REPUBLIC OF KENYA

Court of Appeal at Nyeri

Civil Appeal 155 of 2005

BETWEEN

GACHIHI WANG'OMBE ……..……..…..……. APPELLANT

AND

JAMES MURIUKI MAINA ……..……..…… 1st RESPONDENT

ERASTUS WANG'OMBE ……..…….. 2nd RESPONDENT

(Appeal from the ruling of the High Court of Kenya at

Nyeri (Khamoni J.) dated 26th July 2004

in

H,C.SUCC. C. No. 105 of 1999)

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JUDGMENT OF THE COURT

1. The issue in dispute in this Succession Cause has been before the courts since 1986 and the subject matter is land parcel no. Kirimukuyu/Thiu/54 being part of the estate of Maina Wang'ombe who died in 1986.

Background:

2. When Mr. Maina Wang'ombe died, land parcel No. Kirimukuyu/Thiu/54 was registered in his name. The deceased had a brother by the name Gachichi Wang'ombe who is the appellant in this case. The gist of the appellant's case is that although land parcel No. Kirimukuyu/Thiu/54 was registered in the name of his deceased brother, the said parcel was family land and belonged to their father and as such, the deceased held the land in trust for himself and the appellant in equal shares.

3. Upon the death of the deceased, his widow now late Hellen Thogori filed in the subordinate court Succession Cause No. 314 of 1986 in Nyeri which was later transferred to the High Court as Succession Cause No. 105 of 1999 for grant of letters of administration. A temporary grant of letters of administration was issued in favour of Hellen Thogori on 26th October 1987 which grant was supposed to be confirmed after six months. The said Hellen Thogori is the mother of the 1st and 2nd Respondents in this appeal.

4. At the hearing of this appeal, both parties agreed that the grant of letters of administration issued in favour of Hellen Thogori has never been confirmed by the High Court. Despite this, land parcel No. Kirimukuyu/Thiu/54 which is part of the estate of the deceased was transferred and registered in the name of Hellen Thogori and subsequently sub-divided and registered in the names of the 1st and 2nd Respondents. Upon sub-division, the parcel became known as Kirimukuyu/Thiu/770 and 771.

5. The appellant herein made an application in the High Court by way of Chamber Summons dated 20th August 2003 seeking orders for cancellation of the registration of the 1st and 2nd respondents as proprietors of Kirimukuyu/Thiu/770 and 771 and reversion of the original title Kirimukuyu/Thiu/54. The grounds for the application was that the letters of administration had not been confirmed and the issue of trust had not been determined. By a ruling dated 3rd October 2003, the High Court (Khamoni J) dismissed that application. No appeal was lodged against this ruling.

Present Appeal

6. The appellant lodged another Chamber Summons at the High Court dated 1st December 2003 and filed on 3rd December 2003 seeking orders for revocation or annulment of the grant issued to Hellen Thogori on 26th October 1987. This application was dismissed by the Court (Khamoni J) on 26th July 2004. The learned judge in dismissing the application stated that the matter was *res judicata* having been heard and determined through the ruling of 3rd October 2003.

7. The appellant lodged this appeal against the ruling made on 26th July 2004. The grounds of appeal are that:

i. the learned judge erred in fact and law by dismissing the application for revocation contrary to well laid-down legal procedures.

ii. the learned judge erred in fact and law by treating the Succession Cause as finalized when the grant had never been confirmed.

iii. the learned judge erred in law and fact by refusing to let counsel for the appellant argue his application for revocation and merely gave a one sided ruling.

iv. the learned judge erred in law and fact by failing to consider that the respondents had unlawfully caused the transfer of the suit land to themselves even before confirmation of the grant and that the only redress available is revocation.

v. that the learned judge erred in law and fact by dismissing the application for revocation without any rationale or *ratio decidendi*.

8. The appellant in his appeal seeks the following orders: (1) that the ruling dated 26th July 2004 be quashed and set aside; (2) that the application for revocation dated 1st December 2003 be restored and heard on its own merits by way of viva voce evidence before another judge; (3) that in the alternative, prayers for revocation be granted and (4) the respondents be condemned to pay the costs of appeal.

Submissions by Appellant and Respondents

9. At the hearing, the appellant was represented by learned counsel Mr. K. Wachira while Mr. Kingori Theuri appeared for the respondents.

10. Counsel for the appellant argued the five grounds of appeal urging us to allow the appeal and order annulment of the grant of letters of administration. It was submitted that the learned judge of the High Court erred in dismissing the application for revocation when it was clear that the grant of letters of administration had not been confirmed. The procedure for obtaining confirmation of grant had not been

followed. That the learned judge ignored that the suit property had been transferred and sub-divided when no confirmed letters of administration existed. Counsel admitted that the grant made in 1987 was never confirmed therefore the transfer of the land was irregular.

11. On the issue of *res judicata*, learned counsel submitted that though the appellant was aware of the earlier application and the ruling delivered on 3rd October 2003, the issue at hand was that the grant of letters of administration had not been confirmed yet the suit property had been transferred. Counsel submitted that under the Succession Act, any interested party could apply for revocation or annulment of the grant of letters of administration. He submitted that the appellant was an interested party to the extent that the deceased held the suit property in trust for half share for him.

12. Learned Counsel Mr. Kingori for the respondent in opposing the appeal submitted that the appellant sought orders for cancellation of title in parcel No. Kirimukuyu/Thiu/770 and 771 and reversion of the original title Kirimukuyu/Thiu/54. He submitted that the issue of cancellation was *res judicata* as properly held by the learned judge of the High Court.

13. On the ground that the learned judge refused to hear the appellant, it was submitted that at all material times, the appellant was represented by counsel and he was given an opportunity to present his evidence. That there was no obligation for viva voce evidence to be taken and the appellant exercised his choice to give affidavit evidence. Counsel submitted that the ruling made on 26th July 2004 was based on merit after the learned judge had considered all the evidence on record. Counsel admitted that the grant made in 1987 was not confirmed. Counsel observed that the respondents could not explain how the suit property was transferred and sub-divided since this was done by their late mother, Hellen Thogori, in whose favour the grant was issued.

14. In reply to the respondent, learned counsel Mr Wachira urged that the issue is not about the conduct of the appellant or whether the appellant was represented by counsel at all material times but that the procedure for obtaining confirmation of grant of letters of administration had not been followed. The other issue is how the transfer and sub-division of the suit property was done in the absence of a confirmed grant of letters of administration.

Analysis

15. We have considered the rival submissions by counsel and the evidence on record as well as the ruling delivered by the learned judge of the High Court on 26th July 2004. We have also looked at the grounds of appeal. In the first ground, the appellant contends that the learned judge erred in fact and law by dismissing the application for revocation contrary to well laid-down legal procedures. During submission, counsel for the appellant did not demonstrate the laid down legal procedures that the learned judge failed to follow. Our reading of the ruling does not disclose any failure on the part of the judge. What was before the judge was an application for revocation of the grant that was issued to Hellen Thogori, the widow of the deceased, on the grounds that parcel No. Kirimukuyu/Thiu/54 was registered in the name of the deceased in trust for the appellant. It is not enough to raise a ground of appeal in the memorandum. One has to go further and prove the error of law or fact raised in the ground. In this case, the appellant has not demonstrated what legal procedures were not followed by the judge. This ground of appeal fails.

16. In the second ground, it is contended that the learned judge erred in fact and law by treating the Succession Cause as finalized when the grant had never been confirmed. A reading of the ruling by the honourable judge shows that he stated that the Chamber Summons application before him was *res judicata.* At the hearing of this appeal, the appellant did not deny that a similar application had been made and a ruling delivered on 3rd October 2003. Because the matter was held to be *res judicata,* the appellant avers that the honourable judge treated the Succession Cause as finalized when the grant had never been confirmed. The plain reading of the ruling is that a similar application had been filed and it is this application that was held to be an abuse of court process and was *res judicata*.

17. During the hearing of this appeal, both counsel admitted that no appeal had been filed by the appellant

against the ruling of 3rd October 2003. It is the filing of an appeal that can set aside the orders made on 3rd October 2003. **(See John Liboyi – v- The Board of Governors of St. John College Civil App. No. NAI 138 of 2009).** The learned judge had no application before him to confirm the grant and he did not pronounce himself on this issue. We do not agree with the appellant that the Succession Cause was treated as finalized. The second ground of appeal must accordingly fail.

18. In the third ground, it is alleged that the learned judge erred in law and fact by refusing to let counsel for the appellant argue his application for revocation and merely gave a one sided ruling. Principles of natural justice dictate that all parties to a dispute must be given an opportunity to be heard. Counsel for the respondent submitted that the appellant was heard and was represented by counsel at all material times. We have perused the record of proceedings before the High Court particularly proceedings of 15th July 2004. On this date, the appellant was represented by Counsel and was heard. The appellant's counsel stated that he was not aware that what was before the court was a second application by the appellant seeking revocation. On behalf of the appellant, he sought to withdraw the earlier application. We note that the earlier application which he sought to withdraw had been considered and a ruling delivered on 3rd October 2003 and no appeal was lodged. There was nothing to withdraw. We are satisfied that the appellant was heard during the proceedings held on 15th July 2004 and this led to the ruling made on 26th July 2004 where the court ruled that the application was *res judicata*. In the absence of appeal against the ruling made on 3rd October 2004, the third ground of appeal fails.

19. In the fourth ground, it is contended that the learned judge erred in law and fact by failing to consider that the respondents had unlawfully caused the transfer of the suit land to themselves even before confirmation of the grant and that the only redress available is revocation. It is trite law that no transfer or distribution of property of the deceased can take place before a grant is confirmed. It is not disputed that the grant issued in 1987 has not been confirmed and the suit property has been sub-divided and transferred without the grant being confirmed. Having examined the ruling by the Honourable judge, we are satisfied that he did not consider this issue as it was not pleaded in the application or the supporting affidavit by the appellant.

20.The fifth ground of appeal avers that the learned judge erred in law and fact by dismissing the application for revocation without any rationale or *ratio decidendi*. A reading of the ruling reveals that the dismissal of the application was based on *res judicata* and the doctrine of laches or abuse of court process. The honourable judge stated that the objector (who is the appellant herein) had not prosecuted the objection to the grant of letters of administration for over 16 years. This ground of appeal fails.

Decision

21. We have considered the rival submissions by counsel. There are issues that cannot be wished away by merely dismissing this appeal. In the memorandum of appeal, the appellant is seeking an order for revocation or annulment of the grant. The grant sought to be revoked was issued to the widow of the deceased, who was subsequently substituted by her sons the respondents in this matter. Court orders are not issued in vain. There is no dispute that the deceased was survived by the widow and the sons. The appellant's claim is one of trust which can still be pursued against the respondent's in a civil matter.

22. Section 71 (1) of the Succession Act expressly stipulates that after the expiry of a period of six months or such shorter period as the court may direct, the holder of the grant shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets. Both counsel admitted that the suit property had been transferred and sub-divided when then the grant had not been confirmed. Section 3 A of the Appellate Jurisdiction Act enjoins this court to observe the overriding objective to facilitate a just, proportionate and expeditious resolution of appeals. Section 3 B mandates this court to ensure just determination of proceedings. Accordingly, in the interest of justice, we direct that the procedure provided in law for confirmation of grant should be followed in Succession Cause No. 105 of 1999. We order that the respondents should apply in the High Court for confirmation of grant in Succession Cause No. 105 of 1999 with service to be made upon the appellant. Subject to the foregoing order, the appeal is hereby dismissed with no order as to costs.

Dated and delivered at Nyeri this 9th day of May, 2013.

ALNASHIR VISRAM

……

JUDGE OF APPEAL

MARTHA KOOME

…….

JUDGE OF APPEAL

OTIENO-ODEK
……..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR