



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

SUCCESSION CAUSE APPEAL NO. 95 OF 2017

IN THE MATTER OF THE ESTATE OF MWAURA KIBOBI ALIAS BEDAN MWAURA KIBOBI (DECEASED)

JOHN KIBOBI MWAURA.....APPELLANT

VERSUS

DOMINIC NJOROGE MWAURA.....1ST RESPONDENT

WANJIKU NGUMI.....2ND RESPONDENT

(Being an appeal against the judgement of Giheha, SRM in Thika Succession Cause No.499of 2004 delivered on 4th May,2010) ...

J U D G M E N T

1. This appeal arises from the judgment of the Thika Resident Magistrate's Court dated 4/5/2010 in Succession cause number 499/2004, in which the trial Magistrate in confirming the grant therein ordered with regard to one estate asset **LR. No. Ngenda/Gathage /162** be shared between the Appellants and the Respondents herein. The Appellant was aggrieved by the said judgment and has filed this appeal.

2. His Memorandum of Appeal filed on 3rd June, 2010 and raises the following grounds of appeal:-

“a. The Magistrate had no jurisdiction to hear the Succession case as the estate was stated to be worth Kshs. 400,000/= and the court's jurisdiction was Kshs. 200,000/= under Section 48 of the law of Succession Act and Rule 7(3) of the Probate and Administration Rules.

b. The Magistrate erred in ignoring the 3 wills of the deceased and should have been bound by the last will dated 21/6/1999.

c. The Magistrate erred in giving the second protestor (first respondent a portion of L.R. Ngenda/Gathage /162 and ignored that the first respondent had been given land at Subukia and by the deceased during deceased's life time and the will dated 21/6/1999 gave the 1st respondent 21 rooms in Plot No. Ruiru/Kiuu/6/1317. In any case the 1st respondent never applied for dependency under Section 26 of the Law of Succession Act.

d. The Judgment is against the weight of the evidence.”

3. When the matter came up for directions on 27th June, 2018, it was agreed that this appeal shall be canvassed by way of written submissions. The Appellant's submissions were already on record.

Appellant's submissions

4. The Appellant had filed his submissions through his counsel on 10th September, 2013. Counsel submitted that the trial Magistrate had no jurisdiction to hear the Succession Cause as the deceased's estate was worth Kshs. 400,000/- while the court's jurisdiction was Kshs. 100,000/-. Reliance was placed on the case of **Said Bin Self vs Sir Ali Bin Salim 1940 191 KLR 9** where it was held that if a court has no jurisdiction over the subject matter, its judgments and orders are mere nullities, void and have no effect and may be set aside and declared void.

5. It was contended further that there having been three wills in existence, the trial Magistrate should have been bound by the last will dated 21/6/99. That the first two wills offend Section 11(5) of the Law of Succession Act as they were not attested by two or more competent witnesses. It was submitted that the third will is valid as it fulfills all the requirements of Sections 8 and 11 of the Law of Succession Act. Further, it was submitted that the deceased never devised to the 1st Respondent any portion of **LR Ngenda/Gathage/162** in the will dated

21/6/1999 and which the Respondent witnessed.

6. The Appellant asserted that the said parcel of land was devised to the him and that the 1st Respondent was given land at **Subukia** and 34 rooms in **plot No. Ruiru/Kiuu/6/1317**. In conclusion it was contended that the trial Magistrate should not have interfered with the deceased's will dated 21/6/1999 as no party had had applied to be declared a dependency under Section 26 of the Law of Succession Act.

Respondent's submissions

7. The Respondents on the other hand filed their written submissions on 14th September, 2018. Counsel submitted that the Appellant having petitioned the lower the court cannot by this appeal disclaim its pecuniary jurisdiction. They also pointed out that the Appellant having failed to file the first two wills of the deceased and only filed the third will in the record of appeal the present appeal is incurably defective; that the third will which the Appellant stated to be the last will was to be undated, did not reflect the no author and as such does not fulfil the requirements of a valid will and , must be disregarded.

8. The court has considered the entire record of the lower court and submissions by the parties. This appeal in my view turns on the question of jurisdiction as raised in the first ground of appeal. According to the affidavit in support of Petition sworn by the Petitioners in the lower court, **John Kibobi Mwaura** and **Annahstacia Mwhaki**, the deceased died possessed of five land parcels and other properties whose value was stated to be KShs.400,000/= in the year 2004.

9. The matter proceeded to conclusion before the Chief Magistrate's Court at Thika, resting with the impugned decision of 4th Maty, 2010. Prior to the amendment of Section 48 of the Law of Succession Act in 2016, the pecuniary jurisdiction of the subordinate courts was limited to estates whose gross value did not exceed KShs.100,000/=. The Respondents assertion that the Appellant was party to the filing of the proceedings in the subordinate court is no answer to the Appellant's jurisdictional challenge. It is beyond dispute that the subordinate court was not clothed with the necessary jurisdiction to entertain the cause. In **Samuel Kamau Macharia and Another v Kenya Commercial Bank and 2 others Supreme Court Civil Appeal No.2 of 2011; [2011] e KLR** the supreme Court held that:

“A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as confirmed by the Constitution or written law. It cannot arrogate itself jurisdiction exceeding that which is confirmed upon it by law. Where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.”

10. A court has no power to entertain a matter in respect of which it has no jurisdiction. The proceedings before the subordinate court having been taken without jurisdiction amount to a nullity. As such, even though the subordinate court's jurisdiction has now been enhanced, this court cannot make an order to remit the cause to the said court for determination. This court is not without sympathy for the parties as the dispute herein has been outstanding for almost fifteen years now but notwithstanding, the court must allow the appeal on the 1st ground. It appears that the counsel representing the parties in the lower court did not address themselves to the jurisdiction of the court in light of the stated value of the deceased's estate.

11. Consequently, and most unfortunately, the parties will have to file a fresh petition in the subordinate court at Thika so long as the present value of the estates does not exceed the sum of KShs.20,000,000/=.

12. I note that several original documents and exhibits had been presented by the parties during the proceedings in respect of the protests filed in the lower court cause. Pursuant to the orders made herein, the court directs the Executive Officer of the High Court Registry to ensure that all such exhibits and the Chief's letter dated 29th November 2004 are released to the appropriate parties through their advocates. I further direct that upon release of the exhibits to the respective parties, the lower court file be remitted to the Chief Magistrate's Court Thika, and for record purposes, it is to be housed within the new cause which the parties will file in accordance with this court's orders.

13. The parties will bear their own costs in light of the nature of the dispute.

DELIVERED AND SIGNED AT KIAMBU THIS 15TH DAY OF MAY 2019.

C. MEOLI

JUDGE

In the Presence of:-

Mr. Olaka holding brief for Mr Kinuthia for the Appellant

Respondents absent

Court Assistant - Nancy