



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MIGORI**

**ELC APPEAL NO. 1 OF 2018**

**(Formerly Kisii High Court Civil Appeal No. 107 of 2012 and Homa-Bay High Court Civil Appeal No. 12 of 2017)**

**TOM OTIENO NYAGILO.....APPELLANT**

**VERSUS**

**CHARLES OOKO NYAGILO.....RESPONDENT**

(Being an Appeal from the Judgment of Honourable Z. J. Nyakundi, Principal Magistrate (as he then was) in Rongo Principal Magistrate's Court Land Misc. Application number 28 of 2011 delivered on 13<sup>th</sup> July 2012)

**JUDGMENT**

**A. Introduction**

1. This is an appeal against the trial court's Judgment dated 13<sup>th</sup> July, 2012 (Honourable Z.J. Nyakundi, PM, as he then was) in Rongo Principal Magistrate's Land Misc. Application number 28 of 2011. By the respondent's chamber summons dated 22<sup>nd</sup> December 2011, the trial court adopted East Sakwa location village elders' decision made on 7<sup>th</sup> March 2010. The appellant contends that the mediation process conducted by the village elders chaired by the Chief of East Sakwa location in Migori county that resulted in subdivision of parcel number South Sakwa/Kogelo/516 (hereinafter "the suit property"), the estate of the late Christopher Nyagilo Omolo, (hereinafter, "the Deceased"), disinherited some beneficiaries. It is the appellant's position that all the beneficiaries were not involved in the mediation process and that the distribution of the suit property was unfair.

2. Thus, by a memorandum of appeal dated 31<sup>st</sup> July 2012, and filed in court on even date, the appellant appealed against the whole judgment of the trial court on the following grounds;

*i. That the Honourable Magistrate erred in law and in fact in adopting a resolution manufactured by the applicant and his(sic) cronics as a judgment of the court despite the overwhelming evidence that the alleged meeting giving rise to the resolution never took place.*

*ii. That the Honourable Magistrate erred in law by totally ignoring the provisions of section 40 of the Law of Succession Act Cap 60 the laws of Kenya which governs land distribution in a polygamous family.*

*iii. That the Honourable Magistrate erred in law and in fact by finding that the alleged meeting which never took place was in accordance with Article 159 of the Constitution.*

*iv. That the Honourable Magistrate erred in law and in fact by failing to appreciate and uphold the crucial(sic) tenants and requirement of Alternative Dispute Resolution mechanisms.*

3. So, the appellant has sought the following orders:-

*a) That the appeal be allowed.*

*b) The trial court's judgement be set aside.*

*c) Costs of the application.*

4. The appellant is represented by learned counsel, Mr. Patrick Jaleny while the respondent's learned counsel is Mr. John Odera Were.

5. The parties argued the instant appeal by way of written submissions further to directions of the court (H. Omondi J) given on 31<sup>st</sup> July, 2017. The appeal was transferred to this court from the High Court of Kenya at Homa-Bay on 26<sup>th</sup> February 2018. Earlier, it had been transferred from the Kisii High Court to the Homa-Bay High Court.

### **B. The Appellant's Case**

6. The totality of the appellant's case flows from the way mediation was conducted by the elders. The appellant's contention is that the process was tainted with impropriety and the resolution was forced upon the beneficiaries of the estate of the deceased.

7. In his submissions dated 18<sup>th</sup> February 2019 and filed on 29<sup>th</sup> February 2019, learned counsel for the appellant argued that the mediation process and its resolution was not in conformity with the provisions of Article 50 as well as Article 159 (3) of the Constitution of Kenya, 2010 which provides :-

*“Traditional dispute mechanisms shall not be used in a way that contravenes;*

*(a) the Bill of Rights*

*(b) is repugnant to justice and morality or results in outcomes that are repugnant to justice and morality or*

*(c) is inconsistent with the constitution*

*or any other written law.”*

8. Counsel further argued that the **Law of Succession Act (Cap 160)** was contravened by the judgment of the trial court when it adopted a mode of distribution of the estate that resulted in unfairness. The appellant also contended that the respondent hived off for himself four (4) hectares of the suit property (resulting in land Parcel No. South Sakwa/Kogelo/1439) leaving the remaining 5.2 hectares to be shared amongst 10 (ten) dependants. Finding support in Kisii High Court **Succession Cause No. 76 of 2013 in the Matter of the estate of Johnson Ontiri Igendia (deceased) -vs- Magero Marungo & Julius K. Omuga** and Kericho **ELC Case No. 52 of 2014 (OS); Alice Chemutai Too (suing in her capacity as the personal representative of Kipkoech Tele – deceased -vs- Nickson Kipkirui Korir, the Attorney General and Consolidated Bank of Kenya**, the appellant urged this court to revoke the subdivision of the suit property and deregistration of the parcel hived off by the respondent (Parcel No. South Sakwa/Kogelo/1439). That the entire land do revert to the name of the deceased for purposes of fresh distribution under the Law of Succession Act hence guaranteeing fairness to all the beneficiaries.

### **C. The Respondent's Case**

9. By his submissions dated 13<sup>th</sup> March 2019 and filed in court on 14<sup>th</sup> March 2019, the respondent attacked the appellant's case majorly on two fronts. Firstly, he contested the inclusion of certain documents relating to the subdivision of the land in the record of appeal. Secondly, the jurisdiction of this court on the basis that it is a succession dispute and therefore ought to have been filed in the Family Court. The respondent contended that he was unable to contest jurisdiction at the earliest opportunity because he was not served accordingly. On the question of jurisdiction, the respondent's counsel cited the case of **Nation Media Group Limited v Cradle – The Children's Foundation suing through Geoffrey Maganya (2016) eKLR** where reference was made to the locus classicus decision of Nyarangi JA in **Owners of Motor Vessel Lilian "S" v Caltex Oil (Kenya) Ltd. (1989) KLR 1**.

10. Contesting the ground of appeal of non-participation by other beneficiaries in the meeting that resulted in the distribution, the respondent referred to the replying affidavit of the appellant at page 29 of the record of appeal to demonstrate that the appellant was in the meeting. He further argued that of all the beneficiaries of the deceased, it is only the appellant who was unhappy with the distribution. That the resolution made on the 7<sup>th</sup> March 2010 was arrived at properly. On the ground of non-compliance with section 40 of the Law of Succession Act, the respondent argued that according to pages 47, 48 and 49 of the record of appeal, distribution was done in accordance with the number of children per house, a fact which was exhaustively discussed and settled before distribution.

11. The respondent further faulted the appellant on the allegation that there was conspiracy by the local chief, the sub-chief and the village elders on the mediation process. Referring to the lower court record and provision of **section 80 of the Evidence Act (Cap 80)**, it was his contention that there was no conspiracy and that any contrary position is a burden on the appellant to prove.

### **D. Points for Determination**

12. In view of the foregoing, it is my considered opinion that the issues that arise for determination herein are as follows:

- i. Whether this court has jurisdiction over the instant appeal.
- ii. In view of (i) above, whether the Alternative Dispute Resolution mechanism was properly conducted.
- iii. Whether the trial court was right in adopting the Alternative Dispute Resolution as judgment of the court.
- iv. The orders this court should make in view of issues (ii) and (iii) herein above.

### **E. Analysis and Determination**

13. This being the first appeal, the role of this appellate court of first instance is well settled; see **William Diamonds Limited –vs- Brown (1970) EA 1 and Selle and another –vs- Associated Motor Boat company Ltd and others (1968) EA 123.**

14. As such, the appellate court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions. In doing so, the court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before the court. Furthermore, is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time; see also **Kamau –vs- Mungai and another (2006) 1 KLR 150**

15. On the first point, **section 5 of the Civil Procedure Act (Cap 21)** stipulates that any court shall try all suits of civil nature unless either expressly or impliedly barred. A challenge to jurisdiction of a court goes to the very root of a matter. Jurisdiction is donated to a court by the Constitution or a statute or both as pronounced by the Court of Appeal in **Samwel Kamau Macharia and another –vs- Kenya Commercial Bank and 2 others (2012) eKLR.**

16. This court must first make a determination on whether it has the requisite jurisdiction over the appeal as guided by the landmark decision in the case of **Owners of Motor Vessel Lilian “S” (supra)** where the Court of Appeal held:-

**“Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter it holds the opinion that it has no jurisdiction.”**

17. In the case of **Lemankan Aramat –v- Harun Meitamei Lempaka and 2 others (2014) eKLR**, the Supreme Court of Kenya held that if a court lacks jurisdiction, then its decision would be null ; see also its other decision in **R-vs- Karisa Chengo and 2 others (2017) eKLR** that:-

**“Jurisdiction goes to the root of any litigation”.**

18. The Environment and Land Court Act, 2015 (2011) sets out in detail the jurisdiction of this court. Section 13 in particular, outlines the jurisdiction of this court which **has** original and appellate jurisdiction to hear and determine all disputes in accordance with **Article 162(2)(b) of the Constitution of Kenya, 2010** and with the provisions of the Act or any other law applicable in Kenya relating to environment and land matters.

19. It is pretty clear from the record of appeal and the submissions of counsel for the respective parties that the dispute in this matter revolves around the mode of distribution carried out on the suit property. There is no dispute whatsoever on ownership of the suit property. It was the property of the deceased. Therefore, what will put to rest the dispute herein is the eventual mode of distribution of the suit property.

20. This court is aware of the meaning of the terms **“Personal representative,” “executor”, and administrator “ under section 3 of Law of Succession Act.** The powers of personal representatives are spelt out at section 82 of the Act, while section 45 of the same Act, prohibits intermeddling with property of the deceased.

21. It is also important to note that **sections 47 and 50 of the Law of Succession Act** provide for jurisdiction of the High Court and appeals to the High Court respectively regarding succession matters. Basically, the trial court adopted the resolution of village elders on the distribution of the estate of the deceased. I am of the considered view that this is mainly a succession matter painted as a land dispute. In that regard, I approve that decision of P. Nyamweya J in the case of **Munyasya Mulili and 3 others –vs- Sammy Muteti Mulili (2017) eKLR** where she had the following to say:-

**“On the second issue as regards this court’s jurisdiction as a succession court , this court has wide inherent powers in succession matters to make such orders as may be expedient, to ensure that the ends of justice are met and prevent abuse of court process by parties under section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules. Section 47 of the Law of Succession Act provides as .....**”

22. As regards when a matter is best placed for a succession cause, I endorse the view of Musyoka J. **In Re Estate of Alice Mumbua Mutua(Deceased)(2017) eKLR** where he stated as follows:-

**“ . . . .The Law of Succession Act, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.**

**Disputes of course do arise in the process. ....The presumption is that such dispute arise before the distribution of the estate, or the confirmation of the grant.**

**The primary mandate of the probate court is distribution of the estate and once an order is made distributing the estate , the court’s work would be complete.....”**

23. In view of the foregoing, it is abundantly clear that the instant matter revolves around the distribution of the estate of the deceased. It is preserved for the Family Division of the High court of Kenya as the appropriate forum. The instant appeal pleads for discontinuation as I

hold the opinion that the jurisdiction of this court is ousted thereby.

24. Wherefore, I hereby strike out the instant appeal mounted by way of a memorandum of Appeal dated 31<sup>st</sup> July 2012. Costs to be in the cause.

25. It is so ordered.

**DELIVERED, SIGNED and DATED in open court at MIGORI this 24<sup>th</sup> day of OCTOBER 2019.**

**G.M.A. ONGONDO**

**JUDGE**

**In the presence of :-**

Mr. Patrick Jaleny learned counsel for appellant

Mr. J. Odera Were learned counsel for the respondent

Tom Maurice – Court Assistant