



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITUI**

**CIVIL APPEAL NO. 33 OF 2018**

**MWATI KAKITI NGALAKA.....1<sup>ST</sup> APPELLANT**

**JOHN KIOLI KALUA.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**NZEMBEI KAKITI.....1<sup>ST</sup> RESPONDENT**

**CHARLES KISOO KAKITI.....2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the Ruling and Order in Kitui Chief Magistrate's Court*

*Succession Cause No. 176 of 2012 by Hon. R. Ombata (RM) on 10/07/18)*

**J U D G M E N T**

1. The background of this matter is that a Petition for Letters of Administration Intestate in respect of the Estate of **Kakiti Ngalaka Kalamba** (Deceased) was filed at the **Kitui Magistrate's Court** on the **26<sup>th</sup> September, 2012**. An affidavit in support of the Petition was sworn by the Petitioners disclosing an inventory of assets left by the Deceased as:

- **Kyangwithya/Ndumoni/001**
- **Kyangwithya/Ndumoni/195**
- **Kyangwithya/Ndumoni/215**
- **Kyangwithya/Ndumoni/216**

2. The estimated value of the properties was not given. The aforesaid documents were filed by the firm of **Mulu & Company Advocates**.

3. On the **7<sup>th</sup> day of March, 2013** a grant of Letters of Administration Intestate were issued to **Nzembi Kakiti** and **Charles Kakiti**. Thereafter, **Messrs Kinyua Musyoki and Co. Advocates** who described themselves as advocates acting for beneficiaries of the Estate of the deceased filed a Notice of Appointment on the **12<sup>th</sup> April, 2013** and on the **18<sup>th</sup> day of June, 2013** they filed a caveat on behalf of **John Kioli Kalua** pursuant to the provisions of **Rule 15(2)** of the **Probate and Administration Rules**.

4. Summons for Confirmation of Grant were filed on the **10<sup>th</sup> day of July, 2014** by the Petitioners. A schedule of distribution of the Estate was attached to the affidavit in support of the application.

5. **Mwati Kakiti Ngalaka** one of the Survivors of the Estate of the Deceased from the **1<sup>st</sup> household** filed an Affidavit of Protest to the confirmation of the grant. The Administrators of the Estate had proposed Parcel No. **Kyangwithya/Nduumoni/1** to be shared equally by four households of:-

- **Late Mutendwa Ngalaka**

- Late Malia Kakiti (1<sup>st</sup> wife of Deceased)
- Syokwaa Kakiti (3<sup>rd</sup> wife of Deceased)
- Kamene Kakiti (2<sup>nd</sup> wife of Deceased)

6. In the Affidavit of Protest, **Mwati Kakiti Ngalaka** deposed that during the lifetime his father, (Deceased) he had distributed his share comprising of **5.0 Hectares** being part of **LR Kyangwithya/Nduumoni/1** to **John Muema Ngalaka, Mwati Kakiti Ngalaka** (Protestor) as members of the **Malia Kakiti's** household and they all sold their interests and rights to **John Kioli Kalua** (Caveator).

7. Similarly, **John Kioki Kalua** filed a Protest claiming a portion measuring **12.4 Hectares** that he purchased from **Mwati Kakiti Ngalaka** and **John Muema Kakiti** as survivors in interest to the Estate.

8. A Further and Supplementary affidavits were sworn by **Nzembei Kakiti**, the 1<sup>st</sup> Administrator stating that the Estate had been distributed by the clan and that the purported sale of the Estate of the Deceased was illegal, null and void and that the entire Estate was valued at approximately **Kshs. 2,000,000/=**.

9. At the point of hearing of the Protest, the jurisdiction of the Court was called into question based on the fact that there was non-disclosure of the value of the Estate of the Deceased. **Mr. Kinyua Musyoki**, Advocate for the Protestor urged that the net Estate of the Deceased was worth **Kshs. 15 Million** per the form **P&A 12**. **Mr. Mburu** for the Petitioners/Administrators however argued that it was an error as it was supposed to be **Kshs. 1.5 Million** as confirmed in the Affidavit of Justification. That following the issue of the value of Estate raised, the Court directed the Administrators to swear a Further Affidavit that was done and Estate was estimated to be **Kshs. 2 Million**.

10. The trial Court considered the issue and opined that the supplementary affidavit filed by the Administrator of the Estate sufficed in establishing the value of the Estate. Therefore, the estimated **Kshs. 2 Million** was within the Court's jurisdiction.

11. Aggrieved, the Appellants Appeal on grounds that:

- The learned trial Magistrate erred in law and misdirected herself when she determined the value of the Estate based on the Supplement Affidavit sworn in reply to an Affidavit in Protest to confirmation of grant instead of the value of the Estate given in the Petitioners' affidavits sworn in support of his Petition in forms **P&A 11, 12** and **57**.
- The learned trial Magistrate erred in law and misdirected herself when she failed to apply a keen judicial mind, a misdirection which led her to rely on the wrong record and consequently arrive at the wrong conclusion.
- The learned trial Magistrate erred in law when she held that she has jurisdiction to adjudicate on the Petition even when she has no such jurisdiction.
- The learned trial Magistrate erred in law when she failed to consider the matter as a whole, a misdirection which led her to base her decision on the pleaded value of a portion of the Estate instead of the value of the whole Estate, thereby rendering her decision null and void.
- The learned trial Magistrate erred in law and misdirected herself when she failed to uphold the Appellants' preliminary point of law even when it was clear that the point of law had merit.

12. The Appeal was canvassed by way of written submissions. It was urged for the Appellants that the jurisdiction of the Subordinate Court is limited by the statute and where the value of the Estate is not disclosed the application is rendered incompetent. That the Court should have looked at the primary documents filed to ascertain the value of the Estate and it was erroneous on the part of the trial Court to conclude that the value of the Estate was **Kshs. 2 Million**.

13. The Respondents on their part urged that the matter has been pending in Court for the last seven (7) years because of the Appellants who purchased land from a person who intermeddled with the Estate of the Deceased and any delay in concluding the matter would be beneficial to the 2<sup>nd</sup> Appellant an act that delays the actual beneficiaries the opportunity of utilizing the land.

14. Further, it was urged that the Appeal emanates from a Ruling of the Court and no leave was sought/granted to Appeal hence the Appeal is improperly before the Court.

15. That the Appellants did not give an alternative valuation/estimate of the value of the Estate, the affidavit of the Respondent was adequate.

16. This being the first Appeal, I am duty bound to evaluate the whole record so as to come up with my own conclusion.

17. The issue to be determined is whether the trial Court had jurisdiction to entertain the matter.

18. In the case of **Owners of Motor-vessel 'Lillian S' vs. Caltex Oil (Kenya) LTD (1989) KLR 1**, the Court of Appeal stated thus:

*“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. 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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”*

19. In the case cited, SCA No. 2 of 2011, **Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Limited and 20 Others**, the Supreme Court held thus in respect of jurisdiction:

*“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”*

20. In 2012 when the Petition was filed, a Magistrate’s Court, irrespective of the rank could only hear Succession Causes where the value of the Estate was **Kshs. 100,000/=**. When the Petitioners petitioned for Letters of Administration Intestate they failed to disclose the value of the assets that formed the Estate of the Deceased. It was therefore erroneous for the trial Court to proceed with the matter without establishing if it had the authority to hear the case that was being litigated before it. The argument by one of the Protestors that he paid **Kshs. 285,000/=** for one of the properties established the fact of the Magistrate’s Court having lacked jurisdiction to hear the matter.

21. The law in this regard was amended in 2015 while the matter was pending confirmation of the grant. **Section 7(1)** of the **Magistrates’ Court Act** provides thus:

*“(1) A magistrate’s court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed—*

*(a) twenty million shillings, where the court is presided over by a chief magistrate;*

*(b) fifteen million shillings, where the court is presided over by a senior principal magistrate;*

*(c) ten million shillings, where the court is presided over by a principal magistrate;*

*(d) seven million shillings, where the court is presided over by a senior resident magistrate; or*

*(e) five million shillings, where the court is presided over by a resident magistrate.”*

22. **Section 23** of the **Magistrates’ Court Act** amended the law of **Succession Act (Cap 160)** by repealing **Section 48(1)** and substituting it with the following **Sub-Section**:

*“(1) Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49, a magistrate shall have jurisdiction to entertain any application and to determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed the pecuniary limit prescribed under section 7(1) of the Magistrates’ Courts Act, 2015.”*

23. **Section 48(1)** of the **Law of Succession Act**, provided thus:

*“(1) Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49 of this Act, a Resident Magistrate shall have jurisdiction to entertain any application other than an application under section 76 of this Act and to determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed one hundred thousand shillings:*

*Provided that for the purpose of this section in any place where both the High Court and a Resident Magistrate’s Court are available, the High Court shall have exclusive jurisdiction to make all grants of representation and determine all disputes under this Act.”*

23. At the point of adjudicating over the matter the trial Court was of the rank of **Resident Magistrate** whose pecuniary jurisdiction stood at **Kshs. 5 Million**.

24. In her Ruling the trial Court opined that the proper and correct procedure would have been to amend the affidavit in support of Petition and all other documents to reflect the correct position regarding the value of the Estate. She was however satisfied by the estimated value of **Kshs. 2 Million**.

25. The Respondents filed a Further Affidavit with annexures. Annexure **“NR-1”** an affidavit sworn by the 1<sup>st</sup> Administrator gave the acreage of the properties that formed the Estate of the Deceased. **LR Kyangwithya/Ndumoni/216** measured **0.7 Hectares**; **LR Kyangwithya/Ndumoni/212** measured **53.82 Hectares**; **LR Kyangwithya/Ndumoni/.....** measured **20 Acres** and **LR Kyangwithya/Ndumoni/215** measured **4.76 Hectares**. **LR Kyangwithya/Ndumoni/195** measured **0.7 Hectares**.

These big chunks of land would have called for not only estimation of the acreage but determination of the real value.

26. From affidavit evidence the trial Court should have been persuaded to disqualify itself from proceeding with the matter.

27. This being a Succession Cause, that calls for substantial justice being done, failure to seek leave to Appeal must be viewed as a technicality that should not override justice.

28. In the premises, I find the Appeal having merit which I allow by giving orders as follows:

i) The Ruling by the trial Court dated **10<sup>th</sup> July, 2018** be and is hereby quashed and set aside which I substitute with an order allowing the Preliminary Objection raised.

ii) The Administrators of the Estate shall amend **Form P&A 5** to reflect the total estimated value of the Estate of the Deceased within **14 days**.

iii) The file shall be placed before the **Chief Magistrate's Court, Kitui** on the **27<sup>th</sup> January, 2020** for hearing of the Protest and/or further orders.

29. The Respondents shall pay costs of the Appeal in any event.

30. It is so ordered.

**Dated, Signed and Delivered at Kitui this 9<sup>th</sup> day of January, 2020.**

**L. N. MUTENDE**

**JUDGE**