IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, OUKO , KANTAI JJ. A)

CIVIL APPEAL NO. 75 OF 2012

BETWEEN

JAMES OBANDE ..... APPELLANT

AND

KENNEDY OUMA NYATOGO .....RESPONDENT

(Appeal from a Ruling and Order of the High Court of Kenya at Kisumu

(Hon. Justice N. R. Nambuye, J) dated 23rd September 2011

in

H. C. C. C. SUC 417 OF 2001)

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JUDGMENT OF THE COURT

It is the duty of a first appellate court in an appeal like this one to analyse and re-evaluate the evidence and come to its own conclusions bearing in mind that it did not see or hear the witnesses – See **Selle v Associated Motor Boats Co. Ltd [1968] EA 123** where the duty of the first appellate court to re-evaluate the evidence and draw its own conclusions is discussed. The same point was made in the earlier English case of **Brasegirdle v Oxney [1947] 1 ALL ER 126** where it was held that a first appellate court would only interfere with the conclusions of a trial court if they were unsupported by the evidence on record.

In this matter appellant, **James Obande**, had filed proceedings in High Court of Kenya at Kisumu Succession Cause No. 417 of 2001 that led to his being given a grant of letters of administration to administer the estate of Julius Nyatogo Opondo (***" the deceased"***). He described himself in those proceedings as the nephew and only surviving relative of the deceased. He used that grant to change the ownership of a parcel of land known as Title No. **KODUMO EAST /392 (the suit land)** from the deceased to himself. When the respondent Kennedy Ouma Nyatogo learnt of those developments he filed objection proceedings in that cause claiming that it was he, and not the appellant, who was entitled to a grant.

On 19th September, 2002 Tanui, J, ordered, inter alia by way of directions taken in the succession cause that the objector be plaintiff; that the objection application and accompanying affidavit be deemed to be

the plaint; that the petition be deemed as the defence while the petitioner became the defendant and; that the proceedings be determined through viva voce evidence. The matter was then fixed for hearing on many occasions but could not proceed for various reasons and it was not until 15th October, 2008 that it came for hearing before Mwera, J (as he then was). Neither the appellant nor his advocate was present. The learned judge being satisfied that the appellants' counsel had been duly served with a hearing notice ordered that the cause proceed for hearing that afternoon. It was noted, in the afternoon session, that the appellants counsel though served was still absent and evidence was taken and recorded by the learned judge.

The respondent, as the first witness, testified that he was a son of the deceased and had two living brothers and a sister. He denied being related to the appellant at all and prayed that the suit land reverts to himself and his siblings. This evidence was supported by two witnesses who were local administrators who confirmed to the learned judge that the appellant was not related to the deceased at all but that the respondent was a son of the deceased. At the close of the hearing on the same day it was ordered that written submissions be filed on 22nd October, 2008.

On 21st October, 2008 a counsel instructed by the appellant filed an application under certificate of urgency presumably to set aside the proceedings that had taken place in the absence of the appellant. The court certified that application urgent and ordered that it be fixed for hearing within twenty one days. The record shows that the matter was in court on 12th November, 2008 when that application was withdrawn by consent of the parties. The learned judge therefore continued with the matter and proceeded to deliver a judgement (headed "Ruling") on 23rd January, 2009 where he found that the respondent and his siblings were the rightful administrators of the deceased's estate and he proceeded to cancel the title of the suit land that had been issued to the appellant. The learned judge also annulled the grant of probate.

By an application dated 5th October, 2009 the appellant prayed for setting aside of proceedings and judgement that had taken place. It was stated in the body of the motion, and in the supporting affidavit, that non-attendance at the hearing by the appellants' advocate was for reasons beyond his control; that the appellant had not attended court on advise of his counsel that his attendance was not necessary and that the advocate had not himself attended court because he had been taken ill.

Nambuye, J (as she then was) heard the application and dismissed it in a Ruling delivered on 23rd September, 2011. The learned judge found that the appellant had not shown which issues he could canvass if the matter was reopened the appellant having failed, as found by the learned judge, to dislodge the fact that it was the respondent and his siblings who were the rightful heirs of the deceaseds' estate; that the appellant had not demonstrated that he had a right superior to the said heirs and finally that the application had been made after inordinate delay. Those are the orders that provoked this appeal.

There are four grounds in the Memorandum of Appeal whose theme is to the effect that the learned judge erred in shutting the appellant from the seat of justice and/or that the mistake of counsel had been visited upon the appellant and that the proceedings before Mwera, J were a nullity having been conducted by an advocate without authority or instructions.

The appellant represented himself before us and gave a history of the many advocates he had engaged in the matter at the High Court and who had all failed him so completely that he had decided to act in person.

Mrs.Onyango, learned counsel for the respondent, submitted that the earlier proceedings (before Mwera, J) could not be impeached because the appellants' counsel had been served with a hearing notice and failed to attend court. In any event, thought

learned counsel, the appellant had never challenged the fact that the respondent was a son of the deceased and a rightful heir to the estate of his father.

We have considered the record of appeal, Memorandum of Appeal, submissions made and the law.

On the complaint by the appellant that he was condemned unheard and/or that he was punished for mistakes of his counsel the record shows that when the cause was called for hearing on 15th October, 2008 the learned judge was satisfied that the appellants' counsel had been duly served with a hearing notice but failed to attend court. The record further shows that an application was filed on behalf of the appellant on 21st October, 2008 – before submissions were made. That application which sought to arrest judgment or set aside the proceedings that had taken place on 15th October, 2008 was withdrawn by consent of the parties on 12th November, 2008. It must be presumed that the lawyer who freely withdrew that application had the appellants' instructions to do so and it would be prejudicial to the respondent for the appellant to turn around and blame his own lawyer who had hid ostensible authority to compromise the application as he did. As we have already stated this is a first appeal and although we are mandated to look at the whole matter afresh and reach our own conclusions based on the evidence on record we must be careful not to replace the discretion of the trial court with our own. The judge was exercising a discretion and we should not interfere with exercise of such a discretion unless it is shown that the judge has misdirected his mind in the matter and in the result reached a wrong decision or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of that discretion and that as a result there has been misjustice - **Mbogo & Another v Shah [1968] EA 93**. On our own consideration of the matter as a whole there is no merit in the complaint that appellant was condemned unheard or that he was punished for mistakes of counsel. The appellant was accorded every opportunity by the court and the complaint is accordingly dismissed.

The main complaint in the appeal is whether or not the appellant was denied a right to be heard, or, to use the language of the Memorandum of Appeal, whether the appellant was shut from the seat of justice.

The appellant had in the affidavit in support of petition for grant of letters of administration described himself as a nephew and the only surviving relative of the deceased. When the respondent joined the fray and stated on affidavit and in evidence in court that not only was he a son of the deceased but he had two living brothers and a sister the appellant did not offer an answer or challenge. That is what led Mwera, J, to hold:

"In this court's opinion considering the evidence, oral and by affidavit, the submission and appreciation of the law, first the objector's evidence stands uncontroverted. There was nothing in rebuttle (sic) from James Obande Owuor. The court was thus satisfied that James Obande the petitioner was never a nephew or in any other capacity, a relative of the deceased Nyatogo, entitled to petition to administer the deceased's estate. He seemed to have particularly targeted plot no. 392 of all other assets of the deceased. The court heard that the land was unoccupied. The proper beneficiaries to succeed Nyatogo were/ are Kennedy (PW1) and his 3 siblings. The petitioner did not seek their consent to petition as he did and that was concealing material facts pertaining to the deceased's estate. That act amounted to fraud as even the replying affidavit does not point to any other basis why the petitioner moved to succeed parcel no. 392."

Nambuye, J, in the Ruling appealed from, found, and we entirely agree, that even if the matter was reopened for a fresh hearing the appellant had not demonstrated what issues were alive where findings could be made. The appellant had misrepresented to the High Court that he was a nephew and the only surviving relative of the deceased. By doing so he concealed a material fact from that court – that the deceased had living children, including the respondent, who had a right to inherit the property of the deceased. It was demonstrated to court by the respondent and his witnesses that the appellant was not related to the deceased in any way at all and that he was not entitled to benefit as an inheritor to the estate of the deceased. The learned judge was therefore right to find that there were no issues pending for determination and was right to refuse the application by the appellant. Those conclusions persuade us to hold, as we hereby do, that this appeal has no merit and it is hereby dismissed with costs to the respondent.

Dated and delivered at Kisumu this 23rd day of April, 2015.

D. K. MARAGA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a truecopy of the original.

DEPUTY REGISTRAR