Ogega & another v Ochwoga & another (Civil Appeal E094 of 2022)
[2025] KEHC 6562 (KLR) (26 March 2025) (Judgment)

Neutral citation: [2025] KEHC 6562 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E094 OF 2022

DKN MAGARE, J

MARCH 26, 2025

BETWEEN

JOSHUA OMBATI OGEGA ..... 1ST APPELLANT

JULIUS MAGANGA OGEGA ..... 2ND APPELLANT

AND

EVANS OCHWOGA ..... 1ST RESPONDENT

MILKA MOGOI NYAKWAE MAYIENDA ..... 2ND RESPONDENT

(Appeal from the decision of Honourable W. Kugwa given on 13.10.2022 in Kisii succession causes no. 664 of 2021)

JUDGMENT

1. This is an appeal from the decision of Honourable W. Kugwa given on 13.10.2022 in Kisii succession causes no. 664 of 2021. The Appellants were the applicants in the matter under review. The matter is rather convoluted and will need to be dealt with in order to unravel the imbroglio that is this land matter.

2. The story of the land and succession is the right of a high school drama, with lies, subterfuge, hyperbole, surmise, conjecture, lies, and more damn lies. It is a more complex fraud, skullduggery, backstabbing, greed, pride, greed, gluttony, wrath, and sloth. It is the nadir of vice and the height of hypocrisy. It cannot be fathomed that human beings can extend their greed, which will make Lucifer look like an amateur.

3. Before proceeding to the court's duty, it is necessary to deal with the historical perspective of the case in order to problematize, conceptualize, and contextualize the problem. The deceased, Kemunto Kenyanya, died on 10.08.1974, at a ripe old age of 85 years. The said death occurred of 50 years, 7 months, and 16 days ago. The deceased left behind one parcel of land, namely, Bassi/Bogetaorio/2X8.

4. Evans Ochwoga and Milka Mogoi Nyakwae Mayienda filed succession cause no. 664 of 2021 in their capacity as purchasers. They included David Ogega Ogachi as a grandson. In making the application, the said grandson gave consent for the application of letters of administration. The chief Nyangiti location wrote a letter confirming that the deceased hailed from the location. Annexed to the application was a search for Bassi/Bogetaorio/ 2XX2 and 2XX3. Basi/Bogetaorio/ 2XX2 was registered in the name of Kiriment Ochwoga Nyamugutu. On the other hand, Basi/Bogetaorio/ 2XX3 was registered in the name of milk a Mogoi Nyakwara Mayo. Bassi/Bogetaorio/ 2XX2 was registered on 14.4.1993, while Bassi/Bogetaorio/ 2XX3 was registered on 21.2.2015.

5. The mystery deepened since the identity cards indicated that Evans Ochwoga was in 1978. Milka Mogoi Nyakwae Mayienda was born in 1977. This is about 2 to 3 years after the death of the deceased herein. The grant of letters of administration intestate was issued on 4.2.2022 to Evans Ochwoga and Milka Mogoi Nyakwae Mayienda.

6. The appellants herein, Joshua Ombati Ogega and Julius Maganga Ogega, filed a summons for revocation of the grant on 25.05.2022. They claimed to be grandchildren of the deceased and stated that the grant was obtained through untrue allegations. The court dismissed the application for revocation on 13.10.2022.

7. The Respondents filed an application for review, which was supported by an affidavit of Joshua Ombati Ogega. the main ground was that Milka Mogoi Nyakwae Mayienda was a long-term resident of the United States. That application for review was not heard.

8. The Appellants still filed an appeal and set out the following grounds of Appeal:

    a. THAT the Learned Trial Magistrate erred both in fact and law when he made a finding that the Respondents herein, being alleged purchasers of the land parcel title number BASSI/ BOGETAORIO II/2X8 that belonged to the deceased, had no locus standi to institute maintain and prosecute the Petition for Letters of administration for the deceased and thereafter went ahead to dismiss the appellant's Summons of Revocation of Grant dated 23rd Day of May, 2022 and thus failed totally to make sense of his decision.

    b. THAT the Learned Trial Magistrate erred both in fact and law by dismissing the Appellant's summons for revocation of grant dated 23.5.2022 yet the Respondents in this matter were not creditors for the estate of the deceased neither were they related to the deceased and or the estate and they did not have letters of administration to file succession herein on of the estate they were purporting to represent.

    c. consent to the Respondents in this Appeal to file the Petition for Letters of went ahead to dismiss the Appellant's summons for Revocation of Grant dated 23 Day of May 2022 and thus failed to make sense of his decision.

    d. THAT the Learned Trial Magistrate erred both in fact and law by correctly citing letters of Administration of Grant and the Appellants herein ranking higher in priority to the Respondents and thereafter proceeded to dismiss the Appellant's to make sense of his decision.

    e. THAT the Learned Magistrate erred both in fact and law by proceeding to cite the law applicable for the Revocation of Grant: and from the plain reading of the ruling, the Appellants herein had satisfied the requirements for revocation or annulment of Grant but thereafter the learned magistrate went ahead and dismissed the Appellant's Summons for Revocation of Grant dated 23rd Day of May, 2022 and thus failed to make sense of his decision.

f. THAT the Learned Magistrate erred both in fact and law by misconstruing the law thar the failure by the Appellants, if any, to apply for the letters of administration for the estate of the deceased automatically vested in the respondents the right to apply for the letters of administration without the respondents demonstrating that they had cited the Appellants herein to apply for the Letters of Administration with regard to the deceased's estate.

g. THAT the Learned Magistrate erred both in fact and law by shifting the burden of proof from the Respondents herein to demonstrate and prove how they obtained the Death Certificate of the Deceased and using it as an excuse and or ruse to dismiss the Appellants Summons to for Revocation of Grant dated 23rd Day of May 2022

h. THAT the leamed magistrate erred in law and fact in ignoring and failing to assess and or apply the Legal Principles applicable in Revocation and or Annulment of Grants and the relevant authorities cited in the written submissions presented and filed by the Appellants when reaching the impugned decision(Ruling).

9. They sought the following orders:

a. That this appeal be allowed.

b. THAT the Ruling and Order of Resident Magistrate Hon. W. Kugwa delivered on13 102022 against the Appellants and all the consequential orders emanating therefrom be set aside and substituted thereat with an order allowing the appellant's prayers in the Summons of Revocation and or annulment of grant application dated 23rd Day of May 2022 in lower/trial Court.

c. THAT the Appellants be granted the costs of this appeal and the costs of the application in the lower/trial court.

10. The titles were passed to the administrators, who are equally in possession. Though the appellants allege to be grandchildren of the deceased, only one grandchild is declared in the letters. They did not lay a basis to purport to be related to the deceased. There is no line created from the children of the deceased.

Analysis.

11. This being a first appeal, this court must re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. In the case of Mbogo and Another vs. Shah [1968] EA 93 where the Court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

12. The Court must remember that it has neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as that of the lower court, as parties cannot read

into those documents matters extrinsic to them. In the case of Peters vs Sunday Post Limited [1958] EA 424, court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

13. However, where no witnesses were heard, then this court has similar jurisdiction and discretion. In the case of Sugut v Jemutai & 3 others (Civil Appeal 110 of 2018) [2023] KECA 202 (KLR) (17 February 2023) (Judgment) Neutral citation: [2023] KECA 202 (KLR Kiage JA stated as doth: -

> " I have carefully considered those rival submissions by counsel in light of the record and the bundles of authorities placed before us. I have done so mindful of our role as a first appellate court to proceed by way of re-hearing and to subject the entire evidence to a fresh and exhaustive re-evaluation so as to arrive at our own independent conclusions. See Rule 29(1) of the Court of Appeal Rules 2010; Selle Vs Associated Motor Boat Co [1968] EA 123). I do accord due respect to the factual fndings of the trial court out of an appreciation that it had the advantage, which we do not, of having seen and heard the witnesses as they testified. I am, however, not bound to accept any such findings if it appears that the judge failed to take any particular circumstance into account or they were based on no evidence or were otherwise plainly wrong. I note from the record before us that the learned Judge may not have been in a fully advantageous position in that regard having taken up the case when it was already half-way heard. Her conclusions on the evidence and findings of fact were therefore from a reading of what was recorded by the previous judge."

14. At the time, the estate was entirely administered. Nothing was remaining in the estate when the application was made for revocation, without establishing their link to the deceased. The Respondents established that they have a claim on the said parcel of land. The Applicants are rent-seekers and have no privity of estate or contract with the deceased. There was nothing to revoke. The question of the grant that is confirmed, transmitted in Eldoret CACA 308 of 2019- Mary Wambui Kibunya V Peter Kariuki and James Ngugi, the court of Appeal posited as follows:

The appellant's complaint is that the 2nd deceased surreptitiously obtained letters of administration to the estate of their father to the exclusion of herself and her two sisters. The 2nd deceased died before the application for the revocation of the grant could be heard. He did not even file a response to the summons for revocation of the grant. Teresiah Mukuhi Muriithi, who is one of the people proposed to be appointed in the place of the 2nd deceased, cannot surely defend the interests of the 2nd deceased. Additionally, even though the respondents are the sons of the 2nd deceased, they are not in a position to defend the 2nd deceased for they never assisted him in administering the estate of the 1st deceased. The parties who bought the land from the deceased are not parties to the succession proceedings. Allowing the appellant's application for substitution will put the purchasers' properties at risk yet they have not been heard. Further, and as correctly submitted by the respondents, the estate of the 1st deceased was distributed, and nothing remains to be hassled over.

15. I am comforted that the decision of the court below was supported by a grandson of the deceased. The appellants have no superior claim to the purchasers who have been on the land for the last half a century. The rights the Respondents have is cemented in the decision of the supreme court in the case of Kiebia *v M'lintari & another (Civil Case 10 of 2015*) [2018] KESC 22 (KLR) (5 October 2018) (Judgment),

58. What are we to make of these changes? Several interpretations are plausible. It is now clear that customary trusts, as well as all other trusts, are overriding interests. These trusts, being overriding interests, are not required to be noted in the register. However, by retaining the proviso to Section 28 of the Registered *Land Act* (now repealed), in Section 25 of the *Land Registration Act*, it can be logically assumed that certain trusts can still be noted in the register. Once so noted, such trusts, not being overriding interests, would bind the registered proprietor in terms noted on the register. The rights of a person in possession or actual occupation of land, as previously envisaged under Section 30 (g) of the Registered *Land Act*, have now been subsumed in the "customary trusts" under Section 25 (b) of the *Land Registration Act*. Thus under the latter Section, a person can prove the existence of a specific category of a customary trust, one of which can arise, although not exclusively, from the fact of rightful possession or actual occupation of the land

16. In the circumstances, the application for revocation was totally unmerited and, consequently, was rightly dismissed. the only question is costs. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

17. The Court of Appeal in the case of Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR) had this to say:

> " It is our finding that the position in law if that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is

not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

18. In the circumstances, the appeal lacks merit and is therefore dismissed with costs. the respondents shall have costs of Ksh 85,000/=.

Determination

19. In the circumstances the court makes the following orders:

    a. The Appeal lacks merit and accordingly dismissed with costs of Ksh 85,000/=

    b. 30 days stay of execution.

    c. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 26TH DAY OF MARCH, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

Represented by: -

No appearance for parties

Court Assistant –Michael