



Case Number:	Civil Appeal 93 of 2006
Date Delivered:	19 Mar 2010
Case Class:	Civil
Court:	High Court at Meru
Case Action:	Judgment
Judge:	Mary Muhanji Kasango
Citation:	MARTHA MWONJARU & ANOTHER V M'ATAYA M'AKWALU AKWALU [2010]eKLR
Advocates:	-
Case Summary:	..
Court Division:	-
History Magistrates:	-
County:	Meru
Docket Number:	-
History Docket Number:	-
Case Outcome:	Appeal allowed.
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU Civil Appeal 93 of 2006

MARTHA MWONJARU APPELLANT

AND

M'ATAYA M'AKWALU DECEASED

VERSUS

M'ATAYA M'AKWALU AKWALU RESPONDENT

(An appeal against the judgment of the Hon. Mr. D. Morara (RM) in Maua PM's L.D.T. Case No. 7 of 2005 delivered on 23rd August 2006)

JUDGMENT

The Land Dispute Tribunal Maua North determined the dispute between M'Ataya M'akwalu Akwalu, the plaintiff and M'Ataya M'akwalu Akwalu, the defendant. The decision of the Land Dispute Tribunal was sent to Maua Magistrate Court for purposes of making the writ. It was read on 14th June 2007 in the presence of the plaintiff and the defendant's counsel. It is not disputed that the defendant died after the reading of the writ but before the tribunal decision was adopted by the Maua Magistrate Court as a judgment of that court. The plaintiff made an application dated 27th August 2006 seeking to have the order appointing Martha Mwonjaru M'ataya as the legal representative of the deceased defendant. The plaintiff in support of that application deposed that Martha was the wife of the deceased defendant. The Maua Magistrate Court on 17th December 2005 granted orders as prayed in that application on a finding that no grant had been obtained over the estate of the deceased defendant. The plaintiff further made another application dated 27th July 2006 which was granted as prayed on 15th March 2006. The orders that were granted were for the surveyor to fix the boundary over parcel F/maua/maua/27 and on doing so the defendant was to be bound by the plaintiff's land. It was to be assumed that the order to effect the plaintiff's decision. Martha made an application dated 27th June 2006. By that application, she sought to stay orders pending her to the proceedings to appoint the deceased defendant and to stay orders relieving the tribunal's decision to be executed. The magistrate court rejected that application and dismissed it. It is that dismissal that is the subject of this appeal. The whole appeal, in my view, hinges on whether the magistrate court was right to appoint Martha as the legal representative of the deceased defendant when her grant of representation had not been issued. Section 81(1) and (2) of the Law of Succession provides as follows:-

"It is a general principle that the will is to be given effect from the date of death, and shall render valid all arrangements made by the testator or testatrix in relation to the disposal of his or her estate as such."

"A general principle of administration, with or without the will annexed, shall take effect only as from the date of the grant"

As can be seen, the grant of letters of administration takes effect from the date the grant is issued. It is only on being appointed as legal representative that a party can:

"Administer, by will or otherwise, or cause of action which, by virtue of any law existing the deceased or estate out of his death for his estate."

There are the provisions of Section 82 of the Law of Succession Act. That being the law, there is no basis for the order issued by the learned magistrate to join Martha as a legal representative in the above case. The order granted by the learned magistrate was a nullity ab initio. In this regard, I wish to refer to the case Nyambura v. Njoroge & Others (1998) 1 KLR 100, where Justice Nyamwaya said as follows, but this is very pertinent to this case:

"The investigation mentioned above notwithstanding, this court cannot commence another order nisi. This court would like to apply the principle enunciated in the landmark case of Wright v. Carter (1909) 10 KLR 107. It is a well-settled principle of law applicable to the facts in a testamentary case, that if a will is found to be invalid, it must be set aside. In the instant case, the court was not empowered to inquire and/or, had no jurisdiction to determine its propriety. Accordingly, and being a determination within the meaning of the foregoing legislation was accordingly a nullity."

It follows that both the award and the purported setting of the judgment in issue of the award were nullities. This is so because the award was nullity. It applies: "not of nothing comes nothing". The High Court has a supervening role to play over inferior tribunals and courts and it would not be for its abdications. Its supervening role, in my view, it has power to make and enforce or hold in W. v. McGregor (1962) 1 KLR 100, page 20 - 21."

The order of the learned magistrate was a nullity and I do not wish to say, "not of nothing comes nothing," since there was no legal basis to appoint Martha, the order granted by the learned magistrate both for her appointment and for the admission of the tribunal award have no effect in law. This being so, the application in the lower court dated 22nd July and 29th August 2005 filed by the plaintiff who is the respondent in this appeal must fail. I find that the appeal does succeed and the court does hereby set aside the order made on 27th August 2006 in PM Misc LDT Number 7 of 2005 and does substitute the same with an order dismissing the application dated 22nd July and 29th August 2005 with costs being awarded to the applicant. The PM Misc LDT Number 7 of 2005 is hereby set aside. A legal representative is appointed in the estate of M'Wanjiru M'Kichwa deceased. The costs of this appeal are awarded to the applicant.

Done and delivered at Nairobi 19th day of March 2010.

MART KASANGO

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