



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, MARAGA & MUSINGA, JJ.A)

CIVIL APPEAL NO. 196 OF 2002

BETWEEN

THE PUBLIC TRUSTEE.....APPLICANT

AND

GITHINJI MARARO & 4 OTHERS.....RESPONDENT

(Being an appeal from the Judgment and decree of the High Court

of Kenya at Nairobi (Mitey, J.) dated 15th March 2001

in

H.C.C.A NO. 221 OF 1997)

RULING OF THE COURT

This is an application essentially for reinstatement of Civil Appeal No. 196 of 2002 which was dismissed by this Court on 19th February 2009 and for extension of time within which to file a notice of cross-appeal. Although the application is shown to have been made by the Public Trustee who is the Administrator of the estate of **Kahugi Gituro** by virtue of a Grant granted to the Public Trustee on 28th September 1993, it has emerged that the application is in fact brought by two sons of the deceased namely; **Gituro Kahugi Gituro** and his brother **Stephen Mungai Kahugi**.

It has also emerged that the deceased, Kahugi Gituro who died on 17th June 1976 had four wives namely; **Monica Wanja Kahugi** (1st wife), **Rachael Muthoni Kahugi** (2nd wife), **Hilda Njeri Kahugi** (3rd wife), and **Wanjiru Kamau** (4th wife) and that the two applicants are the sons of Hilda Njeri Kahugi, the 3rd wife.

It has also emerged that distribution of the estate of the deceased Kahugi Gituro which includes part of Maryvale Farm comprising of a total of 81 acres is still pending in Nairobi High Court Succession Cause No. 504 of 1987.

The dispute which gave rise to the appeal relates to the ownership of Maryvale Farm Land Reference No. 61/5 situate in Njiru, Nairobi. It appears from the documents filed in this application that sometime in

1984, six persons, namely Githinji Mararo, Kimaru Kinyanjui, Samuel Kiarie, Bernard Gichuru, Kahugi Gituro and Stephen Kagume, sued Njeri Kahugi (widow of Kahugi Gituro – the 3rd wife) before the District Officer who with the elders made an award which was filed before the Principal Magistrate's Court at Thika for enforcement. The award was registered in court as D.O's Case No. 17 of 1984. The Senior Principal Magistrate (**Mary Mugo**) after hearing the dispute gave judgment on 7th February 1977 in essence that Kahugi Gituro owned one third share and the land should be sub-divided into three equal portions. There was an appeal to the High Court by the Public Trustee and the parties apparently recorded a consent order to the effect that the dispute relating to the ownership be determined by the High Court. The dispute was heard by Mitey J. in HC Civil Appeal No. 221 of 1997 and on 15th March 2001 the High Court gave judgment in which it awarded the family of deceased Kahugi Gituro 65 acres and 16 acres to the respondents, (that is Githinji Mararo and the five others).

Thereafter Githinji Mararo and four other persons filed an appeal in this Court, being Civil Appeal No. 196 of 2002 against the decision of the High Court. The appeal was listed for hearing on 19th February 2009. On the hearing date, counsel for appellants applied for adjournment saying that he was not ready to proceed. On the other hand, Mrs. Ogamba who appeared for Public Trustee applied for adjournment on the ground that she wanted to file a cross-appeal. The Court rejected those applications for adjournment and made an order thus:

“As both counsel do not want to conduct the appeal, the same is hereby ordered dismissed with no orders as to costs”.

The present application for the reinstatement of the dismissed appeal was filed on 22nd February 2012, three years after the dismissal of the appeal. It is supported by the affidavit of Gituro Kahugi Gituro sworn on 9th January 2013 and by two further affidavits sworn by him on 6th May 2013 to which numerous documents are annexed. There is also a replying affidavit of Gituro Ndung'u Kahugi who opposes the applications on his behalf and on behalf of fifteen beneficiaries of the estate of Kahugi Gituro. Stephen Kaguma has also filed a replying affidavit on behalf of the respondents – the appellants in the dismissed appeal. The respective advocates for the parties and counsel for the Public Trustee in addition made submissions before us.

It is evident that the purpose of the application for reinstatement of the appeal is to enable the applicant, Gituro Kahugi Gituro and his brother, Stephen Mungai Kahugi on behalf of the 3rd wife or house, to file a cross-appeal against the judgment of Mitey, J. They contend that the entire 81 acres comprised in Maryvale Farm were purchased by their deceased father without any contribution from the respondents and that the respondents are not entitled to the 16 acres awarded to them and the other persons they represent by Mitey, J.

On the other hand, the other sixteen beneficiaries oppose the application on the grounds, *inter alia*, that it is incompetent and that the entire family had agreed not to pursue an appeal and has further agreed to comply with the judgment and to cause the sixteen acres to be excised from the farm and given to the respondents. They further contend that the application is intended to delay the conclusion of the succession cause.

The respondents (original appellants) have also opposed the application. They contend, among other things, that they do not intend to pursue the appeal against the Judgment of Mitey J. and that the certificate of confirmation of the Grant issued on 29th August 1994 was rectified by the High Court on 8th November 1994, to reflect that they are entitled to 16 acres from Maryvale Farm and that steps were taken to excise the sixteen acres from the farm but the process has been delayed because the two applicants want to prolong the process as they are commercially benefiting from the whole farm.

Regina Nderitu for the Public Trustee explained that the Public Trustee wanted to appeal against the judgment of the High Court but was frustrated by conflicting instructions from the family as three houses did not want the appeal pursued while one house wanted the appeal filed and ultimately the Public Trustee gave the 3rd house permission to pursue the cross appeal on condition that the Public Trustee was

not expected to pay the costs.

The application is fraught with several procedural hurdles. The main one is that the application is not made by the original appellants, (respondents) whose appeal was dismissed. The respondents have no desire to pursue the appeal against the judgment of Mitey, J. They are now satisfied with the 16 acres which was awarded to them. The judgment in respect of the 16 acres has been executed in the sense that the certificate of confirmation of grant in succession Cause No. 504 of 1987 was amended on 8th November 2010 showing that the original appellants were entitled to 16 acres from Maryvale Farm. That ended the dispute between them and the estate of the deceased, Kahugi Gituro. The effect of allowing the application will be force them to continue with the appeal. Neither the applicants nor the Court has power to force them to continue with the appeal.

The next hurdle is that a cross-appeal cannot exist independently of an appeal. As **Rule 93** of the **Court of Appeal Rules, 2010** stipulates, a Notice of Cross Appeal is given in form G in an existing appeal. However, by **Rule 97(1)** a cross appeal can exist independently of the appeal if the appeal is withdrawn. Further, as **Rule 97(2)** provides that where an appeal is withdrawn within 14 days of its institution and before a respondent has filed a notice of cross-appeal, a respondent can file a notice of appeal within the time stipulated. The Public Trustee had the option of either filing an appeal against the decision of Mitey, J, or waiting until the appeal by the respondents is filed and file a cross appeal. The Public Trustee got leave to file the appeal out of time on 24th April 2001 before the dismissed appeal was filed on 5th August 2002 but it neither filed the appeal nor cross-appeal. We now know the reason – three of the four houses did not want to pursue an appeal. The bitter reality is that the right to file a cross appeal was lost when the appeal was dismissed after pending in Court for over six years.

The third hurdle is the capacity to bring the application. It is contended by the majority of the beneficiaries that the applicants have no *locus standi* to bring the application as they are not the administrators of the estate. The two applicants aver that they were given permission by the Public Trustee to bring the application. It is conceded by Gituro Kahugi Gituro, one of the applicants, that the Grant of Letters of Administration was given to the Public Trustee at his insistence. By **section 25(1)** of the **Public Trustee Act**, the Public Trustee is a corporation sole and by **section 25 (3)** has power to sue and be sued. This is reinforced by **section 82(a)** of the **Laws of Succession Act** which provides that the personal representative has power to enforce by suit or otherwise all causes of action which survive the deceased or arise out of his death for the deceased's estate. A grant to the Public Trustee can however be revoked (**section 9** of **Public Trustee Act**, and **section 76** of the **Law of Succession Act**). Further, the Public Trustee has power under the Public Trustee Act to appoint agents or advocates to act on his behalf (**section 25(2); 25(4)**).

By **Order 31 (1) Civil Procedure Rules**, in a suit concerning property vested in, *inter alia*, an administrator, where the contention is between the persons beneficially interested and a third party the administrator shall represent all persons so interested although the court may order any of them to be made parties to the suit. The applicants by an application dated 27th July 2011 filed in the High Court succession cause sought to be appointed co-administrators of the estate purposely to enable them to pursue the appeal and although the Public Trustee had no objection to the application it was abandoned. It follows that at the time the present application was brought the applicants had not obtained any authority from the court to pursue these proceedings. The mere fact that the Public Trustee does not object does not in itself confer upon them capacity to bring these proceedings for the benefit of the estate in the absence of prior formal sanction by court.

Lastly, by the amendment to the certificate of confirmation of the Grant in the succession cause, the respondents (original appellants) have been adjudged as entitled to 16 acres from Maryvale Farm, a part of the deceased's estate. Thus the intended cross – appeal has been superseded by the confirmed Grant rendering the intended cross-appeal futile.

For those reasons the application is incompetent and is hereby struck out with costs to both the respondents and to the 1st, 2nd and 4th houses to be paid by the two applicants.

Dated and delivered at Nairobi this 27th day of February, 2014.

E.M. GITHINJI

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JUDGE OF APPEAL

D.K. MARAGA

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

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