



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME, & OTIENO - ODEK, J.J.A.)

CIVIL APPEAL NO. 121 OF 2010

BETWEEN

PHILLIP MUCHIRI MUGO APPELLANT

AND

MBEU KITHAKWA RESPONDENT

(An appeal from the Ruling and Order of the High Court of Kenya at Nyeri (Makhandia, J.) dated 28th February, 2009

in

Nyeri HCCC No. 111 of 1990)

JUDGMENT OF THE COURT

1. By a Ruling dated 28th February, 2009, the High Court (Makhandia J as he then was), stated that there must be an end to litigation. The background facts are that on 22nd August, 1990, one Mugo Kathakwa (deceased) commenced suit against the respondent herein Mbeu Kithakwa, his step brother. Mugo Kathakwa sought eviction of the respondent from the suit property namely ***Inoi/Kerugoya/769***. The body of the deceased plaintiff is still lying at the mortuary awaiting determination of the dispute involving the suit property.
2. The original plaintiff, Mugo Kathakwa died on 18th May, 2006. On 17th October, 2008, an ex parte order was made by the High Court wherein the suit property was transferred to the respondent. The appellant, who now has a limited grant of letters of administration, alleges that the order made on 17th October, 2008, was made after the death of the original plaintiff and before substitution had been done to enable a personal representative to represent the estate; that the appellant had not obtained letters of administration as at 17th October, 2008, and he could not represent the estate; that whereas the appellant had a power of attorney donated by the deceased, the said power of attorney lapsed on the death of the original plaintiff. That the learned Judge erred in law in making the *ex-parte* orders when the original plaintiff in the suit was dead.
3. The appellant's application to set aside the *ex-parte* orders issued on 17th October, 2008, was dismissed by a ruling dated 26th February 2009, which is the subject of this appeal. The learned Judge in his ruling did not consider or address the issue that the original plaintiff was deceased; instead, the Judge in declining to set aside the orders of 17th October, 2008, found that the appellant had been served with the hearing notice and that he knew the case was coming up for

hearing. Pursuant to the orders of 17th October, 2008, the respondent obtained consent of the Land Control Board and transferred the suit property to himself and title was issued in his name. The learned Judge in dismissing the application further stated that no useful purpose would be served in setting aside the orders made on 17th October, 2008, as the appellant's application had been spent and could not be revived.

4. Aggrieved by the ruling dismissing his application to set aside the orders made on 17th October, 2008, the appellant has filed a memorandum of appeal in this Court citing five grounds:

i. The learned Judge erred in law and fact in failing to set aside the order dated 17th October, 2008, which had been issued against a deceased person.

ii. That the learned Judge erred in law and in fact in failing to appreciate that sufficient cause had been shown to warrant the granting of the appellant's Notice of Motion dated 19th November, 2008, and the limitation period had lapsed to enforce the judgment sought by the application dated 7th August, 2008.

iii. That the learned Judge erred in law and fact in rejecting the appellant's contention that he was not served with the hearing notice of 17th October, 2008.

iv. That the learned Judge erred in law and in fact in refusing to grant the appellant a chance to be heard on the application dated 7th April, 2008.

v. That the learned Judge erred in law and fact in disregarding the fact that the orders being sought to be executed by the application dated 7th April, 2008, had been set aside.

5. At the hearing of this appeal, the appellant was represented by learned counsel, Okoth Jacob Auma holding brief for Mr. Arusei, while learned counsel Messrs Warutere Davidson appeared for the respondent.

6. Counsel for the appellant submitted that the Judge erred in dealing with the matter as if all parties were alive and kicking and he misdirected himself in making an order dismissing the suit of a plaintiff who was deceased; that even if there was service of the hearing notice, the learned Judge erred in dealing with the estate of the deceased without regard to the provisions of **Order 24** of the **Civil Procedure Code** and acted unfairly; that the appellant is entitled under **Article 50** of the **Constitution** to a fair and public hearing before an independent and an impartial tribunal or body; that the suit property was transferred without hearing and representation of the estate of the deceased. It is the appellant's case that when the matter came up for hearing before the High Court, the Judge proceeded to make ex-parte orders when no individual had letters of administration over the estate of the deceased. Counsel for the appellant cited **Article 159 (2)** of the **Constitution** and urged this Court to make a determination of the issues involved without undue regard to procedural technicalities; this Court was also urged to bear in mind the provisions of **Section 3A** and **3B** of the **Appellate Jurisdiction Act** on the overriding objective of the court to administer justice expeditiously and proportionately. Counsel cited the cases of Commissioner of **Income Tax -v- Kencell Communications Ltd.; Civil Appeal No. 84 of 2007, The Motor Vessel "Lillian S" -v- Caltex Oil (K) Limited 1989 KLR1** and **Benjamin Leonard Macfoy -v- United Africa Co. Ltd., (1962) AC 152**. Relying on the **Benjamin case** (*supra*), the appellant submitted that the respondent's title deed of the suit property was null and void. This is because the title was obtained through a court order which was issued without the deceased plaintiff being heard. It was submitted that the proceedings that led to the issuance of the said title were irregular, a nullity and void *ab initio*.

7. Counsel for the respondent in opposing the appeal submitted that in 1983, land parcels **Inoi/Kerugoya/104** and **Inoi/Kerugoya/113** and **Kiaritha 49** were inherited by two step brothers namely Kithakwa Njeru on one hand and Muchiri Njeru and Ndonga Kithakwa on the other hand according to kikuyu customary law. The said Kithakwa Njeru is the respondent's father whereas Muchiri Njeru is Mugo Kithakwa's (deceased plaintiff) father and grandfather to the appellant; that **Land Parcel Inoi/Kerugoya/104** is registered in the name of Ndonga Kithakwa, a brother to Mugo Kithakwa while

Land Parcel Kiaritha 49 is registered in the name of the deceased, Mugo Kithakwa. Counsel submitted that **Land Parcel Inoi/Kerugoya/113** was sub-divided into two parcels **Inoi/Kerugoya/768** and **Inoi/Kerugoya/769**; that **Land Parcel Inoi/Kerugoya/769**, is the suit property where the respondent resides.

8. The respondent submitted that deceased Mugo Kithakwa, alleged that the respondent had trespassed on to the suit property since 1982; the High Court by orders made on 17th October, 2008, decided the suit in favour of the respondent. It is the respondent's contention that the appellant has no *locus standi* to institute the present appeal based on his own admission that he was never substituted as the personal representative of the deceased plaintiff and that the matter had been concluded on 22nd November, 1995, by consent of the parties before Hon. Justice M.A. Ang'awa.

9. The respondent contends that the appellant did not have letters of administration; the appellant had made an application for grant of letters of administration vide **Nyeri HCCC Misc. 229 of 2009**, wherein the Court declined to grant the same; that the appellant later filed a similar application in Nairobi being **Probate and Administration Cause No. 636 of 2009**, without disclosing that a similar application had been filed and declined before the Nyeri High Court. It was submitted that a grant of letters of administration cannot serve as an alternative to substitution of a party; that in the present appeal, the proper procedure would have been for the appellant to apply to be substituted as a party in place of the deceased. Counsel cited the case of **Penina Auma Otieno – v- Charles Otieno Ayoo & 2 others HCCC No. 138 of 2004**, in support of the submission.

10. On the issue that service of the hearing notice was not proper at the High Court, the respondent submitted that the process server was cross-examined and the learned Judge was satisfied that service was effected upon the appellant. The respondent urged this Court not to interfere with the findings by the Judge who heard the process server. Counsel cited the case of **Shah –v – Mbogo, (1967) EA 116**, to buttress the submission that the Judge properly exercised his discretion in arriving at the conclusion that the hearing notice was properly served upon the appellant. The respondent relied on **Article 159 (2)** of the **Constitution** and urged this Court not to rely on technicalities in arriving at its decision. It was submitted that while the respondent sympathized that the appellant has never given his father a decent burial, counsel urged this Court not to be swayed by sympathetic considerations taking into account that **Land Parcel No. Kiaritha 49** is registered in the name of the deceased where he can be buried there; the appellant is not candid and he is bent on delaying the cause of justice and this Court should not allow its process to be abused (See **Safe Rentals Limited – v- Africa Safari Club Limited, Civil Appeal No. 225 of 2010**).

11. We have considered the submissions made by counsel in this matter and analyzed the ruling delivered by the learned Judge on 26th February, 2009. The issue is whether the learned Judge erred in law and fact in declining to set aside the orders made on 17th October, 2008. There are two primary considerations that guide as an answer to the issue. The first relates to the appellant's submission that the original plaintiff was dead when the High Court made orders on 17th October, 2008; the plaintiff having died on 18th May, 2006, **Nyeri HCCC No. 111 of 1990**, had already abated as a matter of law on 17th October, 2008, when the learned Judge issued the orders. There is no dispute that the original plaintiff died on 18th May, 2006; what is unclear is whether it was brought to the attention of the learned Judge that the original plaintiff was dead when the court issued the orders on 17th October, 2008.

12. The second issue raised by the appellant and respondent is that no letters of administration had been issued for the estate of the deceased as at 17th October, 2008. The appellant submitted that the learned Judge erred in law in issuing orders in a suit involving a deceased party when no legal representative had been appointed. On the other hand, the respondent's case is that this appeal should be dismissed because the appellant had not been substituted as the legal representative of the estate of the deceased to enable him file and institute the present appeal; that although the appellant had limited letters of administration *ad litem*, he had not been substituted as a party to the suit at the High Court and in this appeal.

13. In the instant appeal, we are invited to exercise judicial discretion to set aside the orders made by

the High Court on 17th October, 2009, and to dispense justice without undue regard to technicalities. While this Court has power under both **Article 159** of the Constitution and **Sections 3A** and **3B** of the **Appellate Jurisdiction Act**, the said Article and sections cannot be interpreted to dispense with the requirement to substitute a deceased person in a suit by a duly appointed legal representative.

14. It is not in dispute that when the High Court issued the orders appealed against on 17th October, 2008, the original plaintiff had died on 18th May, 2006. There is no evidence on record to show that this fact was expressly brought to the attention of the learned Judge; however, the evidence on record shows that on 30th November, 2007, a Chamber Summons application was filed at the High Court by the respondent wherein he sought to substitute the deceased plaintiff. The affidavit in support of the Chamber Summons dated 30th November, 2007, deposed that the original plaintiff was deceased. The appellant in his replying affidavit dated 28th January, 2008, confirmed that the plaintiff died on 18th May, 2006, and stated that he had never been appointed as the legal representative.

15. It is apparent that more than 12 months had lapsed since the death of the plaintiff on 18th May, 2006, to the date when the High Court issued its orders on 17th October, 2008. By virtue of operation of law, the suit filed by the plaintiff as **Nyeri HCCC No. 111 of 1990** had abated. **Order 24 rule 3 (2)** provides that:

“where within one year no application is made to substitute a deceased plaintiff by a legal representative, the suit shall abate as far as the deceased plaintiff is concerned...and on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff”.

16. On our part, we are convinced that had the fact of death of the plaintiff been disclosed to the learned Judge (Makhandia, J.), he would have arrived at a different decision and declared that **Nyeri HCCC No. 111 of 1990**, had abated and the Judge would not have conducted ex parte hearing without a legal representative for the estate of the deceased plaintiff. For these reasons, we allow the appeal and set aside the Ruling of the High Court dated 17th October, 2009, and the consequential orders and actions taken pursuant thereto. We substitute in its place an order that the **Nyeri High Court Civil Suit No. 111 of 1990**, be and is hereby declared as having abated by virtue of the death of the original plaintiff, Mugo Kithakwa, on 18th May, 2006. Each party is to bear his own costs in this appeal.

Dated and delivered at Nyeri this 30th day of June, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR