



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI JJ.A)

CIVIL APPEAL NO. 95 OF 2011

IN THE MATTER OF THE ESTATE OF EZEKIEL LUKALO ALUDA -

(DECEASED)

BETWEEN

TOM LUKALO..... APPELLANT

AND

BEATRICE LUKALO1ST RESPONDENT

MARGARET OSOLIKA 2ND RESPONDENT

(An Appeal from the ruling and orders of High Court of Kenya

at Kakamega (Chitembwe, J.) dated 15th October, 2009

in

H.C. SUCC. NO. 408 OF 1998

JUDGMENT OF THE COURT

Background

1. This appeal is from the Ruling of the High Court (*Chitembwe, J.*) in a succession matter relating to the estate of *Ezekiel Lukalo Aluda* who died intestate on 2nd March, 1996. At the time of his death the deceased left a sizeable estate in immovable properties. He was survived by his wife and children.
2. On 29th October, 1996 a grant of representation to the estate of the deceased, was issued to the respondents, *Beatrice Lukalo* and *Margaret Osolika*, who are daughters of the deceased. The deceased had eight (8) other children with *Josephine Kaveza* the mother of the respondents. The deceased had other children including the appellant whose mother was called *Selina M'mboga* but was not the deceased's wife at the time of his death.
3. The record shows that the appellant made several applications before the High Court challenging

the issue of the grant of representation to the respondents and the subsequent Certificate of Confirmation of Grant.

4. By his application filed on 27th October, 1997 the appellant sought the revocation and/or annulment of the grant issued to the respondents on 29th October, 1996. That application was dismissed for non-attendance on 21st October, 1999.
5. By his application dated 1st November, 1999 the appellant sought an order setting aside the order of 21st October, 1999 dismissing his application. That application was struck out on 17th December, 2004.
6. An attempt to lodge an appeal against the said order was made but the same was abandoned.
7. On 11th January, 2006 the appellant lodged yet another application seeking the revocation or annulment of the confirmed grant of representation. The application was by way of Summons in Chambers dated 24th October, 2005. That is the application which was dismissed by the High Court (*Chitembwe J.*) on 15th October, 2009 which is the subject of the appeal before us.

The appellant's Case

8. The appellant sought the revocation and/or annulment of the said grant on the grounds that strangers had benefited from his father's estate and that the appellant and other beneficiaries had been locked out of their father's estate. He alleged further that he had not been aware of the proceedings leading to the confirmation of grant and that had he been informed, the distribution of his father's estate would have been fair.
9. On 15th October, 2009 Chitembwe J, dismissed the appellants application for revocation and/or annulment of the grant aforesaid. On the appellant's twin complaints the learned judge said:-

***“The objector was allocated plot No. N. MARAGOLI/KISATIRU/471 jointly with Douglas Lukalo. The applicant contends that the plot did not belong to the deceased. I have noted from record that the plot is one of the deceased's properties and unless the alleged owner raises objection, I have no reason to doubt the petitioners decision to include it as part of the deceased's estate.*”**

The applicant has not indicated which strangers benefited from the estate. Distribution of a deceased's estate should not be taken to be a process whereby each beneficiary should get an equal share.”

10. The learned Judge refused to revoke and/or annul the grant for the further reason that to reverse the process of distribution which had occurred 10 years earlier would lead to unnecessary difficulties to the beneficiaries.

Appeal

11. That ruling triggered this appeal by the appellant. He has cited six (6) grounds of appeal expressed as follows:-

***“1. That the learned Judge erred in law and in fact in failing to find that the proceedings to confirm grant were defective in substance as all persons beneficially entitled were not notified and more specifically the applicant as confirmation of grant of letters was made immediately after dismissal of the applicants objection.*”**

***2. That the learned Judge erred in law and in fact in finding that revocation of certificate of confirmation of grant herein would occasion undue hardship to other beneficiaries in the absence of any evidence on record to that effect.*”**

***3. That the learned trial Judge erred in law and in fact in finding that the appellant had benefited from his late father's estate contrary to the evidence on record.*”**

***4. That the learned Judge erred in law and in fact in failing to recognize that the appellant has a right to lay claim over the late father's estate and his rights did not depend on the rights of other*”**

beneficiaries.

5. That the trial Judge failed to appreciate the appellant's application leading to his finding that the distribution herein was fair contrary to the evidence on record.

6. That the learned Judge erred in law and in fact by deciding on issues that were not raised before him.”

Submissions of counsel

12. **Mr. Munyendo**, learned counsel for the appellant, submitted in substantiation of the above grounds, that the distribution of the estate of the deceased was inequitable as the appellant did not benefit from his father's estate. Learned counsel further referred us to two of the deceased's properties which were given to persons not entitled as heirs. He further contended that only the respondents benefited from the estate.
13. In response to those submissions, **Mr. Lore**, learned counsel for the respondents, contended that the learned Judge of the High Court had exercised his discretion judicially in taking into account the fact that the beneficiaries may have greatly improved their shares. In his view there was no basis to disturb the decision of the learned Judge.

Analysis

14. Having considered the record, the grounds of appeal and counsel's submissions, we have come to the conclusion that this appeal be allowed. In view of the order we propose to make, we shall confine ourselves to matters which we think will not put the trial Judge in a bind.
15. The starting point of course is the ruling of the learned Judge dated 15th October, 2009. The learned Judge rejected the appellant's objection on three grounds. First that plot No. *N/MARAGOLI/KISATITU/471* was one of the assets of the estate of the deceased as the alleged owner had raised no objection to its inclusion among the properties of the estate.
16. The second reason for declining the appellant's objection was that no other beneficiary was complaining.
17. The third ground was that it was too late to disturb the distribution which had been made by the respondents as the respective shares could have been improved at great expense and a reversal of the distribution made would lead to unnecessary difficulties to the beneficiaries.
18. We have perused the Certificate of Official Search in respect of *N/MARAGOLI/KISATIRU/471* which was exhibited at the trial. The Search Certificate shows that this parcel of land was registered in the name of **Marko Mbaizi Sasia** on 7th April 1970. It is probably a first registration.
19. The record does not show how the said title became an asset of the estate of the deceased. The fact that the said title was not registered in the name of the deceased was clear beyond peradventure. It was registered in the name of Marko Mbaizi Sasia. The record does not show that the said proprietor was even aware of the succession proceedings. With due respect to the learned Judge, it was a gross misdirection for him to say that the said proprietor had not raised any objection to the parcel of land being given to the appellant.
20. By dint of the proviso to **section 71 (2)** of the Law of Succession Act, the learned Judge should only have confirmed the grant after first ascertaining the assets of the deceased and the identities of the beneficiaries. He fell into error to confirm the grant with the knowledge that parcel No. *N/MARAGOLI/KISATIRU/471* given out to the appellant and his brother was not registered in the name of the deceased and was therefore not available for distribution.
21. Even if the said parcel was indeed the property of the deceased but only remained to be transferred to him at the time of his demise, it was the duty of the respondents as legal representatives of the estate of the deceased to institute proceedings against the registered proprietor for transfer of the same to them as legal representatives of the estate of deceased. The record does not have evidence of the respondents' efforts to recover the said parcel of land.
22. The appellant is only an heir to the estate of the deceased. He would have no capacity to institute recovery proceedings in his own right. In the premises we wonder how the order of the learned Judge with respect to the parcel of land would have been executed.

23. The appellant was and has always been acknowledged by the respondents as the first son of the deceased. So, the question of whether he was beneficially entitled to a portion of his father's estate did not arise.
24. Given the registration particulars of title No. N/MARAGOLI/KISATIRU/471, we think the appellant's complaint that he did not benefit from his father's estate is not without basis and his interest could not be defeated by what the learned Judge termed as unnecessary difficulties to other beneficiaries who ***"might have either sold or incurred expenses in improving their respective shares of inheritance."***

Conclusion

25. For those reasons we allow this appeal. The distribution of the estate of the deceased is hereby set aside and substituted therefor with an order that the cause be and is hereby remitted back to the High Court for rehearing before a Judge other than Chitembwe J, on the issue of distribution of the estate of the deceased to the rightful heirs. For avoidance of doubt, the High Court has the discretion to only consider the undisputed aspects of the distribution of the deceased's estate. This in effect means that the Certificate of Confirmation of Grant issued to respondents is hereby set aside.

Costs

26. As this is a family matter we order that each party bears its own costs of this appeal and those of the High Court.

DATED AND DELIVERED AT KISUMU THIS 11TH DAY OF JULY, 2014

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR