



IN THE COURT OF APPEAL FOR EAST AFRICA

AT NAIROBI

(Coram: Wambuzi P, Law V-P & Musoke JA)

CIVIL APPEAL NO. 55 OF 1976

BETWEEN

WILLIE J. DANIELAPPELLANT

AND

PUBLIC TRUSTEERESPONDENT

(Appeal from the Judgment of the High Court (Hancox J) Dated 1st July 1976 in Civil Case No 175 of 1975)

JUDGMENT

Law V-P Daniel Kagunya Kimenyi, an African of the Kikuyu tribe, died on 13th January 1970 and left a will whose validity has been challenged in a suit brought by the appellant, his son, who claims that it is invalid under section 4 of the African Wills Act in so far as it (i) deviates from the entrenched customary law of dividing a piece of land equally between “houses”, and (ii) devises immovable property to one widow.

It is common ground that the land in question is registered under the Land Adjudication Act and accordingly falls within the definition of “registered land” in section 2 of the Registered Land Act. The sole executrix named in the will, the deceased’s widow Susana Karungari, has renounced her right to probate and administration of the will, and has consented to the Public Trustee administering the estate. The Public Trustee is accordingly administering the estate, under section 4(3)(c) of the Public Trustee Act (hereinafter referred to as “the Act”). He has not applied to the Court for probate, because the estate is of a gross value, exclusive of the land registered under the Land Adjudication Act, which does not exceed Shs 10,000, so that in accordance with proviso (i) of the Act the estate can be administered by the Public Trustee without the necessity for making any application to the Court for a grant of probate, as would be required under section 4(3) of the Act if it were not for the *proviso*. By section 2A of the Act:

Nothing in this Act shall confer on the Public Trustee or his agents any powers in respect of- ... (b) land registered under the Land Adjudication Act.

By his amended plaint dated 21st May 1976, the appellant further pleaded that the Public Trustee had no power of administration or otherwise in respect of the land which is the subject-matter of the will and suit by reason of the provisions of section 2A. By his amended defence, the Public Trustee pleaded that the will was “valid for all purposes” and that he had undertaken administration under *proviso* (i) to section 4(4) of the Act.

By consent of the parties, a preliminary point of law was argued in the High Court before Hancox J. This preliminary issue should have been stated in writing, under the Civil Procedure Rules, order XIV, rule 6, but no objection was taken to the absence of writing. The preliminary issue was stated orally by Mr Muite to be, so far as is material to this appeal, that:

By virtue of section 2A of the Public Trustee Act ... the Public Trustee ... had no powers to deal with the piece of land which is the subject-matter of this suit.

Mr Kithyoma for the Public Trustee stated that the Public Trustee was administering the will under section 4(3)(c) of the Act, without a grant of probate, the gross value of the estate being not in excess of Shs 10,000 when calculated in accordance with *proviso* (i) to section 4(4) of the Act, and he relied on section 119 of the Registered Land Act as giving the Public Trustee the necessary power to deal with and transfer registered land, notwithstanding the absolute prohibition on exercising any powers in relation to land registered under the Land Adjudication Act contained in section 2A of the Act.

Hancox J did not refer in his ruling to Mr Kithyoma's submission that section 119 of the Registered Land Act gave the Public Trustee the necessary power to deal with land registered under the Land Adjudication Act. He held as follows: (1) that *proviso* (i) to section 4(4) of the Act is not a true *proviso* but has the effect of a substantive enactment; (2) that the effect of that *proviso* is to empower the Public Trustee, in the case of a small estate which he is entitled to administer without a formal grant of probate, to administer that estate "not only as to the non-contentious portions but also as to the property particularised in paragraph 2 of the will", that is to say, the land registered under the Land Adjudication Act; and (3) that the Legislature by enacting the first *proviso* aforesaid "is making it clear that this provision is intended to prevail over section 2A and I hold that it does not prevail".

