



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, JJ.A.)

CIVIL APPEAL NO. 28 OF 2011

DR. LEONARD KIMEU MWANTHI.....APPELLANT

VERSUS

RUKARIA M'TWERANDU M'IRIUNGI.....RESPONDENT

(An appeal from the Ruling and Order of the High court of Kenya at Meru (Lesiit, J.) dated 19th November, 2010

in

Succession Cause No. 197 of 1997)

JUDGMENT OF THE COURT

This is an appeal against the ruling and order of the High Court dated 19th November, 2010, wherein the respondent's summons dated 16th August, 2010, was allowed in **Succession Cause No. 197 of 1997**. The litigation in this matter has seen parties litigate for the same subject matter both under the **Civil Procedure** and the **Law of Succession**. We must state this is a procedure that causes confusion as there is a clear justification and sound reasoning why Legislature separated both regimes. This case is a clear demonstration that when both regimes of law are applied interchangeably, a simple matter for example of Succession of a deceased estate becomes protracted and parties keep hovering from the civil court to the succession cause.

The Law of Succession Act was envisaged as a complete regime of law complete with its own procedure for purposes of administering the estate of a deceased person and the distribution of the estate to the beneficiaries. If there is any claim of civil nature against a deceased's estate, a claimant is supposed to file a civil suit against the administrators of the deceased's estate. Involvement of claimants of civil obligations or others in matters of the administration of a deceased estate causes delays and difficulties in resolving them within the regime of the law of succession.

Some background information about this appeal is that the appellant filed a suit against Rukaria M'Twerandu M'Iriungi before the Chief Magistrate's Court in Meru being **Civil Case No. 119 of 2003**, seeking for three principal orders:

- (a) *A permanent injunction in respect of 1 ½ share of land out of Ntima/Igoki/3183.*

(b) Special damages of Kshs.64,000/= to General damages and exemplary and aggravated damages.

c. An order for Partition of Ntima/Igoki/1363 and transfer of 1 ½ acre, therefore to the plaintiff.

After hearing the parties, the learned magistrate **J. Ndubi**, dismissed the appellant's claim by an order made on 29th July, 2010.

During the arguments before us, we were informed that the decision of the magistrate was never appealed against. Be that as it may, it would appear that during the pendency of the aforementioned suit, the appellant applied to revoke the grant of letters of administration in respect of the matter of the estate of M'Twerandu M'Iriungi (deceased) who perhaps died in the course of the suit. The summons for revocation fell for hearing before **Kasanga Mulwa, J.** who after hearing the parties made the following conclusion in part of his ruling:

“Members of the deceased's family unanimously endorsed the petitioner to administer the estate of the deceased. He moved with diligence as shown by the various applications he made and the compilation of the inventory of the deceased's assets. Normally, one administers the estate of the deceased whether realty or personalty. There is no way the grant of letters of administration to the petitioner can endanger a registered interest in land. If indeed the applicant is registered in common with deceased, then the petitioner shall only administer that part of the land that belongs to the deceased. And if the applicant has a claim against the estate, then it is contrary to his interest that the grant be annulled because in essence, there will be nobody to claim against. However, to protect the interests of the applicant, I order that an inhibition be placed on LR. NO. NTIMA/IGOKI/3183, until the applicant brings a proper claim against the estate.

Finding no merit in this application, I order it dismissed with costs to the petitioner.”

This ruling was rendered on 4th July, 2002, while the aforesaid suit being **CMCC No. 119 of 2003**, was determined on 29th July, 2010. The civil suit and the summons for revocation of the grant having been dismissed, the respondent applied before the High Court for removal of the order of inhibition issued on 7th December, 1998, which was registered on **LR NO. NTIMA/IGOKI/3183**, on 14th December, 1998, and also a caution that were registered on 2nd July, 1998. He sought for an order that they be vacated/or discharged to enable the estate of the deceased to be distributed as per the certificate of confirmed grant.

This application was heard by Lesiit, J., who allowed it and in so doing while exercising the inherent discretion to ensure ends of justice and to prevent the abuse of the court process, the Judge set aside the grant that was issued by the subordinate court for want of jurisdiction. In doing so, the Judge observed that the only issue that affected that grant was the want of jurisdiction. Otherwise the grant was issued to the right petitioner and the estate was distributed to the rightful beneficiaries. The Judge ordered that a new grant be re-issued by the High Court and another certificate of confirmation be issued according to the schedule of distribution indicated in the cancelled grant.

These are the orders that have provoked this appeal; the appellant being dissatisfied, filed a memorandum of appeal on the following grounds which we summarize in order to avoid obvious repetition: -

The learned Judge is generally faulted for:

- ***Purporting to validate a grant which was a nullity; the appellant should have been heard before the grant was confirmed.***
- ***Going against the ruling of Kasanga Mulwa, J. of 4th July, 2002.***
- ***Depriving the appellant a right to property to the extent of his shares in land the subject matter thereby contravening the provisions of the Constitution.***

- ***Failing to hold that 16/31 shares of the subject land belonged to the appellant.***
- ***Relying on photocopy of certificate of search which was a forgery.***
- ***Failure to deal with the respondent's application dated 7th August, 2002.***

In their address to us, Mr. Muthomi, learned counsel for the appellant relied on written submissions and took time to highlight them. Miss Waithaka, learned counsel for the respondent also relied on her written submissions and her oral highlights.

According to Mr. Muthomi, the appellant and deceased were registered as tenants in common of **LR NO. NTIMA/IGOKI/3183**, in which each of them owned a defined share. However, after the deceased died, the respondent applied for letters of administration of the deceased estate secretly and purported to share out the entire parcel of land disregarding the appellant's share. Counsel contended that the appellant should have been given an opportunity to present his protest before the grant was confirmed. He cited the case of ***Aga Wanjiru Mwanini, where -vs- Jane Wanjiru Mwaniki***, where this Court differently constituted held;

“Whilst it is true that Section 76 of the Act does empower the Court on application of a party or of its own motion to revoke a grant in specified cases, this does not in any way detract from the principles of natural justice. The issue of the revocation of grant was not before the Court and it is trite law that the Court should only decide issues on the record. We should like to refer yet once again to the words of Scrutton, L. J. In Blay v Pollard and Morris, (1930) IKB 682: -

“Cases must be decided on the issues on the record; and if it is desired to raise other issues, they must be placed on the record by amendment. In the present case, the issue on which the Judge decided was raised by himself without amending the pleadings and in my opinion, he was not entitled to take such a course.”

Mr. Muthomi, therefore, argued that there was no application for revocation that was before the Judge although the Judge has inherent powers, the facts of the case did not meet the principles for the application of the oxygen rules as the appellant had constitutional rights over the subject property that accrued and were protected by law and could not be overlooked as a procedural technicality.

On the other hand, Miss Waithaka learned counsel for the respondent, argued that under **Section 76 and Rules 73** of the **Law of Succession Act** and the **Probate and Administration Rules**, respectfully, the Judge was fully entitled to make any orders for ends of justice: In any event, the appellant's application for revocation of the grant that was issued to the respondent was dismissed by **Mulwa J.** The order of inhibition was to remain in force while waiting for the appellant's claim which he did in **CMCC No. 119 of 2003**, where he sought a determination of his share of the suit land. The appellant's claim in that suit was similarly dismissed; and this being an old matter, the Judge properly invoked her discretion as provided for under the Civil Procedure Act and the overriding objectives. She made reference to the case of ***Safaricom Limited v Ocean View Beach Hotel Limited & 2 Others, [2010] e KLR***. Where it was emphasized that the overriding objectives under the Civil Procedure Act are meant to facilitate just, expeditious, proportionate and affordable resolutions of disputes.

We have considered the rival submissions, the record of appeal and the written submissions. It is our considered view that only two issues which cut across all the grounds of appeal are for determination. The first one is whether the learned Judge erred by revoking the grant that was issued by the Subordinate Court and re-issuing another grant before hearing the appellant on an application for confirmation. It is not in dispute that the appellant was not laying a claim on the deceased's estate as a beneficiary. He was claiming a defined share of title according to a sale agreement and a registered interest as per copy of a title deed which he claimed he owned 16/31 of the land.

The appellant pursued a civil claim that was filed in a civil court being **CMCC NO 123 OF 2003**. When that suit was still pending, the appellant sought to revoke the grant of letters of administration issued to the respondent. The grounds advanced by the appellant for the revocation of the grant were the

same as in the civil suit that was pending. After hearing the parties, **Kasanga Mulwa, J.**, dismissed the application and in our view rightly, as he observed that a defined share and registered interest of a proprietor's rights to a title of land cannot be taken away through a confirmed grant of letters of administration. The administrator can only administer that which belonged to the deceased.

In our respectful view, the dispute over the appellant's share of the suit land was before a civil court, that court made a finding either rightly or wrongly that the appellant's claim was without basis and dismissed it. The appellant's claim in the civil suit dismissed; his attempt to revoke the grant in the succession matter was also dismissed. What we have asked ourselves is what was left for Lesiit J., in terms of succession cause. Was the Judge entitled to exercise her discretion and issue the impugned orders? The High Court is given the following powers under **Section 47** of the **Law of Succession Act**:

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient” emphasize ours.

Rule 73

“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

The learned Judge was well aware of the above provisions and indeed invoked the same provisions in arriving at the decision as she did and thus made the orders thereto. The question we have paused to ourselves is whether this caused any prejudice to the appellant as he claims he was denied a hearing. We have pointed out that the appellant's application for revocation of the grant was dismissed; he was not claiming as a beneficiary of the deceased's estate but as an owner of a defined and registered portion of the land. The civil claim was also dismissed, considering the matter had been in court for many years, we are satisfied that the Judge properly exercised her discretion and made the orders that she made.

The grant that was revoked was issued by a court without jurisdiction; there was no dispute over the administrator of the deceased estate and also the beneficiaries of the deceased's estate. As far as the process of the succession cause was concerned, the Judge cannot be faulted. Even if the parties were to begin another process of petitioning for grant in the High Court and the appellant was given another opportunity to object or protest, the end result would not have been different. In this case we find that the issue before the Judge included how to bring the old succession matter to finality. This was a dominant issue that cut through the entire proceedings. In other words, the duty of the court is always to administer justice and prevent the abuse of the court process. In our respectful view even if there was no specific application, the issue of how to conclude the succession cause was an issue that was left with the court. See the case of **ODD JOBS V MUBIA, 1970 EA Page 476**, where it held:

“(i) a court may base its decision on an unled issue if it appears from the course followed at the trial that the issue has been left to the court for decision;

ii. On the facts, the issue had been left for decision by the court as the advocates for the appellant led evidence and addressed the court on it.”

The other issue is regarding the appellant's claim over the suit property and the alleged share of 16/31 and 15/31. The appellant's claim that he was issued with a title, which the respondent on the other hand claims, was a mere forgery, those are matters that can only be determined by a civil court.

We think we have said enough to show this appeal lacks merit. The appellant had nothing to do in the succession cause. The appeal is accordingly dismissed with costs to the respondent.

Dated and delivered at Nyeri this 10th day of December, 2013.

ALNASHIR VISRAM

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JUDGE OF APPEAL

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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