IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 28 OF 1998

RACHAEL WANJIKU NJUGUNA …..……..……. APPELLANT

AND

JOSEPH NGUGI KIROGO……..…….1ST RESPONDENT

JAMES KARANJA KIROGO……..…… 2ND RESPONDENT

JOSEPHINE NJERI KIROGO ……..…….…… 3RD RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya at Nairobi (Kuloba, J.) dated 18th December, 1997

in

SUCCESSION CAUSE NO. 1700 OF 1995)

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JUDGMENT OF THE COURT

Muthoni Kirogo, *"the deceased"* was the mother in-law of **Rachel Wanjiku Njuguna**, *"the appellant''*. She died survived by two sons, **Joseph Ngugi Kirogo**, *"the 1st respondent"*,and **James Karanja Kirogo**, *"the 2nd respondent"*. She was also survived by a daughter, **Josephine Njeri Kirogo**, *"3rd respondent"* and a daughter in-law, who is the appellant herein. The 2nd and 3rd respondents died after this appeal was filed. The appeal proceeded only against the 1st respondent.

Sometime in 1995 the appellant filed a petition in the High Court at Nairobi, for the grant of letters of administration intestate to the estate of the deceased. While that petition was pending the three respondents applied for and were granted letters of administration by the Senior Principal Magistrate at Kiambu, which letters were confirmed on 29th May 1997; without specific notice to the appellant.

By her application dated 28th July 1997 the appellant moved the High Court in her cause for orders that the confirmed grant by the court at Kiambu be annulled on the grounds, firstly, that the proceedings

for the grant of those letters were defective, and, secondly, that the grant was obtained fraudulently, "by ***making a false statement or by concealment from the court of something material to the case.***" In the affidavit in support of that application, the appellant deponed, inter alia, that before the deceased died she had shared her land among her children including Francis Njuguna Mburu, deceased, whose share should have been given to her as his widow, and that the succession cause before the Kiambu court was prosecuted behind her back and that she was excluded from the list of beneficiaries. Besides, that the applicant did not disclose to that court that there was in existence another cause regarding the same estate. She exhibited a copy of the consent letter from the Local Land Control Board, giving consent to the sub-division of parcel No. Muguga/Jet Scheme/336 which was the only piece of land the deceased owned as at the date of her death, and which, according to the appellant, she sub-divided and distributed to all her children **inter vivos**. The consent letter shows the different shares for all the children. Her deceased husband was supposed to get 1.75 acres.

The application came before Kuloba J. on 19th November, 1997 for hearing. The recorded proceedings for that day were as follows:

"19.11.97

Coram: R. Kuloba.

Applicant in person, present

In person, respondent, present

Court clerk Mulinge in attendance

ORDER: On the affidavits it does not appear how the applicant brings this application. She does not show evidence of marriage between applicant and deceased. Application dismissed.

R. Kuloba

JUDGE

19.11.1997."

Faced with that decision the applicant filed in the same cause an application expressed to be brought under Orders XLIV Rule 1 & XXIX 1(a) of "***the Civil Procedure Act and all other enabling provisions of Law***'' That application unlike the earlier one was filed through a firm of advocates, Maira & Ndegwa. Clearly the provisions cited in the application were incorrect as the Civil Procedure Act does not have such provisions in the body of the Act. The provisions are part of the rules made under the Act. The applicant, in that application, was seeking orders of review of the order of 19th November 1997, reproduced above, and also for an order that **viva voce** evidence be permitted to prove that the appellant was entitled to benefit from the estate of the deceased as a widow of the deceased's son, Francis Njuguna. In her affidavit in support of that application the appellant deponed , among other things that she was married by Francis Njuguna in 1974 under Kikuyu Customary Law, that Njuguna was a deceased son of Muthoni Kirogo, that the succession cause at Kiambu was subsequent to the cause she had filed in Nairobi, and that because of ignorance on her part she did not know that she was supposed to produce witnesses when her application for annulment of grant came for hearing on 19th November, 1997. She also deposed that she had had 7 children with her deceased husband, three sons and 4 daughters, and that after her husband's death, the respondents became hostile to her and were frequently threatening her with injury. Following those threats she sold her share of the deceased's land to Peter Mwambia Mungai and John Kangethe Nganga. She used the proceeds to buy alternative land elsewhere. The appellant also exhibited other documentary evidence to prove she was a widow of Francis Njuguna, which documents included a burial permit issued to her for his burial. There is no evidence on record to show the respondents filed any replying affidavit.

As the application was for an order of review, by dint of the provisions of **O.XLIV rule 4(1**) of the **Civil Procedure Rules,** which on the basis of **rule 63** of the **Probate and Administration Rules** applied, the motion was placed before Kuloba J. for orders on 18th December, 1997. The record of proceedings on that date shows that a Mrs. Ndegwa appeared for the applicant. There was no representation for the respondents. There is also no record to show what counsel for the applicant said, if at all, concerning the application. What we have is an order as follows:

"ORDER: There is no basis for review. If the applicant is not happy she should appeal. The evidence now alleged to exist should have been produced at the time the application came up for hearing on 19.11.1997. It is not shown that at that time this evidence could not, after the exercise of due diligence, be availed. It is no good for a party to come without evidence and when she is told that there is no evidence she then, goes to get what she could easily have presented on the relevant hearing date. It is no use a party coming to the court merely to test its waters so as to return later. This is a waste of public time, abuse of court process, and unjust. The application has no merit in seeking a court's indulgence. It must be shown that justice was not done on the date the application was dismissed for want of evidence. A fair opportunity was given on 19th ultimo for evidence to be presented. The applicant for unexplained reasons threw away that opportunity. It cannot be said that she has been shut out. I dismiss this application. I so order.

R. KULOBA

JUDGE

18.12.1997".

The appeal is against that order. Four grounds of appeal have been proffered as follows:

"(1) The learned Judge erred in his interpretation of the provisions of Order XLIV Rule 1 as a result of which he narrowed the scope of the said section.

(2) The learned trial Judge erred in disregarding the appellant's reason for failure to produce evidence at the date of hearing.

(3) The learned trial Judge erred in holding that the appellant's application for annulment of grant was merely to test waters.

(4) The trial judge erred in his total disregard to the appellant's application by failing to appreciate that the appellant had indeed applied for grant in the High Court in Succession Cause No. 1700 of 1995 but was undercut by the respondents in the Resident Magistrates Succession Cause No. 213 of 1996."

We earlier stated that both the 2nd and 3rd respondents died during the pendency of this appeal, and no steps were taken by either the appellant or the legal representatives of their respective estates to apply for substitution. The appeal against both of them abated and an order to that effect was made on the date the appeal came for hearing.

In his submissions in support of the appeal Mr. Kiania Njau, advocate, for the appellant submitted on the main, that the appellant was not given an opportunity to urge her application. Nor was she given an opportunity to present evidence in support of her application for revocation of grant.

In answer, Mr. Charles Muriithi, for the 1st respondent, submitted that the appellant did not request for leave to adduce oral evidence. Consequently, he said, the trial judge should not be blamed for ruling against the applicant. He, however, conceded that when the application for revocation of grant came for hearing before the same judge on an earlier date there is no record to show the learned judge gave her an opportunity of urging her application.

The manner in which Kuloba J. handled the appellant's review application as also the application for revocation of grant, is ***prima facie***, casual, flippant and wishy-washy. There is no record to show he received any submissions from the appellant, written or oral. The manner he handled both applications gives the impression that he was not keen in hearing the appellant orally or at all, and that he simply made the orders beforehand and read them to the applicant when she presented herself before him.

The right of a hearing is fundamental and one of the basic rules of natural justice. A court seised of a matter must not only grant a litigant this right, but it must demonstratively show it has done so. The practice of the courts in this country is to record down the arguments a party has presented in support of his matter, or in the alternative, and where practicable a party is asked to put his or her arguments in written form. It is not in all cases that written arguments may be presented, moreso where a litigant or litigants are illiterate or semi literate. Whatever the circumstances, a court should not adopt shortcuts for the sake of expediency or quick disposal of matters.

The appellant's complaint before the superior court was that her right to a share of the deceased's estate had been dissipated and that she needed that court's assistance to regain it. The rules of natural justice require that a person be given a fair hearing before a decision affecting him is taken. In this matter Kuloba J. adopted an approach, which to say the least, showed a blatant disregard of the basic tenets of a fair hearing. He denied the appellant justice and for that reason we are not satisfied the learned judge exercised his judicial discretion properly. In the result we are constrained to interfere. The appeal is allowed, the order dismissing the appellant's judicial review application is vacated. In view of the fact that we are not satisfied the appellant's application was handled in a regular manner, we remit the matter back to the superior court with a direction that the review application be heard by a judge other than Kuloba J. We award the appellant the costs of this appeal. It is so ordered.

Dated and delivered at Nairobi this 1st day of October 2010.

S.E.O. BOSIRE

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JUDGE OF APPEAL

OLE KEIWUA

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR