



IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, NAMBUYE & KIAGE, JJA)

CIVIL APPEAL NO. 13 OF 2015

BETWEEN

MARGARET NCEKEI THURANIRA.....APPELLANT

AND

MARY MPINDA.....1<sup>ST</sup> RESPONDENT

REBECCA KARWITHA M'MAGIRI.....2<sup>ND</sup> RESPONDENT

(Appeal from the Judgment/Decree of the High Court of Kenya

at Meru (MAKAU, J.) Dated 13<sup>th</sup> November, 2014

in

H.C.SUCC. Cause No. 538 of 2009)

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**JUDGMENT OF THE COURT**

1. This is a first appeal against the Judgment, of *J.A. Makau, J* delivered at Meru High Court on the 13<sup>th</sup> day of November, 2014, in Meru succession cause Number 538/2009, in the matter of the Estate of *Cosmas M'Thuranira M'Magiri* (the deceased).

2. The Estate of the deceased comprised Land parcel number Kiirua/Naari/1363 (the suit land), registered in 1985 in the sole name of the deceased. The respondents *Rebecca Karwitha M'Magiri* and *Mary Mpinda M'Magiri* successfully filed Meru L.D.T. No. 59 of 2000 against the deceased claiming three acres each out of the suit land allegedly being land that had originally belonged to their deceased mother but in respect of which their deceased mother could not be registered as she had no identification card and which she caused to be included and registered in the deceased's name. The deceased unsuccessfully appealed against the tribunal's award to the Eastern Provincial Land Disputes Appeals Committee at Embu vide appeal No. 134/2000. His attempt to appeal to the High Court also flopped as he died on the 17<sup>th</sup> day of July, 2006 before the appeal was erroneously filed in his name on the 27<sup>th</sup> day of July, 2006 and was subsequently struck out.

3. The Appellant *Margaret Ncekei Thurania* petitioned for a grant of letters of administration to the

deceased's estate in her capacity as the widow of the deceased naming herself, her sons and daughters as the only beneficiaries of the deceased's estate. The respondents protested when the appellant sought to confirm the said grant. The affidavit of protest was deposed by **Rebecca Karwitha M'Magiri** on the 17<sup>th</sup> day of January, 2011 on her own behalf and on behalf of the co-Respondent. The Appellant responded to the affidavit of protest on the 4<sup>th</sup> day of February, 2011. Directions were given on the 29<sup>th</sup> May, 2014 that the matter be determined by way of written submissions. The merit disposal of the rival arguments resulted in the impugned judgment of 13<sup>th</sup> November, 2014.

4. The Appellant was aggrieved by that decision and she has appealed to this Court raising nine (9) grounds of appeal alleging that the learned trial Judge erred in law and in fact:

- **in that he accepted and based his judgment on a protest which was bad in law and was not covered under section 35 to 41 of the Law of Succession Act Cap 160 Laws of Kenya.**
- **in not accepting the Appellants submission that the protest should have been dealt with in a civil case.**
- **In relying on a bad and unlawful judgment of a tribunal which had no jurisdiction.**
- **in not finding that the tribunals' decision he relied on was based on a different Land Kiirua/Naari-maitei/1363 and not the Land before him. (b) That the said decision could only be dealt with and executed as per the provision of section 7 of the Land Disputes Tribunal Act ( now repealed). (c ) That the said decision was time barred and could not be executed. (d) That the protest was Res-judicata.**
- **in allowing a succession cause to be used as a mode of execution of a judgment decided elsewhere.**
- **in that he failed to consider or sufficiently consider the submission of the appellant and her authorities.**
- **in that he failed to consider or sufficiently consider the affidavits and proposals and other material placed before him by the parties.**
- **in that he misconstrued and misinterpreted the provisions of the Succession Act and the constitution.**
- **in ordering the appellant to pay costs.**

5. In his oral submissions to court **Mr. D.M. Rimita** learned counsel for the Appellant urged us to allow the appeal on the grounds that the deceased was the sole registered proprietor of LR No.Kiirua/Naari/1363 which was different from the land that the Respondents had claimed a portion thereof through the Meru District Land Disputes Tribunals process namely Kiirua/Naari/Maitei/1363; the Appellant was thus justified in naming herself and her children as the only beneficiaries to the deceased's' estate. Further that although the Respondents were purportedly awarded six (6) acres out of the suit land, they do not qualify as beneficiaries to the deceased's intestate estate in terms of sections 35 through to 41 of the Law of Succession Act. Alternatively, the Respondents were non suited as their claim to the deceased's estate stems from the Meru Land Disputes Tribunals award which was never adopted as a judgment of the court in terms of section 7 of the now repealed Land Disputes Tribunal Act, and is therefore incapable of execution. If the above does not hold, argued **Mr. Rimita**, then the respondents remedy lies in a civil claim through a civil litigation against the Appellant as the administrator of the deceased's estate and not through the succession proceedings. The learned trial Judge therefore fell into a grave error when he purported to give effect to the unlawful and illegal Meru Land Disputes tribunals award, more than twelve (12) years after its pronouncement contrary to the clear provisions of the limitation of Actions Act Cap 22 Laws of Kenya. On costs **Mr. Rimita** argued that since the Appellant

had not done anything wrong in connection with the Respondents claims she should not have been condemned to pay costs.

6. To fortify the Appellant's argument Mr. **Rimita** cited the case of **Dr. Leonard Kimeu Mwanthi versus Rukaria M' Iwerandu M'Iringi [2013] eKLR (Nyeri Civil Appeal No. 28 of 2011)** for the proposition that claims falling into the realm of civil litigation should be litigated strictly through the civil process against the administrator of a deceased person's estate and should never be mixed up in succession proceedings as doing so causes delays and difficulties in resolving them. See also the reiteration of this stand in the case of **M'Inoti Nthai versus Naomi Karegi M'Imanyara [2014] Eklr (Nyeri Civil Appeal No. 154/2011)**

7. In response to the Appellant's submissions **Mr. Kaimenyi** learned counsel for the respondents urged us to dismiss the appeal and affirm the decision of the learned trial Judge on the grounds that it is undisputed that the Respondents' deceased mother was a step mother to the deceased husband of the Appellant. The Respondents therefore fell into the category of step sisters of the deceased, as envisaged under section 29 of the Law of Succession Act. Alternatively, if it were to be taken that by reason of the existence of the Land support Disputes Tribunals award the deceased held a portion of the suit land in trust for the deceased's mother of the Respondents, section 86 of the Law of Succession Act which recognizes debts as lawful claims against a deceased persons' estate could be invoked to bring the Respondents claims within the ambit of section 66 which recognizes claims of other beneficiaries. **Mr. Kaimenyi** continued to urge that the appellant and her children stood to suffer no prejudice as they would benefit from the balance of the twelve (12) acres out of the suit land.

8. On the allegation that the Respondent's claim was time barred, **Mr. Kaimenyi** argued that this does not hold because the tribunal's award is not a judgement of the court from whose date the prescribed period of twelve years cannot be computed.

9. On the discrepancy in the title of the suit Land **Mr. Kaimenyi** urged that the litigation has all along been in respect of only one parcel of land that had been registered in the name of the deceased and any error made by the respondents in their description of it is not fatal to their claim as it is curable.

10. On the allegation that the respondents had directed their claim to the wrong forum, **Mr. Kaimenyi** urged that upon the death of the deceased the civil litigation over the suit land became spent as the suit land became a subject of succession proceedings thereby forcing the Respondents to reroute their claims to the succession proceedings.

11. Lastly on costs, which usually follow the event, it is **Mr. Kaimenyi's** contention that the learned Judge exercised his discretion properly when he ruled that the Appellant should pay costs to the Respondent which exercise of discretion should not be interfered with.

12. This being a first appeal, our mandate is as set out in Rule 29(1) of the Rules of this Court namely to re-appraise the facts before us and arrive at our own conclusions. We are however enjoined in the exercise of the above mandate to be slow in interfering with the High Court's findings of facts unless there be demonstration that such a finding was based on no evidence; or that it was based on a misapprehension of the facts; or that the judge was shown to have acted on wrong principles in reaching the finding. See **Sumaria & another versus Allied Industries Limited [2007] 2 KLR 1**. Also where the appeal arises from an alleged wrong exercise of a Judicial discretion, interference with such exercise of judicial discretion can only arise if there is demonstration that the exercise of such a discretion was not based on sound reason but on whim and caprice or sympathy and therefore not exercised with the sole purpose of doing justice to the parties. See **Githiaka versus Nderuru [2004] 2 KLR 67**. Further that there is demonstration that the trial Judge misdirected himself in some matter and as a result arrived at a wrong decision or that it was manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there had been a misjustice. See the case of **Mbogo & another versus Shah [1968] EA 93**.

13. The issues identified by the learned Judge for determination were whether the Respondent's protest

was well merited and second the mode of distribution of the deceased's estate and amongst who.

14. Bearing the totality of the record in our minds our response to the issues set out above is that it was correctly submitted by the Appellant that the objectors had moved to the Meru Land Disputes Tribunal seeking a share in Land parcel No. Kiirua/Naari-Maitei/1363 and yet the Land Registered in the deceased's name is land parcel No. Kiirua/Naari/1363. The Respondents countered this by submitting that there is only one Land registered in the name of the deceased that parties have been litigating over and therefore the inclusion of the name Maitei in the citation of the registration number for the Land neither misled the parties nor resulted in any miscarriage of justice to either of them.

15. On our own, we find that in the absence of proof that there were two distinct parcels of land registered in the name of the deceased, the only reasonable conclusion that can be drawn from the alleged discrepancy in the description of the land by the Respondents is that the inclusion of the word "**Maitei**" in the title was an error, a minor error which does not operate to oust the Respondents claim as it is common ground that the respondents were only interested in the land registered in the name of the deceased which both proceedings have shown was only one, that is Kiirua/Naari/1363. It is further our observation that in her affidavit in reply to the protest, the appellant used the same citation in her paragraph 5 thereof. She cannot therefore be heard to excuse her apparent wrong citation and then fault the same alleged wrong citation by the respondent.

16. On an alleged apparent enforcement by the succession proceedings court of an unlawful Land Disputes Tribunals Judgment, we find that indeed the learned trial judge in his assessment of the facts before him stressed the fact that the Respondents were the successful party in the Land Disputes Tribunals proceedings whose award had never been overturned and that the claims had in fact crystallized. We do not, however, agree with the Appellant's assertions that by saying so the learned Judge was enforcing a judgment as none had in fact ever been pronounced. The award was never adopted as a judgment of the court or a decree in respect thereof extracted. All that the learned Judge did was to appraise himself of the facts laid before him. These were not only obvious but glaring and could not be ignored.

17. The above findings notwithstanding, the learned trial Judge was also categorical that whichever way one could look at the Respondents' claim, it was well founded under the succession law proceedings as there was demonstration that the deceased was registered as trustee of the Respondents deceased mothers share of six (6) acres. To the learned Judge, it mattered not whether the Respondents laid their claim under section 29 (a) of the Law of Succession Act as direct beneficiaries or under section 66 of the Law of Succession Act as creditors.

18. It is undisputed that the alleged trust in favour of the Respondents' deceased mother was not noted against the deceased's title. In the case of *Limuli versus Marko Sabayi [1979] KLR 251* the court ruled that

***"there is nothing in the Registered Land Act (now repealed) which prevents the declaration of a trust in respect of registered Land, even if it is a first registration; and there is nothing to prevent giving effect to such a trust by requiring the trustee to execute transfer of documents"***

The learned trial Judge's finding that the deceased held six (6) acres out of the suit Land on behalf of the respondents deceased mother was a finding of fact. This Court has held on numerous occasions that it will not lightly differ from the findings of fact of a trial Judge who had the benefit 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 rendering the finding he did. See *Jabane versus Olanja [1986] KLR 661*. Herein, we find the learned trial Judge's finding was based on the facts before him. We find no reason to interfere with that finding.

19. With regard to the learned trial Judge's failure to properly appraise both the facts and case law in support of the Appellants case, it is our finding that the Respondents clearly deposed in their affidavit of protest that they were relying heavily on the Land Disputes Tribunal's award as an anchor for their claim

to the deceased's estate; that they were properly before the succession court because the Appellant herself had rerouted their claim from the Land Dispute Tribunal Procedures to the succession court when she filed a replying affidavit before the tribunal objecting to the Respondents' move to enforce the tribunal award therein on the grounds that the matter was now a succession matter, a deposition not controverted by the Appellant. Nor did she disown a copy of the said replying Affidavit annexed to the Respondents Affidavit of protest. We therefore find that the learned trial Judge properly appraised himself of the factual base of the issues in controversy before him and arrived at the conclusion that the respondents claim was before the right forum.

20. On case law, relied upon by the appellant we concur with the learned trial Judges findings that these are distinguishable from the facts of this appeal. In the case of **Dominica Kihu versus Johana Ndura Wakaritu Nyeri CA 269 of 2007**, this Court made a specific pronouncement that the Land Disputes tribunal had no jurisdiction to adjudicate over issues of ownership of Land because that issue was directly before it. In contrast what was before the learned trial Judge was not an issue of lack of jurisdiction in the Land Disputes Tribunal to adjudicate over matters relating to ownership of land but an issue as to who should inherit the estate of the deceased and if so in what proportion. In the case of **Peter Kiruki M'nkanata** (legal representative of the estate of M'nkanata M'Mbogori (deceased) Nyeri CA No.313 of 2010, this Court upheld the High Courts' finding that the judgment sought to be executed was time barred as it was more than 12 years old because there was a judgment with a definite date on which it has delivered from which date the 12 years period could be computed. Herein, since the award subject of the tribunals proceedings was never adopted as a judgment of any court, it was therefore incapable of being christened "**a judgment of any date**" from which the period of 12 years could be computed to bar any claims based on it by the Respondents. In the case of **M'Inoti Nthai versus Naomi Karegi M'Imanyara Nyeri CA No.154 of 2011** the finding that purely civil claims should not be litigated in succession proceedings arose from the fact that the appellant therein had failed to demonstrate existence of an oral Will, bequeathing him a half share of the land in dispute; he failed to explain why it took him 37 years from the time the deceased occupation and 22 years from the date of registration of the land in the deceased's name to assert his rights to re-occupation and lastly there was no demonstration that the appellant was ever a dependant of the deceased. In contrast, herein, the issue of trusteeship by the deceased of six (6) acres of Land out of the suit Land in favour of the Respondents deceased's mother had been raised and unsuccessfully resisted by the deceased during his life time. In HCCC No. 15 of 2010 (J.R.) in the matter of an application for judicial Review for orders of mandamus, exparte **Andrew Memam Mwireria versus Land Registrar Igembe South District and another**, the High Court declined the relief sought as it was directed at a party who had not been party to the proceedings giving rise to the presentation of the Judicial review proceedings. It had no relationship to succession proceedings. Second, herein the deceased was a party to the Land Disputes Tribunals proceedings and by reason of the Appellant stepping into the shoes of the deceased as his administrator, she was and still is deemed to have participated in all the proceedings relating to the suit land.

21. Res judicata does not arise because when the learned trial Judge summarized the facts of what had transpired in the Land Disputes Tribunal proceedings in his judgment, he was not rehearing the dispute a fresh, but was simply reflecting on the documentary evidence as had been laid out before him for purposes of assessment, application of the law to those facts before drawing out conclusions to the same.

22. On the issue of costs, rule 31 of the Rules of this Court enjoins us at the end of our determination to make any necessary, incidental or consequential order including orders as to costs. In **Devran Dattan versus Dawda [1949] EACA 35** it was held that the decision as to whether the successful litigant has a right to recover his costs should be left to the discretion of the judge who tried the case, a position reiterated in **James Koskei Chirchir versus Chairman Board of Governors Eldoret Polytechnic [2011] eKLR (Civil Appeal No. 211 of 2005)** when this Court ruled that notwithstanding, the provision of **section 27** of Civil Procedure Act costs are generally a matter within the discretion of the court. See also the decision in the case of **Super Marine Handling Services Limited versus Kenya Revenue Authority [2010] eKLR (Civil appeal No. 85 of 2006)** for the proposition that costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order. Herein, the learned trial Judge properly exercised his discretion in awarding costs to the respondents. We find no good reason to interfere with the exercise of that discretion as the costs therein had followed the

event considering that the respondents were the victorious party.

23. The upshot of the above is that, we find no merit in this appeal. The same is dismissed with costs to the respondents both here and the court below.

**Dated and Delivered at Nyeri this 14<sup>th</sup> day of October, 2015.**

**P.N. WAKI**

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**JUDGE OF APPEAL**

**R.N. NAMBUYE**

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**JUDGE OF NAMBUYE**

**P.O. KIAGE**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**