



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, SICHALE & KANTAL, J.J.A)

CIVIL APPEAL NO. 142 OF 2017

BETWEEN

LEONARD MBOGO.....APPELLANT

AND

IN THE MATTER OF THE ESTATE OF WALLACE MBOGO NGUYU alias MBOGO NGUNYU (DECEASED)

(An appeal from the Order of the High Court of Kenya at Nairobi

(Kimaru, J) dated 12th March, 2013

in

Succession Cause No. 2194 of 2004)

JUDGMENT OF THE COURT

The appeal before us relates to the estate of **Wallace Mbogo Ngunyuu** (deceased) who died intestate on 11th March, 1996. His wife, **Phyllis Nyambura**, died 13 years later on 13th March, 2009. In their lifetime, they had five sons and two daughters who survived them. They also had some pieces of land and shares in three companies. Although the appellant before us is named as '**Leonard Njoroge Mbogo**' (**Leonard**), and no respondents are named, the dispute in the lower court named the four other sons of the deceased as the respondents.

The record of appeal itself is rather convoluted and we can hardly make head or tail of it! It is no wonder, therefore, that learned counsel for the appellant, **Ms. Melissa Ng'aniamia**, instructed by M/s Muhoho Gichimu & Kinyanjui, Advocates, sought to have it remitted back to the High Court for retrial.

The appeal is stated to be against an Order of the High Court (**Kimaru, J.**) made on 12th March, 2013. The formal Order as exhibited in the record is as follows:-

"REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2194 OF 2004

IN THE MATTER OF THE ESTATE OF WALLACE MBOGO NGUNYU (DECEASED)

IN COURT ON 12TH DAY OF MARCH 2013 BEFORE THE HON. JUSTICE KIMARU

ORDER

UPON READING the application presented to this court on 19th October 2012 by counsel for the applicant under chapter 160 Laws of Kenya and all enabling provisions of the Law AND UPON READING the supporting affidavit of DISHON KANAI

MBOGO sworn on 14th December 2011 AND UPON HEARING counsel for the applicant and LEONARD NJOROGE MBOGO in person;

IT IS HEREBY ORDERED

1. **THAT the grant of letters of Administration and the certificate of confirmation of grant issued to Phyllis Nyambura Mbogo (Deceased) be and is hereby revoked.**
2. **THAT a new grant shall be issued to Wilfred Njuguna Mbogo and Leonard Njoroge Mbogo.**
3. **THAT the estate of the deceased shall be distributed as follows:**
 - i. **THAT Lucy Wanjiru Mbogo shall inherit LR. MUGUGA/KANYARIRI 1290 and 1275**
 - ii. **THAT Peter Ngunyu Mbogo shall inherit two plots one where his house is and the other plot where he cultivates.**
 - iii. **THAT David Ngugi Mbogo shall inherit one plot where he is currently living and the other plot to cultivate.**
 - iv. **THAT Wilfred Njuguna Mbogo shall inherit one plot where his house is and the other to cultivate.**
 - v. **THAT Dishon Kanai Mbogo shall inherit half of LR. MUGUGA/KANYARIRI 1274 where he has built his house and the other plot to cultivate.**
 - vi. **THAT Charles Kinuthia Mbogo shall inherit one plot where he has built his house and the other plot to cultivate.**
 - vii. **THAT Leonard Njoroge Mbogo shall inherit PLOT NO. T.109.**
 - viii. **THAT Hottensiah Ngonyo Felder shall inherit half of PLOT NO. 1274 where parents house is situated.**
 - ix. **THAT the plots which Leonard Njoroge Mbogo was entitled to shall be transferred to Wilfred Njuguna Mbogo, David Ngugi Mbogo, Dishon Kanai Mbogo, Charles Kinuthia Mbogo, Peter Ngunyu Mbogo and Lucy Wanjiru Mbogo in compensation for the development in PLOT T.109 .**
 - x. **THAT the two plots that were to be inherited by Phyllis Nyambura Mbogo (deceased) shall be sold and proceeds thereafter distributed equally among all the ten beneficiaries including the two married daughters.**

GIVEN under my Hand and seal of this court on the 12th day of March 2013.

ISSUED this 15th day of April 2013.

DEPUTY REGISTRAR

HIGH COURT OF KENYA, NAIROBI".

Surprisingly, there is no Ruling on record from which the Order was extracted. What is on record are proceedings dated 12th March, 2013 made pursuant to a "Summons dated 14th December, 2011" which was supposed to have been heard on that day. Apart from the 'Coram' stating that Khamati was appearing for the applicant and Leonard was appearing in person as an "interested person", there were no other parties recorded. Apparently no one addressed the court before the court proceeded to make the orders appearing in the formal Order above. Furthermore, there is nothing on record to show what material in the "Summons dated 14th December, 2011" the court relied on to resort to such orders or what provisions of the law were invoked to justify the orders which the appellant now complains were made unilaterally or *suo motu*.

The formal Order is even more perplexing as it says nothing about who the parties were. It refers to an application made to the court on "19th October, 2012" supported by an affidavit of **Dishon Kanai Mbogo (Dishon)** sworn on "14th December, 2011", upon which counsel for the applicant, Mr. Khamati, and Leonard, were heard. Firstly, if they were heard at all there is no record of it, and secondly, no such application or affidavit are on record. Nor can we find the 'Summons dated 14th December, 2011' which was coming up for hearing on 12th March, 2013 when the Order was made. It is therefore a mystery to us where the details enumerated in the formal Order were derived from.

To compound matters even further, the submissions filed by counsel for the appellant refer to an application dated "16th July, 2004" made by Dishon for revocation of grant which Kimaru, J. is supposed to have erroneously allowed before distributing the estate of the deceased. The application was introduced in a supplementary record of appeal and the submission is that it was the application due for hearing on 12th March, 2013 as it had been stood over by Onyancha, J. on 28th November, 2008. Apart from the record showing that Onyancha, J. stood over such application, it is not apparent on the record that it was coming up for hearing on 12th March, 2013.

That position is supported by learned counsel for the respondents, Mr. Khamati in written submissions, contending that the reference to the application dated 16th July, 2004 was a misapprehension of what Kimaru, J. dealt with. Unfortunately, instead of counsel clarifying what Kimaru, J. dealt with, he conceded that the application dated 19th October, 2012 which was purportedly heard on 12th March, 2013 is nonexistent and that the formal Order is erroneous in other respects too. Counsel supported the distribution of the estate since, according to him, it was done in consultation with the parties who were before Kimaru, J. on 12th March, 2013. As stated earlier, however, only Mr. Khamati and Leonard were before the court on that day and said nothing. There was no consent of all beneficiaries presented to the court either.

It seems to us that the confusion is caused by the existence of two different files dealing with the same estate, and numerous applications and affidavits filed by the beneficiaries. Judging from the meagre and disjointed information before us, there were succession proceedings on the estate of the deceased taken out by Phyllis in Kiambu **Succession Cause No. 569 of 1996**. A grant was issued to her on 15th May, 1997 and was confirmed on 23rd September, 1998. According to Leonard, the estate of the deceased was thereafter distributed and Title deeds issued to the beneficiaries before Phyllis died in 2009. But that cannot be so when Leonard also claims that Dishon had made an application for revocation of the grant in Nairobi **Succession Cause No. 2194 of 2004** in July 2004; Leonard himself made an application to be substituted for Phyllis, which application was rejected by G. B. M. Kariuki, J. (as he then was) on 10th November, 2011; and several opportunities were given by the court for family discussions on settlement without success, between 2007 and 2013.

All in all, we neither have the reason nor basis for considering this appeal on merits. Our jurisdiction under **Article 164** of the Constitution is to hear appeals from the High Court and any other court prescribed by Parliament. That presupposes there was a hearing before those courts, a decision was made, and reasons given for that decision. We do not find any reasoned Ruling or Judgment in this matter.

For the above reasons, we allow the appeal and order that the Order made by Kimaru, J. on 12th March, 2013 be and is hereby set aside. We order that the matter be remitted back to the High Court for hearing and determination in accordance with the law before any Judge of the Family Division other than Kimaru, J. The costs of the appeal shall abide the result of the High Court decision.

Orders accordingly.

Dated and delivered at Nairobi this 20th day of April, 2018.

P. N. WAKI

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR