IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: NAMBUYE, MUSINGA & GATEMBU, JJ.A.]

ELDORET CIVIL APPEAL NO. 163 OF 2018

BETWEEN

FRANCIS BARASA LURARE.....1ST APPELLANT

PATRICK WEKESA LURARE.....2ND APPELLANT

AND

DENIS NYONGESA MALOBA.....RESPONDENT

(Being an appeal arising from the Ruling/Judgment of the High Court of Kenya,

***(Hon. Ali Aroni, J.) dated 29th March 2018 in* Bungoma P&A Cause No. 112 of 2006)**

****

JUDGMENT OF THE COURT

This is a first appeal arising from the judgment of the High Court of Kenya at Bungoma Law Courts, Family Division (**Ali Aroni, J.**) dated 29th March 2018.

The background of the appeal albeit in a summary form, is that the appellants are sons of the late **Alfayo Lurare Kibui** (the deceased). They jointly filed **Succession Cause No. 112 of 2006** seeking a grant of representation to the Estate of their deceased father. The temporary grant was issued to them on 17th May 2007. In January 2008 they filed a chamber summons premised on **Section 71(1)** and **(2)** of the **Law of Succession Act, Cap. 160 Laws of Kenya** and **Rule 73** of the **Probate and Administration Rules** substantively seeking a certificate for confirmation of the grant issued to them on 17th May 2007; and an order for costs of the application. The application was supported by grounds on its body and joint supporting and further affidavits. It was opposed by an affidavit of protest sworn by **Dennis Nyongesa Maloba,** the respondent herein in his capacity as the legal representative to the estate of **Joash Maloba Kituyi,** pursuant to a limited grant of letters of administration Ad Colligenda Bona issued to him on 20th September 2004 under **Section 67(1)** of the **Act**, limited for the purposes of filing a civil claim for and on behalf of the estate of the late **Joash Maloba Kituyi** in respect of land parcel No. **Bokoli/Chwele/826**.

On 1st June 2009, parties entered a consent converting the application for confirmation of grant together with the supporting annextures thereto into a plaint and the affidavit of protest into a defence. The cause was canvassed by viva voce evidence. The 2nd appellant's evidence both in his examination in chief and cross-examination, was basically that although the respondent's family occupies seven acres of land separated from theirs by a river, the deceased only sold two (2) acres of his (deceased's) land to the respondent's father and of which they were ready and willing to have transferred to the respondent and his family; while that of PW2, **Emmanuel Keya,** the document examiner was that in July 2010 he received an agreement of sale dated 1st June, 1970, and two known handwritings of one, **Alfayo**, the deceased, marked B1 and B2 for examination. He carried out the examination and found no agreement. He prepared a report dated 21st July 2010 which he produced in court as an exhibit.

In rebuttal, the respondent, and **Rose Naliaka Maloba,** widow to **Joash,** maintained that all along they have asserted claim to seven (7) acres of the deceased's estate while that of **James Simiyu Wasike**, secretary to the *"Lufu"* of the deceased was that while it was common ground that there was a land sale transaction between the two deceased persons in the year 1970 pursuant to which **Joash**, the respondent's father and his family settled on a portion of the deceased's land which they claimed from the deceased's estate during the *"lufu"* (a ceremony held after burial, for identification of debts owned by and against the estate of a deceased person) without a specific mention of any acreage; that **Joash** passed on in 1975 while the deceased passed on in 1995 before transfer of the suit portion to **Maloba's** family and, lastly, that neither deceased initiated land control board procedures to give effect to the sale agreement hence the protest filed in the succession proceedings by the respondent.

At the conclusion of the trial, the learned trial judge gave a very brief summary of the dispute and then rendered herself as follows:

> ***"5. The issue is very clear, since there is evidence that the objector's family have been in occupation of what they bought 48 years, the same ought to be measured as the agreement did not mention the acreage. Further their occupation has been uninterrupted all along.***
>
> ***6. I therefore order and direct that both sides meet the costs of a surveyor who will visit the site in the presence of the parties and measure the portion the objector's family has occupied.***
>
> ***7. The surveyor's measurement will thereafter form the land due to the objector which land the petitioners will transfer to the objector as the administrator of his father's estate and confirmation.***
>
> ***8. Each party will meet their costs."***

The appellants were aggrieved and filed this appeal raising five (5) grounds of appeal, subsequently condensed into three thematic issues in their written submissions dated 20th July 2020 namely;

> *1. The probative evaluation value of the agreement of sale dated 1/1/1970 relied upon by the respondent in support of his claim that the deceased sold seven*
>
> *(7) acres to **Joash** on which they settled and have lived there on since then.*
>
> *2. The validity of the order on survey and transfer of the portion occupied by the respondent and his family after the delivery of the Judgment.*
>
> *3. The probative evidentiary value of contradictory evidence relied upon by the respondent in support of their objection.*

The appeal was canvassed through written submissions filed by the respective parties without oral high lighting. The set for the appellants is dated **10th July, 2020** while that for the respondent is dated **22nd July, 2020**. Learned counsel **J. W. Sichangi** appeared for the appellants while learned counsel **Situma** appeared for the respondent.

Supporting ground 1 of the appeal, the appellants relied on **section 107** and **108** of the **Evidence Act Cap. 80** Laws of Kenya, both of which enshrine the principle on the burden of proof and **Nyeri H.C. Succession Cause No. 404 of 2012** for the proposition that: ***"section 42 of the Law of Succession Act Cap. 160 of the Laws of Kenya seeks to protect, respect and preserve the wishes and acts executed and undertaken by deceased persons during their lifetime which acts in law are not subject to disruption, change or frustration"***; in support of their submission that the impugned Judgment was a serious misdirection and misapprehension of both the law and the facts because the learned Judge failed to properly appreciate that the burden of proof lay with the respondent to prove that **Jason** purchased seven (7) acres from the deceased. Second, that the portion of the land on which they settled soon after its purchase from the deceased in fact comprises seven (7) acres. Third, that the document relied upon by the respondent in support of their claim and which was subjected to a document examiner's examination by PW2 did not mention anything about the acreage of the land forming the subject of sale pursuant thereto. Fourth, the purported sale agreement relied upon by the respondent did not bear the signatures of the contracting parties and was therefore inconsequential for purposes of proof of any claim against the deceased's estate.

In support of ground 2, the appellant submitted that the impugned order was not only misplaced but was also unfounded both on the facts and in law, and therefore a recipe for abuse of the court process for the Courts' failure to: endeavour itself to identify and designate a surveyor to carry out the exercise; comprehend that each party may opt to settle for their own surveyor who could easily file conflicting reports; appreciate and anticipate the possibility of disputes arising as a result of the order on survey; put in place appropriate safeguards on how disputes if any, arising from the said exercise would be resolved after it had become *functus officio* upon rendering the impugned judgment.

In light of all the above, the appellant contends that the learned Judge's misapprehension of both the law and the facts alluded to above amounted not only to a mistrial but also a denial of the most desired fruits of justice to the respective parties for the failure to effectually and judicially resolve the issue in controversy as between the rival parties.

In support of ground 3, the appellants contend that there was contradiction in the respondent's evidence which rendered it incredible as **Rosa** claimed that she claimed seven (7) acres from the deceased's estate during the *"Lufu"* ceremony while **James**, the Secretary of the *"Lufu"* stated that no specific number of acreage was claimed by **Rosa**. Second, the respondent stated that the sale agreement was written and kept by **Joseph Masakha Lukorito**, a neighbour, while the appellants' claimed that the sale agreement for the sale of two acres to **Jason** was authored by their own brother **Remmy Wanyonyi Lurare** then a Principal at St. Josephs' High School Kitale.

On that account, the appellants contended that there was, no basis for the learned Judge to whitewash the document examiner's report and erroneously hold that the acreage confirmed by the anticipated report on the post-judgment survey of the area currently occupied by the respondent and his family would form basis for their entitlement from the estate of the deceased especially when the learned Judge failed to take into consideration what would happen if the portion occupied by the respondent was either in excess of or less than the seven (7) acres claimed by them.

In rebuttal, the respondent submitted that appellants have not disputed the fact that the respondent and his family have been on the suit property since 1970 for a period in excess of forty-eight (48) years. The portion occupied by the respondent is also clearly delineated by a stream. The issue for determination before the learned Judge according to the respondent was therefore not whether the respondent and his family occupied the land but to what extent. The respondent referred to paragraph 6 of the impugned Judgment and submitted that the

learned Judge cannot be faulted either on the approach she took in the determination of the dispute before court nor the conclusion arrived at thereon as the agreement of sale of land tendered in evidence was not only tattered but did not also address to what extent the respondent and his family occupied the land belonging to the deceased's estate. Neither did the learned Judge order that the respondent be awarded 7 acres out of the deceased's estate but rather that the portion occupied by the respondent and his family be surveyed and the resulting acreage is what would form the respondent's entitlement out of the deceased's estate.

On the onus of proof, the respondent submitted that having proved that the portion purchased from the deceased is what they had occupied for forty-eight (48) years, clearly delineated by a stream the onus shifted on the appellants to prove that it only comprised two acres out of the deceased's estate.

This being a first appeal, the position in law is that we are entitled to re-evaluate and re-analyze the record and come to our own conclusion, bearing in mind that the trial Judge had the advantage of seeing and assessing the demeanor of witnesses. See **Selle & Another vs Associated Motor Board Co. Ltd (1968) EA 123**. In undertaking that exercise, we are guided by the principle that a court of appeal will not normally interfere with a finding of fact of the trial court unless it is based on no evidence or on misapprehension of the evidence or that the Judge is shown demonstrably to have acted on a wrong principle in reaching the finding he did. (See **Jabane vs Olenja (1968) KLR 661**).

We have considered the record in light of the above mandate, the rival submissions and principles of law relied upon by the appellant in support of their opposing positions. The issues that fall for our determination are basically two namely, whether the impugned Judgment:

> **1. Meets the threshold for drafting of a Judgment enshrined in order 21, rule 4 of the Civil Procedure Rules (CPR) and it is therefore sustainable on its merit.**
>
> **2. In light of the court's determination on issues No. 1 above what are the appropriate orders to make herein?**

With regard to issue number 1, Order 21 Rule 4, of the Civil Procedure Rules (CPR) provides as follows:

> ***"Judgments in defended suits shall contain a concise statement of the cause, the points for determination therein and the reason for such decision."***

The above position was reiterated by the court in the case of **Wamitu vs. Kiarie (1982) KLR 481**, wherein the court held *inter alia* that:

> *"in defended suits, the Judgment shall contain a concise statement of the case, points of determination, the decision thereon and the reason for such a decision as required by Order XX, rule 4 of the CPR (as it was then cited) and now Order 21 rule 4."*

We have revisited and construed the above provision on our own, in light of the reinstatement of the principle enshrined therein as enunciated in the **Wamitu** case [supra] and applied it to the rival position herein. Our findings thereon is that since the succession proceedings filed by the appellants were defended by the respondent, the learned trial Judge was enjoined to ensure that in the concise statement of the case both the rival pleadings and the evidence in support thereto were addressed. From the record as appraised by us, the case for the appellants was simply that the deceased sold only two (2) acres to the respondent's father and of which they were ready and willing to cede to them; while the defence of the respondent to that appellants' position was that the area they occupied separated by a stream from the rest of the land forming the estate of the deceased is what the deceased sold to **Jason** now respondent's deceased father. According to them it was seven (7) acres. The above being the undisputed factual position on the record, the points for determination falling for identification and determination by the learned Judge should have revolved around the above contested position. Instead, this is what the learned trial Judge set out as the issue for determination:

> ***"5. The issue in my view, since there is evidence that the objector's family have been in occupation of what they bought 48 years, the same ought to be measured as the agreement did not mention the acreage."***

With utmost respect to the learned Judge, we find no point for determination identified by the learned Judge in the above captioned portion of the judgment. What it all amounts to in our view is an own impression of what the learned Judge had formed of the record before her. We therefore find that no point(s) was (were) identified by the learned Judge for determination as was required of the Court by the prerequisite in the above rule.

Turning to the last prerequisite of giving reasons for determining, it is our finding that the determination of the objection by the learned Judge was subject to a survey of the portion occupied by the respondent and his family which in the learned Judge's view would then form their share of entitlement from the deceased's estate. No directions were given by the learned Judge as to who would appoint the surveyor, the timeline within which the exercise was to be carried out, how the resulting survey report would be incorporated in an already concluded Judgment for purposes of execution as the court became *functus officio* upon delivery of the Judgment. Neither were any guidelines given as to how any dispute arising from the said exercise, if any, would be addressed for purposes of effectually and judicially determining the issues in controversy as between the rival parties.

In light of the totality of the above assessment and reasoning, we agree with the appellants' assertion that sanctioning the impugned judgment would leave the entire proceedings in limbo for the trial court's failure to effectually and judicially determine the dispute between the rival parties.

The appellant has urged us to assume the role of the trial court and determine the dispute finally. We appreciate the provision in **section 3 (2**) of the **Appellate Jurisdiction Act** vests the court with the **'power, authority and jurisdiction vested in the High Court'**. This provision cannot however be read in isolation but in conjunction with **section 3 (1)** of the same **Act**,

which vests jurisdiction in the Court to hear and determine appeals from the High Court which in our view limits the Court's mandate to dealing only with what the High Court has already pronounced itself on, which in the circumstances of this appeal would be confined to the content of the impugned Judgment as already highlighted above.

Rule 3 of the Rules of the Court which enshrines the general power of the Court provides as follows:-

> ***"On any appeal the court shall have power so far as its jurisdiction permits, to confirm, reverse or vary the decision of the superior court or to remit the proceedings of the superior court, with such direction as it is appropriate or to order a new trial and to make any incidental or necessary orders including orders as to costs."***

Guided by the above provision of the law as well as **Rule 31** of the Court's rules and bearing in mind the above assessment and reasoning, we find basis for interfering with the impugned judgment because sustaining it in our view would also not only amount to a misjustice but also to a mistrial. There is therefore no basis for us to delve into the merits of the appeal as doing so would be prejudicial to the proceedings in view of the order we intend to make in the disposal of the appeal.

The orders that commends themselves to us to make in the circumstances of this appeal are as follows:

> **1. We direct a retrial of the objection proceedings before a judge other than A. A. Aroni, J**.
>
> **2. Considering the nature of the litigation and the length of time it has been in our court rooms, we direct that the incoming Judge does all that is possible within his/her power to expeditiously conduct the retrial.**
>
> **3. We direct that this matter be mentioned before the Presiding Judge, Bungoma High Court within 21 days from the date of the delivery of this judgment for purposes of directions as to the hearing.**
>
> **4. There will be no order as to costs.**

Dated and Delivered at Nairobi this 20th day of November, 2020.

R. N. NAMBUYE

.....

JUDGE OF APPEAL

D. K. MUSINGA

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb.

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR