Moruri & another v Ondigo & 4 others (Civil Appeal 103 of 2017)
[2021] KECA 79 (KLR) (8 October 2021) (Judgment)

Neutral citation: [2021] KECA 79 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 103 OF 2017

MSA MAKHANDIA, J MOHAMMED & S OLE KANTAI, JJA

OCTOBER 8, 2021

BETWEEN

CHRISTOPHER AUTA MORURI ..... 1ST APPELLANT

JOSHUA NYAKANGI OMASIRE ..... 2ND APPELLANT

AND

JOHN ONDIEKI ONDIGO ..... 1ST RESPONDENT

JAMES ATEI OBAIGWA ..... 2ND RESPONDENT

MOKAYA MOTURI ..... 3RD RESPONDENT

EVANS ONGERA OMOTE ALIAS MATANGI MOTURI ..... 4TH RESPONDENT

NYABUTI MOTURI ..... 5TH RESPONDENT

(Appeal from the ruling of the High Court of Kenya at Kisii (Okwany, J.) dated 6th December, 2016 in HC. Succession Cause No. 84 of 2006)

JUDGMENT

1. This appeal arises from a ruling of Okwany, J., delivered on 6th December, 2016 in Kisii Succession Cause No. 84 of 2006 . That Cause has been pending in court for many years as the parties have inundated the court with so many applications that have led to the main issues in dispute remaining undetermined for over 15 years since the Cause was first filed in court.

2. There were three applications before the learned Judge leading to the impugned ruling.

3. The main issue in the pending dispute before the High Court of Kenya at Kisii revolves around ownership of a parcel of land known as L.R. No. West Mugirango/Nyamaiya/1519 (the suit land) which was registered in the names of two deceased persons – Nyambane Olisoi and Obaigwa Owoti

who died respectively on 1st February, 1980 and 22nd October, 2003. After these deaths John Ondieki Ondigo and James Atai Obaigwa (the 1st and 2nd respondents) filed a petition for grant of letters of administration in respect of the estate of the deceased and the appellants, Christopher Auta Moruri and Joshua Nyakangi Omasire filed separate objections objecting to grant of letters of administration.

4. The three applications before the Judge were by different parties – the appellants applied by Summons for orders of injunction to restrain the respondents from dealing with the suit land and an order of eviction to evict the respondents from the suit land; an order to declare that a title being uttered by the respondents in respect of the suit land was illegal, null and void and that the police be ordered to evict the respondents from the suit land.

5. The second application was by the 2nd respondent James Atei Obaigwa. It prayed that the court be pleased to allocate an early hearing date and/or give directions facilitative of disposal of the objection proceedings and that hearing and disposal of objection proceedings precede the hearing of any application pending before the High Court.

6. The third application was by the 1st respondent (John Ondieki Ondigo) whose prayers were more or less as in the second application. He also prayed that the court be pleased to consolidate his application with that of the 2nd respondent.

7. The Judge consolidated the applications by the 1st and 2nd respondents and heard the consolidated application with the first application together.

8. In respect of the application for injunction by the appellants the Judge found at paragraph 41 and 42 of the ruling:

> "41.In the application dated 8th February 2016, the objectors are seeking orders of injunction on exactly the same format and for the same reasons that they sought orders of injunction in an earlier application dated 2nd April 2014 for which a ruling was delivered on 17th December 2014 allowing the said application. Indeed, the objectors concede that upon obtaining and serving the said orders of injunction on the petitioners, and the interested parties, the petitioners disobeyed the orders thereby prompting the objectors to institute contempt of court proceedings which were not successful.
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> 42.With this background in mind, it is my finding that the application dated 8th February 2016 is res judicata because a similar application had already been filed, adjudicated upon and final orders issued. It is therefore not open for the objectors to institute the same application 2 years later and hope to get a different outcome. The fact still remains that the restraining orders issued in this case are still in force to date. To my mind, claims that the petitioner and/or interested parties have committed acts of destruction to property trespass and forgery of title documents are claims of complaints which are criminal in nature should be presented to the police for proper investigations and prosecution."

The Judge found that the appellants could approach the court afresh in an application for contempt of court if the appellants were of the view that there was contempt of court orders that had earlier been given by Wakiaga, J. The application for injunction was held to be *res judicata*, the issue having been dealt with and determined by a competent court in an earlier ruling.

9. In respect of the consolidated application the Judge held that the validity and merits of objections filed by the appellants could only be determined after objections were heard; not an interlocutory stage. The Judge observed:

> "In an ideal situation in succession case, once a party files or initiates objection proceedings, after the issuance of grant, what follows is that the parties seek the directions of the court on how to proceed which directions are normally taken by consent of the parties when they inform the court on their preferred mode of prosecuting the case either by way of oral viva voce evidence, by way of affidavit evidence or through written submissions."

The Judge found that a grant of letters of administration had not been issued in the cause and so the issue of directions on the objections did not arise. Further, that the appellants had filed objections but had not pursued the matter, holding:

> "It would appear that upon filing their separate objections to grant, the objectors went to sleep and did not pursue them, they have instead been embroiled in unending applications for injunction, one after the other..."

The Judge in the end found that although the appellants had filed objection proceedings no cross-application or answer to petition had been filed. The Judge found that in terms of Section 68(1) of the Law of *Succession Act* the court was obligated to make a grant in accordance with the original application. Finding that no sufficient cause had been shown by the appellants as to why an answer to the petition had not been filed and the appellants having not taken steps to file an application under rule 17(2) of the *Probate and Administration Rules* for extension of time within which to file an answer to petition the Judge exercised her discretion and ordered grant of letters of administration to be issued to petitioners (the respondents here) who were ordered to apply for confirmation of the grant. The Judge found that the appellants would not be prejudiced in any manner as they were at liberty to apply to revoke the grant or lodge a claim against the estate of the deceased during hearing for confirmation of grant.

10. Those are the orders that have provoked this appeal which is premised on Memorandum of Appeal drawn for the appellants by their lawyers O.M. Otieno Company, Advocates, where 9 grounds of appeal are set out. The appellants fault the Judge for declining to grant the limb of the application dated 8th February, 2016 seeking to preserve the estate of the deceased which estate they say "... had been criminally interfered by the respondents contrary to the mandatory Provisions of Section 45 of the Law of Succession Act." (their highlight). The Judge is also faulted for what the appellants say is abdication of a duty to preserve the estate; that there was nothing left to be administered in the estate if the application for injunction was not granted; that the Judge erred in holding that the application was *res-judicata*; that the Judge erred in holding that the appellants were indolent; in the penultimate ground, that the Judge erred in law in failing to exercise her discretion judiciously in accordance with established principles of law; and, finally, that the decision of the Judge was contrary to the weight of evidence. We are asked to allow the appeal, set aside the impugned ruling and allow the Motion dated 8th February, 2016 and award costs to the appellants.

11. When the appeal came up for hearing before us on 22nd June, 2021 learned counsel Mr. Otieno appeared for the appellants; learned counsel Mr. Wilkins Ochoki appeared for the 1st and 2nd respondents while learned counsel Mr. Mose Nyambega appeared for the 3rd – 5th respondents. All parties had filed written submissions which we had perused and what was left was a highlight of the same by parties who chose to follow that path.

12. Mr. Otieno relied entirely on written submissions where a history of the dispute before the Chief Magistrates Court (Kisii CMCC No. 728 of 2006) and the High Court (Kisii HCCC No. 68 of 1995) is given. It is submitted for the appellants that the High Court had issued orders of injunction; those orders were duly served but there was no compliance; there was an application to cite the respondents for contempt of court but the High Court ruled against the appellants; that the appellants had decided to file another application for injunction (this will be the Motion dated 8th February, 2016); that the respondents filed two applications to defeat the said application for injunction. It is submitted for the appellants that the succession court is duty bound to preserve an estate and stop interference with the same by any party as was held in the case of *Francis Waruinge Mwaura & 4 Others v Henry Njoroge Kamau* [2019] eKLR a litigant should not be allowed to benefit from his own wrong doing. It is submitted that the Judge was wrong to find the Motion res judicata , the appellants stating that there had been subsequent developments by the respondents where entries and records touching on the suit land had been interfered with.

13. In a highlight of written submissions Mr. Ochoki reminded us that the appeal was from a ruling in an interlocutory application. He submitted that the appellants had filed an earlier similar application which had been determined; that the substantive Succession Cause was pending; we should dismiss the appeal as the appellants had obtained favourable orders in the earlier application.

14. Mr. Nyambega, in highlighting written submissions submitted that the properties occupied by respective parties were different and that the appellants had no legal claim to the estate of the deceased.

15. In a rejoinder Mr. Otieno submitted that the appellants had been in occupation of the suit land for many decades.

16. We have considered the whole record of appeal, submissions made and the law and this is how we determine the appeal.

17. It will be remembered that the succession cause at the High Court has not been heard or determined and the less we say in this Judgment the better – so that we do not embarrass the Judge who will hear the case.

18. The only issue for our determination is whether the Judge was right in finding that the application dated 8th February, 2016 was res-judicata.

19. The substance of Section 7 of the *Civil Procedure Act* is set out in full text in the impugned ruling and we need not reproduce it here. Suffice to say that courts are prohibited from trying any suit or issue which has been substantially the issue in a former suit between the same parties, or parties under whom they claim.

20. The appellants moved the court in the "SUMMONS FOR EVICTION AND PRESERVATION OF THE ESTATE OF THE DECEASED" praying for interim orders of injunction to restrain the respondents from dealing with the suit land; that the court be pleased to order eviction of the respondents from the suit land; that an order be issued to declare a title uttered by the respondents in respect of the suit land as illegal, null and void and the police be ordered to evict the respondents from the suit land.

21. The Judge found that the appellants had been granted orders of injunction on 17th February, 2014.

22. We note from the record that the appellants by Motion dated 2nd April, 2014 applied *inter alia* for orders of injunction. In an undated ruling delivered by Sitati, J. at the High Court of Kenya at Kisii, the Judge allowed the Motion. The Judge found:

> "For the above reasons, and taking into account the objectors claim, I am satisfied that the objectors/applicants have demonstrated that they have a prima facie case with a probability of success when the same comes up for hearing during the objection proceedings."

The Judge further found that the suit land was likely to be alienated if injunction orders were not granted and failure to grant injunction would amount to irreparable loss and damage to the objectors (read "appellants".).

23. What followed was an application by the appellants to cite the respondents for contempt of court, it being stated that the respondents had failed to comply with those orders. Wakiaga, J., in a ruling delivered on 29th September, 2015 found that the appellants had not satisfied the threshold required in an application of that nature. In dismissing the application the Judge gave the appellants liberty to adduce further evidence of the allegations of breach of the court order and the court would consider the matter afresh.

24. What followed was the application for injunction and the ruling subject of this appeal.

25. The Judge found at paragraph 44 of the ruling:

> "44. If the objectors complaint is that the petitioners have continued to interfere with and intermeddle with the estate of the deceased, despite the orders of the court issued on 17/12/2014, then my humble opinion is that they can approach the court through fresh contempt of court proceedings in view of the fact that Justice Wakiaga, in his ruling dismissing the earlier application for contempt proceedings delivered on 29th September 2015, gave the objectors a window of opportunity to institute such fresh contempt of court if a need arose proceedings when he in his closing remarks observed as follows:
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> "However, for avoidance of doubt, the applicants are at liberty to adduce further evidence of the allegations of breach of the court order herein...."

We could not agree more.

26. The appellants were granted injunction orders by Sitati, J. as we have seen. The Judge preserved status quo pending hearing of the succession cause and the objections taken by the appellants. The appellants who were armed with those court orders could not approach the court again for orders of injunction which they already had. If, as observed by Okwany, J., the appellants were of the view that the respondents were acting in contempt of court the available avenue, and this had been left open and available to the appellants by Wakiaga, J., was to approach the court with another application to cite the respondents for contempt. Filing an application for injunction where orders of injunction had been issued was not available to the appellants – it amounted to an abuse of the process of the court.

27. This appeal has no merit. We dismiss it with costs to the respondents.

Dated and delivered at Nairobi this 8th day of October, 2021.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR