



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OKWENGU, MAKHANDIA & SICHALE, JJ.A.)

CIVIL APPEAL NO. 145 OF 2012

BETWEEN

FLORIS PIERRO1ST APPELLANT

AND

GIANCARLO FALASCONI (As the Administrator of the estate of Santuzza Billioti alias

Mei Santuzza).....RESPONDENT

(Being an appeal from the ruling of the High Court of Kenya at Malindi (Meoli, J.) dated 9th December, 2011

in

H. C. Succession Cause No. 61 of 2011)

CONSOLIDATED WITH

CIVIL APPEAL NO. 146 OF 2012

BETWEEN

MIDLAND COMPANY LIMITED APPELLANT

AND

GIANCARLO FALASCONI (as the Administrator of the Estate of Santuzza Billioti alias

Mei Santuzza RESPONDENT

(Being an appeal from the ruling of the High Court of Kenya at Malindi (Meoli, J.) dated 9th December, 2011

in

JUDGMENT OF THE COURT

The genesis of this dispute is the Succession Cause filed by the respondent in the High Court at Malindi being **Succession Cause No. 61 of 2011**. In the cause, the respondent sought for a grant of letters of administration intestate for the estate of one, **Santuzza Bilioti alias Mei Santuzza**, “deceased” who allegedly died in Italy on 29th September, 1996. The respondent did not indicate in the petition how he was related to the deceased. He merely stated that he was a relative. However, prior to initiating the petition, the respondent had earlier on obtained a limited grant of letters of administration *ad Litem* for purposes only of defending and or challenging **Civil Suit No. 354 of 2007** in the Chief Magistrate's Court at Malindi as well as **Misc. Civil Appl. Nos. 13 & 14 of 2010** in the High Court at Malindi. The limited grant was also to enable him to do such things as may be necessary for the preservation of the estate of the deceased until further representation is granted. As correctly observed by **Meoli, J.** in the ruling dated 9th December, 2011 the subject of this appeal, the correct citation of the case in the Chief Magistrate's Court is **PMCCC Nos. 353 of 2007** and not **354 of 2007**. In that suit the deceased was sued by one **Katana Karisa Mwambire** for Kshs.1,440,000/= on account of unpaid wages due to him from the deceased. The suit papers were allegedly duly served on the deceased who failed to enter appearance and or file defence in time. Accordingly an interlocutory judgment was entered against him. It is instructive though that the deceased is said to have died on 29th September, 1996 yet the suit was filed on 29th September, 2007. How then could the suit papers have been served on him? Anyhow, pursuant to the interlocutory judgment, Mr. Mwambire proceeded to extract the decree and executed it by selling the deceased's property; **Chembe/Kibabamshe/520** and **530** by way of public auction. The properties were bought by **Floris Piero** and **Midland Company Limited**, the appellants herein. A vesting order was subsequently obtained by the two appellants through Malindi **H.C. Misc. Civil Appl. Nos. 14 & 15 of 2010** respectively.

Fearing that the estate of the deceased was being wasted and intermeddled with given this background and on the strength of the limited grant, the respondent took out a chamber summons application under certificate of urgency dated 22nd June, 2011 seeking in the main that the respondents be restrained by an injunction from further trespassing, inter-meddling, developing, disposing, alienating, wasting and or interfering in any way whatsoever with land title No. Chembe/Kibabamshe/520 and 530 hereinafter “*the suit premises*”. The main ground in support of the application was that by the time that Mwambire filed suit which culminated in the sale by public auction of the suit premises to the two appellants, the then registered proprietor of the suit premises, Santuzza Bilioti (*deceased*) had already passed on. The proceedings and all acts done pursuant thereto were accordingly void *ab initio*.

In response, the appellants cast doubts as to the respondent's capacity to mount the succession proceedings in view of the fact that he did not disclose how he was related to the deceased. They even cast doubts as to whether the deceased had indeed passed on. They went on to contend that they had innocently purchased the suit premises and denied that they were inter-meddling with the estate of the deceased. Further they contended that the Court lacked jurisdiction to grant an injunction in a succession cause.

Meoli, J. having carefully examined the material placed before her, called and perused all the case files that touched on the cause, reached a determination that **rule 73** of the Probate & Administration Rules reserved the court's inherent jurisdiction to allow for the grant of injunctions in deserving cases in a succession cause notwithstanding the provisions of **rule 63** of the Probate and Administration Rules. The Judge further held that the challenge on *locus standi* of the respondent based on the limited grant had overlooked the duly signed full grant that had been subsequently obtained by the respondent. On the propriety of the proceedings in Chief Magistrate's Court, the precursor to the dispute, the Judge was of the view that the proceedings raised questions that required ventilation through evidence. Much as the appellants may well have been innocent purchasers however the question of fraud lingered. On that premises the learned Judge granted the injunction sought. She further directed that the respondent's

application filed in the Chief Magistrate's Court and dated 14th July, 2011 that sought to set aside the interlocutory judgment and subsequent decree be set down for hearing on priority basis.

These determination spurred these two appeals filed by appellants respectively. They advanced similar grounds to wit; that the suit in Chief Magistrate's Court was spent once the decree was issued and executed; that ordering the hearing of the application in Chief Magistrate's Court when a vesting order had already been issued by the High Court was tantamount to asking the Magistrate's Court to sit on appeal on a decision of the High Court; the issue of the appellants' title and its acquisition thereof could not be dealt with in a succession cause; no grant had been issued in Italy since 1996 and none had been presented for resealing as required by **section 77** of the Law of Succession Act and consequently the respondent had no *locus standi* to take out a limited grant; that the suit premises having been vested in the appellants they could not form part of the estate of the deceased; that the appellants were innocent purchasers for value at a public auction; that the appellants were not parties to the suit in the subordinate court and to order that the matter be heard in the said court would amount to condemning the appellants unheard and finally, that the Judge erred in finding that the principles for grant of an injunction were applicable in a succession cause.

On 16th June, 2013, the respondent filed notice of grounds affirming the decision of the High Court pursuant to **rule 94** of this Court's Rules. The grounds were:-

- ***“That the appellant's records of appeal omitted to incorporate a certified copy of an order the subject of the appeal in contravention of rule 85(1)(h) of this Court's Rules. Therefore the appeal was fatally defective and should be struck out.***

- ***That the supplementary record of appeal was filed out of time and without leave of Court.***

- ***That the appellants ought not to be allowed to enjoy the fruits of an irregular and or fraudulent decree as there was clear evidence of their collusion with Mwambire in the case in the Chief Magistrate's Court.***

- ***That the appellants knew that they were inter-meddling with the deceased's estate, since they participated in financing the plaintiff in the Chief Magistrate's Court.”***

When the appeal came before us for hearing on 15th July, 2013, **Mr. Wameyo** and **Mr. Michira**, learned counsel for the appellants and respondent respectively agreed to consolidate the two appeals as they arose from the same ruling and for ease of hearing. They also agreed to canvass the appeal by way of written submissions. An order of this Court to that effect was subsequently made.

Highlighting their respective written submissions on 7th November, 2013, Mr. Wameyo stated that the suit premises did not form part of the estate of the deceased as they were already vested in the appellants. The title deeds issued to the appellants pursuant to the vesting order had never been cancelled. The respondent had a remedy of challenging the sale on the ground of fraud or mistake under **order 21 rule 79** of the Civil Procedure Rules which he did not take up. Counsel further submitted that the High Court should not have ordered for the hearing of the application when it was *functus officio*, and that under **sections 143** and **159** of the Registered Land Act (*now repealed*) the only court that can cancel a title is the High Court and not a subordinate court. With regard to the issue that the supplementary record was filed out of time and without leave of court, counsel submitted that the issue ought to have been raised within 30 days pursuant to **rule 34** of this Court's Rules.

Responding, Mr. Michira, submitted that under **section 45** of the Law of Succession Act, inter-meddling with the estate of the deceased was an offence. That the suit filed in the Chief Magistrate's Court was a non-starter and nullity because it was filed after the death of the deceased and that the appellants were aware of the fact. Well aware that the deceased had passed on and could not be reached for service, the appellants contrived to have service purportedly effected by way of substituted service. This was fraudulent. Finally, counsel submitted that the appellants filed supplementary record of appeal

without leave of Court. The respondent duly notified them of the omission but they elected to take no steps to regularise the position. In the premises, the appeals ought to be struck out.

We have carefully considered the grounds of appeal, rival written and oral submissions, and the law. The application before the High Court was for a temporary injunction to restrain the appellants from dealing with the suit premises in a manner inimical to the estate of the deceased. The question which arose and had to be determined first was whether the Court had jurisdiction to grant an injunction in a Succession Cause. The appellants took the position that the Court had no such jurisdiction whereas the respondent took the contrary position. However, the High Court was persuaded that **rule 73** of the Probate and Administration Rules reserved the Court's inherent jurisdiction to allow for the grant of injunctions in deserving cases. We are in total agreement with this conclusion. We have no doubt at all that the Law of Succession Act gives the Court wide jurisdiction in dealing with testamentary and administration issues of an estate. Indeed **section 47** of the said Act gives the Court jurisdiction to entertain any application and determine any dispute under the Act and to pronounce such decree and orders as may be expedient. It cannot be said that such decrees and orders would exclude injunctive orders. In other words, we are of the firm view that **section 47** of the Act gives the Court all-embracing powers to make necessary orders, including injunctions where appropriate to safeguard the deceased's estate. This section must be read together with **rule 73** of the Probate and Administration Rules which further emboldens Court's jurisdiction to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of Court. We would imagine such orders would also include injunctive orders.

Once the Court determined that it had jurisdiction to grant the injunction in a succession cause and with which we agree as already indicated, the next consideration was the application of the principles for granting such an injunction as laid down in the celebrated case of ***Giella v Cassman Brown Ltd. [1973] E.A. 358***. In our view the case as presented by the respondent before the court raised serious questions of integrity and abuse of judicial process by the appellants. There were allegations that the appellants well knowing that the deceased had passed on a year or so earlier, conspired with Mr. Mwambire to mount a suit against him for the sole purpose of acquiring the suit premises. That the 1st appellant masterminded the suit can be gathered from the affidavit sworn on 29th September, 2011 by Mwambire in which he deponed thus:-

“I KATANA KAISA MWAMBIRE of P.O. BOX 1103 – 80200 Malindi, do hereby make oath and swear as below:

THAT I am the Plaintiff/Applicant knowledgeable, sound mind, competent to swear this affidavit.

THAT I wish to conduct my case herein in person without any assistance from my Advocate on record.

THAT I therefore withdraw my instructions formally (sic) given to my advocate through the financial assistance of Floris Piero and Antonio Pizzino.

THAT Floris Piero, Antonio Pizzino or any other person has no right to give instructions on my behalf to my lawyer herein who I hereby withdraw from action for me.

THAT sworn facts are true to the best of my knowledge and belief ...”

In pursuit of which they deliberately misled the court by purporting to have served the summons to enter appearance by way of substituted service when they knew that the deceased had passed on, obtained an *ex-parte* judgment and decree which enabled them to wrongfully transfer and register unto themselves the suit premises. The appellants did not seriously challenge these allegations. If that be the case, can the appellants claim to be innocent purchasers for value without notice. That question may have to wait for the answer during the plenary hearing. However as matters stand, certainly, the respondent had made out a *prima facie* case with probability of success. The Judge, having so held we doubt whether it was

necessary for her to consider the issues as to whether damages would have been adequate remedy nor the question of balance of convenience. Abuse of judicial process is a serious indictment and more so where a party involved derives a benefit from it. That conduct *per se* warrants the court's intervention to right the wrong without more! On this basis alone, the appeal cannot succeed. The learned Judge expressed her misgivings and dilemma regarding the entire process thus:-

“A court of law cannot suffer to have a fraudster enrich himself unjustly on the estate of a deceased person. At the same time it cannot suffer an innocent purchaser for value lose of benefit derived from a sanctioned legal process. It is my considered view that this is an appropriate case where the Court ought to invoke its inherent jurisdiction in order to prevent a miscarriage of justice.”

We could not agree more with the position taken by the learned Judge. We may also add that the issues as to whether the suit premises formed part of the deceased's estate, whether the subordinate court had jurisdiction to entertain the application, the challenge to the sale, jurisdiction to cancel title and or that the grant should have been re-sealed were not matters for consideration of the High Court at that stage, once the Court reached the conclusion that the integrity of the judicial process culminating in to the transfer of the suit premises to the appellants was in question.

Be that as it may, we also need to consider other issues raised by the respondent in opposition to the appeal; that the record of appeal was filed out of time and lacked the order, the subject of appeal and secondly that the supplementary record of appeal was filed without leave of this Court. To the respondent these were fatal omissions rendering the appeal hopelessly incompetent. On the other hand, the appellants are of the view that the issue ought to have been raised within 30 days pursuant to **rule 34** of this Court's Rules.

It is common ground that the appellants filed their respective records of appeal on 10th April, 2012. It is also common ground that in the said records, the appellants failed or omitted to incorporate certified copies of the order appealed against as required by **rule 87(1)(h)** of this Court's Rules. An order appealed from is a primary document in terms of the aforesaid rule which must form part and parcel of the record of appeal. The order embodies the Court's decision. If it is not included, the Court of Appeal will be at a loss in determining what the High Court determined. It cannot be the business of this Court to tooth-comb the judgment or ruling so as to decipher the decision of the court below. That decision must be embodied in the order and or decree. Accordingly failure to include the court order or decree would render the record of the appeal to be fatally defective and liable to be struck out. In any event an appeal can only be against a decree or an order and not against a judgment or ruling. See *Nuru Ibrahim Amordim vs Amir Mohammed Amir, Civil Application No. 23 of 1998 (UR)*. See also *Mark Odhoch Oyeke v Job Okuna Oyugi & Others, Civil Appeal No. 89 of 2001 (UR)* and *Cosmas Buluma & Others vs Odwagi Irinye Namulanda, Civil Appeal No. 280 of 1999 (UR)*. Further **rule 87** is couched in mandatory terms. Accordingly it is mandatory that the record of appeal must contain copies of the decree or order appealed from.

Having realized the fatal consequences of their omissions, the appellants attempted to remedy the situation by filing a supplementary record of appeal. However the supplementary record of appeal was filed on 14th May, 2012, a month or so after the filing of the initial records of appeal. Yet **rule 88** of this Court's Rules provide *inter alia* that where a document is omitted from the record, the appellant may within fifteen (15) days of lodging the record of appeal without leave, include the document in a supplementary record of appeal and thereafter with the leave of the Deputy Registrar. The rule is clear and unambiguous. It is to the effect that without leave of court an appellant can file a supplementary record of appeal. But that has to be fifteen (15) days of lodging the initial record of appeal. Beyond that the appellant requires leave of Court. From what is on record, it is quite apparent that the appellants lodged the supplementary records of appeal outside the stipulated time. They therefore required leave of Court. They never sought or obtained such leave. Before us, they did not even make such request. As it is therefore the purported supplementary record is irregularly and illegitimately on record and should be struck out. The appellants had referred us to **rule 34** of this Court's Rules as conduit through which the respondent's submissions on this aspect of the appeal can be shut out. However that rule does not aid or

advance the appellants' cause. That rule merely deals with preparation of orders. It is therefore irrelevant.

Though not canvassed before us by respective counsel can we however *suo moto* invoke **Article 159** of the Constitution and the Overriding Objective Principle introduced in the Appellate Jurisdiction Act 2009 to sustain the appeal? We do not think so. **Article 159** of the Constitution of Kenya, enjoins courts to administer justice without undue regard to procedural technicality. Failure to include in the record of appeal a primary document or to formally apply to court for leave to file a supplementary record to include the same cannot be wished away as a procedural technicality. Otherwise there will be no orderly conduct of business in this Court. Nor was that article in the Constitution meant to be a panacea for advocates negligence or casual approach in dealing with appeals to this Court. Nor can it be said that such blatant omissions should be relegated to the periphery in pursuit of the Overriding Objective Principle under **section 1 A** and **1B** of the Civil Procedure Act and **Section 3A** and **3B** of the Appellate Jurisdiction Act. Similarly these provisions were not meant or aimed at camouflaging the indolence and or negligence of parties to the appeal. Neither were they meant to throw out of the window the well-known rules of this Court.

It is on the basis of the foregoing that we find the appeals undeserving. Accordingly they are dismissed with costs to the respondent.

Dated and delivered at Mombasa this 7th day of February, 2014.

H. M. OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

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