



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

E.L.C. APPEAL NO. 6A OF 2017

NJUE MUNYI KIVUANA (Suing as the personal representative of the estate of
MUNYI KIVUANA (Deceased).....**1ST APPELLANT**
EDITH MUTHONI NYAGA (Suing as the personal representative of the estate of
JOSEPH NYAGA ISAAC (Deceased).....**2ND APPELLANT**
EDITH CIAMBUNGU NJUE (Suing as the personal representative of the estate of
NJUE MUKUNGUU (Deceased).....**3RD APPELLANT**

VERSUS

GILBERT NJERU NJAGI
PATRICK NTHIA & 20 OTHERS.....**RESPONDENTS**
MICHAEL NJERU NJUKI(Suing as the personal representative of the estate
of **NJUKIGATEMA**.....**RESPONDENT**

(Being an appeal from the Ruling and Order of Hon. M.N. Gicheru (CM) dated 27th March 2017 in Embu CMCC No. 105 of 1990)

JUDGEMENT

1. This is an appeal against the ruling and order of the Hon. M.N. Gicheru (Chief Magistrate) dated 27th March 2017 in *Embu CMCC No. 105 of 1990*. By the said order the trial court allowed the Respondents' notice of motion dated 21st September 2015 and awarded costs thereof to the Respondent.
2. The material on record shows that the parties have been casing in court for over 30 years now. The Respondents in this appeal filed a suit before the Magistrates court at Embu (i.e. *CMCC No. 105 of 1990*) on their own behalf and 20 others claiming a share of *Title No. Evurore/Nguthi/1964* (hereafter the *suit property*). The Respondents contended that the Appellants were fraudulently registered as absolute proprietors of $\frac{1}{4}$ share each of the suit property whereas they were merely trustees on behalf of the various families they represented including the Respondents and 20 others.
3. The material on record further shows that the dispute was referred to a panel by elders chaired by the District Officer for resolution. Each of the disputing parties were to appoint two elders to assist the District Officer in resolution of the dispute. The dispute was fully heard and an award was made allowing the Respondents' claim. In particular, it was decided that the Appellants were registered as proprietors of the suit property as trustees of those whom they represented. It was further decided that the Appellants were to sub-divide the suit property so that each of the Respondents gets his individual parcel of land.
4. The Award of the said panel was read on 22nd January 1993 before the Magistrates court and adopted as a judgement of the court on or about 25th September 1998. However, it would appear that the said judgement was never implemented for several years. It was after such prolonged delay on the part of the Appellants to implement the said judgement that the Respondents filed the notice of motion dated 21st September 2015 seeking to be mandated to undertake the distribution of the suit property to the respective beneficiaries upon sub-division.
5. The Appellants were aggrieved by the said orders of the Hon. Chief Magistrate and they filed a memorandum of appeal dated 13th April

2017 raising the following 6 grounds of appeal:

- a) *The learned trial magistrate erred in law and in fact in reaching a ruling which was contrary to the award adopted as the court judgement on 25th September 1998 thus interfering with the elders award which was against the law and the spirit of the law.*
- b) *The learned trial magistrate erred in law and in fact in failing to appreciate that the elders award which was adopted as the court's judgment on 25th September 1998 should be obeyed to the letter because the award was not appealed against and it is therefore binding on both the Appellants and the Respondents and the Appellants are the trustees of land parcel No. Evurore/Nguthi/1964 and the court could not change that as it did in its ruling delivered on 27th March 2017.*
- c) *The learned trial magistrate erred in law and in fact in his ruling delivered on 27th March 2017 by interfering with the elders award adopted as the court's judgement on 25th September 1998 and in doing so the learned trial magistrate disentitled all the beneficiaries who are represented by the trustees in the suit land and the effect of the ruling is that the Respondents registered with the suit land and distributed it to themselves with no regard to other beneficiaries represented by the Appellants.*
- d) *The learned trial magistrate erred in law and in fact by failing to appreciate that the Respondents should be given land but by the Appellants as the award clearly stated that each of the Appellant knew which of the Respondents they represented and it is the Appellants who were mandated to subdivide the suit land and distribute the various portions to the Respondents.*
- e) *The learned trial magistrate erred in law and in fact in failing to find that the Appellants herein being the personal representatives of the 1st, 2nd and 4th deceased trustees together with one of the Respondent herein Michael Njeru Njuki the personal representative of the 3rd trustee Njuki Gatema ought to have substituted the deceased trustees and be registered with land parcel No. Evurore/Nguthi/1964 and thereafter subdivide and distribute the same to the Respondents.*
- f) *The learned trial magistrate erred in law and in fact by ordering the Appellants to pay costs of the suit while failing to appreciate the fact that both Appellants and Respondents had to substitute the deceased parties thus the delay in implementing the Award.*

6. A perusal of those six (6) grounds of appeal reveal that in reality there are only three issues which may be rephrased as follows:

- a) *Whether or not the trial court altered or interfered with the Elders award which was adopted as a judgement of the court.*
- b) *Whether or not the trial court erred in failing to hold that the personal representatives of the trustees ought to have been joined in the suit in place of the deceased trustees.*
- c) *Whether or not the trial court erred in law in awarding costs to the Respondents.*

7. The court has considered the material on record and the history of the long standing litigation amongst the parties. All the parties who appeared before the panel of elders were in agreement that the suit property was not the absolute property of the trustees. Those trustees also conceded before the elders that they were holding the suit property on behalf of their respective family members including the Respondents herein. The award of the elders was made without any controversy and it was adopted as a judgement by the trial court without much controversy. It is common ground that none of the parties ever filed an appeal either against the award or the resultant judgement.

8. The only challenge which appears to have arisen is that the judgement of the trial court adopting the award was never implemented. The trustees appear to have died without implementing it in consequence of which the Respondents filed the notice of motion dated 21st September 2015 seeking a declaration that they were entitled to be registered as owners of the suit property and for the 1st Respondent, Gilbert Njeru Njagi, to be mandated to supervise the distribution thereof to the respective beneficiaries. It is evident that the Respondents were simply seeking to be allowed to implement the orders of 25th September 1998 so that they could enjoy the fruits of their judgement. In fact, they stated as much in both the notice of motion and supporting affidavit.

9. The Appellants submitted that the trial court erred in allowing the Respondents' notice of motion dated 21st September 2017 because it altered the award of the elders and disinherited other beneficiaries who were being represented by the deceased trustees. The Appellants' contention was that the trial court in effect gave the entire suit property to the Respondents to their exclusion and the families they represented. With due respect, the court is unable to find any material on record to support such a contention. The orders granted on 27th March 2017 are incapable of being understood or construed in such a manner.

10. The material on record indicates that there was only one award rendered by the elders. There was also only one judgement dated 25th September 1998 which adopted the said award. All the concerned parties as well as the trial court were aware that it was the said award and judgement which the Respondents sought to implement. There is nothing in either the application or the orders of 27th March 2017 which excluded the Appellants and the families they represented from getting their rightful share of the suit property. At no time did the Respondents seek to exclude the other families which were also entitled to a share of the suit property.

11. The notice of motion dated 21st September 2015 was not elegantly drafted. It may have been drafted in more precise terms if it were drafted by a legal expert. But that does not take away the substance of the application which was merely to enforce the award of the elders which had been adopted as a judgement by the trial court. It would appear that the Appellants are simply adopting a most pedantic interpretation of the application dated 21st September 2015 and the subsequent order of 27th March 2017. There is nothing on record to demonstrate that they were disinherited. Accordingly, the court finds no merit in the first ground of appeal.

12. The second ground relates to the substitution of the deceased trustees (the original Defendants before the trial court) with their personal representatives. The trial court was faulted for failing to find that substitution ought to have been undertaken before execution of the judgement could proceed. The record shows that the 1st, 2nd & 4th Appellants were joined as personal representatives in the proceedings before the trial court on 26th September 2016. However, there was no indication of the 3rd Appellant having been joined as personal representative in the proceedings before the trial court.

13. The court has considered the said ground of appeal. The court is not satisfied that there is merit in the said ground for two reasons. First, it was the duty of the 3rd Appellant as personal representative of his deceased father to apply for substitution. He was the holder of letters of administration *ad litem* for the estate of his father. He should not be allowed to use his omission against the Respondents. Secondly, there is no legal requirement that substitution of a deceased party must be undertaken before execution of a judgment. In the case of **Dhola V Gulam Mohusin (1940) 19 LRK 6** it was held that execution proceedings may proceed without the appointment of the personal representatives of the deceased decree holder. So, the issue of some of the Appellants or Respondents being deceased is neither here nor there. Moreover, the Appellants have not demonstrated what prejudice, if any, they suffered as a result of the omission complained of.

14. The third issue is whether or not the trial court erred in awarding the Respondents costs of the application dated 21st September 2015. It is trite law that costs of an action are at the discretion of the trial court. The general rule is that costs of an action or proceeding shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act**. The said section stipulates as follows:

“(1) 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.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.”

15. The court is thus of the opinion that a successful party should ordinarily be awarded costs of an action or proceeding unless there is a good reason to deprive him of such costs. See **Hussein Janmohamed & Sons V Twentsche Overseas Trading Co. Ltd [1967] EA 287**. Once a trial court has made an award of costs in exercise of its discretion an appellate court should not lightly interfere with such an award. The appellate court should only interfere where the trial court has misdirected itself and acted upon the wrong principles or where it is manifest from the case as a whole that the discretion was not exercised judicially.

16. In the case of **Mbogo & Another V Shah [1968] EA 93** it was held that:

“We now come to the second matter which arises on this appeal, and that is the circumstances in which this court can upset the exercise of a discretion of a trial judge where his discretion, as in this case, was completely unfettered. There are different ways of enunciating the principles which have been followed in this court, although I think they all more or less arrive at the same ultimate result. For myself, I like to put it in the words that, a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision; or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and as a result there has been misjustice.”

The court finds no error of principle on the part of the trial court in the award of costs. There is also no material on record upon which it may be concluded that the trial court did not exercise its discretion judicially. Accordingly, the court finds no merit in this ground of appeal.

17. The court has noted something mischievous about the instant appeal. Whereas all the trustees had no objection to termination of the trust and sub-division of the suit property before the elders, three of them strangely objected to sub-division before the trial court supposedly on the basis that the suit property was no longer in existence! It is only the 3rd Appellant who had not changed his mind on implementation of the elders' award. It would thus appear that the Appellants are out to employ all tricks in the book to delay, frustrate and obstruct implementation of the award and resultant decree. The institution of the instant appeal appears to fall well within the scheme because upon filing the appeal, the Appellants went to sleep immediately until they were woken up by the Respondents' application for dismissal of the appeal for want of prosecution about two years later.

18. The upshot of the foregoing is that the court finds no merit in the Appellants' appeal. Consequently the court makes the following orders for disposal of the appeal:

a) The appeal be and is hereby dismissed in its entirety with costs to the Respondents.

b) The Elders award and consequent judgement of the trial court dated 25th September 1998 shall be implemented expeditiously.

c) The 1st Respondent, Gilbert Njeru Njagi, is hereby mandated to supervise the distribution of the suit property i.e. Title No. Evurore/Nguthi/1964 amongst all the beneficiaries entitled thereto.

d) The Deputy Registrar of the court shall sign and execute all the necessary documents on behalf of the Appellants for the purpose

of fully implementing the judgement of the court.

e) The subsisting orders of stay in favour of the Appellants are hereby vacated forthwith.

19. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at EMBU this 13TH DAY of FEBRUARY, 2020

In the presence of Ms. Nzekele holding brief for Ms. Fatuma Wanjiku for the Appellants and the 1st Respondent present on behalf of all the Respondents.

Court Assistant: Mr. Muinde

Y.M. ANGIMA

JUDGE

13.02.2020