In re Estate of John Ikumbi Githae (Deceased) (Succession Appeal E020 of 2021) [2023] KEHC 18262 (KLR) (31 May 2023) (Judgment)

Neutral citation: [2023] KEHC 18262 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

SUCCESSION APPEAL E020 OF 2021

CM KARIUKI, J

MAY 31, 2023

BETWEEN

LUCY WANGARI MWANGI ..... 1ST APPELLANT

JAMES GITHAE MATU ..... 2ND APPELLANT

TERESA NYAMBURA WANDERI ..... 3RD APPELLANT

GEORGE MAINA MATU ..... 4TH APPELLANT

SIMON KIMARU KAMARU ..... 5TH APPELLANT

PRISCILA NJOKI MATU ..... 6TH APPELLANT

AND

JACINTA KAMUYU GITHUNGU ..... PETITIONER

AND

ROSEMARY MWIHAKI IKUMBI ..... RESPONDENT

(Appeal from the Ruling of the Hon. D.M. Ireri Senior Resident Magistrate-Othaya in the Succession Cause No. 194 of 2018 delivered on 20/11/2020)

JUDGMENT

1. The Appellants herein, being dissatisfied by the judgment and decree of Hon. D.M. Ireri, Senior Resident Magistrate, Othaya, in Succession Cause No. 194 of 2018, delivered on 20.11.2020, appealed from the said judgment and decree in its entirety based on the following grounds: -

    i. That the learned trial magistrate erred in law and, in fact, failed to find that the applicants had exhibited sufficient reasons for the setting aside of the court's judgment.

ii. That the learned trial magistrate erred in law and, in fact, by ignoring the introduction letter issued by the area chief of the parties.

iii. That the learned trial magistrate erred in law and in fact in denying the Appellants a hearing and thus caused a miscarriage of justice.

iv. That the learned trial magistrate erred in law and in fact by adopting a narrow interpretation of what sufficient reasons meant.

v. That the learned trial magistrate erred in law and, in fact by generally failing to appreciate the veracity of the evidence placed before her by the Appellants.

2. Reasons wherefore the Appellants pray that: -

i. The appeal herein be allowed, and the ruling by the trial magistrate issued on 20.11.2020 be set aside and substituted with an order reopening the matter and allowing the Appellants case to be heard.

3. Parties canvassed the appeal via submissions as directed by the court.

4. Appellants' Submissions

a. Grounds 1, 2, 5.

5. The Appellants submitted that the court ought not to turn a blind eye to what is on record. That the learned magistrate erred as such in failing to appreciate the veracity of evidence on record; including a Chief's letter/introductory letter which clearly lists the Appellants as children of the late John Ikumbi Githae, the deceased herein. At pages 30 and 33 of the Record of Appeal, which is the deceased eulogies written by both families independently, the Appellants are listed as children of the deceased. PW1, AW2 and AW1 whose evidence leave no doubt that the Appellants have a right to the estate of the deceased, all confirmed that the Appellants were raised by the deceased at pages 49, 50 and 51 of the Record of Appeal.

6. It was asserted that PW1, Rosemary Mwihaki Ikumbi, clearly admitted in court that the Appellants were raised by the deceased even if they may not have been his biological children. It is despite her earlier contradictory remarks on the relationship of the deceased and AW1. (See paragraph 6 page 49 of the Record of Appeal). AW2, Paul Murage Githae's testimony that the Appellants bear his and the deceased's father and mother's name is further proof of paternity (see paragraph 21-55, page 52 and paragraph 1-2, page 53 of the Record of Appeal). The learned magistrate recorded this fact at paragraph 8 and 9 of page 69 of the Record of Appeal. Further, the Appellant also produced pictures at page 26 of the Record of Appeal which confirms that they were acquainted with the deceased.

7. The Appellants argued that from the evidence above, the beneficiaries clearly have a legitimate interest as dependents of the estate of the deceased. The Learned Magistrate ought to have considered the beneficiaries listed in the chief's letter to substantiate their position in the estate of their father. That from the evidence adduced, it is clear that there was a mistake or error apparent on the face of the record having disinherited the Appellants by only considering the issue of marriage and ignoring the issue of dependency.

b.Grounds 3 & 4

8. The Appellants averred that the learned magistrate ought to have appreciated the existence of other dependents of the deceased. Even if they were not called as witnesses in court or filed their individual

protests, it was the court's duty to take note of the said beneficiaries listed in the introductory letter and affidavit for summons for confirmation. Reliance was placed on the case of *Aurenzia Gikiri Njeru v Kimani Kabenge & 2 others*, in the High Court of Kenya at Embu, Civil Appeal No. 75 of 2008 (2014) eKLR.

9. The Appellants disagreed with the learned magistrate's reasoning at page 95, paragraph 4-5 of the Record of Appeal; that the Appellants did not have a desire to share in the estate. They stated that the court cannot presume a fact, it should not be moved by mere allegations but by evidence and a renunciation would have filled the vacuum or at least confirmed that they did not desire a share in the estate.

10. The Appellants submitted that the law of succession requires that renunciation must be done in writing and in a standard form. They therefore disagree with the motion that having signed the consent acted as a renunciation of their rights to the said estate. That it did not mean that they did not have individual interests in the estate and that it should be noted that they only consented to the suggested mode of distribution. It was contended that the Appellants were next in the line of consanguinity, if the protest was dismissed or if there was no protest at all. That it better explains their basis for consenting to the mode of distribution. They pointed out that the learned magistrate also reasoned as above at pages 91, paragraphs 20-22and 92, paragraph 1-2 of the Record of Appeal.

11. It was averred that the learned magistrate ought to have noted that from the evidence on record, the Appellants fell within the definition of a child under Section 3(3) of the *Law of Succession Act* which provides that a child of a male person is one accepted by the deceased man and whom he has voluntarily assumed personal responsibility. That the Law of Succession does not restrict the definition of a deceased's child to only one biologically related to the deceased; even though the Appellants fit this category. That proof of dependency was no record in testimony and documentary evidence and as such it ought to have been considered and they should have been allowed to prove their interest in the matter.

12. The Appellants stated that it is instructive to note that the 1st Petitioner/AW1 was only aiming to prove that she is the deceased's wife. That she was fighting for her right to the estate and thus her failure to call the Appellants as witnesses should not condemn the Appellants and bar them from being heard. After all, being new parties to the suit and dependants' under section 29 of the *Law Succession Act* are sufficient grounds to accord them the right to be heard. Reliance was placed on *Stephen Wanyoike Kinuthia (suing on behalf of John Kinuthia Marega (deceased) v Kariuki Marega & Another*), Court of Appeal at Nairobi, Civil Appeal 201 of 2012 [2018] eKLR

13. They argued that from the evidence on record, it is clear that the Appellants put up a triable issue not worth ignoring during the distribution of an estate. That they have indeed made out a case for review of the Lower Court's judgment. Reliance was placed on *Patel v . E.A Cargo Handling Services Ltd* [1974] E.A. 75 & *Consolidated Lawyers Ltd v. Abu-Mahmoud* [2016] NSWCA 4

14. The Appellants submitted that the learned magistrate omitted the significant fact that the deceased had other dependants other than Priscilla Njoki Matu (AW1) and Rosemary Mwihaki Ikumbi (PW1) who had never filed any document renouncing their rights to the estate. That he failed to appreciate AW1's star witnesses whose evidence is most credible as he is the deceased's brother and was present when AW1 got married to the deceased and sired the Appellants.

15. Further, the magistrate He failed to appreciate the requirement under Section 26 of the *Law of Succession Act* which mandates that all dependants should get a reasonable provision from their father's estate. Consequently, the Appellants' averred that their evidence and testimony outweighs the learned magistrate's reasoning and the matter ought to have been reviewed.

16. 2nd Respondent's Submissions

17. Brief Background

18. The 1st Respondent and the 7th Appellant were Petitioners in Othaya Succession Cause No 194 of 2018 whereas the 2nd Respondent was the protestor. Upon hearing of the protest to the confirmation of grant, the lower court made a finding that the 1st Respondent had failed to provide sufficient evidence to show that she was the wife of the deceased or that her children were sired by the deceased.

19. In the judgement delivered on 13th May 2020, the lower court proceeded to issue orders confirming the letters of administration and further directing the registration of the deceased's property in the name of the protestor. The Petitioners did not appeal against the said judgement.

20. On 5th August 2020, the Appellants filed a summons general before the lower court seeking to review the judgement of the court delivered on 13th May 2020 to include the Appellants as heirs of the estate of the deceased.

21. The application for review was premised on grounds that were an error on the face of the record and that the applicants were not afforded an opportunity to be head. By consent, the parties proceeded by way of written submissions before the magistrate delivered his ruling on 20th November 2020.

22. In his ruling, the magistrate made a finding that the applicants had not satisfied the conditions set out under Order 45(1) of the *Civil Procedure Rules* to warrant a review of the judgement. The summons general were therefore dismissed. Being aggrieved by the decision of the court, the Appellants lodged the current appeal.

23. The 2nd Respondent asserted that the court's power of review stems from the provisions of section of the *Civil Procedure Act* Order 45. The power to review is a discretionary power only to be exercised after the applicant has satisfied the grounds outlined under Order 45 Rule 1.

24. It was submitted that An Applicant must satisfy the following grounds before the court can exercise its discretion to review its judgment;

    i. There must be the discovery of a new and important matter which, after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or

    ii. There was a mistake or error apparent on the face of the record; or

    iii. There were other sufficient reasons; and

    iv. The application must have been made without undue delay

25. The 2nd Respondent stated that it is imperative to consider if the Appellant's motion dated 5th August 2020 satisfied the existence of the foretasted grounds and if the learned magistrate erred in considering the grounds adduced by the Appellant in reaching his determination.

26. Discovery of new evidence

27. The 2nd Respondent pointed out that Appellants' contention before the trial court was that they were children of the deceased and therefore entitled to a share of his estate. They produced photographs and a copy of the Eulogy prepared for the deceased's funeral as new proof to be considered by the trial court in reviewing its judgment. That the 2nd Respondent opposed the assertion by claiming that the photographs and eulogy were not cogent proof of paternity and that the Appellants ought to have

produced more persuasive evidence like DNA certificates and birth certificates as proof of paternity and secondly, that the paragraphs and eulogy were not new evidence as they were in the Appellants custody all along.

28. The 2nd Respondent expressed that it is trite to satisfy the test on new evidence under the rules; an applicant must demonstrate discovery of new evidence which he could not procure when the application was heard despite the exercise of due care and diligence. Had the applicants exercised due care and diligence, they certainly would have produced their evidence during the protest hearing.

29. In his decision, the learned magistrate correctly identified the issue and on page 12, which states as follows

> " There is no reason why the photographs and eulogy now being mentioned were never produced in court, yet those documents which were well within the knowledge of the Petitioners and the applicants when the matter was heard in court. There is also no reason why the applicants and 2nd Petitioner failed to give evidence and produce the said documents when the court had given them a chance, and as such, this court finds that the said eulogy and photos are not new and important evidence which was within the knowledge of the Petitioners and applicants...."

30. Error apparent on the face of the record

31. Reliance was placed on *Muyodi v . Industrial and Commercial Development Corporation & Another* (2006) 1 EA 243.

32. The 2nd Respondent contended that the Appellants opined before the trial court that the learned magistrate did not consider the testimony of their paternal uncle, who had identified them as children of the deceased, and also failed to consider the Chief's letter, which had listed them as the deceased's children. There was, therefore, an error apparent on the record.

33. The trial court seized the issue, and on page 13 where the trial court stated;

> " .... The chief's letter relied upon the applicants is not proof of paternity. In any case, at paragraphs 17 and 18 of that judgment, the court deliberated on who was entitled to the deceased's subject property and also made reference to the chief's letter...."

34. And at page 14

> " This court considered all the evidence on record which touched on whether the 1st Petitioner was validly married by the deceased under Kikuyu customary law and whether they had seven children as alleged. After analyzing the entire evidence as presented by the Petitioners and the protestor, the court found that the 1st Petitioner had failed to prove that she had children (applicants) with the deceased, among other orders. In my view and while being guided by the above two decisions, anyone who was aggrieved by the judgment ought to have lodged an appeal rather than challenge the decision by review...."

35. They affirmed that it is evident that the alleged error on the face of the record constitutes perceived errors in the magistrate's interpretation of the facts and evidence adduced. That this cannot be the basis of a review but an appeal. Reliance was placed on *National Bank of Kenya v Ndungu Njau* [1997] eKLR.

36. It was submitted that from the foregoing, it is evident that the learned magistrate did not err in his understanding of issues and in his subsequent determination of the same. That the Appellants have not highlighted how the learned magistrate erred in his failure to find sufficient reasons. Quite notably, the ground was not raised in the application for review dated 5th August 2020, and the same has not been addressed in the Appellants' submissions dated 14th October 2022.

37. Ground 3; the learned magistrate erred by denying the Appellant a hearing and thus caused a miscarriage of justice

38. The 2nd Respondent stated that the Appellants argued in the application dated 5th August 2020 that they had not been afforded an opportunity to be heard before the court made its ruling on 13th May 2020. The 2nd Respondent (then protestor) rebutted the claims by highlighting that the 7th applicant, now the Appellant was also a Petitioner in the succession cause.

39. Further, the Appellants had signed a consent vesting their right to representation to the 1st and 2nd Petitioners (see pages 35 to 42 of the record of appeal). They were, therefore, adequately represented in the suit.

40. When considering the issue, the learned Magistrate expressed himself on page 10 of the ruling as follows:-

> " The court had already found out that the Appellants were all aware of this matter, and the same is further supported in paragraph 6 of the Petitioner's joint replying affidavit sworn on 18.9.2020, where the Petitioner avers as follows;
>
> That we concede that we failed to articulately represent the applicant's interest in the cause, as we believed that the chief's introduction letter said it all regarding the relationship of the deceased and the applicants.
>
> It thus means, as argued by the protestor, that the applicants had allowed the Petitioner to represent their interests in the court, but they did not do so."

41. Further at page 11 of the court found that:-

> " ...the protest was heard by way of oral evidence, and parties were allowed to represent evidence in support of their case, but the applicants herein did not see fit to file any protest or even give any evidence in support of the Petitioners and cannot now turn around and allege that they were condemned unheard .Even in her evidence in court, the protestor maintained that the deceased had no children with 1st Petitioner and was cross-examined by the Petitioner's learned counsel...after the hearing, the court considered all the evidence on record, together with the chief's letter and found that paternity had not been proved and therefore the applicants argue that the court considered them."

42. It was their submission that from the foregoing, it is evident that the learned magistrate correctly comprehended the issue before reaching the conclusion that the Appellants adequately represented in the initial suit.

43. Lastly, they submitted that the appeal before this court has no merit and, therefore, should be dismissed with costs.

~~44~~. Analysis and Determination

45. Having given due consideration to the appeal on the basis of the supporting grounds and the rival submissions, this court is required to determine whether the application for review dated 5th August 2020 filed by the Appellant before the trial court was merited and whether the ruling by the trial magistrate issued on 20.11.2020 should be set aside and substituted with an order reopening the matter and allowing the Appellants case to be heard.

46. The Appellants' application before the trial court sought orders for review, vary or setting aside of the ruling delivered on 13th May 2020 in that:-

    i. That the judgment of the court delivered on 13th May 2020 be set aside and or be reviewed and include the applicants as heirs of the estate of the deceased.

    ii. That the applicants be given an opportunity to testify in court and prove why they should be considered beneficiaries.

47. The application was premised on the grounds that:-

    i. The applicants were condemned and unheard.

    ii. The applicants were never served with any summons to attend court for the hearing of the matter.

    iii. That critical evidence adduced by AW2 and through the Chief's letter was inadvertently overlooked.

    iv. That there is an error on the face of the record in that whereas the applicants were recognized in the chief's letter as beneficiaries, the parties in the matter never invited them for a hearing.

48. The Appellants reiterated their averments as stated above in the supporting affidavit to the application for review, which affidavit was sworn on 5th August 2020. The ruling that the Appellants sought to have reviewed by the trial court is the one that issued orders confirming the letters of administration and further directing the registration of the deceased's property in the name of the protestor.

49. The question therefore is whether the trial court erred in failing to grant the Appellant orders of review as prayed based on his application dated 5th August 2020.

50. In considering instances of review, a probate court is governed by Rule 63 of the *Probate and Administration Rules*, which provides that:

> "63. Application of Civil Procedure Rules and High Court (Practice and Procedure) Rules
>
> 1. Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the *Civil Procedure Rules*, namely Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.
>
> 2. Subject to the provisions of the Act and of these Rules and of any amendments thereto, the practice and procedure in all matters

arising thereunder in relation to intestate and testamentary succession and the administration of estates of deceased persons shall be those existing and in force immediately prior to the coming into operation of these Rules."

51. Further, any party seeking review of orders in a probate and succession matter is bound by the provisions of Order 45 of the *Civil Procedure Rules*, which stipulates that:-

> " 1(1) Any person considering himself aggrieved—by a decree or order from which an appeal is allowed but from which no appeal has been preferred; or by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.
>
> (2) ..."

52. In the case of *John Mundia Njoroge & 9 Others v Cecilia Muthoni Njoroge & Another* [2016] eKLR, the court cited Rule 63 of the Probate and Administration Rules and stated as follows:

> "As stated above, the only provisions of the *Civil Procedure Rules* imported to the *Law of Succession Act* are orders dealing with service of summons, interrogatories, discoveries, inspection, consolidation of suits, summoning and attending witnesses, affidavits, review and computation of time. Clearly, Order 45 relating to review is one of the *Civil Procedure Rules* imported into succession practice by rule 63 of the Probate and Administration Rules. An application for review in succession proceedings can be brought by a party to the proceedings, a beneficiary to the estate or any interested party. However, the application must meet the substantive requirements of an application brought for review set out in Order 45 of the *Civil Procedure Rules*."

53. Accordingly, the provisions of Order 45 of the *Civil Procedure Rules* establish three circumstances under which an order for review can be made. In such instances, an applicant must demonstrate to the court that:-

i. There has been the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed;

ii. there has been some mistake or error apparent on the face of the record;

iii. there is any other sufficient reason for seeking such a review.

54. Accordingly, I have perused the trial court record. The Appellants did not and have not proved the existence of or discovery of any new and important matter or evidence to warrant a review of the court's orders. Neither did they demonstrate any mistake or error on the face of the record. They neither showed nor demonstrated to the trial court or this court that there was any sufficient reason to warrant the court exercising its discretion and allowing the review as prayed.

55. My finding is based on the fact that on perusing the ruling in question, the trial court correctly and clearly identified that the Appellants were well aware of the matter before the court and opined that the Appellants had allowed the Petitioner to represent their interests in court. In addition, the photos and the Chief's letter that the Appellants were relying on do not amount to new evidence which was not within their knowledge or could not be produced by Petitioners at the time of the hearing of the application for confirmation of grant and the protest.

56. The trial court also made it clear and rightly so that all the Appellants were adults, yet they decided not to lay their claim when they had the opportunity to do so in court; thus, they were not vigilant. That they did not seek any claim from the estate, but instead, they supported their mother's claim. I agree with the trial court's finding that the appellants had allowed the petitioners to represent their interests in court. Moreover, I agree with the trial magistrate's assertion that there is no reason why the photographs and eulogy were never produced in court, yet those are documents that were well within the knowledge of the Petitioners and Appellants when the matter was heard in court. In any case, the same, including AW2's testimony, did not provide sufficient proof of paternity or that the deceased had taken responsibility for the Appellants as their father.

57. Furthermore, I find that there was no error apparent on the face of the record. It appears that the issue as to whether the deceased had any children with the Petitioner was canvased in court, and a determination was made to that effect. The trial court held that the Chief's letter relied upon by the Appellants is not proof of paternity and that the Appellants had not filed any protest or give evidence in support of the Petitioner.

58. In the end, based on the foregoing analysis, I find that this appeal is nothing short of a misconception and that the same is devoid of merit and thus the court makes the orders that;

    i. The appeal is hereby dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 31ST DAY OF MAY 2023

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CHARLES KARIUKI

JUDGE