



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT KISII

CORAM: A.K NDUNG'U J

CIVIL SUIT NO. 11 OF 2017

(FORMERLY ELC NO. 390 OF 2014)

BETWEEN

ONKUNDI OGAMBA TIEMA

ANNA BOSIBORI NYABASA

WILFRED AYIECHA NYANG'AU

WILFRED NYAUMA BANGIRA

WILFRED ONCHONGA ONKUNDI

JOSHUA MOSOTI AYIECHA

JOASH AROSI ONKUNDI

MELLEN KEMUNTO ONKUNDI.....APPLICANTS

AND

PACIFICAH MORAA ONKUNDI

CHARLES OGETO ONKUNDI

TERESA NYABETA MOSE

JANE SIGARA NYAMARI

JAMES OGETO ONKUNDI

THOMAS ONKUNDI

DENNIS AROSI ONKUNDI

JULIUS MARORO NYAMBANE.....RESPONDENTS

RULING

1. By a notice of motion dated 17th May 2019, the respondents raised a preliminary objection against the applicants' application dated 15th March 2019 on the followings grounds;

1) That the court lacks jurisdiction to hear and determine this matter by virtue of the provisions of order 46 rule 18 of the Civil Procedure Rules;

- 2) That the entire application offends the mandatory provisions of order 46 rule 13, 14, 16 and 17 of the Civil Procedure Rules;
- 3) That the applicants have not invoked the necessary provisions of the law and ingredients to set aside judgment obtained by consent;
- 4) That the entire application is an abuse of due process and hence ought to be struck out with costs.

2. Briefly, the facts leading up to this application are as follows; the applicants herein filed originating summons on 14th October 2014 against the respondents challenging the administration of the estate of Onkundi Ogeto (the deceased). The 1st respondent had obtained letters of administration in the deceased's estate in Succession Cause No. 250 of 1991 which had been confirmed on 14th April, 1992. Despite their efforts to trace the court file in respect of the succession cause, the applicants were unable to find it hence the instant cause. The only documents they had from those proceedings were a copy of the gazette notice and certificate of confirmation of grant.

3. The applicants claimed that the estate had not been subdivided over the years until the 1st respondent appointed the 2nd respondent as her attorney. The 1st applicant averred that sometimes in August 2014, he got wind that the 2nd respondent was planning to subdivide land parcel Kineni Settlement Scheme Block 1/61 which was a part of the estate of the deceased. Inquiries made at the land registry in Nyamira revealed that the land had been subdivided and some of those portions transferred to the 2nd, 3rd, 6th, 7th and 8th respondents.

4. The applicants were opposed to these actions of the 2nd respondent since the deceased's house comprised of three houses. The 1st respondent was the deceased's 1st widow with twelve children. Kwamboka Onkundi was the 2nd widow with five children and Milka Bosibori Onkundi was the 3rd widow with twelve children. The applicants urged the court to nullify the subdivisions and transfers of the land to allow the estate to be divided in the appropriate manner.

5. The 1st respondent in her replying affidavit sworn on 3rd November 2014 averred that in as much as she had been issued with the grant of letters of administration which had been confirmed, she was unable to implement the distribution scheme due to the fact that a restriction was registered against land parcel Kineni Settlement Scheme Block 1/61. When the restriction was removed she caused the parcel of land which had already been transmitted to her name to be subdivided into portions and the subdivisions thereof transferred and registered in the names of the rightful beneficiaries of the estate.

6. Further the 1st respondent deposed that the 1st, 2nd, 5th, 7th and 8th applicants who were the deceased's children had already received their respective portions of the estate of the deceased.

7. On 20th February 2017, the parties agreed to have the matter referred to Borabu sub-county commissioner for arbitration. The matter was heard by the Deputy County Commissioner who prepared a report dated 17th May 2017. Majanja J. ordered that the parties be supplied with copies of the report and the parties drew up a formal schedule of distribution in accordance with the report dated 17th May 2017. The matter was marked as settled in terms of the consent evenly dated and filed on 18th December 2018.

8. Subsequently, the 1st, 5th, 6th, 7th and 8th applicants moved the court through the application dated 15th March 2019 seeking to review and set aside the arbitration award and have the matter proceed to hearing.

9. The 6th applicant, on behalf of the other applicants, deposed that there had been no consensus during the arbitration meeting which was terminated after the applicants cited bias on the arbitrator's part. He averred that the arbitrator had proceeded to write a report undeterred by their concerns, and they only got to learn about the report and resultant decree on 2nd March 2019, when the respondents came to the suit land seeking to execute the decree. The applicants were concerned that if the orders were not granted, the respondents would execute the arbitration report which they say was biased against them.

10. The respondents filed a reply to the application but of concern here is their preliminary objection to the application which they filed afterwards, on the grounds set out in the introduction of this decision.

11. In canvassing the preliminary objection, learned counsel for the respondents argued that upon confirmation of grant of letters of administration, the court became *functus officio* and any proceedings mounted on the succession cause affecting the confirmed grant was null and void. Counsel submitted that the issues raised in this matter relate to interest in land and it ought to be placed before the court with the requisite jurisdiction.

12. He went on to submit that the matter was referred to arbitration which was attended by the parties and a consensus reached with both parties present. The parties signed and filed the report which was adopted as the court's judgment.

13. Counsel submits that the applicants failed to invoke the necessary provisions of law under **Order 46** of the **Civil Procedure Rules** to challenge the arbitration award and also failed to meet the requirements for setting aside the judgment obtained by consent of the parties.

14. He further contends that this court cannot grant leave to appeal under **Section 35** of the **Arbitration Act**, as no appeal can lie against a decision of the High Court under that provision. He submits that the applicant's application offends the principle of finality of arbitral process and since **Order 46 Rule 18** of the Civil Procedure Rules does not provide for review of an award after it has been adopted as the judgment of the court unless with compliance of **Rule 16**, the court should allow the preliminary objection.

15. For his part, learned counsel for the applicants argued that they rightly challenged the arbitral award as it had been delivered contrary to

rules of procedure. He submitted that the report dated 17th May 2017 was only delivered on 15th September 2017 in contravention of **Order 46 Rule 10** of the **Civil Procedure Rules**. It is also argued that the parties were not notified of the filing of the report within 14 days and that the award was not read within 30 days of the notice being issued as required under **Order 46 Rule 11**.

16. Counsel contends that the report was wrongly substituted with the consent dated 18th December 2018 and argues that it will be necessary to hear and determine the application dated 15th March 2019 in order to determine whether the arbitral award should be set aside. He submits that **Order 46 Rule 16** of the **Civil Procedure Rules** gives this court the requisite jurisdiction to determine the application and set aside the award.

17. From their depositions and rival arguments, the issues emerging for determination herein are;

- 1) Whether the probate court lacks jurisdiction in this matter which raises issues relating to land;
- 2) Whether the application dated 15th March 2019 offends the provisions of order 46 of the Civil Procedure Rules;
- 3) Whether the application dated 15th March 2019 to set aside the consent judgment is based on the appropriate provisions of the law and legal principles.

18. Sir Charles Newbold in the *locus classicus* on preliminary objections **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696** defined the concept as follows;

A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.

19. J.B. Ojwang J. (as he then was) in **Oraro v Mbaja Civil Suit No. 85 of 1992 [2005] eKLR** described a preliminary objection thus;

A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed.

20. The respondents have challenged this court’s jurisdiction to determine the applicants’ application to set aside the arbitral award adopted as the order of the court. In judicial proceedings, the question of jurisdiction is fundamental and must be dealt with at the earliest opportunity. The court’s jurisdiction is conferred upon it by the Constitution and legislation and where it lacks such jurisdiction, the court must down its tools. (**Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & Others (2012) eKLR; Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others Civil Appeal No. 154 of 2013 (2013) eKLR**)

21. The respondents’ first concern is that this matter relates to interest in land and it ought to be placed before a court with the requisite jurisdiction. The respondents argue that after grant was confirmed, the probate court became *functus officio* and its mandate ceased.

22. This argument is in my view erroneous since the court is empowered to call upon the administrators to complete administration of an estate or give a full account of all dealings in the estate of the deceased in accordance with **Section 83** of the **Law of Succession Act** where a certificate of grant has been issued and confirmed as in this case.

23. The certificate of confirmation of grant in the estate of the deceased was issued by the court on 14th April, 1992 in Succession Cause No. 250 of 1991. For a long time, the estate of the deceased was not distributed. When the process commenced, the applicants who are beneficiaries and interested parties in the estate of the deceased instituted this succession cause challenging the manner in which the distribution of the estate was being carried out by the administrator.

24. The main dispute in this cause concerns the distribution of the deceased’s estate, which the probate court is empowered to deal with under **Section 47** of the **Law of Succession Act**.

25. It is also noteworthy that the parties herein raised the issue of jurisdiction before the Environment and Land Court where the matter had originally been filed and had the matter referred to this court by consent.

26. Turning to the second issue, the respondents contend that the application dated 15th March 2019 offends the provisions of **Order 46 Rule 18** of the **Civil Procedure Rules**. Order 46 of the Civil Procedure Rules provides a guideline for the conduct of matters referred to arbitration by the court. The respondent argues that the applicants failed to move the court with the relevant application under Order 46 and cannot now challenge the judgment of the court entered pursuant to **Order 46 Rule 18** which provides;

18. (1) The court shall on request by any party with due notice to other parties enter judgment according to the award —

(a) when no application has been made within the time allowed by rule 17; or

(b) when an application under rules 13, 14 or 16 has been heard and determined and no other application has been made within the time allowed by rule 17; or

(c) when an application under rules 14, 15 and 16 has been heard and refused and no leave to appeal against such refusal has been granted within fourteen days of that refusal.

(2) Upon the judgment so entered a decree shall follow and no appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with the award.

27. The applicants intend to challenge the arbitrator's decision on the grounds that he was biased. They contend that they only learnt about the decision when the respondents went to the suit land intending to execute it. That despite the time lines set by the rules, they are justified in bringing the application since the arbitrator did not file his award within 14 days of rendering it contrary to Order 46 Rule 10 and the decision was not read to them contrary to Rule 11. **Order 46 Rule 10 and 11** of the **Civil Procedure Rules** provide;

10. Where an award in a suit has been made, the persons who made it shall sign it, date it and cause it to be filed in court within fourteen days together with any depositions and documents which have been taken and proved before them.

11. (1) The registrar shall within fourteen days of filing of the award notify the parties of such filing and the notice shall specify a date and time for reading the award.

(2) The award shall be read within thirty days of the notice.

(3) On the date and at the time fixed by the notice the award shall be read by the registrar to such of the parties as are present.

28. The report made by the Deputy County Commissioner dated 17th May 2017 was filed in court on 18th September 2017. On 12th October 2018, Majanja J. ordered that the report be supplied to the parties. Afterwards, the matter was adjourned severally to enable the parties negotiate a settlement and on 18th December 2018, the matter was marked as settled in terms of a consent entered on the same day.

29. **Rule 63** of the **Probate and Administration Rules** of the Civil Procedure Rules provides;

63. (1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX, together with the High Court (Practice and Procedure) Rules, shall apply so far as relevant to proceedings under these Rules.

30. Interpreting the above rule, the court in **John Mundia Njoroge & 9 others v Cecilia Muthoni Njoroge & another Succession Cause No. 127 Of 1999 [2016] eKLR** held;

“As stated above, the only provisions of the Civil Procedure Rules imported to the Law of Succession Act are Orders dealing with service of summons, interrogatories, discoveries, inspection, consolidation of suits, summoning and attending witnesses, affidavits, review and computation of time. “

31. In **Josephine Wambui Wanyoike v Margaret Wanjira Kamau & another Civil Appeal No. 279 of 2003 [2013] eKLR** the Court of Appeal held;

“We hasten to add that the Law of Succession Act is a self sufficient Act of Parliament with its own substantive law and rules of procedure. In the few instances where need to supplement the same has been identified, some specific rules have been directly imported into the Act through its Rule 63(1). “

32. It is clear from the foregoing that Order 46 of the Civil Procedure Rules is not one of the provisions imported into the Succession Act and I find that it is inapplicable in this case. If the applicants intended to challenge the arbitral process, the applicable law would be the Arbitration Act. When the matter was referred to arbitration, both parties were duly represented by their counsels. The applicants also admit that they were present during the arbitration process but remained mum until the matter was concluded and settled by consent.

33. The principles which would guide the court in reviewing the consent order were outlined by the Court of Appeal in the case of in **Samuel Wambugu Mwangi v Othaya Boys' High School Civil Appeal No. 7 of 2014 [2014]eKLR** thus;

“Circumstances under which a consent judgment may be interfered with were considered in the case of Brooke Bond Liebig (T) Limited -vs- Maliya (1975) E.A. 266. It was stated that prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action and those claiming under them and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court or if the consent was given without sufficient material facts or in misapprehension or ignorance of material facts or in general for a reason which would enable the court to set aside an agreement.”

34. The 6th applicant who swore the affidavit in support of the application to set aside the arbitral award which had been adopted as the order of the court deposed that the arbitrator wrote a report in favour of the respondents and completely disregarded their sentiments. He also claimed that the arbitrator was biased against them. A cursory look at his affidavit shows that the factors that would lead one to perceive that the arbitrator was biased have not been set out nor has he indicated the concerns of the applicants that were purportedly disregarded by the arbitrator.

35. Moreover, I find that the application dated 15th March 2019 is misplaced since the Deputy County Commissioner's report was not adopted as the order of the court. The report dated 17th May 2017 did not make any final determination on the manner in which the deceased's estate was to be distributed. It is perhaps for this reason that my predecessor gave the parties a chance to negotiate a settlement which they did. The parties proceeded to enter a consent which was adopted as the order of the court. In their application, the respondents have not raised issues which would warrant the court to set aside the consent judgment entered on 18th December 2018.

36. I therefore find that the preliminary objection is merited and succeeds on the 3rd ground. The application dated 15th March 2019 is hereby dismissed with costs to the respondents.

Dated and delivered at Kisii this 11th day of December, 2019.

A. K. NDUNG'U

JUDGE