



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E.M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED, J.J.A.)

CIVIL APPEAL NO. 70 OF 2015

BETWEEN

BENA NAFULA MAKANA.....1ST APPELLANT

ELECTINE ADHIAMBO ODUORI.....2ND APPELLANT

ANYANGO WABOMBA.....3RD APPELLANT

AND

NYAORO AKOTH MUKA CRESCENTIA...1ST RESPONDENT

EPHREM SANDE MUKA.....2ND RESPONDENT

EUGENE WESONGA MUKA.....3RD RESPONDENT

FERDINAND OKELLO MUKA.....4TH RESPONDENT

VINCENT OPIYO MUKA.....5TH RESPONDENT

CHRISPINUS ODONGO MUKA.....6TH RESPONDENT

KIZITO OCHIENG MUKA.....7TH RESPONDENT

BENJAMIN WABWIRE MUKA.....8TH RESPONDENT

FRANCIS OWASE MUKA.....9TH RESPONDENT

(Being an Appeal from the Ruling of the High Court of Kenya at Busia, (Tuiyot, J.) dated 12th February, 2015

in

HC SUCCESSION CAUSE NO. 4 OF 2001)

JUDGMENT OF THE COURT

[1] This is an appeal from the High Court (**F. Tuiyot, J.**) dated 12th February, 2015, dismissing an application by the appellants in this appeal for revocation of a Grant of letters of administration intestate issued to **Nyaoro Akoth Muka Crescentia** on 4th June, 2002.

[2] The 1st appellant is a widow of **Gaitano Ekesa Makana (Gaitano)** who died on 8th August, 1984. Gaitano had three wives – **Mary Makana (deceased)** who had three children, **Jacob Muka Makana**, **Veronica Akoth (deceased)** and **Clara Mugeni**. The second wife is

the 1st appellant and has one daughter **Electine Adhiambo Oduori** (the 2nd appellant herein). His third wife was **Trufena Nyangili (deceased)** who had three children; **Elizabeth, Anyango Wabomba** (3rd appellant), and **Michael Oduor Makana**.

[3] On 1st October, 1968, Gaitano was registered as proprietor of land title **No. Bukhayo/Malanga/211** comprising of 58 acres. On 8th June, 1974, Gaitano transferred the whole land to his son **Jacob Muka Makana (Jacob)** as a gift who after the death of Gaitano sub-divided the land into two portions, title Nos. **Bukhayo/Malanga/917** and **Bukhayo/Malanga/918**.

[4] Sometime in 1998, **Bena Nafula**, the 1st appellant filed a land dispute case against Jacob Muka Mukana before Nambale Land Disputes Tribunal. It was alleged at the hearing before the Tribunal that Jacob Muka studied in Russia, that upon his return he deceived his father Gaitano that the Government of Russia had agreed to construct a textile factory for him if he had land; that he persuaded Gaitano to transfer the land but after three years no factory was constructed and Gaitano demanded his land back and that Gaitano died before the dispute was resolved. Apparently, Jacob did not attend the hearing before the tribunal. The tribunal in a decision dated 9th April, 1998 distributed the land giving Jacob 30 acres; the 1st appellant 14 acres and Michael Oduor Makana 14 acres. The decision of the tribunal was adopted as a judgment of the court in Busia Senior Resident Magistrate Case No. 3 of 1998. However, Jacob filed Kakamega High Court Miscellaneous Civil Application No. 140 of 1999 for setting aside the Tribunal's award. The application was allowed on 21st October, 1999 on the ground that the decision was contrary to rules of natural justice as Jacob Muka was not given a hearing.

[5] Sometime in 2004 the three appellants filed Bungoma High Court Succession Cause No. 73 2004 in respect of the Estate of Gaitano. In that cause, the appellants applied for preservation of the estate and in opposition to the application **Ephrem Sande Muka**, the 1st respondent herein who is a son of Jacob filed an affidavit sworn on 16th November, 2011 indicating that upon the death of Jacob Muka in 2001, a succession cause, Busia High Court Cause No. 4 of 2001 was filed, a Grant issued on 4th June 2001 which was confirmed on 4th March, 2003 and the land distributed.

[6] On the basis of that information, the appellants filed an application for revocation of the Grant and other ancillary reliefs.

The appellants averred in the application, *inter alia*, that land was registered in the name of Jacob in trust for them; that the respondents intend to disinherit them of the land; that they live on the land and have an interest in the land; that the 1st respondent applied for Grant of letters of administration without notifying them; that the respondents have threatened to evict them from the land and that had the court been informed of the correct facts, it could not have issued the Grant.

The grounds of the application were that the proceedings to obtain the Grant were defective in substance; that the Grant was obtained fraudulently by making false statements and concealment of material facts and that the Grant was obtained by means of untrue allegations of fact on a point of law to justify the Grant.

[7] The 1st respondent in the application for revocation of the Grant who is also the 1st respondent in this appeal is the widow of Jacob. The other respondents were her sons who are also the respondents in this appeal to whom the estate was distributed.

[8] At the hearing of the application, the 2nd appellant gave oral evidence and adopted her affidavit. The 2nd respondent Ephrem Sande Muka also gave oral evidence. It is clear from the evidence, other than the issue whether, Gaitano transferred the original land title Bukhayo/Malanga/211 to his son Jacob Muka Makana to hold in trust for his family, most of the other relevant facts were not disputed. Ephrem Sande Muka admitted in his evidence in cross-examination that, the 1st appellant is a widow of Gaitano; that the 2nd appellant is a daughter of Gaitano; that the 3rd appellant is a daughter of Gaitano; that Michael Oduor Makana was a wife of Gaitano; that his father Jacob Muka Makana is a son of Gaitano; that the 1st and 2nd appellants live on the disputed land; that his father sub-divided the original land into two portions – parcels No 917 and 918 and that after the death of his father his mother filed a succession cause through which the land was distributed to eight sons of Jacob. The High Court made findings of fact as much.

[9] At the beginning of the impugned ruling the learned judge stated:

“This application will not see the light of the day even if the facts presented by the applicants are taken as uncontroverted.”

After examining the history of the dispute, the learned judge determined the application thus:

“The claim by the applicants is that the deceased and now his Estate are mere trustees of part of the disputed land on their behalf. The claim by the applicants is a claim against the estate. The petitioner on the other hand is the wife of the deceased and all the other respondents are the children of the deceased. The petitioner and the other respondents are dependents of the deceased within the meaning of section 29 of the Law of Succession Act. The superior position they hold cannot be dislodged by way of revocation of Grant by persons claiming against the Estate of the deceased. In my view, the petitioner's counsel is right when he submits that the applicants should take proceedings elsewhere against the estate to prove the existence of a trust.”

[10] The main grounds of appeal are that the court erred and misdirected itself in law and fact in holding that the appellant should take proceedings elsewhere to prove the existence of a trust and that the court erred and misdirected itself in law by failure to render a decision on the issues placed before it. **Mukele** for the appellants submitted, among other things, that, the Law of Succession Act (LSA) deals with matters relating to succession and administration of estate and also with matters connected to succession; that the court had jurisdiction under section 47 of LSA to determine the issue of trust; that Rule 73 of the Probate and Administration Rules (**P & A Rules**) gives the court inherent jurisdiction; that section 29 of the LSA which deals with dependants of a deceased person should be interpreted in a liberal way; that the court was required to do justice without undue regard to technicalities of procedure; that when a son steps into the shoes of his father he

holds the land in trust for the whole family and the passing of the land to the son is a mere technicality and that the appellants should have been given an opportunity to be heard.

On his part, **P.K. Kamau** for the respondents submitted that the court had no jurisdiction to revoke a Grant; that a person has to be a dependant of a deceased person before revocation can be granted; that the appellants are not dependants of the deceased within the meaning of section 29 LSA; that the court had no jurisdiction under section 47 of LSA to determine a claim to adverse possession or trust and that appellants can file separate proceedings.

[11] We have considered the ruling of the High Court, the grounds of appeal and the respective submissions. The application before the High Court was an application for revocation of Grant issued to the widow of Jacob on the grounds, *inter alia*, that, the Grant was obtained unprocedurally and by concealment of material facts, namely, that Jacob Muka Mukana to whom the estate relates was registered as a proprietor of the land in trust for the appellants and that the appellants had an interest in the land on which they were living. The court did not consider the application on the merits holding that the appellants' claim was a claim against the estate and the appellants should file separate proceedings to prove trust. The High Court did not specifically find that it had no jurisdiction to entertain a claim based on trust.

[12] The High Court has unlimited original jurisdiction in criminal and civil matters (*Article 165(3) (9) of the Constitution*). Further, **section 47** of the LSA provides for the jurisdiction of the High Court thus:-

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and pronounce such decrees and make such orders as may be expedient.”

Section 70 of the LSA gives a court wide powers before making a Grant and whether or not there is a dispute as to the Grant including power to call for further evidence as to rights of persons claiming interest on intestacy and power to issue special citations to any person appearing to have reason to object to the application.

Rule 17(1) of the Probate and Administration Rules gives a right to any person, to file an objection to the making of a Grant. Again, **Rule 40(6)** gives a right to any person wishing to object to the proposed confirmation of the Grant to file an affidavit of protest. Further, in an application for confirmation of Grant, an applicant has to satisfy the court that there is in existence no dependant of a deceased person (*Rule 40(2)*) and an affidavit in support of the application for confirmation is required to disclose, *inter alia*, step-parents, brothers, sisters, half-brothers and half-sisters who were living at the time of death of the deceased and were being maintained by him immediately prior to death (*Rule 40(3)*).

Lastly, **Rule 44** gives a right to any person interested in the estate to apply for revocation or annulment of a Grant.

[13] Without in any way determining the appellants' claim of trust, there was no dispute that the suit property was registered in the name of Gaitano who transferred it to his son Jacob as a gift. By proviso to **section 28** of the repealed Registered Land Act, (**RLA**) the right of a registered proprietor did not relieve him from duty or obligations to which he is subject as a trustee.

Further, as **section 29** of RLA provided, a proprietor who has acquired land by transfer without valuable consideration held the land subject to unregistered rights or interest subject to which the transferor held. These provisions have been enacted in the Land Registration Act (*section 25(2) and section 27(1) (a)*).

By **section 30** of the RLA, all registered land was subject to overriding interests including rights of a person in possession or actual occupation. By **section 28** of the Land Registration Act such overriding interests include trusts including customary trusts.

[14] By asserting that the disputed land was transferred by Gaitano to Jacob to hold in trust for the appellants, the appellants were claiming that they are beneficiaries of the trust and therefore had equitable interests in the estate. The purpose of the application for revocation of Grant was to revoke the devolution of estate of Jacob on intestacy to facilitate the hearing of their claim to the equitable interest in the estate. The jurisdiction of the court at law and its equitable jurisdiction are fused. The court exercising the fused jurisdiction is required to exercise its jurisdiction in every cause or matter before it so as to ensure, as far as possible, that all matters in dispute between the parties are completely and finally determined and a multiplicity of legal proceedings with respect to any of those matters is avoided.

[15] As **section 47** of the LSA expressly provides, the High Court has jurisdiction to determine any dispute under the Act relating to intestate and testamentary succession to estates of deceased persons. It does not matter that the determination of a question of trust would make the proceedings litigious or contentious. **Rule 58** of P&A Rules recognizes that a succession court would deal with litigious proceedings and **Rule 63(1)** of P & A Rules imports specific provisions of the Civil Procedure Rules to facilitate the resolution of such disputes. Those rules relate to litigious proceedings. The Civil Procedure Rules which apply to succession proceedings relate to interrogatories and discovery, summoning and attendance of witnesses to give evidence, cross-examination of deponents of affidavits, security for costs and review. Whether or not a court can deal with litigious proceedings is not a question of jurisdiction of the court. Rather, it is a question of whether or not the issue in dispute can be conveniently determined in succession proceedings or in another forum. This was a family dispute. The fact that the land originally belonged to Gaitano and the appellants were closely related to Gaitano and Jacob and have lived in and cultivated the disputed land for a long time coupled with the fact that there were previous proceedings entitled them to be heard in the succession proceedings relating to devolution of the disputed property on intestacy.

It follows that, and we find that, the court erred in declining jurisdiction to entertain the application. Since the court had jurisdiction to entertain the claim in the succession proceedings, the application should not have been dismissed merely on a technicality of procedure.

[16] As regards the merits of the application for revocation of the Grant, the appellants established that the succession proceedings were done without their knowledge; that the succession documents filed in court did not disclose their existence and that material facts were not disclosed to the court.

Considering the requirement of full disclosure in succession proceedings as stipulated by the LSA and P & A Rules and the power of the court to investigate any relevant matter on its own motion, it is not probable that the succession court could have made the Grant or confirmed the Grant without giving the appellants a hearing. We are satisfied that the appellants proved a case for the revocation of the Grant.

[17] For the foregoing reasons:

(i) **The appeal is allowed and the ruling and orders of the High Court are set aside.**

(ii) **The appellants' application for revocation of Grant dated 10th October, 2012 is allowed.**

(iii) **The Grant of letters of administration intestate granted to Nyaoro Akoth Muka Crescentia on 4th June, 2002 and confirmed on 4th March, 2003 as they relate to land titles No Bukhayo/Malanga/917 and Bukhayo/Malanga/918 which are sub-divisions of the original land title No. Bukhayo/Malanga/211 are revoked.**

(iv) **The time for filing objection, answer and cross-petition by the appellants stipulated by Rule 17 of the P & A Rules to the petition already filed is extended by thirty days (30) from the date hereof.**

(v) **The High Court to hear any dispute relating to the estate of Jacob Muka Makana and determine it in accordance with the law.**

(vi) **The costs of the application in the High Court and costs in this appeal shall abide the determination of the succession proceedings by the High Court.**

Dated and delivered at Kisumu this 21st day of May, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.