He accordingly found against the appellant on the preliminary issue. From that decision the appellant, represented by Mr Muite, has appealed. Mr Kithyoma appeared for the Public Trustee. Both advocates agreed that the decision appealed against gave rise to a preliminary decree, appealable as of right. Mr Kithyoma also conceded that the first ground of appeal must succeed. It is that:

The judge erred in law in making the finding that *proviso*

(i) to subsection (4) of section 4 of the Public Trustee Act ... overrides the clear provisions of section 2A of that Act.

In view of Mr Kithyoma's concession, this ground of appeal needs no further consideration. It is sufficient to say that it is a good ground. Quite clearly, in my view, *proviso* (i) to section 4(4) of the Public Trustee Act is a true *proviso* and not a substantive enactment. It does no more than qualify the preceding provisions of section 4 in regard to the valuation of estates, by providing that where the gross value of an estate does not exceed Shs 10,000 (excluding the value of registered land) it may be informally administered by the Public Trustee. It does not purport to confer upon the Public Trustee a right to administer land registered under the Land Adjudication Act. I can see nothing in that *proviso* which in any way affects the clear wording of section 2A of the Act, that nothing in the Act shall confer on the Public Trustee any powers in respect of land registered under the Land Adjudication Act. Far from conflicting with section 2A, the *proviso* reinforces that section by stressing that land registered under the Land Adjudication Act is outside the powers of the Public Trustee.

This leaves for consideration the second ground of appeal:

That the trial judge erred in law and in fact in making the finding that the Public Trustee had any power to step in and administer that portion of the estate consisting of land registered under the Registered Land Act.

which of course includes land registered under the Land Adjudication Act.

This ground is linked with the first ground, but Mr Kithyoma wishes to support Hancox J's finding that

the Public Trustee has power to deal with that portion of the estate consisting of registered land, on grounds not relied on in the court below, that is to say, that the necessary power is to be found in section 119 of the Registered Land Act. Mr Kithyoma should, under rule 91 of the Rules of this Court, have given notice of his desire to contend that the decision appealed against should be supported on other grounds. However, as Mr Muite had no objection to the matter being argued without notice, and as Mr Kithyoma had made the same submission in the court below, we allowed the matter to be argued as if notice had been given.

Section 119 of the Registered Land Act reads as follows, so far as is material:

(1) If a sole proprietor or a proprietor in common dies, his personal representative on application to the registrar in the prescribed form and on production to him of the grant, shall be entitled to be registered by transmission as proprietor in the place of the deceased with the addition after his name of the words 'as executor of the will of ... deceased' or 'as administrator of the will of ... deceased' as the case may be.

(2) Upon production of a grant, the registrar may, without requiring the personal representative to be registered, register by transmission – (a) any transfer by the personal representative; ...

Mr Kithyoma's submission can be summarised as follows: (A) the deceased was the sole proprietor of the registered land; (B) the executrix named in the will having renounced, the Public Trustee has stepped into her shoes as personal legal representative; (C) under section 119 of the Registered Land Act, the Public Trustee as personal legal representative can – (a) have himself registered as proprietor of the registered land by transmission, or (b) without himself registering, require the registrar to register the land by transmission by the Public Trustee to a third party.

In other words, in Kithyoma's submission, the Public Trustee, as a personal representative, can deal with and transfer, in accordance with the terms of the will which he is administering, registered land (including land registered under the Land Adjudication Act), notwithstanding the absolute prohibition contained in section 2A of the Public Trustee Act. Mr Muite argued that the Public Trustee is a legal person whose constitution, powers, rights, duties and obligations are established by, and exclusively by, the Public Trustee Act, section 2A of which absolutely prohibits him from exercising any powers whatsoever in relation to land registered under the Land Adjudication Act. At the most, in Mr Muite's submission, section 119 of the Registered Land Act entitles the Public Trustee to be registered as proprietor by transmission but nothing in section 119 operates to allow him to deal with the land where, as in this case, it consists of land registered under the Land Adjudication Act.

Here indeed is a conflict, which now has to be resolved. Under the Act from which he derives his powers, the Public Trustee is prohibited from doing anything in relation to land registered under the Land Adjudication Act. By section 119 of the Registered Land Act, the Public Trustee can register as proprietor, or can require the registration by transmission from him, of registered land which, by definition, includes land registered under the Land Adjudication Act, in apparent contravention of section 2A of the Public Trustee Act.

How is this conflict to be resolved? After careful consideration, and with some hesitation, I have come to the conclusion that Mr Kithyoma's submissions on this point must prevail. I say so because the Registered Land Act is more recent than the Public Trustee Act. The Registered Land Act applies to land registered under the Land Adjudication Act. Section 119 of the Registered Land Act gives personal representatives powers in relation to registered land, including land registered under the Land Adjudication Act. Section 4 of the Registered Land Act provides that:

Except as otherwise provided in this Act, no other written law relating to land ... shall apply to land registered under this Act so far as it is inconsistent with this Act.

Provided that, except where a contrary intention appears, nothing contained in this Act shall be construed as permitting any dealing which is forbidden by the express provisions of any other written law...

Section 2A of the Public Trustee Act, in so far as it prohibits the Public Trustee from dealing with land registered under the Land Adjudication Act, is a “written law relating to land” and is inconsistent with the provisions of section 119 of the Registered Land Act which empowers the Public Trustee, in his capacity as a personal representative, to transfer registered land (which includes land registered under the Land Adjudication Act whether or not he has registered himself as proprietor. In my view, section 119 prevails over section 2A of the Public Trustee Act. Furthermore, in my view, a “contrary intention” within the meaning of the *proviso* to section 4 of the Registered Land Act appears from section 119, so as to permit the dealing by the Public Trustee in land registered under the Land Adjudication Act which is prohibited by section 2A, as section 119 empowers personal representatives, including the Public Trustee, to administer all forms of registered land. In my opinion, the second ground of appeal fails.

The third ground of appeal is that Hancox J erred in holding that a certificate issued by the Public Trustee to the effect that he was administering the estate of Daniel Kagunya Kimenya without a grant, under *proviso* (i) to section 4(4) of the Public Trustee Act, was not a certificate of administration. In so holding, the judge commented: “It certainly has no statutory backing.” With respect, I think he overlooked section 119(3) of the Registered Land Act, which defines “grant” as including “the grant of summary administration in favour of, or issued by, the Public Trustee, as the case may be”. Clearly where no formal grant has been made by the Court in the case of a small estate, such as this one, the Public Trustee can himself issue a document certifying that he is administering the estate without a formal grant. This ground of appeal, which is not opposed by Mr Kithyoma, in my opinion also succeeds.

In the event, although the appellant has succeeded on two out of three grounds, he has failed on the main ground that the Public Trustee has no power to administer such portion of the will as relates to registered land. For the reasons I have sought to explain, I think the Public Trustee has such power, and that he can administer the estate and transfer the registered land in accordance with the will, provided of course the will is lawful and valid in this respect in the light of section 4 of the African Wills Act. This is a matter raised in paragraph 4 of the amended plaint which still has to be decided before the Public Trustee can dispose of the land in accordance with the testator’s wishes. If the High Court holds that the devises of registered land purported to have been made in the will were valid and lawful, then in my view the Public Trustee can make the necessary transfers notwithstanding the provisions of section 2A of the Public Trustee Act. If the devises of registered land purported to have been made are invalid and unlawful, as contravening section 4 of the African Wills Act, the High Court will have to give directions as to how that part of the estate which consists of land registered under the Land Adjudication Act is to be administered.

I would dismiss this appeal. In view of its partial success, and in view of the Public Trustee’s failure to file a notice of intention to support the judgment on other grounds, I would make no order as to the costs of this appeal.

Wambuzi P. I agree with the judgment of Law V-P that this appeal must fail. I wish to add that the preliminary point of law raised before Hancox J in the court below was primarily a question of interpretation of two provisions of the Public Trustee Act. I think *proviso* (i) to section 4(4) of the Act does not purport to give any powers to the Public Trustee over registered land.

The section 4(4) provides for peculiar circumstances in which the Public Trustee may be granted letters of administration even though there are persons who, in the ordinary course, would be legally entitled to administer the estate of the deceased in preference to the Public Trustee. *Proviso* (i) does no more than make it lawful for the Public Trustee to administer an estate without letters of administration if the gross value of the estate, excluding registered land, does not exceed Shs 10,000. In my view, the exclusion of registered land in *proviso* (i) is superfluous and completely unnecessary, as the Public Trustee has no power anyway in respect of registered land by virtue of section 2A of the Act. I think Mr Kithyoma rightly conceded that the first ground of appeal, that it was an error in law to hold that *proviso* (i) gives any powers to the Public Trustee overriding section 2A, must succeed.

As regards section 2A of the Act I do not think there is any more to it than what it says. The words “nothing in this Act shall confer on the Public Trustee ... any powers in respect of ... land registered under the Land Adjudication Act” do not, in my view, mean that the Public Trustee cannot have powers under

some other Act. I agree with Mr Muite that the Public Trustee is a creature of statute and can exercise only such powers as are conferred upon him by statute. In this case I think it is common ground that the Public Trustee has no powers over registered land under the Public Trustee Act but I would not go so far as to say that section 2A of the Act as worded precludes the Public Trustee from having any powers outside his own Act. I would say that if it was the intention of the Legislature to prevent the Public Trustee from having any powers at all over registered land, the Legislature would have said so in so many words. It is not uncommon to find in written laws expressions like “nothing in this act or in any written law shall confer powers”, etc, etc, or words to that effect. Law V-P set out in his judgment the provisions of section 4 of the Registered Land Act which does exactly this. In these circumstances one looks at the main Act and also any other Act dealing with the subject in question. I think that in this case the Public Trustee is entitled to show that he has powers under some law other than the Public Trustee Act. In this connection we were referred to section 119 of the Registered Land Act which permits registration of a personal representative by transmission. In my view if the Public Trustee is a personal representative then he can in that capacity be registered as executor or administrator of the will of the deceased, unless, of course, he is precluded by his own Act from holding such office, which does not appear to be the case. It follows that the Public Trustee as personal representative cannot invoke any powers under the Public Trustee Act which are specifically taken away from him by virtue of section 2A of that Act. In short, the Public Trustee will not act as Public Trustee, but as personal representative of the deceased. Section 119(3) of the Registered Land Act speaks of a grant of summary administration of the estate in favour of or issued by the Public Trustee. This is inconsistent with the provisions of section 2A of the Public Trustee Act in so far as land registered under the Land Adjudication Act is concerned; but it is generally accepted in these Courts that the Legislature knows what laws it has enacted and, if a law conflicts with an earlier law, the intention in most cases is for the later law to prevail. In this case the *proviso* to section 4 of the Registered Land Act would appear not to affect section 2A of the Public Trustee Act; but I would think that a contrary intention appears in section 119(3) of the Registered Land Act, which specifically refers to a grant of summary administration of the estate in favour of the Public Trustee or issued by him. I do not think that this provision was an oversight.

Lastly, I think that this case is dependent on the validity of the will which is being questioned and, as the Public Trustee can only act as personal representative, I doubt whether the parties have benefited by coming to this Court at this stage.

As Musoke JA agrees with the judgment of Law V-P there will be an order in the terms proposed by Law V-P.

Musoke JA. I have read the judgment of Law V-P in draft and I agree with it.

Appeal allowed in part.

No order as to costs.

Dated and Delivered at Nairobi this 31st day of March 1977.

S.W.W.WAMBUZI

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PRESIDENT

E.J.E.LAW

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VICE PRESIDENT

J.S.MUSOKE

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JUDGE OF APPEAL

I certify that this is a true copy of the
original.

DEPUTY REGISTRAR