CKM v ENM & another (Civil Appeal 250 of 2019) [2024] KECA 293 (KLR) (8 March 2024) (Judgment)

Neutral citation: [2024] KECA 293 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 250 OF 2019

J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA

MARCH 8, 2024

BETWEEN

CKM .... APPELLANT

AND

ENM .... 1ST RESPONDENT

JMM .... 2ND RESPONDENT

(Being an Appeal from the ruling of the High Court of Kenya at Meru, (F. Gikonyo, J.) dated 6th March 2019 in HCCC NO. 136 of 2010 (O.S))

JUDGMENT

1. ENM (the 1st respondent) and JMM (the 2nd respondent who is now deceased) got married under Kikuyu customary law in 1968, and were blessed with two sons and two daughters. One son and one daughter died. In the course of the marriage, the couple acquired several properties. In the High Court at Meru, the 1st respondent sued the deceased (then alive) by way of originating summons seeking the determination of her interest in the matrimonial properties.

2. One of the properties, Nyaki/Kithoka/4XX, had been sold by the deceased to Charles Kanyithia Maithulia (the appellant) for Kshs.25,000/= during the subsistence of the marriage. The 1st respondent's case was that she had solely bought this property but had it registered in the name of the deceased, and that she was not made aware, or her consent sought, when it was sold to the appellant. The deceased's case was that he had solely bought the property, and that the 1st respondent was aware of the sale. According to the appellant, he was an innocent purchaser for value who had taken possession of the property which he was developing.

3. The deceased's response to the originating summons was that the Married Women *Matrimonial Property Act*, on which the 1st respondent had based her claim, did not apply to a customary law

marriage. Secondly, that the 1st respondent had not contributed to the acquisition of the property in question.

4. The hearing of the suit begun on 1st May 2015 before the learned Judge (J.A. Makau, J.) when the 1st respondent partly testified. On 26th May 2016 the matter came before the learned F.M. Gikonyo, J. when the court was informed that the deceased had passed on. On 18th August 2016 the court directed that:-

   " Substitution of deceased be done. I note that the 1st defendant is deceased."

   On 23rd February 2017 the matter was mentioned. Substitution had not been done. It was directed that hearing does commence de novo. On 20th April 2017 the matter came up and the learned Judge, at the request of Ms. Kiome for the 1st respondent, directed that the earlier order regarding substitution be altered and set aside. There had been no substitution, and there was no representation on the part of the deceased who was the 1st defendant. The learned Judge ordered that the matter be heard on priority basis. On 1st March 2018 the 1st respondent testified. She further testified on 22nd November 2018. The appellant testified, as did two defence witnesses Kabura Mutungi (DW 1) and David Nkubu Gikura (DW 3). The matter was then reserved for judgment.

5. In the judgment that was delivered on 6th March 2019, the learned Judge found, in respect of Nyaki/Kithoka/4XX, that it was matrimonial property in which the 1st respondent and the deceased held equal share; that the deceased had sold it to the appellant without disclosing that the 1st respondent had beneficial interest in it; and, therefore, that the appellant was not a bona fide purchaser for value without notice of the suit property. An order was made that the title to the suit property that was in the name of the deceased be cancelled and thereafter the property be partitioned into two portions: one for the 1st respondent and the other for the deceased.

6. The issue of whether, following the death of the deceased, the suit against him had abated was dealt with by the learned Judge in the judgment. Citing Order 23 Rule 4 of the Civil Procedure Rules, he found that the proceedings herein related to matrimonial property which could not be defeated by the death of the deceased. He held that:-

   " 17. Accordingly, matrimonial proceedings survive the death of one of the spouses, and therefore, abatement does not arise."

7. It had been argued that, upon the death of the deceased, the *Law of Succession Act* (Cap. 160) had set in for the estate of the deceased to be allowed to participate in the proceedings after letters of administration had been issued. The learned Judge had been asked to down his tools, now that the estate of the deceased was not represented in the matter. This is how the learned Judge rendered himself:

   " 19. In light of my position on abatement of suit, I hold the view that identification and division of the property of the surviving spouse should be determined under matrimonial property regime. And where one spouse is deceased and such issue arise, then the determination of matrimonial property should be undertaken before succession of the estate of the departed spouse is concluded "

8. These are the findings that aggrieved the appellant who has come before us on appeal. His grounds are as follows:-

> "1) The learned Judge erred in law and fact by making a finding that the respondent contributed towards the acquisition of land parcel No. Nyaki/ Kithoka/4XX and further that the property was held in trust for her by the deceased being one half share contrary to the evidence on record.
>
> 2. the learned Judge erred in law and fact by applying the *Land Registration Act*, 2012 in retrospect and therefore arrived at a wrong decision.
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> 3. the learned Judge erred in law and fact by making a finding unsupported by the facts obtained in the case.
>
> 4. the learned Judge erred in law and fact by failing to find that the suit herein abated in view of the death of the 2nd respondent during the pendency thereof and there is no substitution.
>
> 5. the decision of the superior court was against the law and the weight of the evidence adduced."

9. To our mind, the issue regarding the death of the deceased while the proceedings relating to him were on-going, and the lack of his substitution, touched on the jurisdiction of the Court to hear and determine the dispute between the parties. Learned counsel Mr. Mwanzia who appeared for the appellant in this appeal submitted that following the demise of the deceased in 2016, the suit against him abated one year after the death and that, under Order 24 Rule 4 of the Civil Procedure Rules, the court did not have the jurisdiction to proceed with the hearing of the case against the deceased now that he had not been substituted. According to learned counsel Ms. Kiome for the 1st respondent, there was no one to substitute the deceased as he was the 1st respondent's husband. Therefore, she submitted, the court was bound to proceed with the hearing and determine the dispute.

10. The learned counsel addressed us on the other grounds of appeal, but we have to determine this issue first. This is because, in terms of the decision in Owners of Motor Vessel Lilian "S" -vs-Caltex Oil (Kenya) Ltd [1989]eKLR, where the issue of jurisdiction is raised the Court has to determine it before it can deal with the merits of the matter. Where it holds that it has no jurisdiction it has to down its tools, as is were.

11. Order 24 Rule 4 of the Civil Procedure Rules provides as follows:-

> (1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.
>
> 2. Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.
>
> 3. Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant."

12. The factual position was that the deceased was the registered proprietor of Nyaki/Kithoka/4XX which the 1st respondent claimed was matrimonial property. The deceased had sold it to the appellant in the cause of the marriage but had not transferred it. The 1st respondent claimed that she had bought this property and sought that it be settled in her favour.

13. The deceased died in 2016. Under Order 24 Rule 4 of the Civil Procedure Rules, cause of action survived him and he needed to be substituted which was not done. One year following the death, and without substitution, the suit abated as against the deceased. This was provided by Order 24 Rule 4(3) of the Civil Procedure Rules. Any subsequent proceedings against him were, in our considered view, a nullity (see Kenya Farmers Cooperative Union Limited -vs- Charles Murgor (Deceased) T/a Kaptabei Coffee Estate [2005]eKLR). The continuance of the suit against the deceased upon his death, and without substitution, was barred by law, and the proceedings taken when the suit had abated were a nullity (see Mary Wambugu Njuguna -vs- William ole Nabala & 9 Others [2018]eKLR). We reiterate that the only person who was entitled to substitute the deceased to defend the suit that the 1st respondent had filed against him was the holder of letters of administration in respect of his estate (see Trouistik Union International & Another -vs- Jane Mbeyu & Another, Civil Application No. NAI 269 of 1997). The deceased was the registered proprietor of Nyaki/Kithoka/4XX which the 1st respondent claimed. Once he died the cause of action survived him, and therefore the legal representative of his estate was entitled to be joined in the proceedings to defend the claim.

14. When the proceedings resumed on 1st March 2018 and the 1st respondent resumed her testimony, one year had lapsed since the deceased's death. The proceedings of the day, and all consequent proceedings including the impugned judgment, were a nullity, we find.

15. We do not think, as stated by the learned Judge, that the matrimonial proceedings were so special that they were not affected either by Order 24 Rule 4 of the Civil Procedure Rules or the *Law of Succession Act*. It is basic that the rules of natural justice and fair play would require that where a party to a suit dies and the cause of action survives him, his estate has to be heard through the estate's legal representative before a decision can be rendered. In any case, any decision made against such an estate can only be satisfied by the legal representative. If, one may ask, the impugned judgment were to be executed, against whom would it be executed? It is only under the *Law of Succession Act* that a deceased person can be succeeded.

16. The *Matrimonial Property Act* and the Rules made thereunder do not oust the provisions of Order 24 Rule 4 of the Civil Procedure Rules. If, for a moment, it was to be taken that they do, they would be caught up by Article 50 of *the Constitution* that entrenches the right to a fair hearing.

17. In conclusion, we agree with the appellant that the proceedings that were undertaken by the learned Judge one year after the deceased died without substitution were a nullity by the operation of the law, as they were undertaken without jurisdiction. It follows that the judgment subject of the appeal was a nullity, and is hereby set aside.

18. The dispute between the parties therefore remains unheard and undetermined. We remit the suit to the High Court at Meru to be reheard and determined by a different Judge.

19. Costs follow the event, but the 1st respondent cannot be said to have been responsible for what happened. In the particular circumstances of the case, we order that each party bears his or her own costs of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF MARCH, 2024 .

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR