Maina v Gatune (Civil Appeal 44 of 2018) [2023] KECA 391 (KLR) (31 March 2023) (Judgment)

Neutral citation: [2023] KECA 391 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 44 OF 2018

DK MUSINGA, HA OMONDI & KI LAIBUTA, JJA

MARCH 31, 2023

BETWEEN

JAMES MBAGE MAINA ..... APPELLANT

AND

JOEL KIRAGU GATUNE ..... RESPONDENT

(Being an appeal from the ruling of the High Court of Kenya at Nairobi, (Kubo, J.) dated 28th March 2007 in SUCC. Cause NO 664 of 2002)

JUDGMENT

1. The brief background to this matter is that, after the death of the late Wambui Kimotho on December 25, 1988, Nyambura Gicharu and James Mbage Maina, who were her daughter and grandson respectively, petitioned for grant of letters of administration of the deceased's estate in Succession Cause No 644 of 2002, and later sought confirmation of the grant which had been issued to them on April 7, 2003. In the joint summons for confirmation, each claimed half of the property known as Loc 19/Rwathia/9xx. Subsequently, the respondent herein, contested the confirmation of the grant through an affidavit of protest contending that the deceased was not the owner of the property, which was registered in his name, he produced a title document issued to him following Succession Cause No 224 of 1989, which was later revoked by the High Court (Aluoch, J).

2. The respondent based his claims on an award made by the Kangema panel of elders, which held that the deceased had agreed to subdivide her land with the intention of giving the respondent a portion, and an order made for subdivision of the parcel into three equal portions measuring 1.4 acres each. The magistrate sitting in Muranga adopted the award as a judgment of the court subject, however, to objection within thirty (30) days, but that no objection was raised.

3. In a ruling delivered on the March 28, 2007, the trial court (Kubo, J) agreed with the objection, and held that the respondent herein was entitled to the 1.4 acres of land parcel number Loc 19/Rwathia/9xx, making the following observations:

> "Although the court record shows that the High Court (Aluoch, J), *inter alia*, revoked the objector's grant of letters of administration of the deceased's estate, no evidence was tendered before me that the registration of the objector on June 13, 1991 as proprietor of the suit land was cancelled. In absence of such evidence, I cannot find that ownership or proprietorship of the suit land reverted to the deceased.... I find that the arbitration proceedings took place and that the deceased and objector herein made themselves parties thereto.... to the extent that the petitioners rely on the deceased's title to the suit land as a basis of their claim, then to the extent that the deceased entered into arrangements that encumbered her title, the encumberance, must affect the petitioners' derivative title. In other words, since the deceased who is supposed to be the petitioners' predecessor - in title was a party to the arbitration proceedings which have not been successfully challenged, the petitioners cannot disown those proceedings...
>
> ... I agree with objector's counsel's submission that the free estate of the deceased which in the circumstances of this case she was legally competent to dispose of or bequeath was 1/3 of the suit land, ie 1.4 acres. Accordingly, I uphold the objector's protest to the proposed distribution of the suit land equally between the two petitioners. I make the following orders:
>
> 1. "The grant issued on the April 7, 2003 sought to be confirmed *vide* summons dated December 5, 2003 and filed on December 16, 2003 is confirmed, subject to the suit land Loc 19/Rwathia/9xx being distributed as under:
>
>   a. 1.4 acres going to the objector Joel Kiragu Gatune.
>
>   b. 1.4 acres going to Gichere Chege.
>
>   c. 1.4 acres going to the petitioners Nyambura Gicharu and James Mbage Maina jointly.
>
> 2. Costs shall be borne by the deceased's estate."

4. The appellant was aggrieved by the decision of the learned Judge, and filed this appeal, raising 10 grounds, which he has condensed into the following, namely faulting Kubo, J for:

   a. failing to determine whether the respondent was a son or grandson of the deceased;

   b. condoning issues of issues of misinterpretation by the court clerk of the proceedings;

   c. erroneously conferring 1.4 acres and the respondent's inheritance of the deceased's land;

   d. holding that the land dispute tribunal did not have jurisdiction over the land dispute, and that the respondent had intermeddled in the estate of the deceased; and

   e. failing to appreciate that the orders were against the evidence on record, and were tantamount to unlawful inheritance.

5. The appellant prays that:

a. the ruling distributing the deceased's estate be varied, overturned and set aside; and the appellant be declared the absolute owner of the demised estate designated as land parcel number Loc 19/Rwathia/9xx comprising 1.74 hectares or thereabouts; and

b. the costs of this appeal and the court below be provided by the respondent.

6. The parties in the trial court agreed to proceed by oral submissions of the respective counsel. On the first ground, the appellant submits that the respondent's claim to the land, based on a copy of the title deed he presented, cannot hold as the said document showed that the whole land measuring 1.75 hectares was registered in his name in the year 1991, and indicated that it was issued to him as a result of Succession Cause No 224 of 1989, which was later revoked by the High Court (Aluoch, J). The appellant argues that the moment the grant of letters of administration in Succession Cause No 224 of 1989 was revoked everything that was done by the respondent using the same letters of administration stood revoked, and that land parcel number Loc 19/Rwathia/9xx, which had been illegally acquired by the respondent, fully reverted to the estate of the deceased.

7. In relation to the 2nd ground concerning the alleged misinterpretation by the court clerk, the appellant contends that it was clear from the proceedings of the court of April 7, 2003 before Aluoch, J (as she then was) that the respondent was referred to as a grandson of the deceased; and that this played a role in the courts final determination, and cannot be wished away as a simple error on record.

8. As regards the erroneous conferment of 1.4 acres and the respondent's inheritance of the deceased's land, it is submitted that the respondent is having double speak, in one breath saying that he obtained a title to the entire land parcel number Loc 19/Rwathia/9xx measuring 1.7 hectares courtesy of the Succession Cause which was later revoked by court and, again, that he had acquired the land through an arbitral award which cannot be true as he did not claim 1/3 of the land which he purported to have obtained through the arbitral award.

9. It is further argued that the respondent was not a beneficiary of the estate of the deceased; that there is nowhere in his protest to the succession where he claimed 1.4 acres of the land, his claim having been that he was the proprietor of the entire land parcel number Loc 19/Rwathia/9xx measuring 1.7 hectares; that the same was not available for distribution to the estate of the late Wambui Kimotho; and that there was therefore no basis on which the respondent was awarded the 1.4 acres of the land on record as he was not a beneficiary of the estate in question, and did not present any evidence to that effect.

10. With regard to the issue as to whether the land dispute tribunal had no jurisdiction ab initio to deal with any land dispute tribunal referred to them by the parties; that the dispute purported to have been referred to the elders by the respondent and deceased could not result into an arbitral award; and that the respondent had intermeddled in the estate of the deceased, it is submitted that the decision of the tribunal had no effect in law; that the actions of the respondent in filing succession cause number 224 of 1989 without involving the beneficiaries of the estate of the deceased, and obtaining a title to the entire land parcel number Loc 19/Rwathia/9xx measuring 1.7 hectares amounted to intermeddling in the estate of the deceased; and that, in any event, there is no indication that the deceased was aware of the award or participated in the process during her life time.

11. In support of that position, reference is made to *Khayadi vs Herbert Aganda* [1988] eKLR where this court held as follows:

> " Despite these objections the appeal was dismissed. It is from that dismissal that this appeal arises. In this court too the appellant has taken inter alia the point about the jurisdiction of the elders in the following terms.
>
> The learned Judge erred in failing to observe that the elders had no jurisdiction to award title to the land to anyone and the submission (if any) to elders' jurisdiction (which does not exist)cannot confer jurisdiction to the elder.
>
> Under the Magistrates' Court Act as amended by the Magistrates' Jurisdiction Amendment Act the court's role in land disputes was limited to referring them to panels of elders for arbitration. Consequently panels of elders derive their jurisdiction to deal with land disputes from references by the courts see section 9A; they cannot of their own deal with such disputes merely because parties submit to them. The appellant's challenge of the elders' award on the basis of lack of jurisdiction is therefore well taken. I therefore agree with my lords Hancox and Gachuhi JJ.A. that this appeal should be allowed and that the appellant should have costs of the suit before this Court and all the lower courts."

12. On the ground that the orders made were against the evidence on record and were tantamount to unlawful inheritance, the appellant contends that the court erroneously made a finding that land parcel number Loc 19/Rwathia/9xx was not available and free for distribution as part of the estate of the deceased. Yet, in unexplained turn of events, the learned Judge went ahead and distributed the same parcel of land to the beneficiaries, including the respondent who was not a beneficiary; and did not present any legal and valid evidence to show that he had a legitimate claim over the land.

13. Opposing the appeal, the respondent submits that there are glaring omissions in the record of appeal, and urges us to take note that the grant in the trial court was issued to two (2) joint administrators, namely, Nyambura Gicharu and James Mbage. Yet, the current appeal is lodged by one administrator rather than by the joint co-administrator. It is submitted that this is a fatal procedural omission since the appellant cannot file a suit without the consent of the co-administrator; and that it is reasonable to draw an inference that the co-administrator who has not appealed was satisfied with the decision of the trial court.

14. It is also submitted that the current record of appeal before this court is incompetent since it lacks the pleadings at the trial court, which go to the root of the main appeal rendering it incompetent and, that the same ought to be struck out with costs. The respondent refers us to section 87 of the *Appellate Jurisdiction Act* (we believe the correct citation would be rule 87 of the *Court of Appeal Rules*, 2010 which were applicable then) which provides that where the High Court issued an order in its original jurisdiction and not on a first appeal, then pleadings must form part of the record of appeal. That this is incurable under section 88 of the *Appellate Jurisdiction Act* at this stage, and in support of this submission, the respondent draws from the case of *Tropicana Hotels Limited vs SBM Bank Kenya Limited (formerly known as Fidelity Commercial bank Limited*) [2020] eKLR where this court held that:

> " As for the other complaint's on non-compliance with the rules on what should or should not be contained in a record of appeal, rule 87 of the *court's rules* is explicit on what should form the content of a record of appeal among these are pleadings, judgment or order appealed against and a certified copy of the decree or order appealed against, we do not have the record of appeal before us. However, from our appraisal of the applicant's supportive documents,

> it is evident that some pleadings were admittedly included in the record namely a further amended plaint and an amended defence, meaning that the pleadings missing were the original and amended plaint and the original defence. Rule 87(c) simply makes reference to "pleading." There is no qualification that only current pleadings should be included. Sub paragraph (g) and (h) provide for inclusion of the judgment or order and a certified copy of the decree appealed against, all of which the applicant asserts that they are missing from the record of appeal, a position not controverted by the respondent...mandatory requirement in Rule 87(I)is only subject to subsection [which donates jurisdiction to a Judge or Registrar of the court appealed from to exercise his/her discretion on application of a party to direct which documents or parts of documents should be excluded from the record of appeal. Our appreciation of the implication of this rule in our view is that in the absence of giving of such directions, inclusion of all the documents enumerated in rule 87 of the *court's rules* is mandatory. Non-compliance therefore vitiates the record of appeal as filed by the respondent."

15. It was submitted further, that the ruling being appealed against was delivered on March 28, 2007, and yet the record of appeal was filed on February 19, 2018, which is eleven (11) years later, and no certificate of delay was ever annexed to the record of appeal to explain why there was a delay of 11 years in filing the record of appeal. It is also pointed out that the record of appeal does not contain a copy of the grant issued to the appellant, a copy of the summons of confirmation of grant dated December 5, 2003, a copy of the affidavit of protest dated February 18, 2004, a copy of the supplementary affidavit dated February 24, 2004 and a copy of the further affidavit dated March 3, 2005. Consequently, the respondents have had to rely only on the proceedings and the ruling of the trial court, in drafting their submissions.

16. On the issue as to whether the respondent was a Son/Grandson of the deceased, it is submitted that at no one time did the respondent ever claim to be a son or grandson of the deceased; that his main objection or protest related to the mode of distribution of the estate of the deceased on grounds that it was the whole parcel of LR No Loc 19/Rwathia/9xx that belonged to the estate of the deceased; and that he had a judgment for a portion of that land measuring 1.4 acres from Muranga Resident Magistrates Arbitration case No 30 of 1987, and which he wanted the court to distribute to him.

17. As concerns the interpretation by the court clerk, Mr Kaniaru, to the effect that the respondent was a grandson of the deceased, the respondent argues that, during the proceedings of April 7, 2003 before Aluoch, J, the coram merely misquoted the respondent as a grandson of the deceased, and not during the recorded consent (which the appellant never sought to set aside), and that the error on the coram would not invalidate the ruling dated March 28, 2007 being appealed against.

18. With regard to the submissions that the court erroneously conferred 1.4 acres to the respondent, and to which he was not entitled, the respondent maintains that he proved that the whole parcel of LR No Loc 19/Rwathia/9xx did not constitute the estate of the deceased as he had a legal interest in the same, which had culminated into judgment during the lifetime of the deceased.

19. As regards the contention that the respondent had inherited part of Loc 19/Rwathia/9xx, it is contended that L.R No. Loc.19/Rwathia/916 never formed part of the estate of the deceased as the subject property was LR No Loc 19/Rwathia/9xx, and no submissions were ever tendered concerning plot no 9xx, and that the same belonged to the estate of the deceased. Further, the Judge did not make any determination on LR No Loc 19/Rwathia/9xx since the property was not subject to the protest by the respondent.

20. In response to the assertion that the decision by the land disputes Tribunal was null and void on account of want of jurisdiction, the respondent states that this is an issue which would have best been brought forward before the adoption of the award as a judgment of the Muranga Resident Magistrate's Court, or at the appeal emanating therefrom. The respondent laments that this court is now being called upon by the appellant to sit on appeal of the Resident Magistrate's Court as a first appeal.

21. A ground was also raised that the respondent had intermeddled with the subject property, and to which it is submitted that the trial court noted that the loan taken by the respondent using the title to the suit property had essentially been nullified through the consent order revoking the confirmed grant in Succession Cause No 224 of 1989. In any event, the parties had earlier agreed on October 9, 2020 to continued cultivation of their respective portions on the same land before hearing and determination of that cause; and that the Judge did not make any determination on LR No Loc 19/Rwathia/9xx since the property was not subject to the protest by the respondent.

22. With regard to the appellant's lament that the orders issued were against the evidence tendered, the respondent maintains that he successfully convinced the trial court that he had a legitimate interest in part of the estate of the deceased, and that the appellant never filed any evidence or subsequent proceedings to demonstrate that the claim by the respondent had been satisfied as a liability by the administrators or by the deceased in her lifetime post judgment date.

23. Having considered the record in the trial court as well as the submissions made on behalf of the respective parties, we find that the issues for determination can be narrowed down to the following:

    a. the competence of the appeal having been filed by only one administrator, and yet there are two administrators to the estate; for want of the pleadings that were before the trial court; and in light of the provisions of section 87 of the *Appellate Jurisdiction Act*; and the unexplained delay in filing the record of appeal for a period of 11 years; and

    b. whether the respondent had a legitimate claim to part of the deceased's estate, the misdescription of the respondent, the interpretation of the proceedings by the clerk, and the revoked grant, and yet the elder's award remained unchallenged;..

24. The respondent contends that there are glaring omissions in the record of appeal, and we have been urged to strike it out as being incompetent on account of having been filed by only one administrator, and yet there are two administrators to the estate; for want of the pleadings that were before the trial court, in light of the provisions of section 87 of the *Appellate Jurisdiction Act*; and unexplained delay in filing the record of appeal for a period of 11 years.

25. What is cited as section 87 of the *Appellate Jurisdiction Act* is actually rule 87 of the *Court of Appeal Rules*, 2010 which provided that:

    1. For the purpose of an appeal from a superior court in its original jurisdiction, the record of appeal shall, subject to sub-rule (3), contain copies of the following documents-

        a. ...

        b. ...

        c. the pleadings;

        It is a fact that the record of appeal does not contain the pleadings, and no explanation has been offered.

26. We find that the learned Judge duly considered the evidence, especially the confusing dilemma of the effect of the revoked grant on the title that the respondent had obtained. He was able to resolve this in a two pronged approach that, although the court record showed that the High Court, *inter alia*, revoked the grant of letters of administration of the deceased's estate, no evidence was tendered to demonstrate that the registration of the respondent on June 13, 1991 as proprietor of the suit land was cancelled. Consequently, the trial court declined to find that ownership or proprietorship of the suit land reverted to the deceased.

27. Secondly, we share in the learned Judge's observations that the Murang'a Court adopted earlier arbitration proceedings between the same parties herein before Kangema elders to the effect that the deceased had decided to divide the suit land into 3 portions with the respondent getting 1.4 acres; that no objections were raised within the stipulated 30 (thirty) days, and that, three and a half months later, the deceased unsuccessfully made an attempt to challenge the elders award out of time; that, subsequently, the award was adopted as a judgment of the court; and that, there being no appeal lodged, it rendered the appellant's objection to the respondent's claim, unsustainable.

28. We note that the learned Judge duly considered the appellant's contention that, as petitioners, they were strangers to the arbitration proceedings, and pointed out that, to the extent that they were relying on the deceased's Title to the suit land as a basis of their claim, then to the extent also that the deceased entered into arrangements that encumbered her Title, that encumbrance, must affect the petitioners' derivative title. Indeed, we agree with the learned Judge that the deceased, who was supposed to be the appellant's predecessor in title was party to the arbitration proceedings, which had not been successfully challenged, and the appellant could not disown those proceedings.

29. We are satisfied that the respondent was within his legitimate space to contest the disposal of the entire estate to the exclusion of his interest. We thus hold that the appeal lacks merit, and is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MARCH, 2023.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR