IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, NAMBUYE & P.O. KIAGE, JJA)

CIVIL APPEAL NO. 244 OF 2008

BETWEEN

GEOFFREY WACHIENI KINARO….....APPELLANT

AND

MARY GATHONI..... .....RESPONDENT

(Appeal against the Ruling and Order of the High Court of Kenya at Nyeri (Makhandia, J.) Dated 6th June, 2008

in

Nyeri H.C.Succ. Cause No. 12 of 1998)

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JUDGMENT OF THE COURT

1. This is a first appeal against the Ruling of ***M.S.A. Makhandia, J.*** as he then was delivered at Nyeri on the 5th day of June, 2008 in Succession Cause No. 12 of 1998 dismissing the appellant's application dated and filed on the 6th day of December, 2007 for the cancellation of the grant.
2. Succession Cause No. 12 of 1998 was filed at Nyeri High Court by ***Zipporah Wanjugu Kinaro*** (Zipporah) in her capacity as the widow of the deceased ***Bedan Kinaro Gitimu*** late of Ng'andu who died intestate on the 2nd day of September, 1997, naming herself, her two sons among them the Appellant and her two daughters, among them the current Respondent, as beneficiaries. The list of assets comprised LR. No. Kiri Mukuyu/Ng'andu 776 & 777 and proceeds in a bank account held with KCB Karatina.

3. On the 24th day of July, 1998 prior to the advertisement of the cause on the 21st day of August 1998, the appellant filed an objection to the making of a grant and cross petition both of which were never regularized after the cause had been advertised thereby paving the way for ***Zipporah*** to present an application for a temporary grant which was issued on the 24th day of September, 1998.
4. On the 22nd day of October, 2003 five years later ***Zipporah*** filed summons for confirmation of the temporary grant for the reason that there was no valid objection to the confirmation. The Appellant filed no protest against that application for confirmation. Though directions had been given that the matter do proceed by way of *viva voce* evidence, the learned trial Judge after

thorough scrutiny of the record formed the opinion that there was no valid protest against the confirmation of the grant after ***Pasqualina Nyakanyu Kinaro*** withdrew hers which she had erroneously directed at the Appellant's premature and non-regularized objection and cross-petition and on that account the learned Judge confirmed the grant in terms of the mode of distribution suggested in ***Zipporah's*** supporting affidavit.

5. It is this confirmation of the grant order that aggrieved the appellant prompting him to present the aforementioned application of 6th December, 2007. The application was opposed and the merit disposal of it is what resulted in the impugned dismissal orders of 5th June, 2008.
6. The appellant has appealed against that ruling citing six (6) grounds of appeal namely that the learned trial Judge erred in law:-

- ***in holding a confirmed grant could not be cancelled under the Law of Succession Act cap 160 of the Laws of Kenya.***
- ***in holding that the applicant (sic) concern in the matter was beyond distribution of the estate despite his evidence that the estate was only available to be distributed to him and his 2 sisters.***
- ***for condemning the applicant without giving him a chance to be heard contrary to the Rules of Natural Justice.***
- ***in visited (sic) acts of omission by the Applicants' counsel to file a protest on the applicant contrary to well laid down principles of law that a litigant cant be condemned for mistakes of his counsel.***
- ***in holding that the applicant was keen on delaying the hearing of the matter indefinitely yet the applicant was always in court for the hearing and any adjournments was occasioned by his advocate on record.***
- ***in failing to appreciate that the development on the estate was done pursuant to a lawful court Decree and that the entire investment could be closed by the Ministry of Education if the 5 acres it was erected on were reduced thus occasioning irreparable damage on the applicant.***

7. In his oral submissions before us, learned counsel for the appellant ***Mr. Wabandi Gacheru*** urged us to allow the appeal on the grounds that the learned trial judge should not have ignored clear directions on the record that the matter do proceed by way of *viva voce* evidence; the learned trial Judge should have invoked the court's inherent power enshrined in rule 73 of the Probate and Administration Rules to cancel the grant as requested; the learned trial Judge should not have ignored the clear provisions of law which mandated him to allow only a life interest in the intestate estate in favour of the widow; and lastly**,** that the court should not have denied the appellant an opportunity to file a protest considering that the failure to file one lay with his then advocate on record for him.
8. In response to the Appellant's submissions, ***Mercy Kabethi*** learned counsel for the respondent urged us to dismiss the appeal for being unmeritorious. It was her argument that when ***Zipporah*** filed the application for confirmation of grant, there was no valid protest; no injustice was suffered by the appellant for the court's failure to accord him an opportunity to protest as he received his correct share of entitlement of 2 ½ acres sited at the very location where he had carried out the developments complained of; and lastly that the relief of cancellation of grant that the appellant had sought in his application is alien to the Law of Succession Act procedures.

9. This is a first appeal. Our mandate is therefore as set out in rule 29(1) of the Rules of this court, that is to reappraise the record as has been placed before us and draw out our own inferences of fact, apply the relevant law on those facts and then arrive at our own conclusions on the issues in controversy as between the parties. In the course of such discharge of our mandate herein, we are enjoined respect the learned trial Judge's findings of fact unless there is demonstration that such a finding was based on no evidence; or it was based on a misapprehension of the facts; or that the judge was shown to have acted on wrong principles in reaching the decision. See ***Sumaria & another versus Allied Industries Limited [2007] 2 KLR 1***. However where the appeal arises from a complaint that the learned trial judges did not exercise his Judicial discretion properly, we can only interfere if there is demonstration that the exercise of such discretion was not based on sound reason but on whim, caprice or sympathy and therefore, not exercised with the sole purpose of

doing justice to the parties or that there is demonstration that the trial judge misdirected himself in some matter and as a result arrived at a wrong decision or that it was manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there had been injustice. See ***Mbogo & another versus Shah [1968] E.A. 931*** and ***Githiaka versus Nduriri [2004] 2KLR67***.

10. In making the orders, the learned trial Judge considered both the rival pleadings and submissions before him on the mode of access for the relief sought by the Appellant and then made observations and arrived at the conclusion that Rule 49 deals with situations where a person desires to make an application to court relating to the estate of a deceased person for which no provision is made in the rules, while Rule 73, deals with the inherent powers of this court and that he knew of no provision in the Law of Succession Act and the rules made thereunder that confers jurisdiction to the High Court to cancel a confirmed grant.
11. Section 76 clearly makes provision for only two modes of violation of a confirmed grant that is by way of revocation and/or annulment, reliefs the Appellant did not seek. It does not include the remedy of cancellation of such a grant. Rule 73 of the Probate and Administration Rules on the other hand enshrines the court's inherent powers, which cannot be invoked to cure a defect where there is a clear provision of law providing a remedy for such a defect. Since **section 76** of the Act specifically makes provision for a satisfactory mode of violating a confirmed grant, rule 73 could not be called into play to read the word **"Cancellation"** into it or in rule 49. In the result we agree with the learned trial Judge's finding that the appellant should have moved the court for revocation and/or annulment of the grant under section 76 of the Law of Succession Act and Rule 44 of the Probate and Administration Rules. We also agree that there being specific provisions in the Law of Succession Act relating to the annulment and revocation of grant, and the application not having been presented under those provision, it was rightly found incompetent as the relief of ***"cancellation"*** is unknown in law**.** The invocation of Rules 49 and 73 of the Probate and Administration Rules could not have been of any help to the Appellant in the circumstances.

12. The above finding notwithstanding, we find it prudent to interrogate the other issues similarly interrogated by the High Court and in respect of which parties have submitted on before us. The first of these deals with the Appellant's complaints that the Appellant should have been accorded an opportunity to file a protest. The Appellant had been put on guard at the earliest opportunity by ***Zipporah,*** when she deposed in her affidavit in support of the confirmation of the temporary grant that there was no valid objection to the application for confirmation. There is no indication that he was not served with the application for confirmation. The Appellant ought to have moved with speed to regularize his position if he still wished to protest ***Zipporah's*** move to confirm the grant. His assertion that his lawyers then on the record for him were to blame was rightly rejected by the learned trial Judge. We find as the learned trial Judge did that the payments made in early 2003 could not have been made towards the filing of a protest to the application for confirmation as the same had not been filed. The only payment that could be attributed to this is the one made on 19th November, 2007 because the issue of an intention to file a protest had been mentioned on 13th November, 2007 when the matter was adjourned to 27th November, 2007 for hearing. From 13th November, 2007 to 27th November, 2007 is a period of about two (2) weeks; and from 19th November, 2007 to 27th November, 2007 is a period of about nine (9) days. In our opinion, both of these periods were sufficient for the drafting and the filing of an affidavit of protest. We have also noted not even an intended affidavit of protest was annexed to the supporting affidavit to demonstrate the Appellant's serious intention to protest the proposed confirmation of the grant. The learned Judge was therefore entitled to doubt the appellant's seriousness in his desire to protest.
13. As for the length of time that the matter had taken in court, it is undisputed that the cause was filed in 1998; the application for confirmation was filed in 2003 but served in 2004. Directions for hearing by way of *viva voce* evidence were made on 8th March, 2000 and affirmed on 29th May, 2005. These directions were erroneously made on the assumption that there was a valid protest on the record. The learned trial Judge set out details of adjournments, who had occasioned them and inclusive of the last adjournment occasioned by the appellant on the 13th November, 2007 and the fact that as at 27th November, 2007 no protest had been filed and in the absence of any reasonable

explanation as to why no protest had been filed since 2004, the leaned Judge was left with no option but to proceeded to confirm the grant.

14. As for Appellants' developments on a portion of the estate property, the learned Judge declined to hold this as a material consideration because the developments had been undertaken with the Applicant's knowledge that his deceased mother and siblings had equal rights to the family land. Second, that the appellant had his own land elsewhere on which he could have built the said school.
15. With regard to an alleged decree in Nyeri SRMCC No.196 of 1993, we agree with the learned trial Judge's failure to take it into consideration as a relevant factor because the assertion of its existence was not backed up by a copy of the pleadings and proceedings. Mr**. *Wabandi*** failed to explain why it is in two different **typings** or who, when or why it is in the said two different typings. There is also nothing in the said decree that tends to suggest that it was in relation to the property forming the estate of the deceased. We therefore agree with the submission of **Mercy *Kabethi*** that even if it were true that such a decree existed it would have been unfair for the Appellant to go off with a whooping five (5) acres while leaving his siblings and mother crammed up in 3.5 acres and also that no explanation was given as to why the Appellant never moved to execute it.
16. As for the appellant's complaint that the deceased's widow, ***Zipporah*** should only have been given a life interest in the deceased's intestate estate, we find this was not one of the issues raised before the learned trial Judge for consideration. It ought to have been contained in a protest in order for it to hold. In the absence of a valid protest against that mode of distribution the learned Judge was entitled to approve it as it formed part of the uncontested distribution that had been put forth by ***Zipporah*** in her affidavit in support of the uncontested Application for confirmation.
17. As for costs, rule 31 of the Rules of this Court enjoins us at the end of our determination to make any necessary, incidental or consequential order including orders as to costs. In ***Devran Dattan versus Dawda [1949] EACA 35*** the predecessor of this Court (EACA) reiterated that the decision as to whether the successful litigant has a right to recover his costs is left to the discretion of the judge who tried the case, which discretion is judicious, whose exercise must be based on facts, sound reason and not on caprice, whim or sympathy. In ***James Koskei Chirchir versus Chairman Board of Governors Eldoret Polytechnic [2011] eKLR (Civil Appeal No. 211 of 2005)*** this Court reiterated that notwithstanding, the provision of **section 27** of the Civil Procedure Act costs are generally a matter within the discretion of the court. See also the decision in the case of ***Super Marine Handling Services Limited versus Kenya Revenue Authority [2010] eKLR (Civil appeal No. 85 of 2006)*** for the proposition that costs of any action cause or other matter or issue shall follow the event unless the court or judge should for good reason otherwise order. In the circumstances of this appeal, the Appellant by his conduct had unnecessarily prolonged the matter in court. It was not only prudent but also fair and just for him to pay costs.

18. The upshot of all the above assessment is that we find no merit in the Appeal.
19. The same is dismissed with costs to the respondent both here and in the court below.

Dated and Delivered at Nyeri this 14 day of October, 2015.

P.N. WAKI

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JUDGE OF APPEAL

R.N. NAMBUYE

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR