



IN THE COURT OF APPEAL

AT NYERI

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

CIVIL APPEAL NO. 26 OF 2015

BETWEEN

REUBEN KAMWOCERE APPELLANT

AND

HELLENA WAKINA MAURICIO RESPONDENT

(An appeal from the judgment of the Environment and Land Court at Embu (Bwonwonga, J.) dated 21st January, 2015

In H.C.E.L.C No. 22 of 2014)

JUDGMENT OF THE COURT

This matter involves a land dispute between relatives in respect of parcel number Gaturi/Nembure/2548 (suit land) measuring 3.04 acres. The appellant is the respondent's nephew.

The suit land was initially registered in favour of one Nginyane Njamwitha (deceased), the appellant's grandfather. After the demise of the deceased, the appellant filed Succession Cause No. 5 of 1978 in the District Magistrate's Court at Runyenjes. According to the appellant, a consent judgment was entered on 28th February, 1978 wherein all the beneficiaries to the deceased's estate including the respondent's mother agreed to the appellant solely and absolutely inheriting the suit land. Consequently, the title was registered in favour of the appellant on 7th July, 1978.

In the year 2004, the respondent filed a claim in the Embu Land Dispute Tribunal being LDT No. 3 of 2004 seeking a share of the suit land on the ground that she was the daughter of the deceased hence entitled to his estate. The Tribunal entered an award in her favour and directed the appellant to transfer to her a portion of 1 ½ acres. Aggrieved with that decision, the appellant filed an appeal in Eastern Provincial Land Dispute Appeal Committee being case number 82 of 2006 wherein the Tribunal's decision was upheld. The Appeal Committee's decision was adopted as a judgment of the court on 29th May, 2007 by the Chief Magistrate's court at Embu.

Unrelenting, the appellant filed suit in the High Court seeking:-

- ***A declaration that the decision/ award in Eastern Province Land Dispute Appeal Committee***

case No. 82 of 2006 was ultravires, illegal, null and void ab initio;

- *An order setting aside/quashing the said decision;*
- *A declaration that he is the rightful owner of the suit land;*
- *An order of permanent injunction to restrain the respondent either by herself, her agents, servants or persons acting under her from interfering, wasting, damaging, alienating or in any way dealing with the suit land.*

At the trial before Bwonwonga, J. the appellant reiterated that he was absolutely entitled to the suit land because first, a consent judgment had been entered in the succession cause to that effect and second, under Embu customary law only male children were entitled to inherit. It emerged that the appellant had given contradictory evidence at the Tribunal and the Appeals Committee in regard to whether he had informed the respondent of the succession proceedings. However, before us he maintained that the respondent was aware of the succession cause but refused to attend during the hearing.

On the other hand, the respondent gave evidence that she planted coffee bushes on the suit land with the authority of her late father. During the deceased's lifetime she used to pick coffee thereon. At one point the deceased informed her that she would inherit the suit land since he had no surviving male child. After the demise of the deceased her mother told her to continue picking coffee and use the proceeds to cater for her children. She continued visiting her mother who later became deaf and blind. After the demise of her mother, however, the appellant prohibited her from going to her paternal home and cultivating the suit land.

From the year 1981 Lydia Wariimi Ireri, the respondent's daughter, picked coffee and cultivated the suit land on her behalf until she was chased away by two agents of the appellant. This precipitated her claim in before the Tribunal.

By his judgment dated 21st January, 2015 the learned Judge dismissed the appellant's suit thus provoking the appeal before us. The appellant complains that the learned Judge erred by-

- *Failing to evaluate the appellant's evidence, submissions and authorities;*
- *Exhibiting bias against the appellant;*
- *Finding that respondent's witness as truthful without any basis;*
- *Failing to appreciate the applicable law and in particular Section 3(1) of the Land Disputes Tribunal Act (1990).*

At the hearing of the appeal the parties appeared in person. The appellant submitted that the learned Judge did not record the evidence he gave and also failed to consider his submissions. He faulted the learned Judge for finding that the respondent's witnesses were truthful while in actual fact they were not. He maintained that his late grandfather gave him the suit land directly and entirely since his father had predeceased him and that at the material time under Embu customary law women could not inherit. He urged us to allow the appeal.

The respondent reiterated her evidence before the trial court. She was perplexed that the appellant who she claims to have brought up would be adamant in denying her a portion of her father's estate. She asserted that at the time the appellant instituted the succession cause her mother was old, blind and deaf hence she could not possibly have appreciated the proceedings. She urged us to dismiss the appeal.

In a brief rejoinder the appellant submitted that everything the respondent stated was false.

As this is a first appeal, we are enjoined to revisit the evidence that was before the trial court afresh,

analyse it, evaluate it and arrive at our own independent conclusion, but always bearing in mind and making allowance for the fact that the trial court had the benefit of seeing the witnesses, hearing them and observing their demeanour. See the case of **SELLE –VS- ASSOCIATED MOTOR BOAT COMPANY LTD.** [1968] EA 123.

The appellant in his suit sought various declaratory orders the main one being that the decision of the Appeals Committee was null and void. He argued that the learned Judge erred by failing to appreciate the applicable law under **Section 3(1)** of the **Land Disputes Tribunals Act (repealed)** which set out the jurisdiction of the Tribunals under the Act.

The **Land Disputes Tribunals Act** at **Section 8(9)** provided that a decision of the Appeals Committee could be challenged in an appeal to the High Court on matters of law only. An alternative avenue where such a decision could be challenged was through Judicial Review proceedings. These two main avenues notwithstanding, the appellant could quite properly file the declaratory suit. That was the holding of the Court in **NICHOLAS NJERU –VS- ATTORNEY GENERAL & 8 OTHERS** [2013] eKLR;

“We agree these prayers could have perfectly fitted the bill under judicial review as they seek to supervise the powers of persons exercising public authority. However we do not entirely agree with the learned Judge’s observation that the court had no jurisdiction to grant a declaratory order. We know of no limit to the powers of the court to grant a declaratory order except such limit as it may in its discretion impose upon itself. See the English case of PYX GRANITE CO. LTD V MINISTRY OF HOUSING & LOCAL GOVERNMENT [1958] 1 QB 554

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As aforementioned we are not aware of any statutory underpinning that bars parties from seeking redress by way of declarations save that it must be done according to the set down procedure.”

In declining to grant the declarations sought the learned Judge exercised his discretionary power. In **OPOLOTO –VS- ATTRONEY GENERAL** (1969) E.A. 631 the Court while considering a similar provision to our current **Order 3 Rule 9** of the **Civil Procedure Rules** which provides for a declaratory judgment stated;

“Under O.11 r.7 of the Civil Procedure Rules the court may make a binding declaration of right whether or not any consequential relief is or could be claimed. This is a very wide power; but it is a discretionary power and one which should be exercised, if at all, only with the greatest caution...”

Where this Court is being called upon to interfere with the exercise of discretion of the trial court, the principles it applies, and we do, were set out in the locus classicus case of **MBOGO & ANOTHER - VS- SHAH** [1968] EA 93 at Page 96, as follows:

“An appellate court will interfere if the exercise of the discretion is clearly wrong because the judge has misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate court should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result there has been injustice.”

The appellant’s main basis for entitlement to the suit land was that a consent judgment was entered in the succession cause wherein beneficiaries to the deceased’s Estate agreed that he should inherit the same absolutely. He contended that the respondent refused to attend those proceedings despite being notified but her mother did participate in those proceedings. From the record as we have already observed, the appellant contradicted himself on whether the respondent was given notice of the succession proceedings.

On this issue the learned Judge made the following findings:-

“In this regard it is my finding on the evidence produced that the obtainment of the title deed of the suit land by the plaintiff is tainted with fraud. He did not inform the defendant to attend the Runyenjes Succession Cause proceedings. In this regard, the defendant should have been informed by the plaintiff to attend the succession cause proceedings as she was a potential beneficiary. He materially contradicted himself as to whether he informed her or not.

I find him to be an incredible witness. For example, he went to the extent of telling this court that the two tribunals recorded contrary to what he told them. The plaintiff’s evidence that the mother of the defendant voluntarily consented to him being the sole beneficiary of the suit land is not correct.

In this regard I believe the evidence of the defendant (DW1) and her daughter (DW2) that their mother and grandmother respectively was blind and deaf. I find them to be credible witnesses...

The appellant faults the learned Judge for finding that the defendant and her witness were truthful but not so himself. On credibility of witnesses the Supreme Court authoritatively reaffirmed the primacy of the trial court in **GATIRAU PETER MUNYA –VS- DICKSON MWENDA KITHINJI & 2 OTHERS**, [2014] eKLR:

“We cannot overemphasize the commonplace that the trial Court is alone the custodian of true knowledge of witnesses and their quirks, and can pronounce on issues of credibility. Short of an appraisal of witness account appearing as absurd, or decidedly irrational, it behoves the Court sitting on appeal to respect the trial Judge’s appraisal of primary fact.”

See also **ANDREW PETER NGIRICHI & ANOTHER –VS- WANJE MASHA KURIAH** [2015] eKLR

So guided, we find no reason to interfere with the learned Judge’s finding on the issue of credibility. Given the contradictory evidence on record by the appellant as to whether the respondent was given notice of the succession cause, we find in her favour that she was not aware of it.

The appellant also took umbrage under Embu customary law wherein only a surviving male was permitted to inherit land. It is trite that the law of succession does not discriminate against daughters and sons of the deceased but treats them as children equally entitled to the estate. See **GRACE WACHUKA –VS- JACKSON NJUNGUNA GATHUNGU & ANOTHER** [2014] eKLR. The appellant’s claim on that score is therefore anachronistic and untenable fit for rejection.

On the issue of bias, we note that the appellant did not give any evidence of any instance that the learned Judge exhibited bias against him. We adopt the sentiments of the South African court in **THE REPUBLIC OF SOUTH AFRICA –VS- SOUTH AFRICAN RUGBY FOOTBALL UNION** (1999) 4 SA 147 at 177;

“The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.”

This ground lacks merit.

Having carefully perused the impugned judgment and exhaustively considered the record, we find that the trial Judge did take into consideration the evidence adduced by the parties in arriving in his decision and we see no reason for interfering with his exercise of discretion. This appeal herein lacks merit and is hereby dismissed with no orders as to costs this being a family matter.

Dated and delivered at Nyeri this 2nd day of December, 2015.

P.N. WAKI

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JUDGE OF APPEAL

R.N. NAMBUYE

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR