Muchunku v Gituku (Civil Appeal 37 of 2019)
[2024] KEHC 358 (KLR) (25 January 2024) (Judgment)

Neutral citation: [2024] KEHC 358 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT CHUKA

CIVIL APPEAL 37 OF 2019

LW GITARI, J

JANUARY 25, 2024

BETWEEN

MARKSON KARANI MUCHUNKU ..... APPELLANT

AND

JOSEPH NGARI GITUKU ..... RESPONDENT

JUDGMENT

Background

1. The Appellant lodged the present appeal on 10th March, 2021 challenging the entire decision of the trial court in Chuka C.M. Succession Cause No. 52 of 2016. A brief history of the matter will suffice for purposes of determination of the Appeal herein.

2. The Respondent herein vide a Petition lodged on 12th April, 2016 instituted succession proceedings in Chuka Chief Magistrate's Court Succession Cause No. 52 of 2016 in respect of the estate of the late Rose Kaari Bernard (the "deceased"). The estate of the deceased comprised of the parcel of land known as L.R. No. Karingani/Ndagani/4138.

3. Subsequently, the Appellant herein filed an objection to the said petition on 28th June, 2016.

4. On 28th January, 2019, a grant of letters of administration intestate was issued jointly to the Appellant and the Respondent.

5. The Appellant subsequently solely filed for a confirmation of the grant issued to them vide an application dated 21st February, 2019. The Respondent then filed his affidavit of protest sworn on 28th May, 2019 and another supplementary affidavit of protest on 7th October, 2019. The Appellant contends that the supplementary affidavit of protest was however filed without the leave of the court.

6. On 1st October, 2019, the lower court consequently directed that the Respondent's protest be canvassed by way of written submissions.

7. On 22nd October, 2019, when the matter came up for mention to confirm filing of submissions, counsel for the Respondent indicated that he had filed his submissions and prayed for a date of delivery of judgment which was then set for 19th November, 2019.

8. Vide a summons application dated 17th October, 2019, the Appellant prayed for review orders of the court's order made on 1st October, 2019 directing that the protest be heard by way of written submission such that the protest be canvassed by way of viva voce evidence. This application was however not heard and determined by the lower court.

9. Subsequently, the learned trial magistrate went ahead to deliver the judgment in the succession cause on 19th November, 2019 which was to the effect that the whole estate of the deceased was devolved to the Respondent as the 'husband' of the deceased.

The Appeal

10. Vide the Memorandum of Appeal dated 11th December, 2019, the Appellant instituted this appeal based on the following grounds:

    a. That the learned trial Magistrate erred in law in directing the matter before her to proceed by way of written submissions whereas there were deeply contested issues of fact.

    b. That the learned trial Magistrate erred in law in failing to acknowledge that the appellant has sought to have the directions issued on 1st September, 2019 to have the matter be determined by way of written submissions set aside and/or varied.

    c. That the learned trial Magistrate erred in law and fact in relying on issues of fact raised by the respondent through a supplementary affidavit that was filed irregularly for want of leave of court.

    d. That the learned trial Magistrate erred in law in making conclusive determinations on disputed facts without the benefit of hearing the parties orally.

    e. That the learned trial Magistrate erred in law in putting reliance on documents that bear discernible inconsistencies.

    f. That the learned trial Magistrate erred in law in finding that the respondent was a spouse to the deceased without the presence of any admissible evidence to that effect.

    g. That the learned trial Magistrate erred in law in misconstruing the provisions of Section 29 and 36 of the *Law of Succession Act*.

    h. That the learned trial Magistrate grossly misdirected herself in the manner she handled the impugned proceedings.

11. The Appellant thus prayed for the impugned decision to be set aside and the matter be referred to the lower court for hearing of the protest afresh.

12. The appeal is opposed by the Respondent and the same was canvassed by way of written submissions.

The Appellant's Submissions

13. It was the Appellant's submission that in the lower court, he was not accorded an opportunity of being heard as required under *the Constitution*. That as a consequence, the estate of the deceased, the same

comprised of land parcel no. L.R. No. Karingani/Ndagani/4138 was fraudulently transmitted in the name of the Respondent despite the Appellant being the co-administrator.

14. Further, that despite the Appellant being in possession of the deceased's original title deed in respect of L.R. No. Karingani/Ndagani/4138, the Appellant was not invited to transmit the estate of the deceased in the name of the Respondent. The Appellant claims that original title deed of the deceased was not gazetted as lost before the Respondent was issued with another title deed in respect of L.R. No. Karingani/Ndagani/4138. It is thus the Appellant's submission that the title deed that was issued to the Respondent was issued fraudulently and that as such, the same ought to be revoked and the same be reverted back in the name of the deceased.

15. The Appellant stated that he is the son of the deceased and has a birth certificate to confirm that the deceased was his mother. It was the Appellant's submission that the issues in dispute before the trial court were deeply contested issues of fact. That the alleged marriage between the Respondent and the Appellant's deceased mother was a thorny and contested issue requiring serious test by way of cross-examination of the witnesses. Further, that no witnesses were called to testify for and/or against the said alleged marriage between the Respondent and the Appellant's deceased's mother. The Appellant claims that no marriage could have been sustained between the Respondent and his deceased's mother whilst the Respondent allegedly had and has a subsisting marriage with a woman at their Kirinyaga County. Further, that the Respondent did not adduce any evidence at all in the lower to the effect that he had married the deceased wither by paying of dowry and/or other engagements. That no marriage certificate to prove existence of marriage was ever annexed to the Respondent's pleadings. It is thus the Appellant's submission that the learned trial magistrate ought to have directed that the protests filed by the Respondent be canvassed by way of viva voce evidence.

The Respondent's Submissions

16. On the part of the Respondent, it was submitted that the Appellant consented to the matter being canvassed by way of written submissions, and therefore all documents that were presented before the trial magistrate were admissible evidence.

17. In addition, it was submitted on behalf of the Respondent that the allegation by the Appellant that he was the son of the deceased was false as the certificate of birth produced by the Appellant was allegedly a forgery as its registration date was 8th November, 2020. That the said birth certificate was only submitted with the intent to hoodwink this honourable Court.

18. Finally, it was the Respondent's submission that the Appellant is an indolent litigant who should not be given another chance as he overtly, deliberately, and contemptuously refused to comply with the directions of this Court. That the Appellant has not been a diligent litigant as he has severally refused to take the occasion to prosecute this Appeal. It is also the Respondent's contention that he stands to suffer monumental miscarriage of justice if the appeal herein is allowed.

Issues for Determination

19. I have considered the grounds of appeal, the record of appeal and the

    a. Whether the trial court erred in issuing directions for the matter before it to be heard and determined by way of written submissions;

    b. Whether the instant applicant is meritorious;

    c. What orders should issue as to costs?

Analysis The Duty Of This Court

20. This is a first appeal. A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in Selle & another v Associated Motor Boat Co. Ltd.& others [1968] E.A. 123 and in Peters v Sunday Post Limited [1958] E.A. page 424.

The issue raised by the appellant is on the right to be heard. It is a cardinal principle of Natural Justice that any person who is likely to be affected by a decision must be given an opportunity to be heard. This constitutes the right to fair hearing. This right is entrenched in *the Constitution* Article 50 (1) of *the Constitution* provides:

> "(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."

The principles of a naturel justice are concerned with the procedural fairness. As such the court is called upon to determine whether the applicant was afforded an opportunity to be heard. Article 47(1) of *the Constitution* states as follows:-

> "(I) "(1) Every person has the right to administrative action that is expeditious,efficient, lawful, reasonable and procedurally fair."

Elementary justice and the law demands that a person be given full information on the case against him and given a reasonable opportunity to present a response. This must be done in all cases before a court or a tribunal and when taking administrative action. In the case of Onyango –v- Attorney General (1986-1989) E.A.

The court states:-

> " A decision made in breach of the rules of natural justice is not cured by the holding that the decision would otherwise have been right, since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at....."

It matters not that the right decision was made, it is about treating all the parties with fairness by giving each of them an opportunity to be heard before making a decision.

In persuasive decision in General Medical Council –v- Sparkman (1943) 2 All ER 337 which was cited in the case of R-v- Vice Chancellor JKUT Misc. Application NO. 30/2007 the court stated:-

> " If the principles of Natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of departure from essential principles of justice.
>
> The decision must be declared as no decision."

This holding was restated in the case of Ridge –v- Baldwin (1963) 2 All ER 66, Lord Reid- as follows:

> " Time and again in cases I have cited it has been stated that a decision given without the principles of natural justice is void."

Thus a decision making body should not see relevant material without giving all the affected parties a chance to controvert it and then make a decision on the matter. See Msagha –v- Chief Justice & 7 Others Nairobi H.C MCA No. 1062/2004 where the court stated:-

> " The court observes firstly that the rules of nature justice "audi alteram partem.' hear the other party and no man/woman may be condemned unheard are deeply rooted in English common law..... An essential requirement for the performance of any judicial or quasi judicial function is that the decision makers observe the principles of natural justice. A decision is unfair if the decision maker deprives himself of the views of the person who will be affected by the decision. It is indeed the immaterial whether the same decision would have been arrived at in the absence of departure from essential principle of justice.... . The decision must be declare to be no decision."

To maintain fairness, the decision maker must ensure that there is procedure fairness.

In this case, on 1/10/2019 when the court gave directions that the protestor be heard by way of written submissions, the appellant and his advocate were not in court. The learned trial magistrate was informed by the counsel for the respondent that,

> " We have agreed to have the application by way of written submissions."

The learned magistrate then ordered that the matter be mention for submissions on 22/10/2019.

On 22/10/2019 the appellant and his advocate were not in court on 22/10/2019. It did not strike the learned magistrate that despite the alleged consent, the appellant and his advocate were not in court and did not file submission. A consent Judgment or order is a Judgment or order made by a Judge with the consent of all the parties.

It becomes a valid Judgment or order once it is approved by the court. In Flora Wasike –v- Destimo Wamboka it was stated that,

> " "It is now settled law that a consent Judgment or order has a contractual effect. See also the case of Hiram –v- Kassam (1952) 19 E.A.C.A 131 where the court stated that,-
>
> > " Prima facie any order made in the presence and with the consent of counsel is biding on all parties to the proceedings or action, and on those claiming under them and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court or if consent was given without sufficient material facts or in general for a reason which would enable the court to set it aside."

The court has to ask itself whether the court recorded a valid consent. It is trite that every party to a consent Judgment or order must expressly and to the satisfaction of the Judge consent i.e agree to the Judgment or order. That is the only way the party shall be bound by the consent. A consent which does not have the input of a party is not a valid consent and no court can sanction such a consent.

The Uganda Court of Appeal in Mukula International Limited- v- His Eminence Cardinal Nsubuga & Another (1982) H.C.C 11 stated as follows:

> " A court of law cannot sanction what is illegal and illegality once brought to the attention of the court overrides all questions of pleadings including admissions made thereon."

It is my view that there was no valid consent entered before the learned trial magistrate to have the protest heard y way of written submissions.

The appellant and his advocate were not before the court to endorse the consent. This is not helped by the fact that soon thereafter the appellant applied to set aside the consent and have the protest heard in open court by way of adducting oral evidence. The counsel for the respondent had not instruction to enter a consent on behalf of the appellant. The consent was an illegality, null and void and the learned trial magistrate erred gravely by acting on the alleged consent which was not confirmed by the appellant or his advocate. The learned trial magistrate by relying on the consent in the absence of the appellant and his advocate violated the rules of natural justice by failing to give the appellant an opportunity to be heard. The resultant Judgment was null and void.

It is a rule of procedure in courts of law in this Country that all pending applications must be heard and determined before the final Judgment is entered.

This arises from the definition of a Judgment and decree which forms the final and conclusive determination in a matter. The trial magistrate erred by failing to hearing the application for review of the directions that the protest be disposed by way of written submissions. Section 72 of the *Law of Succession Act* provides:

> " No grant of representation shall be confirmed until the court-
>
> (a) is satisfied that no application under Part III is pending; and
>
> (b) has received a certificate from the Estate Duty Commissioner that he is satisfied that all estate duty payable in respect of the estate concerned has been or will be paid, or that no estate duty is payable in respect thereof; or
>
> (c) is itself satisfied that no estate duty is payable in respect of the estate concerned."

The court was duly bound to hear the protest by the appellant before confirmation of the grant. The contention by the respondent that the appellant did not object to the directions of the trial court that the matter proceeds by way of written submissions cannot be sustained as it is clear from the record that there was no way that the appellant could have objected to the impugned directions of the learned magistrate since he was not in court on that day. The court did not comply with Rules 65(3) of the Probate & Administration Rules which requires that all documents be served on the adverse party. The Rule provides:-

> " The court or Registrar may direct that any document for the service of which no other provision is made by these Rules shall be served on such person or persons as the court or registrar may direct."

The record shows that appellant followed up on the matter by making an application dated 17/10/2019 seeking a review of the orders. The application was filed timeously and before the Judgment was delivered. The respondent did not file any papers in response and the trial court

erroneously by passed the application and proceeded to give a Judgment which left the application hanging.

21. In my view, it would be a great injustice if this appeal is not allowed as the issues raised by the parties are contentious issues that needed to be addressed by the trial court. Be that as it may, the trial court ought to have deferred the judgment until such a time that the pending application of the Appellant was heard and determined. I thus agree with the submissions of the Appellant that the decision of the trial court ought to be set aside and this matter ought to be referred back to the lower for a fresh hearing of the appellant's protest. All the parties have a right to a fair trial which is guaranteed under the Bill of Rights in our Constitution which right includes the right to be heard.

Conclusion

22. From the foregoing analysis, I find that the instant appeal is meritorious as the Judgment was issued in gross violation of the rules of natural justice and was therefore null and void 'ab intio'.

I Therefore Order as Follows:-

1. The proceedings of the learned trial magistrate from 1/10/2019 and the Judgment of the learned trial magistrate dated 19/11/2019 are all set aside.

2. The matter shall be referred back to the lower court for the hearing and determination of the protests by the appellant.

3. Costs to the appellant.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 25TH DAY OF JANUARY 2024.

L.W. GITARI

JUDGE