



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CIVIL APPEAL NO. 42 OF 2016

IN THE MATTER OF THE ESTATE OF LILLI JORGENSEN (DECEASED)

BETWEEN

SALLY NJAMBI MAIHU.....1ST APPELLANT

REPERT PATRIDGE.....2ND APPELLANT

AND

MWANGUZA KAI DECHE.....1ST RESPONDENT

JEFWA ERICKSON.....2ND RESPONDENT

(Being an appeal from the ruling of the High Court of Kenya

at Malindi (Chitembwe, J.) dated 22nd March, 2016

in

H.C. Succession Cause No.140 OF 2014)

JUDGMENT OF THE COURT

The deceased, Lilli Jorgensen died in Kilifi on 11th September, 2014 at the age of 86. The dispute giving rise to this appeal relates to the question whether she left an oral or written will. The 1st appellant, who is an advocate of the High Court of Kenya maintains that for a long time she acted for the deceased, who later named her together with the 2nd appellant in her last will as executors.

From the record it is not clear who the 1st respondent was to the deceased. The 2nd respondent has been described as a house help to the deceased.

Following the death of deceased, the appellants filed in the High Court at Mombasa Succession Cause No. 431 of 2015 for a grant of probate, having informed the respondents of the existence of a written will, in which the deceased had in fact bequeathed some of her workers, including the respondents.

Shortly after this the appellants learnt that the respondents, had also petitioned the High Court at Malindi in Succession Cause No. 140 of 2014 for a grant of probate in respect of the deceased estate; and that the grant in respect of the latter cause was in fact issued to the respondents on 24th March, 2015. Incidentally the grant to the appellants, on the other hand, was issued on 26th March, 2015, two days after that of the respondents, albeit by two different courts.

After exchange of letters between the 1st appellant and the respondents' advocate, and the parties having failed to reach a consensus, the appellants took out summons in the Mombasa cause, pursuant to the provisions of **section 76** of the Law of Succession Act, for revocation of the grant issued to the respondents and also that the Malindi cause be transferred to Mombasa High Court for consolidation and hearing. The appellants premised that application on the grounds that the grant was issued prematurely; and that the oral will allegedly left by the deceased to the respondents did not meet the requirements of an oral will.

The respondents for their part maintained that, due to a disagreement between the deceased and the 1st appellant, the former ceased to give briefs and instructions to the 1st appellant; that as a result the deceased cancelled the will she had made through the 1st appellant's firm and made another one through a different firm of advocates in Mombasa; that the 1st appellant therefore had no instructions to petition for grant of probate the written will having been rescinded by the deceased before her death; that the will presented to court by the appellants and upon which the grant of probate was issued in the High Court at Mombasa was a forgery; that the 2nd appellant, a neighbour to the deceased was working in cohorts with the 1st appellant to defeat the cause of justice; that contrary to the appellants' contention, the respondents were not aware of the appellants' petition and that it was the appellants who were aware of the respondents' intention to file a succession cause.

The respondents insisted that, due to the fact that the deceased was a resident of Kilifi, held property in Kilifi, died and was buried in Kilifi, the jurisdiction to determine any question over her estate could only be decided by the High Court at Malindi, within Kilifi County.

Chitembwe, J considered the application and determined the two questions raised in the application in favour of the respondents. Relying on **section 47** of the Law of Succession Act, the learned Judge decided that, for the reasons advanced by the respondents regarding the deceased abode and investment, any application in relation to her estate could only be entertained by a court in Kilifi County.

The prayer seeking the transfer of the Malindi cause to Mombasa for consolidation was, for those reasons rejected.

The second controversy was the prayer for the revocation of the grant. It would appear from the application itself and affidavit in support, thereof, that there was only one ground for seeking the revocation of the grant. It was alleged that it had been issued prematurely. The second ground relating to the proof of the oral will was itself premature and could not be raised at that stage. The learned Judge's answer to the question whether the grant was issued prematurely was rather confusing and it is for that reason we think it is necessary to reproduce it. He said;

“The grant issued to the Petitioners cannot enable them to make any meaningful transactions. The court is empowered under Section 76 of the Law of Succession Act to revoke a grant even if it has not been confirmed. The best way forward for this dispute is not to revoke the grant at the moment. The pleadings indicate that the deceased was a shareholder in different companies. The court in Mombasa had not issued any grant. It would be prudent to allow the grant to continue operating so that the Petitioners can collect any income and deposit the same in the deceased's accounts with no powers to distribute the estate pending the determination of the dispute.

The Objectors contend that the grant was issued within less than 30 days after it was gazetted..... The fact that the grant was issued before the expiry of 30 days cannot be

visited upon the Petitioners. The court is empowered under Section 71(3) of the Law of Succession Act to confirm a grant under certain circumstances before the expiry of six (6) months. The same powers can be exercised by the court to issue a grant before the expiry of thirty days. The court has the power to revoke or annul any grant and it is up to the Court to decide whether to revoke the grant or not. There is no evidence that the Petitioners triggered or influenced the issuance of the grant by the court. I do find that the grant herein was properly issued”.

The learned Judge then proceeded to give directions as to the hearing of cause. He further directed that Mombasa H. C. Succ. Cause No. 431 of 2014 be transferred to Malindi to be consolidated and heard together with Malindi Succ. Cause No 140 of 2014.

We start with the question of jurisdiction, whether the learned Judge erred in rejecting the application to transfer the cause to Mombasa. In so far as the High Court is concerned, this question of jurisdiction need not occupy us longer than is necessary as the law is settled. **Article 165 (3) (a)** of the Constitution vests in the High Court unlimited original jurisdiction in both criminal and civil matters. Although dealing with the jurisdiction of the High Court under **section 15** of the Civil Procedure Ordinance (now **section 15** of the Civil Procedure Act) as long ago as 1958, Forbes, JA of the former Court of Appeal for Eastern Africa held, in **Riddesbarger v Robson** [1958] EA 375 that, because the jurisdiction of the High Court (then known as Supreme Court) was provided for by the Kenya Colony Order-in-Council and was national, original and unlimited, it could not be limited by **section 15** of the Ordinance. This Court upheld that position in **Francis Ndichu Gathogo v Evans Kitazi Ondansa & Another**, CA. No. 287 of 2002, where it reiterated that the jurisdiction of the High Court under the Constitution, being national, original and unlimited, could not be limited by **section 15** aforesaid. To emphasise this point we cite one most recent decision of this Court where we reiterated that;

“?..... that the High Court of Kenya remains one and the same court, only that it sits at different locations in the country, such as Malindi and Nairobi. The location where it sits cannot therefore affect its jurisdiction. The practice and requirements that suits be filed in particular stations of the High Court are purely for administration and convenience in the hearing and determination of suits. That is not in any way to suggest that such requirements or practice is unreasonable or unnecessary; it is intended to reduce costs of transporting witnesses from one corner of the country to another for hearing of cases and to expedite hearing and determination of suits, thus giving meaning to the overriding objective and the constitutional value in Article 159 which emphasize the need to reduce costs and delay in the hearing and determination of suits”.

See **Christopher Orina Kenyariri t/a Kenyariri & Associates V Salama Beach Hotel Limited & 3 Others** Civil Appeal No 62 of 2016

The Law of Succession Act itself at **section 47** states that;

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

But for the considerations mentioned in the foregoing provisions, an action can be instituted in any High Court in Kenya and no objection can be taken, on either pecuniary or territorial jurisdiction of the High Court, as was the case in this dispute.

Whether the cause filed in Malindi by the respondents ought to be transferred to Mombasa will depend on our determination of the second question,

whether the learned Judge erred in failing to revoke the grant. **Section 76** of the Law of Succession Act specifies the grounds upon which a grant may be revoked or annulled as follows, in the pertinent part;

“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;

.....”

On the other hand **section 67** of the Act requires that;

“67. (1) No grant of representation, other than a limited grant for collection and preservation of assets, shall be made until there has been published notice of the application for such grant, inviting objections thereto to be made known to the court within a specified period of not less than thirty days from the date of publication, and the period so specified has expired”.

The gazette notice specified that the grant would be issued within 30 days if no objection was raised. The grant was gazetted on 18th March, 2015 and issued on 24th March, 2015, one week later.

The only mischief intended by the requirement that the notice of the application for a grant be for a period of not less than 30 days from the date of publication, is to avail any objector the time and opportunity to participate in the probate proceedings.

With respect, it was therefore in grave error for the learned Judge, even after noting that there was an anomaly in the manner the grant was issued and that it ought to have been issued on 19th April, 2015, nevertheless hold that the grant was properly issued.

We find merit in this appeal due to the grave misdirections by the learned Judge, the result of which is that we allow the appeal with costs and set aside the orders of the learned Judge. The grant issued on 24th March, 2015 to the respondents is accordingly revoked.

Dated and delivered at Malindi this 31st day of March, 2017

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR