**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KARANJA, SICHALE & J. MOHAMMED, JJ.A)**

**CIVIL APPEAL NO. 87 OF 2016**

**BETWEEN**

**BARNES MUEMA.....APPELLANT**

**AND**

**FRANCIS MASUNI KYANGANGU.....RESPONDENT**

*(Being an Appeal against the Judgment and Decree of the High Court of Kenya at Machakos (Hon. Justice J.M Ngugi) delivered on 27th February 2012*

***in***

***H.C.C.A. No. 115 of 2003)***

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**JUDGMENT OF THE COURT**

1. This is a second appeal from the judgment and decree of the High Court at Machakos delivered on 27th February, 2012 where the Honourable Ngugi, J. granted orders in favour of the respondent herein. In his judgment the learned Judge set aside the ruling of the trial court, in which half share of the suit property, **Parcel No. Kyangwithya/ Mutune/589**, had been awarded to Barnes Muema (the appellant herein), and gave orders, *inter alia*, that the suit property be registered solely in the name of Francis Masuni Kyangangu (the respondent) in his capacity as the personal representative to the estate of Kyangangu Maithya.

2. It is important to give a brief background of this case in order to place this appeal in proper perspective. The deceased, Kyangangu Maithya, was the father of the respondent, Francis Masuni Kyangangu, while the appellant Barnes Muema, is the grandson of the respondent's 2nd cousin. The deceased died intestate hence on the 15th March, 1999 the respondent petitioned for letters of administration intestate in respect of the estate. In his petition, the respondent listed the assets of the deceased as four parcels of land registered in the deceased's name including the suit property.

3. A Grant of letters of administration was issued on the 15th July, 1999 and on the 20th August, 1999 the respondent filed an application seeking early confirmation of the Grant on grounds that he had medical problems and wanted to sub-divide the parcels of land forming part of the estate, to his sons. The court confirmed the grant of letters of administration on 6th September, 1999 and thereafter the respondent proceeded to distribute the said properties.

4. On the 4th October, 1999 it came to the appellant's attention that the respondent had secured the grant of letters of administration after the respondent attempted to evict him from the suit property. The appellant then filed an application seeking to revoke and/or annul the grant of letters of administration with leave of court on the grounds that the same was obtained fraudulently by the making of false statements and the concealment of material information. The application was heard inter-partes on 7th of October, 1999 and a ruling in favour of the appellant delivered on the 8th of October, 1999 revoked the Grant. By an application dated 29th November, 1999 the respondent sought to review and/or set aside that ruling with no success.

5. On the 22nd November, 2002 the appellant filed an objection and subsequently on the 14th February, 2002 he filed a cross petition and affidavit in support of a Grant of letters of administration in his capacity as *'a grandson to the deceased's brother'*.

6. It was the respondent's case that the deceased was his father and that he had three sisters who were married. He testified that he was the only one living on his father's homestead and that his father left him four parcels of land, including the property the subject matter of the suit.

He further testified that he knew the appellant and that he was not a step grandson to the deceased therefore he could not inherit any property belonging to the deceased.

7. The respondent also deponed that the appellant's father died even before the appellant was born and that the appellant's grandfather, Katulwa Muthenya, was not an immediate member of his and the deceased's family but was a clan member. He further testified that the deceased inherited the properties from his father, the respondent's grandfather, who sub-divided the land between one Engali and one Maithya. He further averred that during the adjudicating process, the deceased's right to the land had only been objected to by one Malusi Ngunguu who's objection was dismissed by the Land adjudication board and that the appellant never raised an objection to the ownership of the land during the deceased's lifetime. The respondent testified that the appellant came into the suit property sometime in 1999 and that apart from occupying a part of the land, there is no other development thereon. The evidence of his other witnesses is summarized as hereunder.

8. PW1, one Kamene Muli, who is the respondent's sister, testified on behalf of the respondent. She averred that she knew the appellant and that he was not entitled to inherit the estate of the deceased. She also testified that she knew the appellant's grandfather, Katulwa Muthenya, and he was not the deceased's brother. She averred that the appellant has been living on his own land, which he inherited from his grandfather.

9. PW2, one David Kilungu, the District Land Registrar, Kitui District testified that the records of registration show that the suit property was registered in the deceased's name on 5th May, 1977 and that he obtained the land certificate on 20th February, 1979. He also averred that it appeared that the respondent succeeded the deceased on 17th September, 1999 and he obtained the title deed on the suit property on the same day. He further deposed that when the land was adjudicated in 1977 there was an objection No. 37 of 19th December, 1975 by one Stephen Kithome Muli; and that the said objection was dismissed.

10. PW3, one Wambua Muli Kavinilo, also testified on behalf of the respondent stating that he knew the respondent who was his nephew. He also averred that he knew the appellant who was the son of one Nzuku Mitau, son of Katulwa Muthenya; that the appellant had no right to inherit the deceased's property but could only inherit his grandfather, Katulwa Muthenya's property. He deposed that the appellant had built on another parcel of land where his mother lived. He further deposed that he was conversant with the ancestry of the family of the respondent and that of the appellant; that the main family link between the respondent and the appellant was one Ukungu who was the respondent's grandfather and the appellant's great-great grandfather. He also deponed that the suit parcel was part of a bigger parcel of land from which the respondent's father got the suit property and the appellant's grandfather got another parcel; that such sub-division was done in 1973 when the appellant was already a grown up having been born in 1955. He averred that the appellant never raised any objections against the deceased during his lifetime.

11. It was the appellant's case that one Katulwa Muthenya, who died in 1977, was his grandfather. He averred that during the time that a dispute arose between the deceased, one Stephen Kithome, one Makata Kaviu and one Malusi Ndungu over the suit property, vide the land adjudication objection No. 37, his grand father requested him to represent him. That initially, his grandfather had appointed the deceased to represent him in the dispute and upon the dismissal of the objection, the land reverted to his grand father. He deposed that the Land Adjudication proceedings referred to his grandfather as the owner of the suit property.

12. He further deponed that the suit property was later registered in the deceased's name fraudulently and that he only learnt of this when he was served with an eviction letter in 1999 from the chief's office. He also averred that the respondent never served him with a citation during the petition proceedings for grant of letters of administration; and that the respondent had deceived the Court that he was unwell. He also deposed that he did not see the gazette notice of 4th June, 1999 and that if he had seen it, he would have raised the objection then.

13. The appellant averred that he only had an objection over the suit property; that he had grown trees and had a homestead there including three other houses one which belonged to his brother. Further, that he lived on the suit property with his mother.

14. He also deposed that the deceased died in 1981 and conceded that he had not lodged any claim to the suit property during the deceased's lifetime since he did not know that the property was registered in the deceased's name and that he only came to know of this in 1999. He further averred that he was present during the land adjudication proceedings when objection No. 37 was raised but he did not know that after dismissal of the objection the land was registered in the deceased's name. He averred that he was 18 years old then. The appellant testified that the deceased and his grandfather, Katulwa Muthenya, were not brothers but clan mates; and that they nonetheless lived together.

15. DW1, one John Mbwika Muangi, a former assistant chief in the area, testified on behalf of the appellant stating that he knew both the appellant and the respondent; that they were from one clan. He averred that the appellant did not live on the suit property but had been using the land for farming since 1958 although there are no houses on the land. He further averred that the respondent only started using the land for farming in the recent past.

16. He deposed that he knew the respondent's father who was the deceased and that he was not the owner of the suit property. He claimed that the appellant's grandfather, Katulwa Muthenya, was the owner of the suit property and that he only accommodated the deceased; that during the land adjudication proceedings Katulwa requested the deceased to represent him since he was senile. He deposed that he was only present for the proceedings on one day and did not know how the land was registered to the deceased instead of Katulwa.

17. After considering the above evidence, the trial magistrate delivered a ruling on 7th November, 2003 where he ruled that the distribution of the suit property would be equal between the appellant and the respondent.

18. Aggrieved by the said ruling the respondent filed an appeal before the High Court premised on 7 grounds in his memorandum of appeal dated 11th November, 2003. He faulted the trial magistrate for finding that the appellant had a legal standing in his claim and faulted the learned magistrate for misdirecting himself as to the legal ownership of the suit property.

19. The respondent opposed the appeal and maintained that the appellant's application for revocation of grant was rather peculiar, as the

appellant did not claim ownership of the suit property in his own right but through his late grandfather, one Katulwa Muthenya. Counsel for the respondent argued that the appellant was neither a beneficiary nor a creditor to the said estate and he was not therefore entitled to apply for a grant of letters of administration to the deceased's estate. He maintained that the respondent's claim was too remote to be recognized by law and that he was actually a stranger to the estate of the deceased and could not benefit from the same.

20. He also brought the Courts attention to a copy of the land register/green card arguing that the same showed that the deceased, Kyangangu Maithya, was the sole registered proprietor; that upon registration of the suit property in 1977 no caution, restriction or inhibition was registered against the title during the lifetime of the deceased hence the appellant's claim was an afterthought.

21. Counsel challenged the appellant's legal standing by citing **Section 2** of the **Civil Procedure Act** and the case of **Najeno v. Serwanga 1974 E.A 322** where it was held that for a person to become the legal or personal representative of the estate of a deceased person, a grant of letters of administration is necessary. He argued that it was only through a grant of letters of administration of the estate of the appellant's grandfather, Katulwa Muthenya, that the appellant would have a legal standing and in absence of such grant, the appellant's claim was not maintainable in law.

22. In conclusion, counsel urged that the trial Magistrate's order awarding half of the suit property to the appellant ought to be set aside with a corresponding order that the same be distributed to the respondent in whole share as the sole administrator of the estate of the deceased.

23. In opposition of the appeal, Counsel for the respondent in the appeal supported the trial court's findings saying that the trial Magistrate had considered all relevant facts and evidence in arriving at his ruling. He absolved the trial Magistrate for relying on the documentary history of the land rather than the ancestry of the patriarchs in arriving at the impugned decision.

24. Counsel maintained that the trial court considered the fact that the appellant was in possession of the suit property, was born on the land, was also once an Assistant Chief of the area and that the appellant's father had a homestead on the land, a fact that the court confirmed through a site visit; that witnesses corroborated all these allegations and the trial magistrate had the benefit of examining the demeanor of the witnesses and his view could not be faulted. He urged the High Court to dismiss the appeal.

25. The learned Judge after considering the evidence before him narrowed the issues for determination to two. The appellant herein's *locus standi* and whether from the evidence before the court the suit property belonged solely to the deceased, contrary to the finding by the trial Magistrate.

26. On the issue of *locus standi*, the learned Judge found that the trial Magistrate misdirected himself while analyzing the evidence before him hence arriving at an erroneous finding, He expressed himself as follows:-

> ***"In any event, I would agree with the Appellant (****respondent herein)* ***here that the respondent*** *(appellant herein)* ***had no legal standing to sue on behalf of the estate of Muthenya. He neither claimed nor proved that he was the legal representative of the estate of Muthenya and therefore capable of maintaining the suit on behalf of the estate."***

In arriving at the above finding the learned Judge relied on **section 82** of the **Law of Succession Act,** the case of **Troustick Union International & Anor v. Mrs. Jane Mbeyu & Anor Civil Appeal No. 145 of 1990** and **Virginia Edith Wambui Otieno v. Joash Ougo & Another (1982) 1 KAR 1048** where this Court found that one does not have a legal standing to bring an action as administrator before obtaining letters of administration and that any such suit would be incompetent at inception.

27. On the second issue, the learned Judge analyzed the entire evidence presented before the trial court and found fault with the Magistrate's finding that Muthenya was the respondent's father, while infact from the evidence before the court, he was his grandfather. The learned Judge also found that the appellant alternated between claiming that the whole parcel belonged to Muthenya alone; that Maithya was registered as a trustee for the benefit of Muthenya and claiming that the suit property was family land to which both Maithya and Muthenya were entitled.

28. The learned Judge further noted that the trial Magistrate put great emphasis in the Land adjudication proceedings in Objection Case No. 37; an objection which had been filed by one Stephen Kithome Muli against the deceased which after formal hearing was dismissed. He however challenged the trial Magistrate's interpretation of the Adjudication officer's findings. The learned Judge stated that such findings could not be construed as evidence of co-ownership of the suit property by Maithya and Muthenya, but went to show that the suit property was a part of a whole owned by the deceased, which was shared out by the original owner to Maithya and Muthenya and perhaps to others. He buttressed such finding by the fact that Muthenya was registered as the sole owner of other parcels of land which in his opinion raised two issues which made the appellant's claim implausible: first, what was the rationale for registering only the suit property while all the rest were registered either in the name of Maithya or Muthenya? It would be presumed that Muthenya acquiesced to the land being registered in the name of Maithya because he, Muthenya, was too old. Therefore, if he were too old for the suit property to be registered under his name then he would have equally been too old for the other properties to be registered in his name.

29. After a thorough analysis of the evidence, the learned Judge in conclusion found that:-

> ***"Hence, because the documentary evidence relied on by the Learned Magistrate does not prove co-ownership of the Suit Property between Kyangangu Maithya and Katulwa Muthenya and because the respondent (appellant herein) did not have locus standi to bring the suit in the first place, this Court reverses the decision of the Learned Magistrate and hold that the Suit Property… shall be registered solely in the name of the appellant in his capacity as the Personal Representative to the estate of Kyangangu Maithya."***

30. Aggrieved by the above findings, the appellant proffered the instant appeal. The appeal came up for the plenary hearing on the 18th June,

2019 where parties were represented by learned Counsel; Ms. Eunice Muthama holding brief for Ms. Kethi Kilonzo for the appellant and Mr. Japheth Mwalimu for the respondent. Although parties were directed during the case management conference to file submissions within 30 days from 6th April 2017, even as at 18th June, 2019 when this appeal came up for hearing, no submissions had been filed. Parties did not file any authorities either. The appeal was consequently canvassed by way of oral submissions.

31. The appeal was premised on five (5) grounds on the face of the memorandum of appeal which, *inter alia*, fault the learned Judge of the High Court for failing to consider the provisions of **section 67** of the Law of Succession Act and **Rule 17** of the Probate and Administration Rules which allow any person to lodge an objection, hence arriving at the erroneous finding that the appellant lacked *locus standi*; holding that the appellant had not proved his claim under the law of trust; holding that the documentary evidence produced by the appellant did not prove co-ownership of the suit property between the deceased and the appellant's grandfather; holding that the suit property belonged to the deceased and; finding that the suit property be registered solely in the name of the respondent.

32. Urging the Court to allow the appeal, counsel for the appellant expressed that she wished to rely on the appellant's memorandum of appeal and made no submissions.

33. In a bid to demonstrate why the appeal should be dismissed, counsel for the respondent submitted that the respondent had failed to demonstrate that he had the legal capacity to file objection proceedings; a claim that could only be sustained by obtaining a grant of letters of administration. He contended that indeed whereas **section 67** of the Law of Succession Act allowed any person to lodge objection proceedings such proceedings could only be lodged by a person with the requisite capacity and a justiciable claim in the deceased's estate; that the appellant had failed to demonstrate that he was a beneficiary in the estate of the deceased for purposes of succession.

34. On the issue of co-ownership of the suit property, counsel submitted that the allegation of co-ownership of the suit property between the deceased and the appellant's grandfather lacked basis as neither the appellant nor his grandfather were parties in the objection raised during the land adjudication proceedings. Further, that the said objection was in any event dismissed and therefore it cannot be a basis for claiming ownership of the suit property. In view of the foregoing he urged the Court to dismiss the appeal.

35. This is a second appeal hence this Court's duty is as was set out in the case of **Kenya Breweries Ltd. v. Odongo Civil Appeal No. 127 of 2007**, where Onyango Otieno, J.A held,

> ***"In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse."***

36. Bearing the foregoing in mind, having perused the record of appeal, two distinct issues arise for determination: Whether the appellant had the requisite capacity to lodge objection proceedings in the manner that he did and if so; whether the appellant had any claim in the suit property.

37. On the first issue, it is not in dispute that from the objection proceedings lodged by the appellant herein the appellant swore an affidavit dated 8th November, 1999 where he stated thus "***That I have a legitimate claim to the land as the deceased was to share it with my grandfather Katulwa Muthenya who was the deceased's brother."***

In the objection to Making of Grant dated 20th November 2000 the appellant stated as follows;-

> ***"(1) That the deceased Kyangangu Muthenya was the brother of Katulya Muthenya the grandfather of the objector.***
>
> ***(2) That Kyangangu Maithya and Katulwa Muthenya owned the land jointly and it was to be subdivided between the family.***
>
> ***(3) That Katulwa Muthenya, the grandfather of the objector died before the subdivision was done.***
>
> ***(4) The land parcel is family land."***

38. From the foregoing, it is evident that the only reasons the appellant initiated objection proceedings in respect of the suit property was on account of the relationship between the deceased and his grandfather, one Katulwa Muthenya, and on account of the fact that the said land was 'family land'. His claim was inherently pegged on his grandfather's alleged interest in the suit property, which would inevitably mean that he was raising the objection on behalf of his late grandfather's estate. Did he have the legal standing to do so?

39. The statutory provisions governing Objection proceedings in succession matters are **section 67** of the Law of Succession Act and **Rule 17** of the Probate and Administration Rules. Rule 17 of the P & A rules provides;-

> ***"Objections, answers and cross-applications***
>
> ***(1) Any person who has not applied for a grant to the estate of a deceased and wishes to object to the making of a grant which has been already applied for by another person may do so by lodging within the period specified in the notice of the application published under rule 7(4), or such longer period as the court may allow, either in the registry in which the pending application has been made or in the principal registry, an objection in Form 76 or 77 in triplicate stating his full name and address for service, his relationship (if any) to the deceased and the grounds of his objection."***

40. From the reading of the foregoing provisions, there is no doubt that any person has the right to lodge objection proceedings. The objector must however have a direct interest in the estate of the deceased. The issue here is not that the appellant could not file the objection on his own behalf, but whether he could sue on behalf of his late grandfather or other members of his family without obtaining a grant of letters of administration in respect of his grandfather's estate first. See this Court's decision in ***Otieno v Ougo [1986-1989] EALR 468,*** where the Court rendered itself thus: ***"… 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."***

41. In the instant appeal, it is evident that the appellant did not institute proceedings on his own behalf but on behalf of the interest purportedly held by his grandfather who was long deceased. His claim was that the suit property was "family land". His claim was therefore based on Trust.

Could he sue on behalf of the family of his late grandfather? He does not dispute the fact that he had no grant of letters of administration to enable him sue on behalf of his late grandfather. The law is very clear on this point. The learned Judge was correct in his enunciation of the law on the issue of *locus standi* in succession matters. He cannot be faulted for the said finding. That ground therefore fails.

42. Having so found, the learned Judge did not even need to consider the second issue of merit. He nonetheless did so out of abundance of caution in case we upset his finding on the first issue. Having upheld the learned Judge on the issue of *locus standi*, it is our view that the appellant's claim was a nullity from inception, in which case, it will be superfluous or otiose for us to consider the second issue.

43. Consequently, we are persuaded this appeal lacks merit and we dismiss it with costs to the respondent.

**Dated and delivered at Nairobi this 25th day of October, 2019**.

**W. KARANJA**

**…….…….**

**JUDGE OF APPEAL**

**F. SICHALE**

**……...…….**

**JUDGE OF APPEAL**

**J. MOHAMMED**

**…….…….**

**JUDGE OF APPEAL**

*I certify that this is a*

*true copy of the original.*

***DEPUTY REGISTRAR***