IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME JJ.A)

CIVIL APPEAL NO 92 OF 2018

BETWEEN

FATUMA R. SEBE………...……………..………….……………...1ST APPELLANT

SALIM JUMA MWABASHO………….……….…………………2ND APPELLANT

AND

RASHID MASAUDI NASORO……………………………………1ST RESPONDENT

THE DIANI OASIS LIMITED……..……………….……………..2ND RESPONDENT

(Being an appeal from the Ruling of the Environment and Land Court at Mombasa (Komingoi, J.) dated and delivered at Mombasa on 17th April, 2018

in

E.L.C. Case No. 193 of 2017.)

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JUDGMENT OF THE COURT

[1] This is an interlocutory appeal against a ruling by **Komingoi, J**., delivered on 17th April, 2018 in Mombasa Environment and Land Court (ELC) No. 193 of 2017. The dispute is over a parcel of land known as Plot No. Kwale/ Msambweni "A"/ 2204 measuring 1.3 Ha or there about, (hereinafter referred to as suit land). It appears the dispute has been ranging for a long time, although the record is not quite clear, the dispute was registered by one Nassoro Ganzori (father of the 2nd respondent) at the Land Disputes Tribunal and an award was made on 14th October, 2008. The award recommended that the District Land Registrar – Kwale to revoke and cancel the title deed to the suit land which was held by Fatuma Sebe (1st appellant) and instead issue a new title deed to Rashid Masaudi Nasoro (1st respondent) on behalf of his family members who are the rightful heirs of the plot. The appellants appealed against the said award before the Provincial Land disputes tribunal but withdrew the appeal without informing the 1st respondent.

[2] While the 1st respondent contends that the said award was adopted as an order of the court, by the Senior Resident Magistrate at Kwale, there seems to be no certified and extracted order to that effect, although there is a hand written minute of the court. Be that as it may, by a plaint dated 28th April, 2017 the 1st respondent filed suit against the 1st appellant and Salim Juma Mwabasho (2nd appellant) seeking an order of injunction to restrain the appellants from interfering with the suit land; a declaration that the 1st respondent was the legal owner of the suit property and thus he be issued with a new title. This was followed by an application for injunction which was heard in the absence of the appellant and an order of injunction was issued on 22nd June, 2017 by Komingoi J. Soon thereafter counsel for the 1st respondent must have realized the suit land had been transferred to Diani Oasis Ltd, (the 2nd respondent). This prompted the 1st respondent to apply to amend the plaint to include the 2nd respondent which was successfully done.

[3] The appellants filed a joint statement of defence denying the allegations that the suit land belonged to the 1st respondent. They contended that the suit land was registered in the name of the 1st appellant and Juma Salim Mwabesho as proprietors in common way back in 1979. However upon the demise of Juma Salim, and through transmission the suit land was registered in the name of the 1st appellant and 2nd appellants as trustees and heirs of the late Juma Salim. Being the registered proprietors, they sold the suit land to the 2nd respondent and a

title was issued in the name of the buyer on 4th April, 2017. In the appellants view, the buyer who paid full value of the suit property is entitled to possession and in any event was not joined in the suit when the order of injunction was issued.

[4] Before the suit was heard, the appellants filed a notice of motion dated 30th November, 2017 seeking to have their names struck out of the suit on the grounds that they were the lawful owners of the suit land vide transmission in Succession Cause No 5 of 2017 at the Kadhi's court at Kwale; pursuant thereto, they were issued with the title deed on 3rd March, 2017 which they disposed of by way of sale on 4th April, 2017 thus by the time the suit herein was filed on 5th June, 2017 the appellants were not the owners of the suit premises. They alleged that they have no interest over the suit land. What was more shocking to them was the fact that the 1st respondent had no capacity or lacked local standing to institute the suit because he had no letters of administration on behalf of the estate of his late father to file the said suit in court.

[5] This is the application that has escalated to the present appeal because after hearing the rival submissions this is what the learned Judge posited in a pertinent portion of the impugned Ruling;-

> ***"I have gone through the plaint. It is not in doubt that the plaintiff has not exhibited letters of administration to show that he is the legal representative of the estate of the late Masudi Nasoro Ganzori, who was his father.***
>
> ***He annexed as, "RM2 A" the judgment from the Land Disputes Tribunal Msabweni. The judgment is dated 25th October, 2008. The same was adopted as judgment of the court by Hon A. Obura, Principal Magistrate, Kwale Law court.***
>
> ***He has also annexed as "RMN4" which is a letter from the then Provincial Commissioner confirming that the 1st and 2nd defendants had filed an appeal against the said findings of 25th October, 2008. The said appeal was later withdrawn. In essence the findings of the Land Disputes Tribunal Msabweni and adopted as judgment of the court in Kwale has never been appealed against or reviewed.***
>
> ***Article 159 (2) (d) states***
>
> > ***a) "…***
> >
> > ***b) …***
> >
> > ***c) …***
> >
> > ***d) Justice shall be administered without undue regard to procedural technicalities.***
> >
> > ***e) …"***
>
> ***I am guided by the above provision in finding that the plaintiff ought to be given an opportunity to ventilate his claim to conclusion.***
>
> ***I find it fair and just to give the parties an opportunity to adduce evidence in support of their respective claims so that the dispute can be solved once and for all.***
>
> ***I have considered the circumstances of this case and find that the 1st and 2nd defendants' application dated 30th November, 2017 and the preliminary objection lack merit and they are dismissed."***

[6] Aggrieved by the said order, the appellants filed the instant appeal which is predicated on some 4 grounds of appeal which boil down to two issues. That is to say the appellants fault the learned trial Judge for allowing the 1st respondent's suit to continue when he had no locus standi to institute the suit; for interpreting Article 159 of the Constitution in a way that changed the law on the need for a party to obtain letters of administration of a deceased person before filing suit on behalf of the estate of the deceased person.

[7] During the plenary hearing, **Miss Murage** learned counsel holding brief for **Miss Rutton** for the appellants relied on the written submissions and did not make any highlights. There was no appearance on the part of the respondent despite having been present at the case management conference represented by one Elkana Manguro who took the hearing date of the appeal. The respondent did not also file submissions as directed during the said case management conference.

[8] By the submissions made by counsel for the appellant it is argued that the 1st respondent did not have the requisite letters of administration to represent the estate of the late Masoud Nassoro Ganzori who they claim was the beneficial owner of the suit land. Thus the suit before the High court was a non-starter. To support this argument they cited the case of **Rajesh Pranjivan Chudasema vs. Sailesh Pranjivan Chudasama [2014] eKLR** where it was emphasised that a litigant is clothed with locus standi upon obtaining a limited or full grant of letters of administration and any action brought by an administrator of a deceased estate before taking out the grant of letters of administration is incompetent as of the date of inception. Thus according to the appellants the learned Judge erred in law by entertaining the suit filed by the 1st respondent even after establishing that he had no grant of representation of the deceased estate.

[9] On the application of the provisions of **Article 159 (2) (d)** of the **Constitution** as the antidote that aids the courts in addressing the broader matters of substantive justice as opposed to obscure matters of procedural technicalities that obstruct and delay justice, counsel for the appellants submitted that failure to obtain grant of representation of a deceased estate was not a procedural misstep. It simply went to the

core as the suit could not stand. To amplify this point of view, the case of **Nicholas Kiptoo Arap Korir Salat vs. IEBC & 6 Others** was cited. In that case **Kiage JA** was emphatic that the provisions of Article 159 were never meant to aid or to overthrow the Rules of procedure and create an *'anarchical free for all in the administration of justice.'* Since the suit in the court below was filed by the 1st respondent who admitted to have done so without letters of administration counsel urged us to allow the appeal and declare the said suit a nullity.

[10] We have considered the record of appeal, the written submissions and list of authorities cited by counsel for the appellants. We have done this while bearing in mind this is a first appeal where we are enjoined by law to proceed by way of re-appraising all the evidence and re-examine the same in a fresh and exhaustive way before arriving at our own independent conclusions. See **Rule 29** of the **Court of Appeal Rules** and **Seascapes Limited vs. Development Finance Company of Kenya Ltd Nairobi Civil Appeal No. 247 of 2002** thus;

> ***"As the first appeal, the Court of Appeal was enjoined to revisit the evidence that was before the High Court afresh, analyze it, evaluate it and arrive at its own independent conclusion, but always bearing in mind that the High Court had the benefit of seeing the witnesses, hearing them and observing their demeanor and giving allowance for that."***

[11] Bearing in mind the foregoing principles albeit this was an interlocutory ruling based on a preliminary objection in that the evidence considered was what was deposed in the affidavit. As aforementioned, the respondent did not appear or file written submissions. In our considered view the issue for determination is whether the learned Judge erred by entertaining the suit filed by the 1st respondent who had no letters of administration. It was not in dispute the 1st respondent was litigating before the Environment and Land Court on behalf of his brothers and sisters over the suit land which belonged to his late father Massoud Nassoro Ganzori. This is how he pleaded his case by an amended plaint dated 28th day of September, 2017.

> ***"At all material times of this suit the plaintiff was in occupation of plot No Kwale/Msambweni "A"/2204 measuring 1.3 Ha or thereabouts together with his brothers and sisters which piece they inherited from their late father Massoud Nassoro Ganzori.***
>
> ***…***
>
> ***The dispute earlier arose in March 2004 between the 1st and 2nd defendants and Massoud Nassoro Ganzori, as claimants, before the District Land Disputes Tribunal, Msambweni whose judgment was delivered in favour of the plaintiff on 25th October, 2008. The plaintiff was awarded the said plot for being the heir to Massoud Nassoro Ganzori who was found to be the legal owner of the land in dispute."***

[12] The 1st respondent seems to have also represented his late father without first obtaining letters of administration even before the land disputes tribunal as discernible from an affidavit filed therein sworn by him where he deposed in a pertinent paragraph as follows;-

> ***"That I am the son of one Masoud Nassoro Ganzoni who is now deceased (vide burial permit No 859486 of 30/5/05.***
>
> ***That in land dispute case No. 4 of 2009 my father was one of the respondents and I used to represent him in the said case since he is deceased.***
>
> ***That I am making this affidavit in support of my application to represent my deceased father in the said case."***

It is indisputable that the 1st respondent was litigating on behalf of his late father who was the one who filed a dispute before the land disputes tribunal. It is trite that for a party to institute a suit on behalf of a deceased person, it is necessary for him or her to first obtain letters of administration. This is because a deceased person has no rights other than what survive him which can only be pursued through a personal representative. It is letters of administration that gives a party the authority that is known in law as locus *standi*. This was aptly stated in the oft' cited case of **Otieno vs. Ougo [1987) e KLR** where it was held that a litigant is clothed with *locus standi* upon obtaining a limited or a full grant of letters of administration in cases of intestate succession.

> ***"… an administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception."***

Although there is no doubt that the 1st respondent is a beneficiary of his late father or even better, perhaps one who would be the administrator, he nonetheless had to petition for letters of administration. **Section 82 (a)** of the **Law of Succession Act** confers power on personal representatives and on them alone. As to who are personal representatives within the contemplation of the Act, Section 3 the interpretative Section, provides an all-inclusive answer; it says *"personal representative means executor or administrator of a deceased person."* It is common ground that the deceased in this case died sometimes in May, 2005 either intestate or testate, what is apparent here is the respondent did not have letters of administration or probate as the case may be. Therefore, the only person who can answer the description of a personal representative is the administrator or executor of the estate of the deceased. **Section 3** of the **Law of Succession** states that an *"administrator means a person to whom a grant of letters of administration has been made under this Act."*

[13] The 1st respondent did not even pretend to have obtained the letters of administration. This now leads us to the next enquiry which was at the heart of this dispute and that was whether failure to obtain the letters of administration before filing suit was a procedural technicality that can be cured under the provisions of **Article 159 (2) (d)** of the **Constitution** as held by the trial Judge. No doubt the learned Judge misapprehended the discretion under the above provision to arrive at the conclusion as she did that absence of letters of administration is a procedural technicality. It is also a settled principle in law that this Court will be slow to interfere with the Judges exercise of discretion unless it is not judicious, whimsical or based on no reasons. It is plain that the 1st respondent could not file a suit to pursue a claim on behalf of his late father without obtaining letters of administration. That is a well-established principle of law which cannot be excused because it is

the letters of administration that would give him the *locai standi*, or the power to pursue the claim. Allowing any party to litigate on behalf of a deceased person without obtaining letters of administration would cause chaos and uncertainty in the administration of justice.

[14] The purpose of maintaining principles of law and procedure even when they may appear cumbersome is to ensure uniformity and predictability. That much was stated by this Court differently constituted in **Nicholas Kiptoo Arap Korir Salat v IEBC & 6 Others** (supra) ruling by Kiage JA;

> ***"I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned."***

It cannot be said by any stretch of imagination that filing a suit on behalf of a deceased person without letters of administration is a technicality. It is core, it is fundamental and thus the 1st respondent's suit was a nonstarter. The appellant's preliminary objection was justified.

[15] We find merit in this appeal which we allow with the result that the ruling dated 17th April, 2018 is hereby set aside and in its place the application dated 30th November, 2017 is allowed. Due to the nature of this dispute which involves family members to a large extent, we are reluctant to award costs, each party should bear their own costs.

Dated and delivered at Mombasa this 14th day of March, 2019.

ALNASHIR VISRAM

....

JUDGE OF APPEAL

W. KARANJA

....

JUDGE OF APPEAL

M.K. KOOME

....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR