IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 115 OF 2002

PAUL MBURU NJOROGE ……..……...…… APPELLANT

AND

JOSEPH WAWERU GITUMBII …….. RESPONDENT

(Appeal from the order of the High Court of Kenya (Kuloba J) dated 22nd May 2001

In

H.C.SUC. CAUSE NO. 409 OF 1987)

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JUDGMENT OF THE COURT

This matter has an unfortunate and chequered history. It is an example of proceedings which have been protracted largely because of a mistake which could easily have been avoided.

The appellant ***Paul Mburu Njoroge***, and the respondent, ***Joseph Waweru,*** are step brothers and the sons of **Johana Gitembei** alias *Gitembei Gikebe*, deceased. He died on **2nd April 1981**, and was survived by two wives and several children. Following his death the respondent applied to the Resident Magistrate's court at Kiambu, and was granted letters of administration for his estate. The grant was confirmed on 11th November, 1986 after an objection by one **Gikebe Gitembei** was heard and dismissed. Later the appellant applied to the High Court at Nairobi for the revocation of that grant. His application was filed in person on 8th June 1987. The grounds for the application are not material in this appeal. Suffice it to state that he was aggrieved with the manner the estate was shared between the two houses of the deceased.

On 13th July 1989, Rauf J. became seised of the application. The record of appeal shows that without hearing the parties he recorded the following order.

"ORDER

I note that the original grant was obtained and confirmed through Resident Magistrate's court at Kiambu under Rule 4(1) of the Law of Succession Act Rules. I review this application to be dealt with by a Resident Magistrate at Kiambu. Costs in the cause."

This was the beginning of problems for the appellant. The application for revocation of grant was

made pursuant to the provisions of section 76 of the Law of Succession Act, which provides, as material, that:

"76. A grant of representation whether or not confirmed, may at any time be revoked or annulled if the court decides …"

Section 47 of the same Act confers jurisdiction on the High Court to entertain any application and to determine any dispute under the Act and to pronounce such decrees and make such orders therein as may be expedient. That section has a proviso to the effect that the High court may in certain instances be represented by *"resident magistrates appointed by the Chief Justice."* The Resident Magistrate who issued the grant to the respondent must have acted under this proviso. But **section 48** of the Law of Succession Act limits the jurisdiction of Magistrates courts. Rauf J. was therefore in error to have referred the application for revocation of grant to the Resident Magistrate's court. Following the order by Rauf J. the appellant went before the Resident Magistrate's court at Kiambu for orders on his application. The court treated the appellant's application as an objection to the grant and for reasons which we will not go into, dismissed it on 18th April, 1989. That provoked Civil Appeal No. 102 of 1989. That appeal was heard by Mbito J. who eventually ruled that, the magistrate had no jurisdiction to entertain the application citing **section 48**, aforesaid as the basis for his decision. In the cause of his judgment he made the following statement which we respectively agree with:

"It is trite law that jurisdiction cannot be assumed or conferred by consent of the parties. I would also add, it cannot be conferred by a superior court. The jurisdiction has to be in accordance with the applicable law and in this case the Law of Succession Act."

It is noteworthy that the appellant is the one who requested Rauf J. to refer his matter to the Resident Magistrate's court at Kiambu. But as rightly pointed out by Mbito J., jurisdiction has to be conferred by statute. In the event the learned Judge set aside the order referring the matter to the subordinate court with a direction that all records concerning the application for revocation of grant be forwarded to the High Court for it in turn, to deal with that application. He also vacated the magistrate's order dismissing the appellant's application for revocation of grant. The learned Judge's judgment was delivered on 31st March 1992.

The matter next came before the High Court for orders on 21st June 1996, and an order was made fixing it for hearing on 31st October, 1996. The matter was placed before Kuloba J. and like Rauf J. he proceeded to make an order without hearing the parties. This is what he said:

"ORDER

There is nothing on this file for dealing today, as the last order on the file referred the matter to the Resident Magistrate's court at Kiambu for final determination (see order issued on 4th March, 1988, on this file); and as the file seems to have been closed, it be placed away."

The file had not been closed. Be that as it may several other applications followed, and on 29th July 1997, the file was again placed before Kuloba J. The coram shows that Mr. Wagunda appeared on behalf of Mr. Kanyi for the appellant and Mr. Gikonyo for the respondent. There is no note to show that the advocates said anything, but the record of appeal is clear that the learned Judge proceeded to make an order, in the following terms:

"ORDER:

It appears that the record and orders of the late Rauf J. of 1988 are not being heeded. The file was closed. No application is to be made on this file and in these proceedings any more. I strike off the record all applications still pending in the closed file that have been made since 1988 after the matter closed. Nothing is to be listed on this file for judicial attention. I so order."

This order was made on 29th July, 1997, and in September, 1998, the applicant caused Mr. Mutiso, advocate, to draw an application for review of that order. In a supporting affidavit by the appellant the main reason given is that the appellant could not comply with the order of Mr. Justice Rauf referring the matter to the subordinate court due to the order in High Court Civil Appeal No. 102 of 1989.

According to rules of practice (**O.44 rule 4**) the application was supposed to and was indeed referred to Kuloba J. for determination. The application came before him on 22nd May 2001 for hearing. The record shows that Mr. Mutiso appeared for the appellant as applicant, and Mr. Wachira was holding Mr. Gikonyo's brief for the respondent. There is no note that either counsel said anything either in support of or against the application for review. The learned Judge is recorded to have made the following order:

"***ORDER***

There is nothing to bring this application within the review procedure; and this is again a defiance of another order of this court. I dismiss this application."

This appeal is against that order. The appellant through his advocate, Mr. Mutiso laments that his application was dismissed summarily without him being given on opportunity to argue it. Complaints are often made against Judges, and in most cases they are unjustified. It is however, a serious matter where a complaint is made against a Judge for refusal to allow a party an opportunity to present his case. The complaint made herein against Kuloba J. is, with respect, justified. It is not only elementary but fundamental that before a cause is lost or won a party has the right to be heard. The arguments presented may be outrageous, but there is the need for a hearing before the arguments are dismissed for being outrageous. It is a travesty of justice to short circuit the judicial process and more so when the shortcut taken denies a party a hearing. No matter that there is no basis for an application, but a party must be allowed to urge his matter before a decision is reached one way or the other.

Mr. Gikonyo for the respondent conceded that without a note on record to that effect, it may be difficult to say whether or not the appellant was given a hearing. We are of the same view. In the event we cannot say the appellant's appeal is not without merit.

In the result notwithstanding Mr. Gikonyo's complaint that the appellant was indolent in prosecuting his application for review, we think that that is not an issue we should delve into now, as our view is that the appellant was denied justice. We allow his appeal, set aside the order of Kuloba J. dated 22nd May 2001 and direct that the appellant's application for review dated 24th September 1998, be set down for hearing before a Judge other than Kuloba J. if he is still on the bench. The costs of this appeal shall abide the outcome of that application. Orders accordingly.

Dated and delivered at Nairobi this 31st day of July 2008.

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

J. ALUOCH

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR