**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: VISRAM, KOOME & MARAGA, JJ.A.)**

**CIVIL APPEAL NO 52 OF 2011**

**(IN THE MATTER OF THE ESTATE OF CHARLES KIMOTHO MUKUNU (DECEASED) Alias KIMOTHO S/O MUKUNU)**

**BETWEEN**

**PETER WAHOME KIMOTHO…….APPELLANT**

**AND**

**JOSPHINE MWIYERIA MWANU……...…..…….RESPONDENT**

*(Being an appeal against the ruling of the High Court of Kenya at Nyeri (Sergon, J.), delivered on 16th July, 2010*

*and the decree issued on 20th January 2011)*

**JUDGMENT OF THE COURT**

[1] On 16th July, 2010, Sergon J., dismissed an application by Peter Wahome Kimotho, the appellant, wherein he had sought the revocation or annulment of the grant of letters of administration issued to Josphine Mwiyeria Mwana, the respondent. The respondent's late husband, John Munnu Njugi, had entered into a sale agreement for purchase of a portion of the deceased's parcel of land known as ***LR NO THEGEGE/IHITHE/520***, *(hereinafter referred to as the suit land)* with Ester Njoki Kimotho. The appellant is a son of the late Charles Kimotho Mukunu (deceased) who died intestate on the 7th day of December, 1985.

[2] The genesis of this dispute that has now snowballed into the present appeal can be linked to a sale agreement dated the 21st February, 1995. In that sale agreement, Ester Njoki Kimotho in her capacity as the widow of the deceased agreed to sell to John Munnu Njugi (the deceased), who we understand was the husband of the respondent, a portion of the aforesaid parcel of land measuring 1.5 acres. That sale agreement was entered into before Ester Njoki obtained the grant of letters of administration. It would appear that the said agreement was executed by Ester Njoki and some of the beneficiaries of the deceased's estate including the appellant who also endorsed it. Up to that stage, there is no dispute. What is in contestation in this appeal is the mode of performance of that sale transaction which was done within a succession cause by the respondent who was not a beneficiary of the deceased estate.

[3] Sometimes in April 1996, Ester Njoki Kimotho in her capacity as the widow of the deceased applied for the letters of administration in respect of the deceased's estate. She named the beneficiaries of

the estate as the following:

1. ***Ester Njoki Kimotho - Widow***
2. ***Cyrus Ndungu Kingori - Son***
3. ***Joseph Mwaniki Kingori - Son***
4. ***Peter Wahome Kingori - Son***
5. ***Priscilla Wangari Mwangi - Daughter***
6. ***Mary Wambui Ndiritu - Daughter***

The deceased's assets were indicated as two properties, namely ***LR NO THEGENGE/ITHITHE/520*** and ***Plot No. 720*** in Ol Dala Farm.

[4] On 13th February, 2009, the respondent filed an objection to the making of the grant on the grounds that her interests in respect of the 1.5acres portion out of Title ***No Thegenge/Ihithe 520*** was not noted. The respondent also cross petitioned on behalf of the estate of the purchaser to be issued with the letters of administration of the deceased's estate. It seems the respondent also placed a caveat on the suit land. Both the petitioner and the objector seem to have taken no steps to prosecute the petition. By a strange twist of fate, Ester Njoki Kimotho died on the 20th June, 2001. The appellant as one of the beneficiaries of the deceased's estate did apply to be substituted, but it would seem that application merely remained on the court records as no order was made to that effect. On the other hand, the respondent successfully moved the High Court for an order of injunction to restrain the beneficiaries of the deceased and their agents or servants from interfering with the caveator's possession of the suit premises. An order of injunction was issued on 15th June, 2004.

[5] The respondent also proceeded with the prosecution of the objection after Ester Njoki Kimotho died and the record shows that her cross petition was duly gazetted. The respondent was issued with the grant and it was confirmed on 30th October, 2009. On the 8th January, 2010, the appellant filed the summons seeking to revoke the same grant. That summons was predicated on the grounds that the grant was obtained fraudulently by making of false statements and concealing material facts particularly the fact that the sale agreement forming the basis of the objector's/ respondents' claim was *void ab initio* and of no effect this was because Ester Njoki lacked capacity to sell the land. Secondly the appellant contended that the grant was obtained by means of untrue allegations of fact essential in a point of law to justify the grant; and finally the proceedings to obtain the grant were defective in substance.

[6] That application was heard by way of written submissions. After considering the affidavit evidence for and against the application for revocation the learned trial Judge made the following conclusion in his ruling of 16th July, 2010:

> ***"The application for confirmation of grant was heard and allowed on 30th October 2009 in the presence of the applicant and his counsel. The applicant waited until the 3rd February 2010, when he took out the current summons for revocation of grant. It is quite clear from the history of this dispute that the applicant herein was aware of the existence of the claim by the respondent against the estate of the deceased. He was served with the pleadings on several occasions. The cross-petition was advertised in the Kenya gazette notice. It cannot be said that the respondent concealed some facts material of this case. The applicant was personally served with the order of injunction issued by this court on 30th June 2007. The applicant has pointed out certain defects which he thinks will invalidate the respondents' title. With respect, I agree with the submissions of Mr. Wahome. That the respondent's title cannot be defeated by virtue of the provisions of section 93 of the Law of Succession Act. the respondent has been open and transparent in pursuing the deceased's estate. She cannot be accused of material non-disclosure nor of fraud. There is evidence that the respondent has been in occupation of the suit land for many years. The law of succession recognizes such rights".***

[7] This is the judgment or ruling that has provoked this appeal that is predicated on some 7 grounds of appeal that in summary and in order to avoid repetition and proliferation, faults the learned trial judge for:

1. ***Holding that the respondent was a beneficiary of the deceased's estate; and proceeding to distribute the estate to her thereby disinheriting the rightful heirs.***

2. ***Holding that the respondent was protected under Section 93 of the Law of Succession Act whereas the sale agreement was void ab initio.***

3. ***For failing to appreciate that the respondent was guilty of material non-disclosure and for making untrue allegations of facts essential in point of law.***

4. ***For failing to appreciate the respondents claim was a liability to the estate and did not entitle her to a share thereto.***

5. ***For distributing part of the deceased estate to the respondent when she was neither a dependant nor a beneficiary of the estate.***

6. ***For arriving at the conclusions that was against the weight of the evidence on record.***

[7] In further arguments to support the above grounds of appeal, Mr. Sigilai learned counsel for the appellant submitted that the respondent was a stranger to the estate of the deceased; her claim was based on a sale agreement which was between her late husband and Ester Njoki who had no grant of letters of administration to deal with the estate of the deceased; this was an agreement for sale of agricultural land which was a controlled transaction, nonetheless the land control board consent was not obtained; the full consideration for the land was also not paid; thus the provisions of ***Section 93*** of the ***Law of Succession Act*** cannot aid the respondent for reasons that the transaction was illegal *ab initio.* [8] According to counsel for the appellant, the respondent claimed that she was a beneficiary of the estate of the deceased instead of claiming from the estate as a creditor. The respondent was faulted for claiming that she was a beneficiary of the deceased's estate, which was tantamount to concealment of material facts and the grant was therefore issued contrary to the provisions of ***Section 71*** of the ***Law of Succession Act***. There was no consent by the beneficiaries when the grant was issued. Counsel also drew our attention to the proceedings when the grant was confirmed, counsel for the appellant informed the court that they were not served with the summons for confirmation and that notwithstanding, the Judge proceeded to confirm the grant instead of giving the appellant time to prepare for the hearing.

[9] This appeal was opposed by Mr. Gikonyo, learned counsel for the respondent, who took a two pronged approach. First, counsel challenged the competency of the appeal which he argued was filed without the leave of the court. On this issue, we drew the attention of counsel to the provisions of ***Rule 84*** of this ***Court Rules*** that require an application challenging the competency of an appeal to be filed within 30 days of the service of the record of appeal. Counsel was, however, of the view the issue of the competency of the appeal was a matter of law and could be argued alongside other arguments. He submitted that the appeal before the Court was bad in law as the appellant never sought leave of the High Court as provided for under Section 75 of the Civil Procedure Act. He cited the case of ***MAKHANGU V KIBWANA EALR, [1995-1998] 1 EA 168*** where this Court held that:

> ***"Under section 47 of the Succession Act (Chapter 160), the High Court had jurisdiction on hearing any application to pronounce decrees or orders. Any order made under this section was appealable under section 66 of the Civil Procedure Act either as of right if it fell within the ambit of section 75 of the Civil Procedure Act or by leave of the court if it did not.***
>
> ***The order dismissing the application in this case was not covered by section 75 of the Civil Procedure Act and was therefore only appealable by leave of the Court. Since no leave was obtained the appeal was incompetent".***

Counsel was of the view that the decision that is appealed against was not a decree or order that attracted automatic appeal. The appellants' application was simply dismissed thus it was necessary for the appellant to obtain the leave of the court.

[10] The other grounds urged in opposition to this appeal were that the memorandum of appeal, and arguments by counsel for the appellant went beyond the scope of the matters that were adjudicated upon by the Judge on an application for revocation of the grant. The appellant had alleged that the grant of letters of administration was fraudulently issued to the respondent but he failed to prove those allegations. The respondent was able to prove the existence of a sale agreement and the sum of Ksh 72,000/= that her late husband had paid to redeem the title to the suit property which was under eminent danger of being auctioned to recover an outstanding debt over the suit property. Equity follows the law; the appellants cannot keep the money and the parcel of land. The appellant signed the sale agreement as a witness and he should not be made to benefit from his own wrong doing. The respondent could not file a civil case because the beneficiaries of the deceased were not cooperative and they failed to take out letters of administration. Counsel urged us to dismiss the appeal.

[11] In response to the above submissions, Mr. Sigilai urged us to consider that the holding in the case of ***Makhangu*** case (supra) did not bring out the nature of the pleadings that were before the court. Secondly the provisions of ***Section 75*** of the ***Civil Procedure Act*** are clear that no leave is required when the decision of the High Court results into a decree. This is because, after the application was dismissed the grant was confirmed which gave rise to a decree. Counsel further urged us to embrace the broad principles in the administration of justice as per the Constitution of Kenya and ensure substantive justice is addressed instead of resorting to striking out this appeal on a mere technicality.

[12] This is a first appeal and that being so we have a duty to reevaluate the evidence on record and draw our own independent conclusion. See the case of ***Selle v Associates Motor Boat Company, [1968] EA 123, at page 126*** where it was held:

> ***".....this Court must reconsider the evidence, evaluate itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect....." See Jwanji vs Sanyo Electrical Company Limited (2003) KLR 425".***

[13] As pointed out earlier in this judgment, the respondent did not file an application under ***Rule 84*** of ***this Court's Rules*** seeking to strike out the appeal. Therefore we have a duty to address the merit of this appeal and consider the issue of the competency of the appeal as one of the arguments against the appeal. Matters of succession are governed by the Law of Succession Act which is a complete code with its own rules of procedure known as the Probate and Administration Rules. The only provisions of the ***Civil Procedure Rules*** applicable to proceedings under the ***Law of Succession*** are those that are specifically imported under the provisions of ***Rule 63*** of the ***Probate and Administration Rules*** which provides as follows:

> ***"Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Orders V, X, X1, XV, XV111, XXV, XL1V, and XLIX, together with the High Court (Practice and Procedure) Rules, shall apply so far as relevant to proceedings under these Rules".***

***Section 50*** of the ***Law of Succession Act*** provides that:

1. ***"An appeal shall lie to the High Court in respect of any order or decree made by the resident magistrate in respect of any estate and the decision of the High Court thereon shall be final.***

2. ***An appeal shall lie to the High Court in respect of any order or decree made by a Khadhis' Court of the estate of a deceased Muslim and, with prior leave thereof in respect of any point of Muslim law. To the Court of Appeal".***

[14] There is no provision for appeals from the High Court to the Court of Appeal. What are provided for are appeals from lower courts to the High Court. That is why Mr. Gikonyo argued that it was necessary for the appellant to seek leave of the Court as there was no automatic right of appeal. We must

state that this is clearly a grey area as it may also be argued that ***Section 66*** of the ***Civil Procedure Act*** is not automatically imported into the ***Law of Succession Act***. There is also a thin line to be drawn as to whether the order appealed against was a decree or a mere dismissal order that did not amount to a decree. This is because upon the dismissal of the application for revocation, the grant was confirmed thereby resulting into a decree. Be that as it may, this appeal was filed in 2011 after the ***Constitution of Kenya 2010*** that gives the Court of Appeal jurisdiction to hear appeals from the High Court and any other court or tribunal as prescribed by an ***Act of Parliament*** was operational. Under the ***Constitution***, all matters from the High Court are appealable to the Court of Appeal. We therefore find that this appeal is competently before us.

[15] On the merits of the appeal, it is not disputed that the respondent was not a beneficiary of the estate of the deceased. Her husband was a purchaser of a 1.5 acres portion of the deceased's suit. The sale agreement was entered into between the late John Munnu Njugi and Ester Njoki, the widow of the deceased before she obtained the letters of administration. The issue of whether she had legal capacity to deal with the estate of the deceased was not addressed by the High Court. It has been repeated time without number that the objectives of the Law of Succession Act are the administration of a deceased's estate. Claims of civil nature regarding contracts entered into on behalf of the estate of a deceased person unless they have been recognized by the administrators of that deceased person's estate as liabilities to the estate, fall within the civil realm of the law and cannot appropriately be determined in a succession cause.

[16] There were other issues such as the competency of the sale agreement that were raised and with respect, the learned Judge did not address them. It was submitted that the consent of the land control board regarding the sale agreement was not obtained and further the full purchase price was not paid. To us these were valid points as the grant was confirmed to the respondent who should have been ranked after the beneficiaries and she went ahead to transfer the suit land to herself before complying with the laid down procedure governing sale of land. The other issue that was also not considered by the trial Judge was the mode of distribution of the estate. Even at the hearing of this appeal, we sought clarification from counsel for the respondent on how the respondent was able to know the appropriate shares of the land to distribute to the respective beneficiaries as there was no consent of the beneficiaries as provided for under the ***Probate and Administration Rules***. The respondent who was merely a creditor took over the administration of the deceased's estate and used her own discretion or lack of it, to distribute it to herself and the beneficiaries.

[17] It was argued for the respondent that the appellants sat on their laurels and did not take the initiative to prosecute the succession cause after the death of Ester Njoki. That may not entirely be correct as we find on the record an application by the present appellant filed on the 8th October, 2009, in which he sought to be substituted for Ester Njoki. Even if this application was not prosecuted, this cannot be blamed on the appellant. We also note from the record of proceedings of the 30th October, 2009, when the grant was confirmed, that the appellant was represented by Mr. Kingori who addressed the court as follows,

> ***"My client was not served with a hearing notice for the summons for confirmation".Court:***
>
> ***"The grant is confirmed as prayed in the summons for confirmation of grant dated 06/07/2009 as prayed in the supplementary affidavit".***

[18] From the above proceedings, we are not satisfied that the appellant was given a hearing because the Judge did not satisfy himself as to whether or not the appellant was served with a hearing notice. As this Court stated in the case of ***Richard Ncharpi Leiyangu V IEBC &Another, C .A. No. 18 of 2013 ( Nyeri):***

> ***"The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the Court process from abuse that would amount to injustice and at the end of the day there should be proportionality. We are of the view the learned Judge misapprehended the reasons given for non-attendance which arose as a result of a mistake. In the case of Philiph Chemowolo &***

***Another v Augustine Kubede [1982-88] KAR 103 at 1040 Appalo JA*** *(as he then was) posited as follows:*

> ***"Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline".***

The appellant may not have pleased the Judge by the nature of the shoddy manner he represented matters before the Court; he may not also have appeared as a person driven by good faith; but he was entitled to a fair hearing.

[19] The last issue to consider is whether the respondent's interests regarding the purchase of 1.5 acres of land were protected under the provisions of ***Section 93*** of the ***Law of Succession***. It is obvious the learned Judge misapprehended the above provision as Ester Njoki did not have the requisite grant of representation when she entered into a sale agreement. The sale transaction was also not completed as there was no transfer by Ester Njoki or the deceased. Had the Judge addressed all these issues he would have come to the conclusion, like we have, that the grant of letters of administration issued to the respondent ought to have been revoked.

[20] In the upshot we find merit in this appeal, which we hereby allow with the result that the orders made on the 16th July, 2010, are hereby set aside. The confirmed grant issued on 30th October, 2009, and the consequential orders are set aside. The appellant should move the High Court for substitution of the late Ester Njoki and move appropriately from where the widow of the deceased left the succession cause when it was taken over by the respondent. Due to the nature of these proceedings we order that each party do bear their own costs.

***Dated and delivered at Nyeri this 6th day May, 2014.***

***ALNASHIR VISRAM***

**……**

***JUDGE OF APPEAL***

***M. K. KOOME***

**…….**

***JUDGE OF APPEAL***

***D. K. MARAGA***

**……..**

***JUDGE OF APPEAL***

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

**DEPUTY REGISTRAR**