



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAPENGURIA
CIVIL DIVISION
CIVIL APPEAL NUMBER 3 OF 2018

BETWEEN

THOMAS KOSGEI KIBET1ST APPELLANT

PETER KIPKETER KIBET..... 2ND APPELLANT

AND

ELIZABETH CHEPKORIR YEGO1ST RESPONDENT

ROSA CHEPKEI YEGO 2ND RESPONDENT

MICHAEL KIPLAGAT YEGO3RD RESPONDENT

(Being an appeal from a ruling of Hon. V. O. Adet, Senior Resident Magistrate in Kapenguria SRM Civil Case NO. 28 of 2018 delivered on 23rd October 2018)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Introduction

1. This appeal, which arises from a ruling dated 23rd October 2018 in Kapenguria SRM Civil Case No. 28 of 2018 is premised on the following grounds:-

- 1. THAT the learned trial magistrate erred in law and fact by failing to hold that the subject matter of the suit is a burial dispute.**
- 2. THAT the learned trial magistrate erred in law and fact by holding that the appellant lacks *locus standi* to institute suit against the respondents.**
- 3. THAT the learned magistrate erred in law and fact by considering that the appellant ought to challenge the respondent in succession court and yet the subject matter is a burial dispute.**
- 4. THAT the learned magistrate erred in law and fact by considering extraneous issues and not considering relevant issues hence arriving at a wrong conclusion.**
- 5. THAT the learned magistrate erred in law and fact by failing to consider that the Appellants and Respondents are guided by customary law in burial disputes.**

2. Briefly the appellants in this case were the respondents in Kapenguria SRM Civil Case Number 28 of 2018 in which they sued the respondents, who are the legal administrators of the estate of the late Henry Yego Ayieka for the following reliefs.

- a. An order of permanent injunction restraining the defendants by themselves, their agents, relatives, servants, and or employees or any other person or otherwise from performing the customary rites and burying the remains of the deceased**

Selina Chepkemei on the plaintiffs “portion of land part of” LR WEST POKOT/SIYOI “A”/302, in the alternative bury her next to her husband’s grave.

b. Costs of the suit and interest.

c. Any other relief the court may deem fit and just to grant.

3. The reliefs outlined above were anchored in the appellants’ averments at paragraphs 3, 4, 5,6,7,8 and 10 of the plaint dated 3rd October 2018 in which the appellants alleged that the parcel of land known as WEST POKOT/SIYOI A/302 belonged to one Henry Yego Ayieko, deceased, and who was said to be an uncle to the two appellants. The appellants also averred that the respondents herein proceeded to take out a Grant of Representation, to have the same confirmed and subdivision done and completed without involving the two appellants, with the sole purpose of disinheriting the appellants.

4. The appellants further averred at paragraph 8 of the plaint that on 26th September 2018, one Selina Chemkemei, mother to Elizabeth Chepkorir Yego (1st Respondent) died and that plans to bury the said Selina on the suit land were underway. According to the appellants, the respondents have no proprietary interest whatsoever in part of the suit land so as to entitle them bury the remains of Selina Chemkemei thereon, hence the prayer for an injunction, as per the Notice of Motion dated 3rd of October 2018.

Notice of Preliminary Objection

5. After entering appearance and filing of statement of defence, the respondents filed and served their Notice of Preliminary Objection dated 8th October 2018 on grounds:-

a. The instant suit offends the provisions of sections 3A, 6 and 7 of the Civil Procedure Act, Laws of Kenya

b. The instant suit offends the provisions of sections 5, 6 and 8 of the Land Control Act.

c. The instant suit and the application offend the provisions of sections 67, 68, 69, 70, 76 and 79 of the Law of Succession Act, Laws of Kenya.

6. The respondents therefore urged the court to strike out the whole of the appellants Notice of Motion dated 8th October 2018 with costs to themselves.

Ruling of the Learned Trial Court

7. After hearing and considering rival arguments in the matter, Hon. V. O. Adet, relying in particular on the provisions of **section 7 of the Civil Procedure Act**, and noting further that the appellants were not beneficiaries to the Estate of the deceased upheld the respondent’s preliminary objection and struck out the entire suit with costs to the respondents. That ruling dated 23rd October 2018 gave rise to this appeal.

Duty of this Court

8. As this is a first appeal, this court is under a duty to re-examine and carefully reconsider the pleadings, grounds of appeal, submissions and ruling of the learned trial court with a view to reaching its own conclusions in the matter, and in particular, to determine whether the appellants’ complainants have any merit.

