



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, J.J.A)

CIVIL APPEAL NO. 49 OF 2015

BETWEEN

CHEBET KIMUGAI APPELLANT

AND

MARGARET CHEPKIROR CHARITO RESPONDENT

(An Appeal from the ruling of the High Court at Kitale,

(Hon. J.R Karanja, J) dated 12th March, 2013

in

SUCCESSION CAUSE NO. 35 OF 2002)

JUDGMENT OF THE COURT

[1] What is before the Court is an appeal from a ruling delivered by the High Court (Karanja J) in a succession cause in regard to an application lodged by **Chebets Kimugai** the appellant herein for revocation of a grant of letters of administration issued to **Margaret Chepkiror Charito** (the respondent herein) in respect of the estate of her late husband, **Julius Charito Lopor** (the deceased).

[2] During the hearing of the application the appellant sought revocation of the grant on the ground that the grant of letters of administration issued to the respondent was fraudulently obtained. At the heart of the dispute was property known as **WESTPOKOT/SIYOI/288** (hereinafter referred to as the suit property). The suit property was listed as the only asset of the estate of the deceased. The appellant maintained that this was a misrepresentation as the rightful owner of the suit property was actually the appellant's father, the late Kimugai Kiptum

[3] The appellant explained that the deceased was a herdsman whom Kimugai Kiptum lived with from the age of 12 years, and later adopted into his family; that the adoption was necessitated by the fact that Kimugai Kiptum had only ten daughters, four of whom have since died; that Kimugai Kiptum died in 1974 leaving behind a widow (the appellant's mother) and his children as beneficiaries to the suit property; that the deceased together with one Sangara Chepgat, a nephew to Kimugai Kiptum,

fraudulently took advantage of the widow, and transferred the suit property into their joint names; that the effect of the grant was to fraudulently exclude the appellant and her siblings from the suit property to which they are beneficiaries and deprive them of right to own property contrary to **Article 40** of the Constitution.

[4] The respondent filed a replying affidavit in reply to the application for revocation and asserted that she was the rightful heir to the suit property by virtue of being the only widow of the deceased; and that the suit property belonged to the deceased as it was registered in the joint name of the deceased and Sangara Chepgat at the time of the deceased's death, as evidenced by an official search that she exhibited.

[5] Having considered the application and the contending arguments, from both parties, the trial Judge ruled in favor of the respondent and dismissed the appellant's application for revocation of the grant, and this is what provoked this appeal in which the appellant has challenged the ruling on grounds that the learned Judge:

a) Erred in law when he dismissed the objection yet in his ruling he found that the land parcel belonged to the appellant's father

b) Erred in law when he held that the omission of the appellant's names from the petition by the petitioner was not enough reason to revoke the grant, when that omission was crucial in the petition

c) Grossly misdirected himself in law when he held that the appellant would not be rendered destitute if they were to be left out of the Estate of the deceased.

[6] During the hearing of the appeal, Ms. Arunga appeared for the appellant and Ms. Bett for the respondent, and both made oral submissions. **Learned Counsel**, Ms Arunga learned counsel argued that the grant was obtained fraudulently without disclosure of the fact that the appellant and her sisters were utilizing the suit property together with the respondent; that the trial judge made a finding in his ruling that Kimugai Kiptum (the appellant's father) was the original proprietor of the suit property; and that this finding supported the appellant's contention that the suit property was part of their father's estate. Ms Arunga drew the Court's attention to a consent recorded in the trial court on 15th November 2011 that the appellant would continue using 12.5 hectares, and the respondent 2.5 hectares until the suit is heard and determined. She added that the consent was predicated upon a survey report dated 17th October, 2007 prepared by L. M. Lumasayi the then District Surveyor for West Pokot District, pursuant to the directions of the trial court and that the report confirmed that whereas the respondent occupied 2.5 hectares of the suit property, the appellant occupied 12.5 hectares.

[7] Ms Arunga faulted the trial judge for finding that the female children would not be prejudiced if they do not inherit the suit property. She maintained that there was no good reason to exclude the respondent and her sisters from the succession cause, as the fact that some had their own homes was immaterial in considering the inheritance rights. Finally, she urged the Court to find the appeal with merit and allow the same.

[8] For the respondent, learned counsel Miss Bett submitted that the respondent was wife to the deceased who was an adopted son of Kimugai Kiptum the original owner of the suit property; that Kimugai Kiptum was never registered as the owner of the suit property; that the suit property rightfully belongs to deceased who is the title holder; that the letters of administration concerned the estate of the deceased who is the current registered owner of the property; that the respondent being the widow of the deceased has the right to administer the estate and inherit the suit property; and that the sisters of the appellant who are in occupation of the suit property would not be rendered destitute. Miss Bett urged the Court to dismiss the appeal as it had no merit.

[9] This being the first appeal, we reiterate our mandate as a first appellate Court as stated by Hancox J. A. in **Jabane –vs- Olenja [1986] KLR 661** at page 664:

“...this court does have the power to examine and re-evaluate the evidence and the findings of facts of the trial court in order to determine whether the conclusion reached on the evidence should stand – see Peters –vs- Sunday Post [1958] EA 424. More recently, this court has held that it will not likely differ from the findings of facts of a trial judge who had the benefits of seeing and hearing all the witnesses, and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular Ephantus Mwangi –vs- Duncan Mwangi Wambugu (1982-88) 1KAR 278 and Mwana Sokoni –vs- Kenya Bus Service (1982-88) 1KAR 870.”

[10] Therefore we must re-evaluate and re-assess the evidence on record deferring to the findings of the trial court, which had the advantage of assessing the demeanor of the witnesses, unless such findings are not supported by evidence, or the trial court has acted on wrong principles.

[11] During the trial several witnesses testified that the suit property originally belonged to Kimugai Kiptum. Of note is the evidence of PW 6, David Kariuki Ndosu Biwot, the area Chief, and PW 3, John Kitia a neighbor whose land is approximately one kilometer away from the suit property. The two witnesses were in agreement that the suit property originally belonged to Kimugai Kiptum. This evidence was consistent with the evidence of PW 7, Mr. Michael Mureithi the Deputy Lands Adjudication Officer, West Pokot who testified that as per the records in their office, during the demarcation and adjudication process done before 1974, the proprietor of the suit property was indicated as Kimugai Kiptum.

[12] On the other hand, the respondent testified that she got married to the deceased when Kimugai Kiptum was already dead, and that all that she knew was that the suit property was in the name of the deceased when they got married. In light of the above evidence, the trial judge rightly found that the suit property originally belonged to Kimugai Kiptum.

[13] The evidence of the Deputy Lands Officer provided some explanation as to how the deceased became a registered owner of the suit property. He stated that before the adjudication process was finalized and title issued, the deceased and one Sangara Chepgat lodged an objection to the registration of the suit property in the name of their “father” Kimugai Kiptum whom they explained had died, and requested that the land be registered in their names. Therefore, the suit property was registered in the name of the deceased and Sangara Chepgat. This is to some extent supported by the Certificate of Official search that was produced in evidence and which confirmed that the suit property was registered in the names of the deceased and Sangara Chepgat as proprietors in common.

[14] It is important to bear in mind that what was before the trial court was an application for revocation of the grant issued to the respondent in regard to the estate of the deceased. The respondent sought to have the grant revoked because it was allegedly issued on a misrepresentation, that the suit property belonged to the deceased.

[15] Under **section 76** of the **Law of Succession Act** a grant of letters of administration, whether confirmed, or not, may at any time be revoked or annulled if the court finds either; 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 the concealment from the court of something material to the case; or, 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. These are the factors that the trial judge ought to have addressed.

[16] In his judgment the trial judge directed himself as follows:

“For the avoidance of doubt this is a succession dispute rather than a land ownership dispute. However, its outcome would invariably determine whether or not the petitioner and the objector are entitled to the ownership of the material plot No 288 which is listed as the sole property asset of the deceased Julius Charito.”

[17] In our view the learned judge did not succinctly identify the issues. While it is true that the

ownership of the suit property was at the heart of the dispute, the critical question that the trial court ought to have addressed in order to determine whether to revoke or annul the grant issued to the respondent, was whether the suit property formed part of the deceased's free property that could be disposed off to his beneficiaries through intestate succession. This issue was not satisfactorily addressed because the trial judge confused objection proceedings in regard to confirmation of the grant under **section 71** of the law of **Succession Act**, with proceedings for revocation of grant under section 76 of the Law of Succession Act. Indeed, in arguing the appeal the appellant's counsel also made the same mistake.

[18] The following extract from the judgment of the trial judge illustrates this confusion:

“Indeed there was no substantial or any dispute at all that the deceased and Sangara in whose names the material plot is registered are the late adopted sons of the deceased. ... It is clear that the objector and her sisters are demanding a share of their brother's estate either solely or jointly with the petitioner their sister in law.

There is no evidence that the registration of the estate property in the names of the deceased and his brother was fraudulent. There would be no reason to revoke the grant issued to the petitioner and although the names of the objector and that of her sisters were not included in the application for the grant, there was no prejudice occasioned to them as they were not the immediate or at all dependants of the deceased... ..

It must be remembered that they are laying a claim to their late brother's estate and not their late father's estate. However, they would only be entitled to their late brother's estate only if there is enough for all family members of the patriarch, the late Kimugai kiptum.....

In general a widow is the most suitable person to obtain representation to the deceased husband's estate. She is the person who would rightfully be expected to properly and honestly safeguard the assets of the estate for herself and her children (see, Re-Kibiego(1972)EA 179). The petition herein falls in this position. Consequently, the objection is without merit and is dismissed accordingly.

[19] Clearly, the trial judge misdirected himself. The appellant was not demanding a share in the estate of the deceased, nor was she challenging the respondent's right to letters of administration in regard to the estate of the deceased. The appellant was only challenging the grant to the extent that the suit property that was listed as the only asset in the estate, though partially registered in the deceased's name was not his free property, as the suit property originally belonged to Kimugai Kiptum, and all the children of Kimugai Kiptum were each in their own right entitled to a share in the suit property.

[20] Even assuming that there was no evidence of fraud in the registration of the suit property in the names of the deceased and Sangara, there was need for the court to investigate the veracity of the appellant's contention regarding her interest in the suit property, in order to rule out circumstances such as misrepresentation or untrue allegations that could vitiate the grant issued to the respondent, and the possibility of the deceased having held the suit property in trust for himself and other beneficiaries of Kimugai Kiptum.

[21] We find that the trial judge having misapprehended the dispute before him, failed to properly address the issues. The evidence before the trial court was clear that the suit property originally belonged to Kimugai Kiptum; that Kimugai Kiptum died before the adjudication process was finalized and the suit property registered; that Kimugai Kiptum was not the one who initiated the registration of the suit property in the name of the deceased and Sangara Chepgat; and that the appellant and her sisters have been utilizing part of the suit property for many years even during deceased's lifetime.

[22] It can therefore be concluded that the suit property was not for the sole benefit of the deceased or his immediate family to the exclusion of Kimugai Kiptum's daughters, but was being used as family property for the benefit of all the children of Kimugai Kiptum. Therefore the deceased was holding the same in trust for himself and kimugai Kiptum's children including the appellant. By obtaining letters of

administration for the estate of the deceased with the suit property as the only asset, and without recognition of the interest of Kimugai Kiptum's children, the respondent obtained the grant by concealment of material information.

[23] Further, the evidence of the Deputy Lands Officer and the certificate of official search that was produced confirmed that the suit property is actually registered in the name of the deceased and Sagara Chepgat as properties in common each having half undivided share. This then means that the deceased's share in the suit property was only half undivided share and the whole property could not form his estate.

[24] Thus, the trial judge erred in failing to invoke his power under **Section 76** of the **Law of Succession Act**, to revoke the grant as it was issued to the respondent under a mistaken belief that the suit property was the deceased's free property. Since the deceased was holding the same in trust for himself and the other children of Kimugai Kiptum, the respondent would only be entitled to the deceased's share-taking into account the shares of Kimugai Kiptum's other children.

[25] Consequently, we allow the appeal and revoke the grant for the letters of administration for the estate of the deceased issued to the respondent; and direct the High Court to issue a grant of letters of administration for the estate of the deceased in the joint names of the respondent and the appellant to facilitate the distribution of the suit property to all persons entitled to a share in the property. Any other dispute relating to the distribution of the suit property may be resolved in the Succession Cause in the High Court.

This being a family dispute there shall be no orders as to costs.

Dated and Delivered at Eldoret this 16th day of November, 2017

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.