



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: PLATT, GACHUHI JJA & MASIME Ag JA)

CIVIL APPEAL NO 142 OF 1986

IBRAHIM OKOYANA SHIAMBIRI APPELLANT

VERSUS

ZIPORAH MUSI & ANOTHER.....RESPONDENTS

(Appeal from the High Court at Kakamega, Aganyanya J)

JUDGMENT

The appellant Ibrahim had obtained letters of administration on March 7, 1985. This grant was confirmed on October 7, 1985. But on June 17, 1986 Ziporah Musi (first respondent) summoned Ibrahim to defend her application to revoke or annul the grant of letters to Ibrahim. She claimed that Ibrahim had omitted important material in his application because she, Ziporah, was a widow of the deceased and entitled to live on the land, which was to be registered in the appellant's name. Therefore she ought to be an administrator as well as Ibrahim. Not all the heirs had been mentioned in the appellant Ibrahim's application. The deceased, the father of Ibrahim and husband of Ziporah had divided the land; each of those left behind had their portions; but Ibrahim wanted to evict Ziporah from the land, Ibrahim denies that and claims to look after her.

Ziporah's application came on for hearing on June 26, 1986. The record does not disclose what occurred in chambers on July 15, 1986, the date to which the matter had been adjourned for the appearance of the appellant. On this latter day, a consent order was entered on the record.

It reads:

'By consent, land register to be rectified as follows: Land Registration Number Bunyala/Sirigoi/251 to be sub-divided into three equal parts and given different numbers for Ibrahim Okoyana Shiambiri; David Musa Wafumbi and Ziporah Musi and respective land certificates to be issued in respect thereof. The parties of course, to comply with Land Control Act requirements before the said sub-division.'

Each party then signed.

The appellant now appeals against this consent order claiming it to be against all the facts of the case. He adds that he was put in a cell to 'soften' him up, and when he was cleared he was told to sign. The court has understood the grounds of appeal to mean that on the actual application before the court, no such consent order could be entered. It was invalid and the terms of that order were null.

At any rate, that is the position taken now for two reasons. The first is that there could be no distribution of the estate of the deceased whilst it was uncertain who the administrator or administrators actually were. If the grant to Ibrahim was to be revoked, then the registration of the land in his name was in doubt. If Ibrahim had no sole grant, he would act unlawfully. The same goes for Ziporah. She could not agree to distribute the estate before she had Letters of Administration (see *Burns v Campbell* [1952] 1 KB 15). Neither of them could give David Wafumbi a share. It is not possible to enter into a consent judgment to carry out an unlawful purpose. Any such proceedings are null and void. (See 1 *Seton on judgments and Orders* (7th edn) page 124 approved in *Brooke Bond Liebig (T) Ltd v Mallya* [1975] EA 266 at 269).

The second point is that the parties could not agree to rectify the register before the consent of the Land Control Board had been given. They could agree to apply for consent of the Land Control Board for subdivision. But it was premature to agree to rectification, a matter which concerned the registrar. They could seek to sub-divide and then seek to have the subdivision carried into effect. On the other hand, David Wafumbi was not a party to the proceedings, initiated by Ziporah. All that she asked for was to be made a joint administrator with Ibrahim.

This appeal succeeds on the ground that whether or not there was a true consent order the proceedings of July 15, 1986 were null and void, and must be set aside. It is so ordered. The record is remitted to the High Court, Kakamega, for a different judge to hear and determine Ziporah's application according to law. Each party will bear his or her own costs of this appeal.

Dated and Delivered at Kisumu this 20th Day of June, 1987

H.G PLATT

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JUDGE OF APPEAL

J.M GACHUHI

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JUDGE OF APPEAL

J.R.O. MASIME

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Ag JUDGE OF APPEAL