Submissions

9. Counsel appearing made oral submissions at the hearing of the appeal. Mr. Lowasikou, who appeared for the appellants submitted that the trial court fell into error when it failed to appreciate the subject matter of the case before him, namely a burial dispute concerning the burial site of a wife of the deceased. In this regard, counsel contended the trial court ought to have taken evidence from parties so as to establish the relationship between the deceased and the appellants herein. That by summarily dismissing the suit the appellants were condemned unheard in contravention of **Articles 22 and 48 of the Constitution of Kenya 2010**. Counsel further submitted that the respondents, being personal representatives of the deceased were properly sued.

10. Counsel also submitted that though there is a confirmed grant which can be revoked at any time on the application of any party under **section 76 of the Law of Succession Act**, the appellants were not bound by the said provisions because the matter in hand is a burial dispute. While conceding that the respondents and the appellants all live on the suit land, the appellants want Selina to be buried next to her husband’s grave and not anywhere else on the suit land. It was submitted such a step would ensure compliance with customary law which is enshrined under **Article 2 of the Constitution as well as section 3(2) of the Judicature Act**. It was submitted that both parties belong to the Sengwer Community, and are bound by the customary law of the said community.

11. The appeal was opposed. Mr. R. E Nyamu appeared for the respondents. Counsel submitted that this appeal is before the wrong court since this court does not have the jurisdiction to hear environment and land matters as provided under **Article 162(2) of the Constitution**.

12. Counsel also submitted that from the pleadings this matter concerns proprietary interests in LR No. WEST POKOT/SIYOI A/302 and as such, this court not being an Environment and Land Court is not the proper court to hear and determine the instant dispute on the merits. It

was thus counsel's submissions that the trial court rightly struck out the appellant's suit.

13. On whether or not this matter is a succession cause or a burial dispute counsel submitted that there can be no denying that this is a succession matter as clearly set out at paragraph 10 of the plaint. Counsel thus submitted that the purpose of the said suit was to embarrass the trial court which had already issued a confirmed grant to the respondents; and further that if the appellants were interested in the deceased's estate, the option open to them was to invoke the provisions of **section 76 of the Law of Succession Act** to have the grant revoked and not to file a fresh suit as they erroneously did. Counsel for the respondents questioned the appellant's fidelity in this matter when in one and the same breath they confirm Selina is a wife to the deceased and that she should not be buried in the suit land.

14. Respondent's counsel also submitted that the appellants had no *locus standi* to file the suit the subject of this appeal. That appellants' locus could only come about by becoming objectors to the confirmed grant.

15. Finally Mr. Nyamu submitted that the respondents' opposition to this appeal is strengthened by the fact that the appellants have since filing this appeal, filed an application in the original **P&A Succession Cause No. 12 of 2017** by which they seek revocation of the grant issued to the respondents herein.

Analysis and Determination

16. I have now carefully considered the grounds of appeal, the pleadings filed before the trial court, the ruling of the honourable trial magistrate and the rival submissions made before me by counsel during the hearing of the appeal. I have also considered the relevant constitutional and statutory provisions as well as authorities cited to the court. I have also perused **Kapenguria SRM P&A Succession Cause No. 12 of 2017. In the matter of the Estate of Henry Yego Ayieka (Deceased) and (1) Rosa Chepkei Yego (2) Elizabeth Chepkorir Kiplagat and (3) Michael Kiplagat Yego.**

17. In light of all the above, I have reached the inevitable conclusion that this appeal lacks merit and ought to be dismissed. As rightly submitted by respondent's counsel, this matter belongs to the realm of the estate of the deceased, which matter has been substantively dealt with vide **Kapenguria SRM's P&A Succession Cause No. 12 OF 2017**. Further, it is to be noted that though one Selina (may she rest in peace) is waiting to be buried, it cannot be said that what is before this court is a mere burial dispute. The appellants are making a claim against the proprietary interests of the respondents in the suit land. That claim ought to have been filed either before the Environment and Land Court or alternatively been filed as an objection to the grant in the main **succession cause number 12 of 2017**.

18. I have noted upon perusal of **Kapenguria P&A Succession Cause number 12 of 2017** that the appellant's filed summons for Revocation of Grant on 8th October 2018 seeking to revoke the grant issued to the respondents on 7th June 2018. Even with this development the appellants were not brave enough to apply to this court to withdraw this appeal, but instead proceeded to argue the appeal on 14th December, 2018 as if nothing had happened or was happening. In my considered view, this is the highest level of abuse of court process.

Conclusion

19. All in all, I am satisfied that this appeal is untenable and lacking in merit. The same be and is hereby dismissed with costs to the respondents.

20. Orders accordingly.

Judgment delivered, dated and signed in open court at Kapenguria on this 19th day of February, 2019

RUTH N. SITATI

JUDGE

In the Presence of

Miss Bartilol for Lowasikou for Appellants

Miss Chebet for Mr. Nyamu for the Respondents

Mr. Juma – Court Assistants