IN THE COURT OF APPEAL

AT ELDORET

(CORAM: GITHINJI, OKWENGU & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO. 23 OF 2016

BETWEEN

PHILIP TOO

LABAN KIPRUTO ROTICH.....APPELLANTS

AND

KIMAGUT ARAP SANG.....RESPONDENT

(An Appeal from the ruling of the High Court at Kitale (Hon. J.R Karanja, J.) dated 9th July, 2015

in

SUCCESSION CAUSE NO. 357 OF 1998)

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JUDGMENT OF THE COURT

[1] This appeal arises from a succession dispute involving the estate of the late **Kipsanga Arap Tuiya** (hereinafter referred to as deceased), who died on 22nd December, 1995. Following the death of the deceased three persons namely, Joseph Sang, Paul Samoei and Philip Too (Too) petitioned the High Court sitting at Eldoret for letters of administration with Will annexed. The three brought the petition in their capacity as the Executors named in the deceased's will. The three were issued with a grant of letters of administration intestate on the 20th September, 2001, which grant was confirmed on 23rd June, 2005 pursuant to the provisions of Section 71(1) and (3) of the Law of Succession Act. According to the written Will of the deceased, the deceased bequeathed his property Nandi/Sigot/114 (hereinafter referred to as 'disputed land') to his grandson Laban Kipruto Rotich (Rotich). Rotich is a son to Philip Too. Rotich and Too are the appellants.

[2] Before the grant was confirmed, the deceased's son Kimagut Sang (Kimagut), who is also the older brother to Philip Too, and one Jipchirchir Tuiya who claimed to be a purchaser, lodged an objection to the issuance of the grant of letters of administration. By an application dated 31st October, 2001 Kimagut sought to have the grant issued to the three executors annulled, and the alleged Will of the deceased declared invalid. Kimagut contended that the Will was a forgery and that the grant was obtained by concealment of material facts. This application was listed for hearing but adjourned severally. Kimagut also filed another notice of preliminary objection dated 7th May, 2002. On 23rd June 2005 the High Court dismissed the objection for non-attendance, confirmed the grant issued to the executors and ordered that the disputed land be transferred to Rotich.

[3] After the orders of 23rd June 2005, Kimagut filed an application under **Section 45** of the **Law of Succession Act** seeking to have the executors stopped from intermeddling with the deceased's estate and also an order that status quo be maintained pending the hearing of the succession cause. In effect Kimagut was seeking to restrain the executors from dealing with the estate of the deceased as well as a stay of the succession of the deceased estate. In dismissing the application, the High Court faulted Kimagut for failing to prosecute his application dated 31st October 2001, and noted that although Section 45 of the Law of Succession Act prohibits persons from intermeddling with the estate of a deceased person, it did not give the High Court powers to give the orders sought.

[4] Undeterred Kimagut and Jepchirchir, filed yet another application dated 23rd November, 2005 seeking to have the confirmation of the grant; the order dismissing the application dated 31st October 2001 set aside; and the confirmed grant revoked. In the meantime, the Executors through their advocates filed an application for the removal of Paul Samoei from the Certificate of confirmation of grant as he was deceased. This application was heard and allowed.

[5] From the record, it seems Kimagut's application dated 23rd November, 2005 was never prosecuted. That notwithstanding, it is evident that Kimagut had also by an application dated 2nd February, 2015 filed Summons for annulment of the grant under **Section 76** of the **Law of Succession Act** and **Rule 44** of the **Probate and Administration Rules**. One of the grounds upon which this summons was anchored was that the Will allegedly written by the deceased was a forgery, hence the prayer to have the grant issued to the three executors annulled.

[6] In his supporting affidavit Kimagut averred that the executors took out grant of letters of administration alluding that the deceased died intestate, while at the same time they claimed there was a will left by the deceased. One of the grounds upon which the executors opposed Kimagut's application, was that the application was *res judicata* as the respondent had filed two applications over the same issue. The summons dated 2nd February was determined by the ruling of the High Court dated 9th July 2015 which is the subject of the current appeal.

[7] In the Ruling of 9th July 2015, the learned Judge found *inter alia*, that Kimagut's applications dated 31st October, 2001 was not prosecuted, while the one dated 23rd November, 2005 was withdrawn; that both applications never proceeded to full hearing and were therefore not determined on merit; and that the doctrine of res judicata could not therefore apply to his summons of 2nd February 2015. The learned Judge found no justification to the allegation that there was concealment of material facts in the application for the grant.

[8] Nonetheless, the learned Judge faulted the process adopted by the Executors in obtaining the grant, noting that they ought to have petitioned for grant of probate rather than grant of letters of administration with will annexed. The learned judge therefore revoked and or annulled the grant concluding as follows:

> ***"The whole process of obtaining the disputed grant of letters of administration together with the certificate of confirmation was erroneous and therefore defective in substance if not null and void "ab-initio."***

[9] It is this decision that has led to the current appeal. The main grounds of the appeal are that the learned Judge erred in law and fact: in failing to find that the application was res judicata; in failing to find that there was inexcusable delay in filing the application; in disregarding the consent judgment entered between the appellants and Kimagut declaring Rotich as the rightful owner of the disputed property.

[10] At the hearing of the appeal, the parties were represented by counsel who made oral submissions. Mr. J.O. Samba appeared for Too and Rotich while Mr. Miyienda, E.O appeared for Kimagut.

[11] In his submissions, Mr Samba took issue with the propriety of Kimagut's application that was the subject of the High Court Ruling, maintaining that it was drafted by a person who did not at the material time, hold a current practising certificate entitling him to practise. On the issue of res judicata, counsel insisted that the application filed on 31st October, 2001, which was dismissed for non-attendance, was similar to the application dated 2nd February, 2015; that the learned Judge erred in failing to consider the consent judgment entered into between the parties in Kitale HCCC No. 156 of 2006 where Rotich and Kimagut consented that Rotich be declared the rightful owner of the disputed property, and that Kimagut be barred from entering and trespassing into the disputed land. It was thus counsel's submission that in view of the consent, Kimagut's summons seeking to have the grant annulled was an abuse of the court process. In addition, counsel faulted the learned judge for annulling the grant purely on a procedural infraction without any evidence of prejudice suffered by Kimagut due to the infraction.

[12] On his part learned counsel Mr. Miyienda maintained that at the material time he had a practising certificate, as he had forwarded the required documents to the Law Society of Kenya; and that Kimagut's summons was properly before the court. Counsel took issue with the record of appeal contending that the same was incomplete, and that the appellants had only included in the record documents favourable to them, and this made it difficult for him to respond to some of the issues raised in the appeal. In regard to the consent judgement, counsel submitted that the consent was only "sneaked" into the court record in 2015 despite being drawn in 2008. Counsel maintained that the disputed land was different from Nandi/ Sagot/114 which was captured in the grant. He urged the Court to dismiss the appeal.

[13] This being a first appeal, we reiterate our primary role as a first appellate court, which is to re-evaluate, re-assess and re-analyze the evidence on record and determine whether the conclusions reached by the learned trial Judge are supported by the facts that were before him, and whether the learned judge properly interpreted and applied the law. ***Kenya Ports Authority vs. Kuston (Kenya) Limited [2009] 2 EA 212.***

[14] The main issues for determination are whether the appellant established that the application for revocation of grant was res judicata, whether there was inexcusable delay in the filing of the application, and whether the learned Judge erred in revoking/ and or annulling the grant. Section 76 of the Law of Succession Act gives the court powers to revoke or annul a grant under the following circumstances:

> **76. A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—**
>
> **(a) that the proceedings to obtain the grant were defective in substance;**
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> **(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;**
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> **(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;**
>
> **(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—**

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.

[15] In the summons for annulment that was lodged by Kimagut, he raised various grounds upon which he sought the annulment of the grant. The most pertinent grounds were the allegation that the grant was obtained by means of untrue facts and or allegations; that the grant was defective in substance; and that the Will allegedly made by the deceased on 19th February 1995 is a forgery.

[16] In his judgment the learned judge dismissed the allegations of fraud finding that there was no evidence adduced that could support the allegations of forgery in regard to the Will of the deceased. Similarly, the learned judge found that the allegations of concealment of material facts were not established, as the executors petitioned for letters of administration with Will annexed in their capacity as executors of the Will, and not as surviving sons of the deceased, and that the deceased had liberty to bequeath his property to any person including persons who were not members of his family. In his memorandum of appeal Kimagut did not specifically raise any issue concerning the grounds for annulment of the grant. The only issue raised that could cover these grounds was the general statement at ground six of the memorandum in which it is contended that the ruling of the learned judge was against the weight of evidence. However, there was nothing adverted to in the submissions made by Kimagut's counsel to support that contention. On our part we are in agreement with the findings made by the trial judge in that regard.

[17] The main ground upon which the learned Judge annulled the grant was under Section 76(a) that the proceedings to obtain the grant were defective, as the appellants petitioned the Court for grant of letters of administration instead of grant of probate. In this regard the learned Judge stated as follows:

"The foregoing factors clearly indicate that the respondent wrongly petitioned the Court for grant of letters of administration instead of grant of probate. They could not petition for grant of letters of administration with written Will annexed because the Will herein had appointed them executors of the Will. The whole process of obtaining the disputed grant of letters of administration together with the certificate of confirmation was erroneous and therefore defective in substance if not null and void ab-initio".

[18] Thus the question that this Court must address is whether the learned Judge was right in finding that the Executors applied for the wrong grant, and if so whether the wrong grant vitiated the proceedings as to make the grant issued to the executors a nullity. From the evidence on record, the appellants in applying for the grant annexed a written will dated 19th February 1995.The production of a Will signed by the deceased confirmed that the deceased died testate. Section 53 (a) of the Law of Succession Act provides as follows:

A court may, where a deceased person is proved (whether by production of a will or an authenticated copy thereof or by oral evidence of its contents) to have left a valid will, grant, in respect of all property to which such will applies, either—

(i) probate of the will to one or more of the executors named therein; or

(ii) if there is no proving executor, letters of administration with the will annexed;

[19] The will dated 19th February, 1995, named three executors. Clause 6 of the will reads;

'That I appoint JOSEPH SANG, PAUL SAMOEI and PHILIP TOO as the Executors of my estate and give them fully authority to do everything according to my will."

[20] In line with the provisions of **Section 53 (a) (i)** of the **Law of Succession Act**, upon the deceased's death, the three persons named as executors of the deceased's Will, should have petitioned for a grant of probate of the will. Instead, the executors petitioned for a grant of letters of administration with the will annexed. **Section 53 (a) (ii)** of the **Law of Succession Act** provides that a grant of letters of administration with will annexed should only be taken out where there is need to prove an executor or there is no executor named in the Will, and that was not the case with the deceased's Will.

[21] Once the executors applied for letters of administration with Will annexed, the proceedings took a different course upon which they were issued with a grant of letters of administration and thereafter, a certificate of confirmation of grant pursuant to the provisions of Section 71 (1) and (3) of the Law of Succession Act, instead of grant of probate of the Will under section 53 (a)(i). The question that arises is whether the appellant's act of proceeding under the wrong provisions vitiated the succession process that was followed and the Letters of administration and confirmation of grant issued to the executors.

[22] We have considered whether the proceeding under the wrong proviso was an irregularity that was curable or a nullity that was void from the moment the petition for letters of administration with will annexed were taken out. In addressing this issue we take cognisance of the often cited sentiments of Lord Denning in ***Macfoy Vs United Africa Co Ltd (1961) 3 All ER, 1169*** in distinguishing between an act that is a mere irregularity and one that is a nullity:

> ***"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse…But if an act is only voidable, then it is not automatically void. It is only an irregularity which may be waived. It is not to be avoided unless something is done to avoid it. There must be an order of the court setting it aside; and the court has a discretion whether to set it aside or not. It will do so if justice demands it but not otherwise. Meanwhile it remains good and a support for all that has been done under it."***

[23] It is evident that the Law of Succession Act gives clear guidance on how a deceased's estate should be distributed, and that there is a clear distinction between how an estate of a deceased person who dies testate and one who dies intestate is treated. The act of the executors petitioning for letters of administration with will annexed was a wrong procedure that did not comply with the provisions of the Law of Succession Act. The consequent letters of administration and confirmation of grant issued to the Executors were substantively defective and this made the whole process void.

[24] For these reasons we uphold the finding of the learned Judge that the letters of administration and the confirmation of grant must be revoked. Since they allege that there is a Will the Executors must go back to the drawing board and follow the proper procedure in executing the Will of the deceased. Accordingly, we dismiss this appeal. In light of the circumstances of this matter, we find it appropriate to order each party to bear their own costs.

Those shall be the orders of this Court.

Dated and delivered at Eldoret this 28th day of June, 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