REPUBLIC OF KENYA

IN THE HIGH COURT

AT MALINDI

Civil Appeal 50 of 2010

JAPHET MJAMBILI TSUMA and

NIGOGO MWARUA MWAKOYO (*legal representatives*

of the estate of KIBAKI OMAR **(DECEASED) .....APPELLANTS**

-VS-

DREAMGEAST LTD

EDWARD MUTUNGI NZIOKA .....RESPONDENTS

RULING

1. Before me is an appeal from the Judgment of the learned Chief Magistrate Malindi, delivered on 8th September, 2010. The judgment appealed from declared the appellants' suit incompetent on grounds *inter alia* that the respondents Japhet Mjambili Tsuma and Migogo Mwaruwa Mwakoyo, obtained authority to file the suit for damages namely HCCC No. 155/2009 via a limited grant of Letters of Administration *(grant ad litem)* but proceeded to prosecute it while not being possessed of a full grant. And that moreover Japhet was not a dependant of the deceased Kibaki Omar, while his alleged widow, Nigogo Mwarua Mwakoyo did not testify in the case.

2. Although the appellants raised ten grounds in the memorandum of appeal, the gist of the appeal is contained in grounds 3, 6, 7, 8 and 9 as reproduced hereunder.

3) The learned magistrate erred in law and fact by disregarding the evidence adduced by PW7 regarding dependancy.

6) The learned magistrate erred in law and fact in holding that the suit was incompetent for want of a full grant.

7) The learned magistrate erred in law and fact in failing to distinguish the circumstances of the case with the authority quoted by the respondent namely of John Komen versus Amos Kandie CC 20/1995 Eldoret.

8) The learned magistrate erred in law and fact by failing to appreciate that the wife of the deceased was a plaintiff in this matter by virtue of the amended plaint dated 3rd November, 2009 but filed on 24th November, 2009.

9) The learned magistrate erred in law and fact by failing to appreciate that the wife of the deceased was a co-administrator by virtue of the limited grant of letters of administration ad litem issued on 4th January, 2009 but granted on 2nd November, 2009.

3. The appellants' contention is that the Lower Court erred by wrongly applying the authority of **John Komen vs Amos Kandie**. HCC 20/1995, Eldoret in this case, without distinguishing that the former related to a *grant ad colligenda* while in the present case the appellant had been issued with a limited *grant ad litem* authorising the prosecution of the case. Mr. Wambua, counsel for the appellants severally stated in the submissions that by virtue of the amended plaint, both grantees of the *grant ad litem* were parties to the suit. Hence the evidence of PW7 was sufficient proof of the case for the dependants of the deceased, including Nigogo Mwaruwa Mwakoyo (second grantee), who did not testify in the case.

4. Mr. Wambua cited the case of **Lydia Ntembi Kairanya and Fredrick Mugambi Domenic vs the Hon. Attorney General (2009)e KLR** as authority for the proposition that in such a case the court ought to have proceeded to find in favour of the appellant rather than striking out the suit on the basis of what he suggests was a "technicality" raised as an ambush by the respondents at the close of the trial.

5. For their part, the respondents reiterated their submissions in the lower court that the grant to the appellant was limited to *filing suit* and *not prosecuting* the same (see **Eldoret HCCC No. 20 of 1995 John Komen vs Amos Kandie**). That PW7 had not demonstrated any authority to testify on behalf of his co-grantee, the widow of the deceased and that failure to call her as a witness was fatal to her dependency claim. With regard to the timing of the objection to the limited grant held by the plaintiffs, it was submitted that these were issues of law which did not require to be pleaded in the defence, as suggested by the counsel for the appellants.

6. I have now considered the parties' respective submissions and also perused the entire record of appeal. I have also read carefully the two authorities cited on either side with regard to the question of the limited grant. My considered view of the matter is as follows:

7. First, the record shows that there was one initial plaintiff in the suit being Japhet Mjambili Tsuma the original grantee of the limited granted issued by this court on 4th November, 2009. On record also is an application to amend the plaint, filed on the same date, seeking to include the second grantee as the 1st plaintiff. Contrary to Mr. Wambua's assertions, I cannot find any evidence on the record of the lower court that this application was ever allowed. I say this because a consent in respect of that application filed on 24th November, 2009 does not appear to have been adopted as an order of the court and neither were filing fees paid in respect of the said amended plaint.

8. Having also perused the original record of the lower court, I cannot find the original amended plaint purported to have been filed on 24th November, 2009 by the plaintiff a copy of which is at pages 19-20 of the Record of Appeal. As evident from Mr. Wambua's submissions on appeal, the matter of the amendment of the plaint was important because the dependency claim by the 1st purported plaintiff could probably have been salvaged even if the claim on behalf of the estate of the deceased was lost due to the insufficiency of the *ad litem grant*. My conclusion on the matter of amendment is that the record is unsatisfactory and it is debatable whether indeed any amendment was ever made to the plaint to introduce the widow of the deceased as a plaintiff.

9. But, even if that were done, and I think that is the correct understanding of the decision of Khamoni J's

very elaborate judgment in **Lydia Ntembi Kairanya's Case**, that a dependency claim is a matter of evidence and can succeed even in the absence of a full grant having been issued to a dependant. In that case, the Hon. Judge found that the grant relied on by the plaintiffs being a *grant ad litem* did not authorise them to do more than file the suit. The court rendered itself thus:

"From what I have been saying therefore, there is no dispute that the plaintiffs filed and have prosecuted this suit on the strength of a limited grant of letters of administration Ad Litem issued to them jointly by this High Court on 14th June, 2007 and it is exhibit 1. It is not disputed that grant authorized the plaintiffs to file this suit. But that is as far as that limited grant of letters of administration Ad Litem can go. That grant does not contain authority or power to prosecute a filed suit. It did not contain the power to collect or receive proceeds of the suit should plaintiffs be successful. Those should have been included in the Limited Grant. ...There was nothing preventing the plaintiffs from applying for rectification of the Limited Grant if plaintiffs wanted powers beyond the power to file suit. This is not a matter of form. It is a matter of substance which goes to the core of the type of authority given in the Limited Grant. Though the plaintiffs prosecuted this suit therefore, they did it without legal power to do so and they lack legal power collect or receive proceeds from prosecution of this suit in the event of success – under the Law Reform Act."

10. And after quoting Section 58 of the Law of Succession Act which requires the appointment of more than one administrator to an estate of an intestate deceased person, the Hon. Judge continued to observe:

"From what Section 58 says therefore when I see the 1st plaintiff, in this suit coming to court in the absence of the 2nd plaintiff her co-administrator to prosecute this suit, I become suspicious of the 1st plaintiff's activities and that suspicion of the 1st plaintiff becomes stronger when I realize that these are plaintiffs who were given a limited grant more than two years ago and up to now there is no evidence before this court that they have taken steps to obtain a full grant of Letters of Administration to the Estate of the deceased. Are these the real people lawfully ad properly entitled to administer the Estate of the Deceased and therefore people to be entrusted with proceeds of this suit? In the circumstances the claim of the plaintiffs under the Law Reform Act fails.

11. The only part of the claim which succeeded in that case was the dependency claim under the Fatal Accidents Act, because the 1st plaintiff therein was claiming as a wife/dependant of the deceased. It must be noted that in that case the said dependent was a party and testified at the hearing. The judge's award to the dependant was based on her evidence of dependency. In the instant case, it is debatable that the widow was actually a party but even worse, she did not adduce evidence at the trial and neither was any representation made to the effect that PW7 (the purported 2nd plaintiff) was approved to testify on her behalf.

12. As Khamoni J. observed in the **Lydia Ntembi Kairanya's Case**, it is suspicious that the deceased's widow appears to have taken a back seat in the prosecution of the case before us. The Record of Appeal at page 68 shows that PW7 during cross-examination was hard pressed on this aspect, the question of dependency by the widow and income of the deceased. He admitted that initially he applied for a limited *grant ad litem* alone only including the widow later. His answers regarding the income of the deceased and the widow's dependency revealed precious little information.

13. It is true that in her judgment the Learned Magistrate while considering the adequacy of the *grant ad litem* did not consider the evidence of PW7. In my considered opinion, that does not matter for two reasons:

a) The introductory part of the judgment shows there was only one plaintiff in HCC 155/2009. Contrary to the appellant's assertions to the contrary it appears that the plaintiff Japhet M. Tsuma labored under an assumption that there were two plaintiffs.

b) Even if the widow had been joined as a plaintiff, there was no intimation on record that PW7 was to testify on her behalf. And as I have observed PW7's evidence on income and dependency with regard to

the deceased was shot right through during cross-examination.

14. The appellant's complaint that the legal objections regarding the *ad litem grant* were an ambush or matters of 'technicality' cannot stand. This is because these were points of law, liable to be raised at any time, but preferably prior to the trial. Secondly, the same are matters of substance not merely technicalities as they go to the core of the authority of the purported applicant. (see **Lydia Ntembi Kairanya's Case**) Indeed the court itself could have raised them *suo motu* in its judgment, because a party purporting to act on behalf of the estate of a deceased person must be vested with the necessary authority. To suggest otherwise would in my view be tantamount to proposing that the law of Succession Act has force of law only as befits the exigencies of a party. That cannot be a reasonable or lawful proposition.

15. Mr. Wambua submitted that the Lower Court in considering whether the *grant ad litem* was "proper or not" erred as this was an extraneous matter suitable only for canvassing before the "succession court". With respect, the Lower Court was bound by the decision of the High Court brought its notice, and the consideration was not so much in respect of the propriety of the grant as to its purport or extent of its authority to the plaintiffs. The Lower Court is a Court of Law and is expected to uphold the rule of law.

16. In this case, it mattered not that the **Komen decision** related to a *grant ad colligenda*, which as the judge in the case noted, the plaintiff in that case attempted to use as a *grant ad litem.* The applicable principles are the same. It is well to note that the **Lydia Ntembi** authority cited by Mr. Wambua in support of his appeal and dealing with a *grant ad litem* arrived at a similar conclusion as the **Komen Case**: a limited grant can only be used for the purposes for which it is granted and no more. Therefore the two authorities are not distinguishable.

17. For these reasons. I am satisfied that the learned magistrate correctly applied the law to the facts before her. I find no merit in the appeal before me and will dismiss it with costs.

Delivered and signed at Malindi this **2nd** day of **July, 2012** in the presence of Mr. Nyakoe holding brief Mr. Wambua for the appellant. Respondent – absent: court clerk -Evans/Leah.

C. W. MEOLI
JUDGE