



IN THE COURT OF APPEAL

AT KISUMU

CIVIL APPEAL NO. 36 OF 2016

(CORAM: KOOME, OKWENGU & MURGOR, JJA)

BETWEEN

FELIX ETOKHO

*(As administrator of the Estate of MUSA SUMBA ETOKHO).....***APPELLANT**

AND

HUSSEIN MWANZA ETOKHO.....RESPONDENT

(An appeal from the Judgement of the High Court of Kenya at Kakamega (Sitati, J.)

delivered on the 29th July, 2015 in Kakamega HC Succ. Cause No. 59 of 1996)

JUDGMENT OF OKWENGU, JA

[1] This is an appeal arising from the judgement of the High Court of Kenya (**Sitati, J**) in a succession dispute that has been pending since 1996. The judgment was in regard to two applications, one brought by **Musa Simba Etokho (Musa)**, who is now deceased. The appellant **Felix Etokho** is the administrator of the estate of Musa.

[2] The first application dated 28th December, 2013 was brought by Musa, who was one of the two joint administrators of the estate of **Ishmael Etokho** (deceased). The estate included North Wanga/Mayoni/276 (**suit land**), and the grant was confirmed on 30th June 1998. In his application, Musa claimed that the land registrar had found that the suit land had been grossly interfered with, subdivided and distributed in total disregard of the confirmed grant. He therefore sought to have all titles issued out of the suit land contrary to the confirmed grant issued on 30th June, 1998, cancelled. [3] The second application dated 5th November, 2014 is said to have been brought by interested party No. 49. It is not clear, but we assume that **Patrick Sakwa Nyendwe** (Patrick), who swore the affidavit in support of the motion is the 49th interested party. Patrick sought to have rulings and orders that had been made by the High Court on 27th September, 2012 and 29th August, 2013, relating to cancellation and nullification of titles arising from the suit land and all consequential orders, reviewed and/or set aside. His motion was anchored on grounds, *inter alia*, that the orders were obtained as a result of material non-disclosure; and that nullification and cancellation of titles cannot be done in a succession cause. Patrick also claims that although he was not a party to the proceedings, the orders are prejudicial to him and will cause him irreparable loss.

[4] Upon hearing the two applications, the learned Judge dismissed Musa's application as having no merit. The learned Judge declined to issue the orders sought by the interested party, holding that no useful purpose would be served by issuing him with such orders. Patrick has not lodged any appeal in regard to the dismissal of his application. The appellant has lodged an appeal on behalf of Musa's estate in which he has raised 12 grounds.

[5] In the memorandum of appeal, the learned Judge is faulted, *inter alia*, for: reopening the distribution of the estate rather than enforcing the implementation of the confirmed grant; framing wrong issues concerning the revocation or annulment of the grant, instead of implementation of the confirmed grant; misapplying the provisions of section 76 of the law of Succession Act; misinterpreting section 93(1) of the law of Succession Act; and failing to do substantial justice to the parties.

[6] The appellant has filed written submissions in which he relies on **Joash Ochieng Ougo & Anor vs Virginia Edith Wambui Otieno [1987] eKLR**, where the Court issued an order of injunction because the learned Judge of the High Court failed to take into consideration all the relevant facts and issues. The appellant also relied on **Kenya Airports Authority vs Mitubell Welfare Society & 2 others [2016] eKLR**, where the Court faulted the High Court for failing to properly evaluate the pleadings and the evidence on record, and to take into

account critical aspects of evidence relating to the flight path to Wilson Airport. The appellant urged the Court to allow the appeal as the learned Judge misinterpreted and misapplied the law.

[7] The respondent, **Hussein Mwanza Etokho** who was the other joint administrator of the estate of Ishmael Etokho (deceased), had opposed Musa's application contending that it was brought in bad faith and was a mere afterthought aimed at frustrating the beneficiaries of the estate. The respondent did not however file any written submissions to the appeal.

[8] Hearing of the appeal proceeded by way of the GoToMeeting online platform. Learned counsel Mr. Mokaya Momanyi for the appellant though served with a hearing notice and the link for the platform, was absent. Ms. E. Chunge was present for the respondent, while Ms. Simiyu who held brief for Mr. Osundwa for Patrick was present. Ms. Simiyu confirmed that they had not filed any written submissions. Although given opportunity to address the Court on the online platform, Ms. Simiyu did not make any oral submissions. Ms. Chunge tried to address the Court but experienced technical problems and was unable to do so. She later wrote an email in which she informed the Court that her efforts to address the Court were frustrated by technical problems and reiterated that the respondent was supporting the judgment of the High Court and was relying on the submissions that he had made in the High Court at pages 415-419 of the record of appeal.

[9] This being a first appeal, the obligation of the Court as a first appellate court is to reconsider and re-analyse the evidence that was adduced before the trial court, and the judgment of the learned Judge, in order to arrive at its own conclusions in determining whether the learned Judge arrived at the proper decision. (**Selle vs Associated Motorboat Company [1968] EA 123, Kenya Ports Authority vs Kuston (Kenya) Limited [2009] 2EA 212**).

[10] Being alive to this obligation, I have considered the record of appeal, the written submissions that were availed to the Court, and the applicable law. It is not disputed that the grant relating to the estate of Ishmael Etokho (deceased) was confirmed on 30th June 1998, and that Musa was one of the administrators charged with the distribution of the grant. In fact, the record of appeal shows that the grant was confirmed following a consent that was recorded in court on 26th March, 1998 wherein Musa was included as a co-administrator and mode of distribution was agreed.

[11] In his application, Musa sought to have titles arising from the suit land, contrary to the confirmed grant, nullified and cancelled. From the confirmation of grant, it is clear that the suit land formed the core of Ishmael's estate, and that this is what was distributed to the beneficiaries at the time of confirmation of the grant.

[12] In her judgment, the learned Judge stated as follows:

"22. ...the only issue that falls for determination is whether all titles issued out of the suit land should be cancelled and therefore whether all the survey that was carried out on the suit land 'contrary' to the confirmed grant should be annulled. What this means is that the confirmed grant herein should also be revoked and/or annulled.

...

27. It is also worth noting that the applicant's complaint concerns the apparent difficulty on the part of the District Land Registrar and the District Surveyor in carrying out an (sic) implementing the confirmed grant. It would therefore appear to this court that the applicant is saying that the confirmation of the grant was not taken through the correct process, but the record does not support him. As has been argued by those who are opposed to the application, this court is not the proper forum for the applicant to ventilate his case for cancellation of titles that have been created out of a lawful process involving subdivision of the suit land after confirmation of the grant herein.

28. I also find and hold that the titles sought to be cancelled or revoked are protected by the provisions of Section 93(1) of the Law of Succession Act which provides that transfer of any interest in property, whether real or personal by the original personal representative remains unaffected by the revocation of the grant, even in cases where the purchaser has notice that all debts, liabilities and other expenses which take priority have neither been provided for nor discharged. What this means is that even if the applicant had satisfied the requirements of Section

76 of the Law of Succession Act for revocation of grant, the impugned titles would not necessary be cancelled and or revoked.

29. The true picture in this case is that the sub-division of the suit land was done by the applicant and his co-administrators. The documents availed to the court through the replying affidavits clearly show that the administrators were all present during subdivisions and sale of the various portions to the interested parties. The alleged difficulty on the part of the District Land Surveyor is only in the mind of the applicant. Hussein Mwanza Etokho, the applicant's co-administrator, admitted in his papers filed in Court that he and the applicant sold the parcels of land to the interested parties after confirmation of grant and not before."

[13] Musa invoked sections 45 and 47 of the Law of Succession Act in his notice of motion. Section 47 gives the High Court jurisdiction to entertain any application and to determine any dispute under the Law of Succession Act, and make orders as may be expedient. The substantive provision that was invoked by Musa is in effect section 45 of the Law of Succession Act that provides that no person shall intermeddle with the property of a deceased person, except as authorized by written law or by a grant of representation. It also provides a penal section for any person who intermeddles with such estate.

[14] This means that for Musa to rely on section 45 of the Law of Succession Act, he needed to prove that there has been interference with the estate of Ishmael and clearly identify the person or persons who had interfered with the estate, and the fact that they had no authority, and the manner in which they had intermeddled with it, as the latter would determine whether such an application could be dealt with in the succession matter, or whether it would require separate proceedings.

[15] It is apparent from the record, that the estate of Ishmael was distributed and that there are third parties who have subsequently acquired interest in some of the properties following subdivision. Musa cannot therefore make a general assertion that the suit land has been grossly interfered with, without clearly specifying the portion interfered with and by whom. Moreover, Musa and Hussein were the administrators who were charged with the responsibility of distributing the estate in accordance with the confirmed grant. The learned Judge properly found that this was done. Once the distribution of the estate was done, the role of the administrators was finished, and if there was any complaint regarding a particular sub-division, it was for the beneficiary of that particular portion to take up the matter. Musa therefore failed to establish any intermeddling with the estate.

[16] Musa did not move the court as a beneficiary, but as an administrator. As observed by the learned Judge, the general complaint made by Musa is in effect challenging the confirmation and distribution of the grant, and this could only be done if the threshold in section 76 of the Law of Succession Act was met. However, there was no evidence adduced to show that the proceedings to obtain the confirmation of grant issued on 30th June, 1998 were defective, or that the grant was obtained fraudulently by making of a false statement or concealment of material fact, or that the grant had become useless and inoperative. Section 76 of the Law of Succession Act was therefore inapplicable.

[17] I come to the conclusion that the learned Judge came to the right conclusion in dismissing Musa's application. The learned Judge did not re-open the distribution of Ishmael's estate, nor did she entertain any claims from purchasers. The learned Judge merely used the evidence regarding the distribution, the subdivisions and subsequent sale of some of the subdivisions, as background information. The learned Judge cannot be faulted for considering evidence of interested parties such as Patrick who are likely to be affected by the orders sought by Musa.

[18] In my view this appeal has no merit. As my sister Murgor, JA is of the same view, the appeal is dismissed with costs.

This judgment has been delivered in accordance with section 32(3) of the Court of Appeal Rules, Koome, JA (as she then was) having been appointed Chief Justice.

Dated and delivered at Nairobi this 9th day of June, 2021.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

IN THE COURT OF APPEAL

AT KISUMU

CIVIL APPEAL NO. 36 OF 2016

(CORAM: KOOME, OKWENGU & MURGOR, JJA)

Between

FELIX ETOKHO

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-VERSUS-

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CONCURRING JUDGMENT OF MURGOR, JA

I have had the advantage of reading OKWENGU, JA. I am in full agreement with and have nothing further to add.

in draft, the judgment of the reasoning and conclusions

Dated and delivered at Nairobi this 9th day of July, 2021

A.K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR