



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: OMOLO, ONYANGO OTIENO & OKWENGU, JJ.A)

CIVIL APPEAL NO. 282 OF 2006

BETWEEN

KITUR ARAP MUZEE.....APPELLANT

AND

MARY JEPTARUS MIBEI.....RESPONDENT

*(Being an appeal from the Ruling of High Court of Kenya at Eldoret (Hon. Mohammed Ibrahim, J.)
dated 19th October, 2006*

in

MISC. SUCC. CAUSE NO. 193 OF 2005)

JUDGMENT OF OKWENGU, JA.

1. The genesis of this appeal as we have gathered from the record is succession cause No. 31 of 1980, which was filed in the magistrate's court at Kapsabet. The succession cause was in regard to the estate of the late **Kipkolum Arap Mibei** (hereinafter referred to as the deceased), who died on 19th August, 1978. The only asset forming part of the estate of the deceased, which was subject of the succession cause, was land known as **Nandi/Petty/Cheptil/6**. On the 31st July 1980, the deceased's three widows namely; **Elizabeth Mibei**, **Martha Jepkoskei Mibei** and **Mary Jeptarus Mibei** recorded a consent dividing the land amongst themselves as follows:

- Elizabeth Mibei – 3 acres
- Martha Chepkirui Mibei (presumably the same person as Martha Jepkoskei Mibei) – 4 acres
- Mary Jeptarus Mibei – 4 acres

2. It would appear that there was an objection to that subdivision, although it is not clear who the objectors were. The District Magistrate who was handling the matter referred the matter to elders for discussion with a view to reaching a settlement. On 20th May 1981, another consent was recorded by the District Magistrate in the presence of the advocates for the objector and the three widows of the deceased, that the three widows, **Martha Jepkoskei Kipkolum**, **Jeptum Elizabeth Mibei** and **Mary Jeptarus Mibei** be registered as joint proprietors of the suit property. Apparently Elizabeth Mibei died thereafter. About four years later, one **Kitur Muzee** appeared before the District Magistrate on 16th April 1985 claiming to have bought the share of **Cheptum Elizabeth Mibei**. The District Magistrate then recorded an order as follows:

“Since the deceased had sold her share in plot No. Nandi/Petty/Cheptil/6 to one Kitur Arap Mzee before her death and there being no objection from the other two joint proprietors. I therefore order that the name of Kitur Arap Mzee be inserted in place of Jeptum Elizabeth Mibei and he be registered as the joint proprietor in plot No. Nandi/Petty/Cheptil/6, with the other two surviving windows.”

3. After another ten years, **Martha Jepkoskei Kipkolum** filed an application in Succession cause No. 31 of 1980. The application was by way of a chamber summons said to be brought under “**section 71(1) (3)** of the **Probate & Administration Rules Cap. 160 Laws of Kenya**”. It was seeking orders that the grant of letters of administration issued by the court on 20th May, 1981 be confirmed on the grounds that the grant was made on 20th May, 1981 when consent of the parties was recorded, and that there is no objection to the recorded consent. In her affidavit filed in support of the application, **Martha Jepkoskei Kipkolum** deponed that the mode of distribution had been agreed as follows:

(i) Martha Jepkoskei Kipkolum – 4 acres

(ii) Mary Jeptarus Mibei – 4 acres

(iii) Kitur Arap Muzee – 3 acres

4. On 17th May 2005, the application was allowed as prayed and a certificate of confirmation of grant issued under the provisions of **section 71(1) & (3)** of the **Law of Succession Act Cap 160**. An attempt was made by the Ministry of Lands & Settlement to subdivide the land in accordance with the confirmed grant. It was then that **Mary Jeptarus Mibei** (hereinafter referred to as the respondent) moved to the High Court by way of Miscellaneous Succession Application No. 193 of 2005 seeking annulment of the grant under **sections 47 and 76** of the Law of Succession Act, Cap 160 and **Rules 44, 58 & 73** of the Probate & Administration Rules.

5. The application was anchored on the grounds *inter alia*; that the magistrate did not have jurisdiction to entertain the application for confirmation of grant, or to issue the certificate of confirmation dated 17th May, 2005 as the succession of the estate of the deceased had been finally concluded on 20th May, 1981, and the beneficiaries registered as joint proprietors. It was contended that the confirmation of the grant was obtained fraudulently as **Kitur Arap Muzee** was not a beneficiary of the estate of the deceased and was unlawfully enjoined in the proceedings.

6. In response to that application **Kitur Arap Muzee** (hereafter referred to as the appellant), swore a replying affidavit in which he deponed *inter alia*, that the proceedings in Kapsabet succession cause No. 31 of 1980 were commenced before the Succession Act Cap. 160 which came into force on 1st July 1981; that the proceedings in the Kapsabet court were not governed by the Succession Act, and therefore, the court had no jurisdiction to annul the certificate of confirmation. Secondly, that the Law of Succession Act is not applicable to the estate of the deceased as he died on 19th August, 1978. He denied being aware of the certificate of confirmation issued on 20th May, 1981 and maintained that he obtained the consent of the Land Control Board to subdivide L.R. No. Nandi/Petty/Cheptil/6 and thus the registration of Nandi/Petty/Cheptil/38 and Nandi/Petty/Cheptil 39 was lawful.

7. Counsel for the appellant also filed a notice of preliminary objection challenging the competence of the

respondent's application on the following grounds:

- (i) The provisions of the Law of Succession Act Cap. 160 of the Laws of Kenya are in applicable to the estate of the deceased.**
- (ii) The deceased having passed away on 19th August, 1978 his estate was not governed by the provisions of the Law of Succession Act Cap. 160 Laws of Kenya.**
- (iii) The application contravenes the provisions of section 2(1) of the Law of Succession Act which applies only to estates of people dying after commencement of the Act.**

8 The preliminary objection was argued before Ibrahim, J. (as he then was). **Mr. Momanyi** for the appellant reiterated that the application does not lie as the provisions of **section 2(1)** of the Law of Succession Act does not apply to the estate of the deceased. **Mr. Choge** who appeared for the respondent maintained that the application was to annul a certification of confirmation issued on 28th April 2005 under the Law of Succession Act, and therefore the respondent was right in seeking the annulment of the certificate under the same law.

9. In his ruling delivered on 19th October 2006, **Hon. Ibrahim J.** (as he then was), sustained the objection holding that the provisions of sections 47 and 76 of the Law of Succession Act were not applicable to the estate of the deceased as he died on 19th August, 1978 before the Law of Succession Act became operative. Nevertheless, **Ibrahim, J.** proceeded in exercise of his supervisory jurisdiction to rule that the grant purportedly issued by the Principal Magistrate Kapsabet confirming the grant issued on 20th May, 1981, was an abuse of the process of the court. He therefore quashed and set aside the order of confirmation and the certificate of grant issued on 17th May, 2005, and declared any subdivision, transfer, dealings or disposal of any nature whatsoever of the assets of the deceased using that certificate of confirmation, as null and void.

10. The appellant who is aggrieved by that ruling has lodged this appeal raising six grounds as follows:

- (i) His Lordship erred in law and fact in holding that the appellant and Martha Jepkoskei Kipkolum (deceased) had fraudulently conducted themselves before the lower court.**
- (ii) His Lordship erred in law and fact in dealing with substantive succession matters in a miscellaneous application.**
- (iii) His Lordship erred in law and fact in dismissing the application while at the same time allowing the same.**
- (iv) His Lordship erred in law and fact in holding that he had powers to entertain the application, while at the same time holding that he had no jurisdiction to entertain the matter.**
- (v) His Lordship erred in law and fact in awarding costs of the application to the respondent when the respondent's application had been dismissed.**
- (vi) His Lordship's decision to allow the application after holding that the application was not for grant was as a whole wrong and legally untenable.**

11. **Mr. Momanyi** who appeared for the appellant, submitted that there was no justification for the conclusion by the learned Judge that the conduct of the appellant was fraudulent, as there is no evidence that the parties who were in person acted fraudulently. He submitted that the appellant only took the share of **Jeptum Elizabeth Mibei** upon her death, because she had already sold her entitlement to the appellant. **Mr. Momanyi** submitted further that there was a contradiction in the ruling of the learned Judge as the Judge came to the conclusion that he did not have jurisdiction to hear the application, and yet made an order which in effect allowed the application.

12. **Mr. Birech**, counsel for the respondent reiterated that the lower court having issued orders vesting the property, subject of the deceased estate in the name of the deceased's three widows, the court had completed its work and had therefore no jurisdiction to confirm the grant as it purported to do on 17th May, 2005. **Mr. Birech** argued that in the circumstances, the respondent rightly moved the court to have that confirmation annulled. He pointed out that the appellant having bought the land from one of the widows, **Jeptum Elizabeth Mibei**, he could only claim that share through the estate of **Jeptum Elizabeth Mibei**.

13. I have deliberately taken the trouble to extensively set out the background to this appeal because it is apparent from that background that the deceased died on 19th August 1978, and that succession cause No. 31 of 1980 was not commenced pursuant to the provisions of the Law of Succession Act, as that Act only came into force later, on 1st July 1981. In accordance with **Sections 2(1) & (2)** of the Law of Succession Act, that Act was not applicable to the estate of the deceased. Moreover, the proceedings in succession cause No. 31 of 1980 were concluded on 20th May, 1982 when a consent was recorded confirming the distribution of the estate to **Martha Jepkoskei Kipkolum, Jeptum Elizabeth Mibei** and **Mary Jeptarus Mibei**. The proceedings of 16th April, 1985 before the Magistrate at Kapsabet court, which brought in the appellant in place of **Jeptum Elizabeth Mibei**, were incompetent in that the appellant purported to succeed **Jeptum Elizabeth Mibei**, who was said to have disposed of her interest in the suit property, simply by having his name substituted in place of **Jeptum Elizabeth Mibei**, without following the proper procedures.

14. For the above reasons, I come to the conclusion that the learned Judge was right in upholding the preliminary objection as the application filed on 28th April 2005, by **Martha Jepkoskei Kipkolum** under **section 71(1) and (3)** of the Law of Succession Act, for confirmation of the grant issued on 20th May, 1981 was incompetent, and the order of confirmation of grant made on 17th May, 2005, and certificate of grant issued on the same date were null and void.

15. Further, it was evident that there was an abuse of the process of the court, as the District Magistrate had no powers to substitute the appellant in place of **Jeptum Elizabeth Mibei**, and issue a certificate of confirmation of grant under the Law of Succession Act and Probate & Administration Rules long after the succession cause had been concluded and without following the proper procedures.

16. I find that the learned Judge was right in exercising his supervisory powers *suo moto*, to correct this abuse which had come to his notice. As regards the issue of costs, the respondent was forced to seek the annulment of the confirmation of grant because of the orders obtained irregularly by the appellant. Therefore, I find no reason to interfere with the exercise of the learned Judge's discretion in awarding costs to the respondent.

17. The upshot of the above is that I find no merit in this appeal and would therefore dismiss it with costs.

Dated and delivered at Eldoret this 19th day of September, 2012.

H. M. OKWENGU

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JUDGE

JUDGMENT OF ONYANGO OTIENO, JA.

I have read the judgment prepared by Okwengu, JA. I agree with her fully and I have nothing useful to add. Accordingly, the appeal shall be dismissed with costs to the respondent as proposed by Okwengu, JA.

This judgment has been delivered under **Rule 32(3)** of the Court of Appeal Rules as Omolo , JA. is not presently performing judicial functions.

Dated and delivered at Eldoret this 19th day of September, 2012

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR
OF APPEAL