



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO. E016 OF 2021

CONSOLIDATED WITH E017 OF 2021

MATTHEW NJEGA NJOGU.....1ST APPELLANT

CHARLES MAINA NGATIA.....2ND APPELLANT

VERSUS

ROSEMARY MUTHONI NJUE.....RESPONDENT

JUDGMENT

1. The respondent herein petitioned for letters of administration intestate for the estate of Njue Karaga (deceased) in Embu CM's Succession Cause No. 559 of 2016 wherein she stated that she was a wife of the said deceased. The grant of letters of administration intestate was thereafter issued to the respondent herein and after which she applied for confirmation of the grant vide an undated summons for confirmation of grant. The respondent proceeded to file an amended summons for confirmation of grant and the grant was confirmed on 4.07.2017 and a certificate of confirmation of grant issued which was dated 30.11.2017.

2. The 1st appellant herein proceeded to file summons for revocation of grant dated 10.06.2019 and wherein he deposed that, (grounds in support of the summons for revocation of the grant) he purchased Plot No. 62 Embu Site and Service Scheme from the Njue Karaga (deceased herein) and which sale was handled by their mutual advocate M/s Waweru Gatonye & Co. Advocates and as thus, the said plot did not form part of the estate of the deceased. That the 1st appellant had been in quiet and uninterrupted occupation since the time of sale 1982) whereafter he proceeded to develop the same and he has paid the full purchase price and all the outstanding rates and interests thereon. However, the Municipal Council of Embu (defunct) did not effect the transfer of ownership to him despite the various requests by his advocate.

3. That the respondent herein proceeded to write a letter to the tenants thereon requesting that they deposit the rent with her with effect from 1.06.2017 failure to which, eviction proceedings would be commenced against them for distress for rent and in so doing the respondent took advantage of the fact that the suit plot had not been transferred to him (1st appellant). He then filed a suit being Embu ELC No. 107 of 2017 simultaneously with an application seeking interim orders and the court issued restraining orders against the respondent herein and one Mary Rita Ileri and which orders restrained them from interfering with the management, occupation, entering, trespassing, selling, transferring, alienating, damaging, developing and/ or interfering in any way with the said plot. That as such, the amended grant obtained by the respondent herein on 4.07.2017 including Plot No. 62 as forming part of the estate of the deceased was obtained fraudulently and by concealing from the court that there was a court order made on 13.06.2017 and confirmed on 8.03.2018 restraining the respondent by way of injunction from interfering with the said plot. Further that the respondent herein did not include the said plot as forming part of the estate of the deceased in the initial application for confirmation of grant but the same was introduced in the subsequent amended summons for confirmation of grant after she was assisted by one Mary Rita Ileri to trace the same. The 1st appellant herein reiterated that the said plot did not form part of the estate of the deceased.

4. The 2nd appellant herein also filed summons for revocation of grant dated 22.10.2019 and wherein he deposed that he was a beneficiary and a purchaser of the estate of the deceased and that the respondent herein filed amended summons for confirmation of the grant without making any notice to him and without including him. He deposed that as such, the certificate of confirmation of grant was obtained fraudulently and through concealment of material facts to the court to the effect that he had bought the suit land herein and that the respondent had in fact included him as a beneficiary in the initial summons for confirmation of the grant. However she excluded him in the amended summons for confirmation of grant.

5. The respondent herein opposed the application by the 1st appellant by way of a replying affidavit sworn on 1.10.2019 and wherein she deposed that the 1st appellant was not a beneficiary of the estate and thus, had no locus standi to bring the said application. Further that if

there was any violation of the said orders then the recourse would have been in citing the respondent for contempt of court but not to apply for revocation of the grant. She also deposed that the orders of 8.03.2018 in Embu ELC case No. 107 of 2017 did not in any way affect the succession proceedings and that the grounds raised by the 1st appellant were not good enough to warrant revocation of the grant. Further that the orders relied on were issued on 8.03.2018 long after the confirmed grant had been issued and that at the time the 1st appellant moved to court for the said orders, the respondent herein had already made the application for confirmation of the grant. She further deposed that the issue as to ownership of land was yet to be determined by the Environment and Land Court and as such the 1st appellant herein could not claim ownership thereof.

6. The respondent further opposed the application by the 2nd appellant and wherein she deposed that the 2nd appellant having bought the suit land from her as per the agreement dated 15.09.2008 refused and/ or declined to clear the purchase price as agreed and he never paid the balance of Kshs.100,000/- and that she did not enter into the subsequent (second) sale agreement as was alleged but the 2nd appellant was always evasive when asked about the balance. That the 2nd appellant herein delayed the process until the agreement became void and the value of the suit property escalated and as such the said agreement could not be enforced due to effluxion of time and that the 2nd appellant herein was the one who was in breach of the said agreement. She thus prayed that the application be dismissed with costs.

7. The two applications were ordered to be heard together and by way of written submissions.

8. The trial court proceeded to consider the said applications and vide a ruling delivered on 30.03.2021, the two applications were dismissed and costs awarded to the respondent herein (the respondent in the said applications). Basically the trial court found that it had no jurisdiction over the issues raised in the two applications.

9. It is this ruling which necessitated the instant appeal.

10. The 1st appellant filed a memorandum of appeal in Embu High Court Civil Appeal No. 17 of 2021. However, from the record, it appears that he abandoned the said appeal and proceeded to file his submissions in the court file herein. In the said submissions he submitted in support of the grounds of appeal as were postulated in the memorandum of appeal he had filed in the said Embu High Court Civil Appeal No. 17 of 2021.

11. As such, I am of the view that the two appeals can be considered simultaneously and I will proceed on that footing.

12. The grounds of appeal raised by the 1st appellant herein are as follows;-

1) That the trial court erred in law and in fact by dismissing the application for summons for revocation of grant dated 10.06.2019 on the grounds that it did not have jurisdiction to hear and determine the 1st appellant's claim as a purchaser under section 76 of the Law of Succession Act.

2) That the trial court erred in law and fact in misinterpreting section 76 of the Law of Succession Act and failed to find that the 1st appellant being a purchaser of the property forming part of the deceased's estate (plot No. Embu Municipality 1112/831 also known as Plot No. 62 Embu Site and Service Scheme) qualified as "an interested party" within the meaning of section 76 of the Law of Succession act and had a right of expectancy in the deceased estate which vested in him a right to move the court seeking revocation of the grant

3) That the trial court erred in law and in fact in failing to find that the respondent herein obtained the grant fraudulently by making a false statement to the effect that the suit plot formed part of the estate of the deceased and ended up inheriting the same.

4) That the trial court erred in law and fact in failing to find that the respondent herein had concealed from court the fact that the appellant herein had been in possession of the suit plot for over 30 years and the suit plot did not form part of the estate of the deceased.

5) That the trial court erred in failing to find that the injunction issued in Embu ELC Case No. 107 of 2017 was sufficient to justify revocation of grant as the same was issued to protect interference with the same

6) That the trial court erred in law and in fact in his ruling which he overturned the ELC Court order of injunction issued on 8.03.2018 as the ruling enabled the respondent herein to interfere with the suit plot which was against the orders of injunction.

7) That the trial court erred in law and in fact in applying section 30 of the Law of Succession Act in his finding that he could not revoke the grant since it had been confirmed as opposed to section 76 of the Law of Succession Act under which the appellant brought his application for revocation.

8) That the learned trial magistrate erred in law and in fact in dismissing the appellant's application dated 10.06.2019 and thereby awarding costs to the 1st respondent and wherein it was the 1st respondent who necessitated the application for revocation because she obtained the grant fraudulently and concealed from the court that the appellant was in ownership and possession of the plot for over 30 years.

13. The 1st appellant as such prayed that the appeal be allowed and the judgment be entered in favour of the appellant and the judgment of the learned trial magistrate be set aside and that the court do award costs of the suit to the appellant and the costs of the appeal be borne by the respondent.

14. The 2nd appellant herein also being dissatisfied with the ruling by the trial court filed his appeal vide a memorandum of appeal dated 20.04.2021 and wherein he raised eight (8) grounds of appeal. In a summary, the 2nd appellant challenged the said ruling on the basis that:-

1) *The trial magistrate erred in law and fact by delivering a ruling against the 2nd appellant despite the weight of evidence against the 2nd appellant's claim.*

2) *The trial magistrate erred in law and fact by failing to consider the sale agreement dated 15.09.2008 for LR No. Ngandori/ Kangaru/ T.167 measuring 0.048 Ha entered between the 2nd appellant and the respondent at a consideration of Kshs. 150,000/- and later revised on 23.07.2009 at Kshs. 205,000/-.*

3) *The trial magistrate erred in law and fact by failing to consider that during the purchase of the Land Parcel No. LR No. Ngandori/ Kangaru/ T.167 the same was registered in the names of Njue Karaga (deceased).*

4) *The trial magistrate erred in law and fact by failing to consider that the respondent filed summons for confirmation of grant including the 2nd appellant as the beneficiary to get a share of Land Parcel No. LR No. Ngandori/ Kangaru/ T.167 measuring 0.048 Ha.*

5) *The trial magistrate erred in law and fact by failing to consider that the respondent fraudulently and secretly filed amended summons for confirmation excluding the 2nd appellant as the beneficiary without his knowledge and consent and replacing her names to get Land Parcel No. LR No. Ngandori/ Kangaru/ T.167.*

6) *The trial court erred in law and fact in condemning the appellant to pay the costs to the respondent whereas the application was dismissed.*

7) *The trial magistrate erred in law and in fact by finding that the applicant did not have a chance to explain or ventilate his claim.*

8) *That the trial magistrate erred in law and fact in dismissing the applicant's application against the respondent with costs on the fact that the evidence produced was water-tight.*

15. The appellant as such, prayed that the ruling of the Honourable H. Nyakweba dated 30.03.2021 be set aside and an order be made for the 2nd appellant as prayed in the application dated 22.10.2019; that the respondent be condemned to pay the costs of the appeal and those of the lower court; and any other relief that the court may deem fit to grant.

16. The appeal was canvassed by way of written submissions.

17. On behalf of the 1st appellant and in support of grounds 1 and 2 of appeal, it was submitted that the trial court erred in finding that it had no jurisdiction to hear the appellant's claim as a purchaser under section 76 of the Act. He reiterated that the court had jurisdiction to entertain the said application on the basis of the injunction orders made by the court in Embu ELC No. 107 of 2017 which had been issued preventing any dealings with the suit land and the existence of which orders the respondent herein did not disclose to the court. Further that, the court had jurisdiction to revoke the grant for the reasons that he had purchaser's interests in the suit land and as such, he was an interested party within the meaning of section 76 of the Law of Succession Act. Reliance was made on the case of **Musa Nyaribari Gekonde & 2 Others –vs- Peter Miyienda & Another (2015) eKLR** and **in Re Estate of Mary Chesiroyebei (deceased)[2019] eKLR**.

18. The appellant further reiterated that the trial court erred in law and fact in failing to find that the grant was obtained fraudulently by making a false statement to the effect that the suit plot formed part of the estate of the deceased whereas he knew that the 1st appellant was in uninterrupted possession of the same for over 30 years having bought the same from the deceased and wherein he produced overwhelming evidence in support of the said purchase. Further that he failed to disclose the existence of the injunction orders issued by the ELC Court. Further that the trial court erred in finding that the grant could not be revoked as it had already been confirmed and in ordering that the appellant do pay the costs of the application.

19. It was submitted on behalf of the 2nd appellant that the 2nd appellant was claiming the Land Parcel No. LR No. Ngandori/ Kangaru/ T.167 measuring 0.08Ha whereby on 15.09.2008 he entered into a sale agreement with the respondent for the sale of the said land at a consideration of Kshs. 150,000/- to enable her file the succession cause and at the time of the said purchase, it was registered in the name of Njue Karaga (deceased) and who was the husband to the respondent herein. That after the said purchase, the respondent put the 2nd appellant into vacant possession immediately and he build a house and also planted macadamia, graveria and mango trees and also napier grass and the respondent proceeded to file a succession cause being Embu High Court Succession Cause No. 412 of 2009. Further that the respondent called the 2nd appellant and after which it was agreed that they enter into a revised sale agreement for the suit land herein and which revised agreement was entered on 23.07.2009 and he cleared all the outstanding balance.

20. The respondent filed summons for confirmation of grant and wherein the 2nd appellant was included as a beneficiary to inherit the suit land herein but the respondent later fraudulently and secretly filed an amended summons for confirmation of grant dated 29.05.2017 without the 2nd appellant's knowledge and consent whereby she excluded the 2nd appellant from the said summons. That the grant was subsequently confirmed and the respondent was issued with certificate of confirmation of grant and after which the 2nd appellant applied for revocation of the said grant and the suit land herein do revert to the names of the deceased but which application was dismissed vide the impugned ruling. He submitted that as such, he prayed that the said ruling be set aside and orders be made in favour of the 2nd appellant as was prayed in the application dated 22.10.2019.

21. There were no submissions on behalf of the respondent at the time of writing this judgement.

22. As it is now settled by the numerous authorities both by this court and the superior courts, the duty of this court as the first appellate court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. Further, this court ought not to ordinarily 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).

23. I have indeed re-evaluated the evidence which was tendered before the trial court and also perused through the pleadings which were before the learned trial magistrate as can be seen above. As I have already noted, there are two separate memoranda of appeal and each of the appellant raised his own grounds. However, I note that the 1st appellant raised a ground as to the trial court having erred in finding that it had no jurisdiction to determine the application before it. I also note that all the other grounds of appeal in the two memoranda basically challenges court's decision in failing to revoke the grant and failing to recognize their claims over the estate. The appellants further raised a common ground of appeal to the effect that the trial court erred in law and fact in awarding the costs to the respondent yet it's her actions which necessitated the filing of the applications. It is my view that in the circumstances the issues for determination herein are:-

1) *Whether the trial court erred in finding that it had no jurisdiction over the said application and if not,*

2) *Whether the trial court erred in law and in fact in failing to revoke the grant of letters of administration issued to the respondent herein based on the grounds presented before it by the appellants herein in their respective applications*

3) *Whether the trial court erred in awarding costs of the applications to the respondent herein.*

24. As to whether the trial court erred in finding that it had no jurisdiction to determine the applications by the appellants herein, as I have already noted, the appellants filed before the trial court two separate applications seeking revocation of the grant. The 1st appellant's case was basically that he was a purchaser of plot No. Embu Municipality 1112/831 also known as Plot No. 62 Embu Site and Service Scheme and having bought the same from the deceased. As such, the plot did not form part of the estate of the deceased. He annexed to the application evidence in support of this fact. His case was that the respondent herein failed to disclose the fact that there were interim orders issued in the ELC court (at the time she filed for confirmation of grant). The 2nd appellant's case on the other hand was that he purchased Land Parcel No. LR No. Ngandori/ Kangaru/ T.167 from the respondent herein.

25. As such, basically, what the trial court was invited to do in the two applications was to revoke the grant based on the said interests.

26. The respondent herein opposed the application and wherein she deposed that the 1st appellant was not a beneficiary of the estate and that the fact that there were orders of injunction did not mean that the suit plot belonged to him (1st appellant). In relation to the 2nd application the respondent herein deposed that the 2nd appellant did not honor the agreement by paying the whole of the purchase price.

27. Revocation of grant is provided for under section 76 of the Law of Succession Act. The grounds upon which the grant may be revoked are well provided therein. The said section provides that revocation can either be at the instance of an applicant or can be by the court *suo moto*. However, it is a prerequisite that the conditions for revocation as set out under section 76 must be proved. In the case of Jamleck Maina Njoroge –vs- Mary Wanjiru Mwangi (2015) eKLR the court discussed circumstances when a grant can be revoked. The court observed:

“11. The circumstances that can lead to the revocation of grant have been set out in Section 76 Law of Succession. For a grant to be revoked either on the Application of an interested party or on the court's own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.”

28. *The power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the court to invoke section 76 and order for revocation or annulment of a grant. And when a court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased's estate and ensure that the action taken will be for the interest of justice. (See Albert Imbuga Kisigwa v Recho Kawai Kisigwa, Succession Cause No.158 OF 2000).*

29. Generally, the trial court has jurisdiction to revoke a grant if the conditions under section 76 are satisfied. This is in furtherance of the probate court's duty to distribute free property of the deceased to the rightful beneficiaries. Definitely, where property has been distributed to a wrong beneficiary, the court can revoke the grant and have the property revert back to the deceased for proper distribution.

30. However, a clear look at the grounds in support of the applications for revocation which were before the trial court, the same were basically based on the fact that the appellants herein were purchasers of their respective suit properties. The respondent herein vehemently denied the said claims. This means, therefore, that for the trial court to have revoked the grant, it ought to have determined as to whether the alleged sale of the estate of the deceased by the deceased (in relation to the 1st appellant's claim) and by the respondent (in relation to the 2nd appellant's claim) were valid. In short, there was a dispute as to the ownership of the said properties and the question being whether the same belonged to the deceased so as to form the estate of the deceased. That would mean the court had to decide a question of ownership of the said property as between the estate and the appellants herein. Sale of property is about conveyance of title from the seller to the buyer. The dispute, therefore, is at the heart of title and ownership. Documents were placed on record to demonstrate that there were agreements of sale and that money changed hands.

31. As I have already noted, the jurisdiction of the probate court is always to distribute free estate of the deceased. The **Law of Succession Act** in **section 47** provides for jurisdiction of the High Court in respect of matters falling under the Act as follows:-

The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.

32. **Rule 41(3) of the Probate and Administration Rules** provides that:-

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 of the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71(2) of the Act, proceed to confirm the grant.

33. In the case of **Priscilla Ndubi and Zipporah Mutiga vs Gerishon Gatobu Mbui, Meru Succession Cause No. 720 of 2013**, held:-

“The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified. Thus, where issues of ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed. And that is the very reason why rule 41(3) of the Probate and Administration Rules was enacted so that claims which are prima facie valid should be determined before confirmation.”

34. In **re Estate of Stone Kathuli Muinde (Deceased) [2016] eKLR** the Learned Judge held that:-

“With regard to the assets, one of the questions that may present itself would be the ownership of the assets presented as belonging to the deceased. An outsider may claim that the property does not form part of the estate and therefore it need not be placed on the probate table. The resolution of such questions do not necessitate joinder into the cause of the alleged owner to establish ownership. It is not the function of the probate court to determine ownership of the assets alleged to be estate property. That jurisdiction lies elsewhere.

Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit properly brought before a civil court in accordance with the provisions of the Civil Procedure Act and the Civil Procedure Rules. This could mean filing suit at the magistrates’ courts, or at the Civil or Commercial Divisions of the High Court, or at the Environment and Land Court. If a decree is obtained in such suit in favour of the claimant, then such decree should be presented to the probate court in the succession cause so that that court can give effect to it.”

35. As held in **Alexander Mbaka –vs- Royford Muriuki Rauni And 7 Others [2016] eKLR**;

“It is only where one has established claim against the estate that has already crystallised that he can litigate it before a Family Court. The claim is to be considered as a liability to the estate. This Court, in my view, cannot be called upon to ascertain whether or not one has a right to an estate of the deceased where such right has not yet crystallised. The right must be shown to have crystallised before the Family Court can entertain it.”

36. In the instant case, the claims by the appellants before the trial court were basically based on sale agreements which were refuted by the respondent herein and thus it revolves around ownership of the two disputed properties. Article 162 of the Constitution as read together with article 165(5) of the Constitution and the Environment and Land Court’s Act no. 9 of 2011 establishes the Environment & Land Court and which is bestowed with the jurisdiction to determine issues as to ownership of land (see section 13 of the Act).

37. It is my view that the trial court had no jurisdiction to determine the issue as to ownership of the respective plots/lands as were claimed by the appellants herein. The same falls squarely within jurisdiction of Environment and Land Court. It is the said court which ought to have determined as to the validity of the said agreements or otherwise. Once the said court issues a decree, the same is supposed to be filed before this court for adoption. This is because the appellants’ claim on their respective parcels shall have crystallized so as to be referred to the probate court.

38. I believe it is in appreciation of this fact that the 1st appellant had indeed filed a suit before the Embu ELC being ELC Case No. 107 of 2017.

39. I therefore agree with trial court’s finding that it had no jurisdiction to determine the dispute before it and it cannot be faulted for the said decision.

40. Having found that it had no jurisdiction, it had no any other duty other than to down its tools as a *court of law* down 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**). It cannot be said therefore that the trial court erred in law and in fact by not having revoked the grant made to the respondent at the instance of the applications by the appellants herein.

41. It is my considered view, as such, that on the ground of the want of jurisdiction by the trial court and which I have affirmed, the appeal herein cannot proceed for further consideration on the merits of the applications before the trial court. The two appeals as such ought to fails. As such, issue number two herein is moot.

42. As I have already noted elsewhere in this judgment, both appellants raised a common ground to the effect that the trial court erred in law and fact by awarding costs to the respondent herein. The next issue for determination as such is whether the trial court erred in awarding costs of the application to the respondent herein.

43. The general rule as to costs is provided for in **section 27 of the Civil Procedure Act** which provides as follows:

Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

44. This provision has been the subject of several judicial pronouncements. In the case of **Supermarine Handling Services Ltd –vs- Kenya Revenue Authority Civil Appeal No. 85 of 2006** the Court of Appeal expressed itself thus:

“Costs of any action or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order. It is well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the Judge who tried his case, that discretion is a judicial discretion, and if it be so its exercise must be based on facts. If, however, there be, in fact, some grounds to support the exercise by the trial Judge of the discretion he purports to exercise, the question of sufficiency of those grounds for this purpose is entirely a matter for the Judge himself to decide, and the Court of Appeal will not interfere with his discretion in that instance...Thus, where a trial court has exercised its discretion on costs, an appellate court should not interfere unless the discretion has been exercised unjudicially or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where the reasons are given if it considers that those reasons do not constitute “good reason” within the meaning of the rule...In the instant case the learned Judge gave no reasons whatsoever for his decision to deprive the successful plaintiff of its costs and yet it was not shown that the defendant had been guilty of some misconduct which led to litigation. In the court’s view the learned Judge’s order was wrong and for the foregoing reasons, the plaintiff’s appeal succeeds as to the award of interest and costs on the principal sum awarded.”

45. In **Party of Independent Candidate of Kenya & Another vs. Mutula Kilonzo & 2 Others HCEP No. 6 of 2013**, it was held:

“The main reason why this Petition should be withdrawn is due to the demise of the 1st Respondent. This would call upon the Court considering ordering each party to bear their own costs. In the case of Nedbank Swaziland Ltd verses Sandile Dlamini No. (144/2010) [2013] SZHC30 (2013) Maphalala J. referred to the holding of Murray C J in the case of Levben Products VS Alexander Films (SA) (PTY)Ltd 1957 (4) SA 225 (SR) at 227, who stated as follows:

“It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion (Fripp vs Gibbon & Co., 1913 AD D 354). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at...In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”

46. In this case, the appellants did not prove to this court how the trial court’s discretion has been exercised un-judicially or on wrong principles so as to make this court interfere with the costs. I thus find this common ground baseless.

47. Considering all the above, it is my view that the two appeals herein lack merit. The same are hereby dismissed with costs to the respondent.

48. It is so ordered.

Delivered, dated and signed at Embu this 3rd day of November, 2021.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent