IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, NAMBUYE & AZANGALALA, JJ.A)

CIVIL APPEAL NO. 5 OF 2016

BETWEEN

NYAGA COTTOLENGO FRANCIS.....APPELLANT

AND

PIUS MWANIKI KARANI.....RESPONDENT

(An appeal from the Ruling and Order of the High Court of Kenya

at Embu (F. Muchemi, J) dated 30th June, 2015

in

Succession Cause No. 180 of 2009)

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JUDGMENT OF THE COURT

1. This is a succession matter in the Estate of Francis Giture Mwaniki (Deceased) who died on 26th September, 2006 leaving only one property **LR. NGARIAMA/KABARE/51** (Plot 51) measuring about 11 Acres, as his free disposable estate. His son, **Nyaga Cottolengo Francis** (Nyaga), the appellant before us, claiming to be the sole heir to the estate applied for and was issued with a grant of Letters of Administration intestate on 6th September, 2011 which grant was confirmed a year later on 11th December, 2012. He then proceeded to Kerugoya lands office to transfer plot 51 to himself only to find a caution and a restriction having been registered against the title by **Pius Mwaniki Karani** (Pius), the respondent before us.

2. According to Nyaga, the caution was registered on the basis that Pius had a beneficiary's interest in plot 51 and the restriction was placed on the basis that there was a pending case between Pius and the deceased before Embu Land Disputes Tribunal (LDT). On both counts, contended Nyaga, there was no lawful basis for encumbering the Title. Firstly because no one, including Pius, raised any objections during the proceedings in **Succession Cause No. 180 of 2009** and, secondly, because LDTs were abolished by ***Act No. 18 of 1990*** and with it all claims pending before those tribunals.

3. On 25th August, 2014, Nyaga went before the High Court in Embu and filed a Chamber Summons in the Succession Cause under ***Rules 63*** and ***73*** of the ***Probate and Administration Rules (P&A Rules)***

seeking the immediate removal of the caution and restriction. Upon being served, Pius swore a replying affidavit asserting that Nyaga had obtained the grant of representation by stealth and by making false statements in the Succession Cause. He swore that the deceased had married his mother under Kikuyu customary law in 1953 and had five children together, including himself, between 1960 and 1973. His mother and siblings were therefore entitled to inherit from the deceased. As for plot 51, he asserted that the deceased had in his lifetime ceded a 3 Acre portion of the land to him and that is why the matter was before the LDT, but the deceased died before any decision was made. In his view, he could approach the court at anytime to seek annulment of the grant of representation and in the meantime he was entitled to secure his interest by registering a caution. The restriction had been placed by the registrar to prevent any fraudulent transfer. He opposed the application for removal of the encumbrances.

4. The application was, by agreement of the parties, determined on the basis of the affidavits on record and the submissions of counsel. In his submissions, Nyaga, through M/s. Morris Njage & Company Advocates, raised two issues for determination as follows:-

> ***"(i) Whether the Respondent Pius Mwaniki Karani is the beneficiary of the deceased's estate by virtue of being a "son" of the deceased; by virtue of the deceased having married "his mother in 1953" under Kikuyu customary law and she remained so until his death.***
>
> ***(ii) Whether the caution and the restrictions filed by the Respondent against the deceased's parcel of land number NGARIAMA/KABARE/51 are maintainable in the circumstances of this cause and if not, whether the same should be removed."***

5. He argued strongly on the first issue that Pius was not a son of the deceased and his mother was not a wife. That is because there was no evidence of paternity such as birth certificate or identity card and the mother had not sworn any affidavit to support him. Only a Chief's letter was produced whose authenticity was questionable. At any rate, he added, the court had already determined the beneficiaries of the estate and Pius was not one of them.

6. As for the 2nd issue, Nyaga contended that the caution and restriction were neither maintainable nor legally justifiable. That is because the green card in respect of the Title confirmed that the name of Pius, though initially inserted therein, was removed and it must have been so removed after he lost his case with the deceased. He never proceeded to follow up the claim in the Succession cause after the deceased's death in September 2006 or in any other way after the decision of the Tribunal in June 2007. The filing of a caution, in his view, was not a cause of action and therefore the caution was a mischievous clog on the title and an abuse of court process.

7. Responding to those submissions through learned counsel **Ms. Yvonne Twili,** Pius framed issues similar to Nyaga's but added the issue:-

> ***"Whether the grant of letters of Administration intestate in respect of the deceased issued on 6th September 2011 should be revoked on account of fraud and the making of a false statement."***

He maintained that the succession proceedings were carried out without his knowledge and he could not therefore file an objection until he discovered the anomaly; that under ***Rule 73*** which was invoked by Nyaga, the court had wide discretionary powers to do substantial justice in the administration of any estate; that he was a dependant as defined under ***Section 29*** of the ***Law of Succession Act*** and his affidavit which annexed the Chief's letter was sufficient to establish that; that the deceased had, in his lifetime, given a portion of the land to him as a gift, as confirmed by the green card, and the distribution of the estate should take this into consideration; that Nyaga was fully aware of the interest of Pius but went ahead to exclude him in the succession proceedings and in the share of the estate; that Nyaga made false statements in completing forms P&A 5 and P&A 80; and that under ***Section 76*** of the ***Law of Succession Act***, the court had the power, even without application by anyone, to set aside defective grants, grants obtained by fraud or untrue allegations of fact. He sought the dismissal of the application as it was brought in bad faith.

8. Upon considering the application, the High Court, (**Muchemi, J.**) perused the main file on the succession matter and found that some crucial supportive documents were missing, including: the chief's letter, Form A5, consents for making the application, identity cards of sureties, stamp duty on Form P&A 57. It also noticed that the Cause was initially filed as a testate succession with an annexed Will but was somehow altered to intestate succession and a grant of representation intestate issued. Furthermore, the respondent had raised an important issue of his entitlement to a portion of the estate which could not be ignored. The court considered those as issues that went beyond the mere consideration of the application for removal of a caution and decided, in the interests of justice, to give Pius a chance to pursue his rights by filing the necessary application. The following orders were given in the Ruling dated 30th June, 2015:-

> ***"(i) That the applicant files the Chief's letter, Form A.5, Consent to Making of Grant form and identity card details for the proposed sureties within 14 days.***
>
> ***(ii) That stamp duty be paid for Form P&A 57 within 30 days.***
>
> ***(iii) That execution of grant is hereby stayed pending regularization of the proceedings.***
>
> ***(iv) The caution and restriction on LR. NGARIAMA/KABARE/51 to remain in force until further orders.***
>
> ***(v) The respondent is at liberty to file summons for revocation of grant within 21 days in default of which the court may proceed to give further orders upon regularization of the proceedings."***

9. Nyaga was aggrieved by those orders and is now before us on a first appeal which requires us to consider the matter by way of a retrial, but no hearing of any witnesses took place. The application before the High Court required the exercise of discretion and therefore our duty is to determine in principle whether the discretion was exercised judicially, and if so, whether there is any ground for interference with the orders given. The principles upon which we should consider the matter are well settled and we take them from Sir Clement De Lestang V-P in ***Mbogoh & Anor v Shah** [1968] EA 93*:

> ***"I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should have taken into consideration and in doing so arrived at a wrong conclusion."***

For his part Sir Charles Newbold P in the same case stated:

> ***"For myself I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercise of his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."***

10. Six grounds were put forward in the memorandum of appeal but they were urged in two tranches in written submissions of learned counsel. The first tranche (grounds 1, 2, 3 and 5) asserts that the trial court had, contrary to the law and principle, made a decision on unpleaded issues and issues which were not brought before it by the parties. In support of that submission, counsel cited the case of ***Nairobi City Council v. Thabiti Enterprises Ltd** [1995-98] 2EA 231.* In counsel's submission, the court raised and determined issues on its own motion without notice or reference to the appellant, contrary to the rules of natural justice. Counsel also contended that the court had sat on appeal from the decision of the Judges of equal jurisdiction who had granted and subsequently confirmed the grant of representation.

11. The second tranche (grounds 4 & 6) contends that the court exceeded its powers when it ordered the appellant to file a fresh application for grant when there was already a confirmed grant which gave rise to

vested interests. The more serious error, in counsel's view, was the order given to the respondent to file an application for revocation when he had not sought any and in any event, the further order that the caution and restriction orders would be removed once the appellant rectified his documents was contradictory and unenforceable. According to counsel, what the trial court did was to give legal advice to a party which was contrary to ***Rule 9 (6)*** of the ***P&A Rules.*** Finally, he submitted, the judgment was not in compliance with ***Order 21 Rule 4*** of the ***Civil Procedure Rules*** which requires a judgment to contain a concise statement of the case, the points for determination, the decision thereon and the reasons for the decision.

12. In his written response through counsel, the respondent submitted that the trial court was seized of the matter under ***Rule 73*** of the ***P&A Rules*** and was at liberty to make the orders it did on its own motion after confirming non compliance with the law. The only motivation for the court was to do justice without paying homage to strict procedural technicalities as decided in the case of ***Peter Wasike Siboko v. Felix Sakini Wasike [2012] eKLR***. In counsel's view, it was clear to the court, through the affidavits sworn by the parties and the submissions filed, that a serious issue had arisen after confirmation of the grant which needed determination otherwise a genuine dependant would be disinherited. That would be the result if the orders sought by the appellant were granted. Counsel relied on the case of ***Mumbi Mwathi v. Stephen Ndung'u Mwathi & Another [2012] eKLR*** **(Nambuye, J.)** which in turn relied on this Court's decision in ***Matheka and Another vs Matheka [2005] 1 EA 251*** on the interpretation of ***Rule 76***.

13. We have considered the appeal fully. On the outset we agree with the appellant on the objective of pleadings in an adversarial system that the court can only lawfully determine issues that are specifically pleaded and proved before it and that the court cannot base its decision on an unpleaded issue. This has been restated times without number but we take it from ***Gandy v. Caspair Air Charters Ltd. (1956) 23 EACA 139*** where Sir Sinclair, V-P**,** said:-

> ***"The object of pleadings is, of course, to secure that both parties shall know what are the points in issue between them, so that each may have full information on the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent. As a rule relief not founded on the pleadings will not be given."***

14. However, there are exceptions to that rule even under the strict adversarial system where the court was generally warned against descending into the arena of litigation lest it is blinded by the dust of it. The exception was noted in the case of *Odd Jobs v. Mubia* ***[1970] EA 476*** where Duffus P. while considering the question whether an unpleaded issue can form the basis of a decision, rendered himself as follows:-

> ***"Generally speaking pleadings are intended to give the other side fair notice of the case that it has to meet and also to arrive at the issues to be determined by the court. In this respect a trial court may frame issues on a point that is not covered by the pleadings but arises from the facts stated by the parties or their advocates, and on which a decision is necessary in order to determine the dispute between the parties."***

15. More recently, the notion that the courts are mere bystanders in adversarial litigation process has been rendered blurry by amendments to the ***Civil Procedure Act*** in ***Sections 1A*** and ***1B*** as well as the ***Appellate Jurisdiction Act*** in ***Sections 3A*** and ***3B*** which give the courts considerable latitude to intervene with a view to achieving the overriding objective of civil litigation, that is to say, the just, expeditious, proportionate and affordable resolution of civil disputes in Kenya. Thus, the courts have a duty and will play their part in t*he just determination of the proceedings, the efficient disposal of the business of the Court, the efficient use of the available judicial and administrative resources, the timely disposal of all the proceedings before the Court, at a cost affordable by the respective parties, and with the use of suitable technology. Under* ***Article 159*** *of the new Constitution (now 7 years old!) the people of Kenya who are the sole repository of Judicial authority have spelt out in peremptory manner how that power will be exercised and the courts have no option but to comply.*

16. In the appeal before us, we need not go beyond the governing law to the provisions of the Constitution or the overriding objective. The deceased died in 2006 and it is common ground that the ***Law of Succession Act****, Cap 160 applies. The matter before the High Court was not commenced by pleadings but was an application made within the main cause. The application was grounded on affidavits and was decided on the basis of submissions of counsel. The procedural law invoked by the appellant was* ***Rule 63*** *of the* ***P&A Rules*** *which relates to applicability of some* ***Civil Procedure Rules*** *to succession matters, and* ***Rule 73*** *which saves the* inherent powers of court as follows:-

> "***Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court***".

17. The substantive Act in ***Section 47*** spells out the jurisdiction of the High Court in the administration of estates in these terms:

> "***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:.."***

18. There is further general power granted under ***Section 70*** for courts, before making a grant of representation, ***'whether or not there is a dispute as to the grant'*** to:

> ***"(a) examine any applicant on oath or affirmation; or***
>
> ***(b) call for further evidence as to the due execution or contents of the will or some other will, the making of an oral will, the rights of dependants and of persons claiming interests on intestacy, or any other matter which appears to require further investigation before a grant is made; or***
>
> ***(c) issue a special, citation to any person appearing to have reason to object to the application."***

19. More importantly, ***Section 76*** of the Act gives the court very wide powers on revocation or annulment of grants, ***"whether or not confirmed"*** and ***"may at any time"*** revoke or annul them ***"on application by any interested party or of its own motion"***. The court will do so if it decides in part:

> "***(a) That the proceedings to obtain the grant were defective in substance.***
>
> ***(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.***
>
> ***(c) That the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant not withstanding that the allegation was made in ignorance or inadvertently.***

20. That provision has been construed by this Court in the ***Matheka case*** ***(supra)*** which laid out the guiding principles as follows:-

> ***"1. A grant may be revoked either by application by an interested party or on the court's own motion.***
>
> ***2. Even when revocation is by the court upon its own motion, there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by the making of a false statement or by concealment of something material to the case or that the grant was obtained by means of untrue allegation of facts essential in point of law or that the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the estate.***

3. The grant may also be revoked if it can be shown to the court that the person to whom the grant has been issued has failed to produce to the court such inventory or account of administration as may be acquired.

4. <u>When a deceased has died intestate, the court shall save as otherwise expressly provided have a final discretion as to the person or persons to whom a grant of letters of administration shall in the best interests of all concerned be made</u> but shall without prejudice to that discretion accept as a general guide the following order of preference.

(a) Surviving spouse or spouses, without association of other beneficiaries.

<u>(b) Other beneficiaries entitled on intestacy with priority according to their respective beneficial interests</u> as provided by part V of the law of succession Act.

(c) The public Trustee; and

(d) Creditors".

[Emphasis added].

21. The combined effect of the provisions of the law cited above is to clothe the court with considerably wide powers to do justice in any particular estate of a deceased person on case by case basis. The discretion exercisable is in terms unfettered but, of course, it must be guided by the law and reason but not whim or caprice.

22. There was no application for revocation or annulment of the grant in this case.

The grant was issued and confirmed by two different judges of the same court.

Ordinarily, a judge of coordinate jurisdiction would not interfere with such orders, but the law allows it in succession matters, 'whether a grant has been confirmed or not'. The issue of the respondent's interest in the estate arose in the affidavit in reply to the application made by the appellant and the parties went ahead to raise and discuss it in their submissions as an issue in the matter. In that case, the appellant cannot be heard to complain that the issue was not before the court for consideration. It was an issue raised in the pleadings (say affidavits) and in the words of the ***<u>Odd Jobs</u> case***, one that ***"arises from the facts stated by the parties or their advocates, and on which a decision is necessary in order to determine the dispute between the parties."*** As there was no application for revocation, we find no impropriety by the trial court issuing an order for the filing of one in order to effectively have the issue agitated and decided on in accordance with the law.

23. The trial court had on its own motion, as it was entitled to, examined the record and was satisfied that it was defective and/or contrary to the law in various respects which it enumerated. In our view, the court was within its power to make an order for compliance with the law by the appellant before the matter proceeded further. In sum, we do not find that the discretion was exercised on whim or caprice and we decline the invitation to interfere with it.

24. For those reasons, the appeal has no merit and we so find. We order that it be and is hereby dismissed but each party shall bear its own costs as this is a family matter.

25. This Judgment is delivered under ***Rule 32*** of the Court of Appeal Rules, 2010 after retirement of the Hon. Mr. Justice Azangalala.

Dated and delivered at Nyeri this 7th day of June, 2017.

P. N. WAKI

…….……..

JUDGE OF APPEAL

R. N. NAMBUYE

…….……..

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR