



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 26 OF 2010

**IN THE MATTER OF THE ESTATE OF MWAURA KIBOBI *alias* BEDAN MWAURA KIBOBI
(DECEASED)**

JOHN KIBOBI MWAURA.....APPELLANT

VERSUS

DOMINIC NJOROGE MWAURA.....1ST RESPONDENT

WANJIRU NGUMI.....2ND RESPOENDENT

RULING

1. The appeal herein was filed on 3rd June 2010 through a memorandum of appeal dated 2nd June 2010, and it arises from a judgment delivered in Thika RMCSC No. 499 of 2004 on 4th May 2010. There is a record of appeal on record dated 23rd January 2013.
2. The memorandum of appeal raises four grounds -
 - a. That the lower court had jurisdiction over the matter given that the value of the estate was stated as Kshs. 400, 000.00;
 - b. That the trial court erred in ignoring the three wills of the deceased and should have been bound by the last will dated 21st June 1999;
 - c. That the trial court made an error in giving the second protestor a portion of Ngenda/Gathage/162 and ignoring that he had already been given land elsewhere during the deceased's lifetime and he had also been given another property under the will; and
 - d. That the judgment impugned was against the weight of the evidence.
3. Directions were given on 18th November 2014 for the disposal of the application by way of written submissions.
4. Both sides filed their respective written submissions. The appellant's submissions are dated 30th August 2013 and were filed herein on 10th September 2013. The respondent's submissions are dated 24th November 2014 and were filed herein on 1st December 2014.

5. I have carefully perused before them. I noted that the respondent raises a preliminary point that touches on jurisdiction, that an appeal lies against an order or a decree of a lower court, and that a copy of the decree or the order impugned has not been exhibited to the memorandum of appeal or the record of appeal. It is averred that what is attached is a copy of the judgment, yet the appeal does not lie against a judgment.

6. I have perused through the record of appeal and the memorandum of appeal and noted that the two do not have a copy of the decree or order that is the subject of the appeal.

7. Appeals from decisions of the resident magistrate's court to the High Court are provided for under section 50(1) of the Law of Succession Act, Cap 160, Laws of Kenya, which states as follows -

'An appeal shall lie to the High Court in respect of any order or decree made by a resident magistrate in respect of any estate and the decision of the High Court thereon shall be final.'

8. The wording of that provision is plain that the appeal lies not against the ruling or judgment but against an order or decree. Orders are extracted from rulings, while decrees are drawn from judgments; the two sets of court processes therefore do not amount to the same thing. Orders and decrees encompass the final decision or determination by the court.

9. My attention has been drawn to decisions made in *Margaret Wangechi Muchoki vs. Julia Wanyiri Muchoki* Nyeri HCCA No. 123, *Kotak vs. Kooverji* (1967) EA 348 and *Mukasa vs. Ocholi* (1968) EA 89. I have gone through the three decisions, where it was held that it was mandatory that the memorandum of appeal must be accompanied by a copy of the decree or order challenged, and that where a copy thereof is not attached there would not be jurisdiction to entertain the appeal.

10. On the basis of the above I am persuaded that the appellant has not complied with the law by failing to extract a formal decree from the judgment the subject of the proceedings and failing to attach a copy of the decree that should be the subject of these proceedings. By the authority of the decisions cited above I ought to strike out the appeal herein.

11. The authorities that were cited before me, and which I have referred to above, were all made prior to the promulgation of the Constitution of Kenya in 2010. The coming into force of that Constitution appears to have changed the position. Its Article 159(1)(d) states as follows –

'In exercising judicial authority, the courts and tribunals shall be guided by the following principles – ... justice shall be administered without undue regard to procedural technicalities ...'

12. Although the statutory provisions on appeals enable me to strike out the appeal before me on a technicality, statute must bend to the constitutional dictate that justice should be administered without undue regard to procedural technicalities.

13. Before the appeal can be determined on its merits, the appellant shall have to comply with the procedural requirement that he files a formal order or decree extracted from the judgment delivered in Thika RMCSC No. 499 of 2004 on 4th May 2010. That direction is for compliance within thirty (30) days from this day, and in default the appeal shall stand dismissed. Costs shall be in the appeal.

14. The estate comprises of property situated within Ngenda, Gatundu of Kiambu County. Upon compliance with the order made above, the matter shall be transferred to the High Court of Kenya at Kiambu for the disposal of the appeal.

DATED, SIGNED and DELIVERED at NAIROBI this 20TH DAY OF JANUARY, 2017.

W. MUSYOKA

JUDGE