised so as to ensure preservation of the estate pending distribution to the rightful beneficiaries. This court has a further duty to ensure that the deceased’s estate is distributed to the rightful beneficiaries.

19. The respondent herein ought to be given an opportunity to litigate before the right forum and prove his claim before the land he is in occupation is distributed. As such, the court ought to make the following orders; -

1. That the land parcel No. Kyeni/Mufu/3224 be set aside from the distribution of the estate herein.
2. That the respondent do file a suit in the right court to have his claim ascertained and determined.
3. The suit to be filed within 45 days from the date of this judgment.
4. The appellants herein do proceed to file a fresh summons for confirmation of grant before the trial court excluding the said land parcel No. Kyeni/Mufu/3224 from the estate available for distribution.
5. Each party to bear his own costs of the appeal.

20. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 21ST DAY OF JULY, 2021

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent