



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, MWILU & MUSINGA, J.J.A.)

CIVIL APPEAL NO. 111 OF 2012

BETWEEN

ODUOR HAWI AMBALA

OGOLA KODHEK AMBALA APPELLANTS

VERSUS

MARVIN OPIYO AMBALA

CHIZI ADHIAMBO AMBALA

PEREZ AUMA AMBALA

ADONGO AMBALA

ODHIAMBO AMBALA RESPONDENTS

*(Being an appeal from the Ruling of the High Court of Kenya, Kisumu (R.N. Nambuye, J.)
given on 2nd August, 2011*

in

H.C. SUCC. NO. 68 OF 1986)

JUDGMENT OF THE COURT

1. **Otieno Aggrey Ambala**, hereinafter referred to as “**the deceased**”, died on 8th June, 1985. His family members believed that the deceased died intestate and shortly thereafter commenced intestate succession proceedings, only to discover much later that the deceased had left behind a written will. That notwithstanding, the parties decided to proceed with the administration of the estate intestate.
2. The deceased had married Perez Ambala in 1958 and together they had five sons namely, **Otieno Ambala Junior (deceased)**, **Oduor Safari Ambala**, **Odhiambo Tabu Ambala**, **Nyerere Omondi Ambala** and **Ogola Kodhek Ambala**. The widow, Perez Ambala, had died in 1973.

3. After the demise of Perez, the deceased married another wife under a civil marriage, Beryl Lilian Odinga; with whom he sired two daughters, Perez Auma and Chizi Odhiambo. The deceased and Beryl divorced in 1981 or thereabout.
4. During the subsistence of the deceased's marriage to Beryl, the deceased cohabited with one Nancy and that union produced four children namely, Marvin Ambala, Akinyi Ambala, Adongo Ambala and Apiyo Ambala.
5. Upon demise of the deceased, Nancy Ambala, Otieno Ambala Junior and Joseph Ambala applied and were granted Letters of Administration of the deceased's estate on 26th August, 1986. But by a consent order dated 14th July, 1989, their appointment was revoked and a fresh grant was issued to one H.R. Sahi, who passed away on 24th September, 1991, without having completed administration of the estate.
6. Following the death of Sahi, the firm of Rajni Somaia was instructed by some family members of the deceased, among them, Odhiambo Ambala, Nancy Ambala, Nyerere Ambala and Oduor Ambala, to apply for grant of letters of administration of the deceased's estate to be issued to one Bhuben Shah, a chartered Accountant. Initially, a limited grant, (ad colligenda bona) for the purpose of collecting and getting in and receiving the deceased's estate was issued to him on 20th January, 1992.
7. A full Grant of Letters of Administration was issued to Bhupen Shah on 25th October, 1995 and confirmed on 2nd November, 1995.
8. On 3rd December, 2004, the parties' advocates appeared before Tanui, J. in the High Court of Kenya at Kisumu and agreed that all the children of Perez, Beryl and Nancy would be beneficiaries of the deceased's estate. Mr. Oguso appeared for Odhiambo Ambala, Mr. Odeny for Gadhia for Bhupen Shah (Administrator) and Mr. K'Owade (now deceased) for the rest of the beneficiaries.
9. Regarding division of the deceased's estate, it was agreed and recorded as follows:
 - “(i) Kisumu Shops (Ambala Estate). There are a total of 10 shops of which 9 are of the same size and one shop which is double the normal size. The big shop is to be given to Auma and Chizz Ambala. The remaining 9 shops is (sic) to be given to each beneficiary.***
 - (ii) Petrol station off Kakamega road. This is to be sold to the highest bidder. The net amount to be received is to be divided equally among all the beneficiaries after all liabilities due from the estate have been paid off.***
 - (iii) Land in Muhoroni. This land is to be divided equally among all the beneficiaries.***
 - (iv) Houses in Fort Jesus. These should be divided equally among Otieno, Oduor, Odhiambo, Nyerere and Ogola Ambala.***
 - (v) Shares in Navarash Wholesalers company to be sold and the proceeds to be divided equally amongst Otieno, Oduor Odhiambo, Nyerere and Ogola Ambala.***
 - (vi) Land in Karen: This land is to be divided equally amongst Otieno, Oduor, Odhiambo, Nyerere and Ogola Ambala.***
 - (vii) Houses in Siaya: These are to be divided amongst Otieno, Oduor, Odhiambo, Nyerere and Ogola Ambala.***

The residue of the estate should be divided equally amongst the 16 beneficiaries.

That Walter Ambala and Alfred Jacob Ambala are to execute and/or sign any legal

documents necessary for purposes of effecting the distribution of the estate as stated above.

All the beneficiaries herein above specified be ordered to account for all the monies they have received or may have received from the estate and that those accounts be audited by independent Auditors who will verify their correctness;.....

There be an escrow account to be operated by Walter Ambala and Alfred Jacob Ambala which account shall be used for collection of other rents proceeds, proceeds for sale of shares and/or any income due to the estate pending finalization on administration of the account. Liberty on any named beneficiary to apply.

Each party to bear own costs.”

B.K. TANUI – JUDGE

Signed **Obura Oguso** 3/12/2004

J.R.K. Owade”

10. On 25th November, 2008, the parties filed a consent that appears to have varied the mode of distribution of the estate as earlier agreed upon. The consent letter read as follows:

“19th November 2008

The Deputy Registrar

High Court of Kenya

KISUMU

Dear Sir

**RE: KISUMU HIGH COURT SUCCESSION CAUSE NO. 68 OF 1986 IN
THE MATTER OF THE ESTATE OF THE LATE OTIENO AGGREY
AMBALA**

The parties would like to record the following consent order: -

“By consent

- 1. The Karen property being L.R. No. 1160/234 had been sub-divided into L.R. No. 1160/286, L.R. No. 1160/288 and L.R. No. 1160/289 totaling 15 acres.***
- 2. That Otieno Ambala Junior and Nyerere Omondi Ambala have already had the benefit of their inheritance by taking possession and selling off properties in L.R. No. 1160/286 which comprised of 5 acres being sub-divisions aforesaid thus the two have already benefited from the consent order made on the 4th December 2004 in the following manner: -***
 - a. Otieno Ambala Junior – 3 acres***
 - b. Nyerere Omondi Ambala – 2 acres***
- 3. That the Karen property comprising of 15 acres was meant to be divided among 5 sons now has only 10 acres remaining which shall be divided between the remaining beneficiaries as***

follows:-

- a. *Oduor Hawi Ambala – 3 acres*
 - b. *Odhiambo Tabu Ambala – 3 acres*
 - c. *Nyerere Omondi Ambala – 1 acre*
 - d. *Metric Ogola Kodhek – 3 acres*
4. *That the consent order of 4th December 2004 is hereby varied to the extent of what is stated above.*
 5. *There be no orders as to costs.*
 6. *That upon recording this consent then the applicants application dated herein will be marked as settled.*

Yours faithfully

Rajni K. Somaia

Advocates for the Respondents

Signed

Mungu and Company

Advocates for the Applicants”

11. Shortly after recording the aforesaid consent orders, Marvin Ambala filed an application dated 17th February, 2007 seeking the following orders:

- “(i) The application be certified as urgent and service of the same be dispensed with in the first instance.*
- (ii) The grant for (sic) letters of Administration issued to NANCY OTIENO AMBALA, JOSEPH ODHIAMBO and OTIENO AMBALA JUNIOR on the 26th March 1987 be revoked.*
- (iii) The certificate of confirmation of grant issued on 2nd November 1995 to BHUPEN SHAH and certificate of confirmation of grant dated 10th February 2006 issued to WALTER AMBALA and ALFRED JACOB AMBALA be cancelled.*
- (iv) The Honourable court do appoint an independent and recognized accountant to undertake an audit and receive accounts from all the beneficiaries and Administrators of whatever kind.*
- (v) That all the beneficiaries and Administrators of whatever nature who have handled the Estate do submit accounts to the court appointed Auditors.*
- (vi) That the honorable court do restrain any of the beneficiaries, purported administrators, their agents servants or otherwise howsoever from transferring, selling, administering, alienating, in of the fixed asset of the Estate, especially Lands in Siaya, Muhoroni, and Karen i.e. L.R. NO. 1160/288, L.R. No. 1160/289, L.R. No. 5812 NAIROBI pending hearing and determination of the application.”*

12. On 18th March, 2009 Marvin Ambala filed another application urging the Court to give directions

as to the mode of proceeding with his earlier application.

13. Before directions could be given, Chizzy Ambala filed an application dated 17th March, 2009 and sought the following orders:

“(i) The application be certified as urgent and service of the same be dispensed with in the first instance.

(ii) The honourable court do review and set aside the consent orders issued or entered on the 3rd December 2004, 2nd April 2008, 28th November 2008 and any other consequential actions or orders emanating from them.

(iii) That the honourable court do set down the matter for full hearing and redistribute the assets and liabilities of the Estate fairly either per house or per unit.

(iv) That the honorable court do restrain all the beneficiaries especially ODUOR AMBALA, ODHIAMBO AMBALA, METRIC OGOLA AND NYERERE AMBALA from transferring selling and alienating charging mortgaging, disposing, dealing with the property belonging to the Estate more specifically Karen i.e. L.R. No. 1160/288, and 1160/299 Karen, pending hearing and determination of the application or any further orders.”

14. The Court directed counsel to file submissions on the status of the deceased’s estate before any of the applications could be heard. That was done and counsel urged Court to set down the main matter for hearing.

15. In a brief ruling on directions, Mwera, J. (as he then was), set out the issues for determination that emerged from the submissions and stated:

“In doing its best from the submissions, this court is minded to rule and it rules that it will order the sequence of hearing the pending applications by viva voce evidence on the above points and any relevant ones that may crop up on the way. Parties to be at liberty to put forth points of fact and law. Hearing dates to be fixed on directions by the court.”

16. On 25th November, 2010, the matter was listed for hearing before Karanja, J. but could not be reached. The court adjourned it **“for hearing of the application dated 17/2/09 by “viva-voce” evidence for two days on the 19th and 20th January, 2011 as a matter of urgency and priority”**. On 19th January, 2011 Nambuye, J. (as she then was), directed counsel to avail to her a write up on the issues for determination. That was done and like Karanja, J. she ordered that the application for revocation of the grant dated 17th February, 2009 be heard first.

17. In their submissions dated 3rd August, 2009, the 1st and 2nd respondents had urged the court to have the matter heard on its merit presumably by way of viva voce evidence.

18. However, it appears that after perusal of the submissions that had been filed, Nambuye, J. rendered a judgment in which she not only revoked the letters of administration that had been granted to Nancy Ambala, Otieno Ambala Junior and Joseph Odhiambo but also went on to appoint other administrators of the deceased’s estate and further, distributed the estate in its entirety.

19. Being dissatisfied with that decision, the appellant preferred an appeal to this Court that raises 23 odd grounds. We will not list all the grounds of appeal but shall highlight them. The appellants lamented that the learned judge erred in law and in fact by granting orders that were not applied for by the respondents or canvassed by the parties; that the learned judge erred in law by assuming that the grant of letters of administration issued to Joseph Odhiambo, Barack Odhiambo Ambala, Nancy Ambala and Otieno Ambala Junior was still in existence; that the learned judge erred in law by proceeding on the

wrong basis that the grant of letters of administration issued to Harbans Rai Sai and Bhupen Shah were a nullity.

20. The appellants further faulted the judge for appointing administrators to the estate who did not meet the requirements set down by the law and having done so, for proceeding to distribute the estate, even when some of the properties so distributed had long been disposed of.

21. All the 23 grounds of appeal were amplified in written submissions filed on 4th April, 2013 and orally highlighted by **Mr. Mungu**, the appellants' learned counsel. The respondents as well as a caveator by the name Farooq Asif Butt, through their respective advocates, **J.M. Theuri & Associates** and **Miller & Company Advocates**, filed their submissions in response and orally highlighted the same.

22. We have carefully perused the submissions filed. We observe that both Mwera and Karanja, JJ. had directed that the application for revocation of the grant that had been issued to the appellants, being highly contested and with parties swearing affidavits that were highly conflicting in their contents, be determined by way of viva voce evidence. We think that was the most appropriate way of disposing of the application. However, the record shows that on 25th March, 2011 counsel agreed by consent to have that application disposed on the basis of written submissions.

23. The submissions filed were limited to the specific orders sought in the application. However, the learned judge went far beyond the issues canvassed by counsel and raised several others, *suo motu*, then proceeded to determine the same, without affording counsel an opportunity to give their views on the same. The court stated:

“This court has given due consideration to both rival pleadings and submissions and in its opinion the following are own framed questions for determination in the disposal of their matter.”

24. Even if the order to revoke the letters of administration granted to Nancy Ambala, Otieno Ambala Junior and Joseph Odhiambo was merited, there was no prayer for appointment of new administrators of the deceased's estate. The court, in appointing the three administrators *suo motu*, purported to rely on **Rule 10** of the **Fifth Schedule** to the **Law of Succession Act**. The Fifth Schedule provides for limited grants generally and **Rule 10** relates to Administration **pendente lite** and stipulates as follows:

“Pending any suit touching the validity of the will of a deceased person, or for obtaining or revoking any probate or any grant of letters of administration, the court may appoint an administrator of the estate of the deceased person, who shall have all the rights and powers of a general administrator, other than the right of distributing the estate, and the administrator shall be subject to the immediate control of the court and shall act under its direction.”

25. It is clear that **Rule 10** cited above can only be invoked to issue a limited grant **pendente lite** pending determination of such dispute as specified in the rule but not in the final judgment in a succession cause. Further, such an administrator has no power to distribute the estate and so the judge was plainly in error in invoking the court's inherent power under **Rule 73** of the **Probate and Administration Rules** to mandate the new grant holders to distribute the estate under the supervision of the court.

26. Parties had not made any submissions as to who could be appointed as an administrator of the estate or how the estate ought to have been distributed, in the event that the application was successful, and in our respectful view, the learned judge erred in making these orders without giving the parties an opportunity to address the court on the same.

27. Although the learned judge truly desired to bring an end to this succession dispute that had been in court for nearly 26 years, it is evident to us that some of the issues that she dealt with and reached a determination on required parties to adduce *viva voce* evidence before the court could reach an informed finding.

28. Consequently, we allow this appeal, set aside the judgment made on 2nd August, 2011 in its entirety and substitute therefor an order remitting the matter to the High Court of Kenya at Kisumu for viva voce hearing and determination of the three applications that were pending before it prior to 25th March, 2011. Each party shall bear its own costs of this appeal.

Dated and Delivered at Kisumu this 7th day of February, 2014.

D.K. MARAGA

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JUDGE OF APPEAL

P.M. MWILU

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JUDGE OF APPEAL

D.K. MUSINGA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR