IN THE COURT OF APPEAL AT NAIROBI

CORAM: GATEMBU, M'INOTI & MOHAMMED, JJ.A.

CIVIL APPEAL NO. 258 OF 2008

BETWEEN

RUTH NYAMBURA CHUCHU……....…….1STAPPELLANT

ZIPPORAH WANGUI CHUCHU……....……..……2ND APPELLANT

FLORENCE NJERI CHUCHU…….……..……..3RD APPELLANT

V

AND STEPHEN GATHOGA CHUCHU ALIAS

STEPHEN MUNGAI GITHU……....…..……..……RESPONDENT

(Appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Gacheche, J.) dated 8th April, 2008 in

H.C.C.C. No. 1379 of 2006)

****

JUDGMENT OF THE COURT

This appeal relates to the estate of **Solomon Chuchu Wataku** alias **Chuchu Wataku Gathiba (hereafter deceased),** late of Githunguri, Kiambu, who died on 9th March, 2006. The three appellants, **Ruth Nyambura Chuchu, Zipporah Wangui Chuchu** and **Florence Njeri Chuchu** who are the widows and joint administrators of the estate of the deceased, challenge a ruling of the High Court that ordered the taking of DNA samples from 5 sons of the deceased for purposes of determining whether the deceased was the respondent's father. They contend that the application that was heard by the High Court and which ought to have been determined, but was not, was a summons for revocation of grant, not an application for determination of the respondent's paternity.

The deceased left behind a vast estate estimated at the time of his death to be valued at approximately Kshs 138 million and was survived by his three appellant widows and twenty undisputed children. Following his death, the appellants, on 21st June, 2006, petitioned for Letters of Administration Intestate of his estate and were jointly issued with a Grant of Letters of Administration on 25th September, 2006.

What had promised to be an unusually seamless succession and transition in a polygamous

household was abruptly thrown into disarray on 27th November, 2006 when the respondent, **Stephen Mungai Githu** alias **Stephen Gathoga Chuchu,** filed a summons for revocation or annulment of the grant issued to the appellants. The grounds upon which the summons was based were that the appellants had fraudulently concealed to the court the fact that the respondent was a son and heir of the deceased; that the appellants were advanced in age and therefore unlikely to effectively and diligently administer the vast estate and that the respondent was likely to be denied his rightful share of the estate of the deceased.

In an affidavit sworn on 27th November, 2006 in support of the summons for revocation or annulment of the grant, the respondent further averred that the applicants had failed to disclose the full particulars and value of the estate and that prior to his death the deceased had recognized and accepted the respondent as his son. The summons were also supported by a subsequent affidavit sworn on 10th April, 2007 by one **Abigail Nyachomba Mugo** who deponed that she was the mother of the respondent; that she had had a relationship with the deceased from which the respondent was born on 1st September, 1960; that the respondent met and was introduced to the deceased in 1971; that the deceased paid the appellant's fees in primary school, secondary school and college; and that the respondent had been assisting the deceased to run his business empire.

The applicants resisted the summons for revocation of grant through an affidavit sworn on 20th February, 2007 by the 1st appellant, in which they denied that the respondent was a son or dependant of the deceased.

Before the summons for revocation or annulment of the grant could be heard and determined, two more applications were filed in the cause. The first was a summons for confirmation of the grant, filed by the appellants on

12th February, 2007. In that application, the appellants averred that it had been agreed by all the dependants of the deceased that his estate should be divided between his three houses, respectively represented by the three appellants. The summons was supported by a consent letter signed by all the twenty children of the deceased agreeing to and approving the proposed distribution of the estate.

The second application was filed by the respondent on 7th March, 2008. It sought an order to compel three children of the deceased, namely **Clement Ng'ang'a Chuchu, Peter Mburu Chuchu** and **Mary Wairimu Chuchu** and two brothers of the deceased, namely **John Njoroge Wataku** and **Peter Mburu Wataku** to provide DNA samples for purposes of determining the respondent's paternity. In the alternative, the respondent sought an order for exhumation of the remains of the deceased for DNA testing.

There is nothing on record to indicate that these two applications were ever heard, withdrawn or otherwise abandoned. When the parties appeared before **Gacheche, J.** on 10th March, 2008 for hearing, there was no doubt in their minds that the application before the learned judge was the summons for revocation or annulment of the grant dated 27th November, 2006, although the record erroneously indicates its date as 22nd November, 2006. **Mr Gitau**, learned counsel for the respondent, prosecuted the application relying on the affidavit sworn by the respondent on 27th November 2006 and that of his mother sworn on 10th April, 2007. For his part, **Mr Njuguna**, learned counsel then appearing for the appellants, opposed the summons contending that there was no evidence presented to the court to prove that the respondent was a son or dependant of the deceased.

On 8th April, 2008, the learned judge delivered a ruling in which she ordered the respondent to undergo a DNA test to conclusively determine his paternity. To give effect to that order, the learned judge further directed the appellants **"to nominate five named sons of the deceased who shall offer samples for the said test."** Those five sons were to be local residents and their names were to be supplied to the court within seven days of the order.

In arriving at that order, the learned judge held that the issue of paternity could not be

conclusively determined by affidavit evidence and that under **sections 22 and 23 of the Civil Procedure Act,** the court has power, on its own motion, to call a witness to give evidence or to produce documents.

Aggrieved by the ruling and order, the appellants filed a notice of appeal on 10th April, 2008 and followed it up with an application before this

Court for stay of execution of the order of the High Court. On 24 th October, 2008, this Court stayed execution of the order dated 8th April, 2008 until the hearing and determination of the appeal now before us.

In their memorandum of appeal, the appellants have set out six grounds of appeal. In our view, however, the issues of moment raised in the appeal are only three, namely:

i) **Whether the learned trial judge erred by making orders that were not sought in the application before her;**

ii) **Whether the learned judge erred by basing her decision on issues that were not pleaded or argued before her;**

iii) **Whether the learned judge erred by making orders against persons who were not party to the dispute.**

With the consent of the parties, the appeal was heard by way of written submissions under **Rule 100 of the Court of Appeal Rules** followed by oral highlights. For the appellants, **Mr Nduati,** learned counsel, submitted that the application that was heard by the learned judge was the summons for revocation or annulment of grant dated 27th November, 2006, but in her ruling, the learned judge ignored the issues that were raised in that application and canvassed before her and instead made orders regarding the respondent's paternity and DNA testing. The real issue canvassed before the learned judge, namely the revocation of the grant, counsel contended, was left in limbo. In counsel's view the appellants as well as the children of the deceased were denied an opportunity to be heard on the issue of DNA testing before the court made its order. It was learned counsel's further contention that adverse orders were issued against third parties, namely the intended donors of the DNA samples, who were not parties to the proceedings and who were not afforded an opportunity to be heard.

The order of the High Court was also impugned on the additional grounds that it lacked precision and was unenforceable in the event that the nominated sons of the deceased declined to submit themselves to DNA testing. It was further contended that sections 22 and 23 of the Civil Procedure Act which was invoked by the learned judge to order DNA testing, had no application to succession causes, being not one of the provisions of that Act applied to succession causes by **Rule 63 of the Probate & Administration Rules**.

Learned counsel concluded by citing the judgments of this Court in **GALAXY PAINTS CO LTD VS FALCON GUARDS LTD (CA No. 219 of 1998)** and **OLE NGANAI VS ARAP BOR (CA No 33 of 1981)** respectively for the propositions that a court can only pronounce itself on the issues before it, and that it will not grant an order that has not been prayed for.

Mr Gitau, learned counsel for the respondent opposed the appeal and supported the order of the High Court. In his view, the issue of DNA testing had been raised in the pleadings and was therefore a lingering issue which the learned judge could validly determine. Counsel submitted further that under sections 22 and 23 of the Civil Procedure Act, the court had power, on its own motion, to call a witness to give or produce evidence and that under **Rule 73 of the Probate and Administration Rules** the court has inherent powers to make the orders it deems necessary for the ends of justice.

On whether orders were made against persons who were not parties to the proceedings and who had

not been afforded an opportunity to be heard,counsel submitted that the parties affected by the orders made by the High Court were not strangers because they were beneficiaries of the estate of the deceased. And on enforceability of the order, learned counsel saw no impediment, since all the sons of the deceased were known and it would be very easy to pick any five of them. In any event, counsel added, DNA sampling and testing as provided in **section 122A(2) of the Penal Code** was a simple test whose minor inconvenience should not override the right of the respondent to know the identity of his parent.

Mr Gitau concluded his submissions by contending that the order of 8th April, 2008 was a mere preliminary order pending the hearing and determination of the summons for revocation of grant and that after the DNA testing, further proceedings would take place.

The decisions of the High Court in **MARY WAMBOI VS KIARIE CHEGE HC Misc App No 105 of 2004 (Kakamega)** and **IN THE MATTER OF THE ESTTAE OF GEORGE MUSAU MATHEKA HCCC No 470 of 1990** were relied upon to submit, respectively, that there is no inhibition to the power of the court to order DNA testing, or to determine issues of disputed paternity.

It is common ground that the hearing that took place on 10th March, 2008 was in respect of the respondent's application for revocation or annulment of grant dated 27th November, 2006. In his written submissions, Mr Gitau candidly conceded that at the date of the hearing of the summons for revocation or annulment of the grant, the respondent's application dated 7th March, 2008 for DNA testing did not have a hearing date. By electing to proceed with the application for revocation or annulment of grant before the

application for DNA testing was heard and determined, the respondent was in essence setting out to prove the grounds for revocation of the grant without the aid of the DNA evidence.

As the application for DNA testing was not before the trial judge, it is not surprising that none of the parties really addressed any of the DNA issues that arise from that application, such as the desirability of the DNA testing; whether DNA testing was necessarily the only method of proving the respondent's dependency on the deceased; the willingness or otherwise of the persons named in that application to submit to the DNA testing; the viability of the alternative prayer for exhumation of the remains of the deceased; whether the DNA testing, if ultimately ordered, would involve primary samples or would be restricted to sibling testing; among other such issues.

With respect, the learned judge erred in making the order on DNA testing while the issue was not before her. Ex concessis, that issue was pending for determination in the separate and distinct application dated 7th March, 2008. By proceeding as she did, the learned judge in effect determined issues in an application that was not before her and without the parties being afforded an opportunity to be heard on those issues.

The general rule still remains that parties are not allowed to raise issues other than those that they had submitted to the court for determination. In **GANDY VS CASPAIR (1956) 23 EACA 139**, **Sinclair V-P** stated that no relief will be given unless it is founded on the pleading. And in **BHARI VS KHAN (1965) EA 94,** at **P. 105**, **Newbold Ag V-P** stated as follows:

> **"If a judge were free to determine issues not before him, then it would result in the injustice of condemning a party upon a ground of which no fair notice had been given."**

It is however accepted that where the parties have raised an issue and left it for the decision of the court, it is within the power of the court to determine the issue even though it was not pleaded. So in **ODD JOBS VS**

MUBIA (1970) EA 476, the predecessor of this court held that:

"A court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision."

As we have already observed, in the appeal before us the issue of DNA testing was raised in a separate and distinct application which was still pending for hearing. During the hearing of the application for revocation or annulment of grant, the issues of DNA testing were not addressed. We find that on the facts of this appeal, the issue of DNA testing was not raised by the parties and left to the Court to decide within the application for revocation or annulment of the grant.

Another fundamental problem with the order of 8th April, 2008 relates to the right of the affected parties to be heard before the order was made. In the respondent's application for DNA testing, the samples were sought from five specified persons, namely:

i) **Clement Ng'ang'a Chuchu, son of the deceased;**

ii) **Peter Mburu Chuchu, son of the deceased;**

iii) **Mary Wairimu Chuchu, daughter of the deceased;** iv) **John Njoroge Wataku, brother of the deceased; and** v) **Peter Mburu Chuchu, brother of the deceased**.

In the order that the trial judge made, the DNA samples were to be provided by **"five named sons of the deceased who shall offer samples for the said test."** It is not clear where the five sons were **"named"** for no names were given in the ruling. Clearly the persons that the learned judge had in mind cannot possibly be the persons in respect of whom the applicant had sought DNA samples because not all of the persons specified by the respondent were "**sons"** of the deceased. There was a daughter and two brothers of the deceased among the five persons named by the respondent. Even assuming that the learned judge had in mind the pending application for DNA testing, which in the circumstances of the case before her she ought not, she ended up making an order against persons other than the particular persons against whom the respondent had specifically sought the order.

We are therefore not satisfied in the circumstances of this appeal that it can be asserted, as the respondent's counsel does, that the persons against whom the order was made had an opportunity to be heard on the issue of DNA testing simply because they are beneficiaries of the estate. The right to be heard is real, not assumed. In addition, granted the rather personal and, depending on the DNA collection procedure adopted, invasive or intimate nature of the procedure, it was necessary that, unless the persons against whom the order was made voluntarily agreed to submit to the procedure, they be afforded a real opportunity to be heard.

In **MUTISO VS MUTISO (1984) KLR 536**, this Court Stated that:

"It is a fundamental principle of justice that before an order or decision is made, the parties and particularly the party against whom the decision is to be made should be heard."

(See also **MATIBA VS ATTORNEY GENERAL (1995-1998) 1 EA 192**

There is still the vexed question of the uncertainty of the order issued on 8th April, 2008. From the record, the deceased has ten sons. Instead of specifying which five of those ten sons would have to submit the DNA samples, the court left it to the applicants to **"nominate"** five sons to give the samples. The natural question that arises is how the court order was to be enforced against any of the "nominated" sons if for any reason they were unwilling to submit themselves to DNA testing, having not been parties to the application and having not been afforded an opportunity to be heard?

It has been asserted time and again that a court should avoid making orders in vain or orders that are

ineffectual, in the sense that they cannot be enforced at all, or at any rate without undue supervision by the court. In **ERIC V.J. MAKOKHA & 4 OTHERS VS LAWRENCE SAGINI & 2 OTHERS, CA No. NAI 20 of 1994**, a bench of five judges of this Court stated, in the context of applications for injunctions, that a court should not stultify itself by making orders which cannot be enforced or which are ineffective for all practical purposes, and that the court ought not to grant orders that will be impossible to comply with. The principle, in our opinion, is valid even in the context of this appeal. (See also **HITENKUMAR AMRITLAL VS CITY**

COUNCIL OF NAIROBI, CA No 47 of 1981).

The appellants have satisfied us that the order of the High Court dated 8th April, 2008 cannot be allowed to stand on the grounds that it is based on issues that were not before the court, the persons who were likely to be directly affected by it were not afforded an opportunity to be heard and the order in and of itself is too uncertain to be capable of enforcement. On that basis, we do not consider it necessary to address the other issues raised by learned counsel on both sides of the dispute.

Accordingly, we allow this appeal and set aside the judgment of the High Court dated 8th April 2008. We also award the costs of the appeal and those of the application before the High Court to the appellants.

Dated and delivered at Nairobi this 10th day of October, 2014

S GATEMBU KAIRU

---------- JUDGE OF APPEAL

K. M'INOTI

---------- JUDGE OF APPEAL

J. MOHAMMED

---------- JUDGE OF APPEAL

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

DEPUTY REGISTRAR

jkc