In re Estate of Alloys Obunga Aboge (Deceased) (Succession Cause E001 of 2022) [2023] KEHC 18520 (KLR) (30 May 2023) (Judgment)

Neutral citation: [2023] KEHC 18520 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

SUCCESSION CAUSE E001 OF 2022

RE ABURILI, J

MAY 30, 2023

IN THE MATTER OF THE ESTATE OF ALLOYS OBUNGA ABOGE(DECEASED)

BETWEEN

DEBRA AWINO OKALLOH ALIAS DEBORAH WAINO OKALLO ..... APPELLANT

AND

EMILY OLAGO ..... 1ST RESPONDENT

ALPHONCE ABOGE ..... 2ND RESPONDENT

FLORENCE ATIENO ABOGE ..... 3RD RESPONDENT

(An appeal against the Ruling of Hon. W. Onkunya (SRM) delivered on the 10th February 2022 in Kisumu Chief Magistrates Succession Cause No. 489 of 2020)

JUDGMENT

1. The appellant vide a Notice of Motion application dated 26th April 2021 sought orders before the trial court for a temporary injunction restraining the respondents and their agents from interfering with land parcel number Kisumu Municipality No. 22808 (hereinafter referred to as the suit property) pending the determination of the deceased's estate and further sought orders for provision for the appellant in regard to the deceased's will dated 13th October 2017.

2. In her ruling which is impugned by this appeal, the trial magistrate found that the appellant had not satisfied the conditions for grant of temporary injunction and further that the appellant failed to meet the conditions precedent to enable the trial court make an order of provision for her. The trial court thus dismissed the appellant's application.

3. Aggrieved by the trial court's ruling and order, the appellant filed the amended appeal dated 25th May 2022 on the 26th May 2022 in which she raised the following grounds of appeal:

i. The learned trial magistrate erred in law and in fact in failing to find that satisfactory evidence as to the appellant's past, present or future capital or income and her existing and future need was an issue that could only be canvassed at the confirmation of probate stage of the succession proceedings and that parties could still file further affidavits without prejudice being occasioned on any one of them.

ii. The learned trial magistrate erred in law and in fact in finding that the appellant had failed to give satisfactory evidence as to her past, present or future capital or income and her existing and future needs while failing to appreciate that there was enough evidence to show that the appellant was already living on one of the deceased's properties and had children with the deceased and clearly were dependent on the deceased and deserved to inherit.

iii. The learned trial magistrate erred in law and in fact in failing to find that even if the evidence of the appellant's past, present or future capital or income and her existing and future needs had not been satisfactorily adduced, it was an issue that only affect the distribution of the estate and the requirement of such evidence could be filed at confirmation stage of the said succession proceedings without any prejudice being occasioned upon the respondents herein or the beneficiaries to the estate.

iv. The learned trial magistrate erred in law and in fact in failing to find that the court had the ultimate discretion to order for a further affidavit in respect of the issue of distribution of the estate of the deceased and determining which specific share was to be allocated to the appellant herein.

v. The learned trial magistrate erred in law and in fact in appreciating that indeed the appellant was an intended beneficiary in the estate having been allocated one of the properties of the deceased which was jointly owned but all the same disallowing the application for reasonable provision.

vi. The learned trial magistrate erred in law and in fact in failing to consider the submissions and authorities advanced on behalf of the appellant as regards the procedure to be followed where an application for reasonable provision is made before confirmation of grant.

vii. The learned trial magistrate erred in law and in fact in failing to find that she was bound by the doctrine of stare decisis as regards matters of procedure highlighted by the High Court in the estate of Ezekiel Mabeya Kegoro (deceased) [2019] eKLR.

viii. The learned trial magistrate erred in law and in fact in dismissing the appellant's application dated 26.4.2021 on procedural technicality while at the same time finding that indeed the said applicant was a beneficiary of the estate of the deceased.

ix. The learned magistrate erred in law and in fact in failing to acknowledge the averments in the appellant's supporting affidavit that she was fully dependent on the deceased before his unfortunate death and has been living on one of the properties owned by the deceased with her children even after the death of the deceased.

x. The learned trial magistrate erred in law and in fact in failing to find that the issue for determination before it was whether the appellant herein was entitled to adequate provision from the estate of the deceased and instead jumped the gun and opted to decide on issues of distribution of the estate of the deceased which issue was not presented before it for determination.

xi. The learned trial magistrate erred in law and in fact in failing to exercise her discretion and failing to hold that the appellant had demonstrated a good case for reasonable provision from the estate of ALOYS OBUNGA ABOGE (DECEASED) and was entitled to a share in the estate.

xii. The learned trial magistrate erred in law and in fact in making orders that had the net resultant effect of disinheriting the appellant and her five children while at the same time recognizing that indeed they were beneficiaries of the estate of the deceased.

xiii. The learned trial magistrate erred in law and in fact in condemning the appellant herein to pay costs of the application in a family matter.

4. The parties agreed to dispose of the appeal through written submissions.

The Appellant's Submissions

5. It was submitted that given the definition of personal and household effects, the deceased must have been married to the appellant herein for the said deceased to leave his personal and household effects in the house that was occupied by the appellant for there was no dispute that the deceased and the appellant did not share a blood or ancestral relationship.

6. It was further submitted that from the averments in the respective replying affidavits by the petitioners/ respondents, no documentary proof was tendered by the respondents herein to controvert the appellant's claim of marriage to the deceased, that no expert witness was availed before the trial court to confirm the invalidity of the birth documentation as alleged by the respondents herein and thus the evidence submitted by the appellant before the trial court, remained uncontroverted in that respect.

7. The appellant thus submitted that she was a dependant of the deceased within the meaning of the provisions of Section 29 of the *Law of Succession Act*, Cap 160, Laws of Kenya. It was submitted that no evidence was tabled before the trial court to refute the claim that indeed the appellant was married to the deceased at the time of his death and that no evidence was tabled before the court that the deceased lacked the capacity to contract any other marriage after marrying Florence Atieno Aboge and Judith Millicent Awuoche Obunga Aboge.

8. It was the appellant's submissions that the deceased in exercising his testamentary freedom expressly bequeathed some of his property to the appellant to express his wish that she together with her children be provided for out of his estate.

9. The appellant submitted that the only property left for the appellant in the will of the deceased turned out to be jointly owned by the said deceased and the 3rd respondent herein and therefore through the doctrine of jus accrescendi never formed part of the estate of the deceased, however, the mere fact that the deceased expressed his intention to bequeath something to the appellant went a long way to demonstrate to the court that indeed the said deceased recognized the appellant as one of his dependants.

10. It was submitted that any beneficiary not adequately provided for in a will may approach the succession court for orders of adequate provision and that the discretion to grant any specific share out of the estate of the deceased lies with the court that would be guided by the circumstances provided for under Section 28 of the Act.

11. The appellant submitted that she complied with the provisions of Section 28 of the Act by stating the extent to which she was dependent on the deceased which averments were sufficiently corroborated by

the fact that for all intents and purposes, the deceased wished the appellant to be adequately provided for.

12. The appellant further submitted that the trial court failed to consider the evidence of the appellant on dependency and instead opted for a document with the title "existing and future means and needs of the dependant" thus erring in law and fact in making its decision that was based on procedural technicalities rather than substantive justice. It was submitted that nothing stopped the court from exercising its inherent powers by either deferring the ruling on the specific share to the confirmation of grant stage of these proceedings or given that dependency had been proved to the required standard; from calling for additional affidavit evidence on the issues pertaining to title "existing and future means and needs of the dependant".

13. The appellant submitted that no prejudice would have been occasioned on the other litigants given the special nature of succession proceedings.

14. It was submitted that the *Law of Succession Act* and the subsidiary rules enacted thereunder all give the Honourable Court the inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court as provided under Rule 73 of the Probate and Administration Rules.

15. The appellant submitted that the position to defer a ruling on adequate provision when material before the Honourable Court wasn't sufficient to enable the court make a sensible order had been followed in previous judicial decisions such as in the case of Brian Kadima v Jackson William Musera & another [2017] eKLR, where the Court deferred its ruling on account that the size of the nature and size of the estate had not been determined and in the case of In re Estate of Albert Musyoka Mueti (Deceased) [2020] eKLR, where the court exercised its inherent powers to differ the issue of ascertainment of the issue of adequate provision to the stage of confirmation of grant.

16. The appellant submitted that that nothing prevented the trial court from exercising its inherent jurisdiction to defer its ruling and call for more evidence to shed light in matters it deemed not adequately adduced before it to make a sensible order and that no prejudice would have been suffered by the other litigants in these proceedings if the issue of adequate provision would have deferred to the confirmation of grant stage.

17. On costs, it was submitted that the courts have eschewed from awarding costs in a dispute involving family members as was in the case of Mbulwa Maingi v Veronica Nthamba [2015] eKLR and the Court of Appeal case of Emmanuel Musembi Nthambi v Tarmal Wire Products Ltd [2019] eKLR.

The 1st and 2nd Respondents' Submissions

18. It was submitted that whereas it was not disputed that the deceased was a polygamous man, the evidence showed that he had two wives only, none of whom was the appellant and that save for her claims/statements to that effect, she did not show that she was a wife of the deceased by statutory or customary marriage and therefore a dependant by reason of section 29(a) of the *Law of Succession Act*. It Was further submitted that the appellant and her children were not mentioned in the local chief's letter as having been related to the deceased in any way.

19. The 1st and 2nd respondents submitted that even assuming that the appellant proved dependency (which she did not), the appellant was obliged to show that she was entitled to consideration for reasonable provision. Further, it was their submission that it was for the appellant to satisfy the Court that the testator made no reasonable provision for her but that the appellant in this matter placed

nothing before the court – no evidence of capital or income, and no evidence of existing future needs - to show what would have been reasonable provision for her.

20. It was submitted that an executor cannot vary the testator's will as Section 5 of the Act provides that any person of sound mind and not a minor may will his or her property in any manner he or she chooses as held by the Court of Appeal in Elizabeth Kamene Ndolo v George Matata Ndolo [1996] eKLR.

21. The respondents submitted that the appellant failed to present any evidence that the deceased was providing for her prior to his death or at all and thus failed to show that she was a wife/dependant or that her children were dependants of the deceased and therefore entitled to reasonable provision from the deceased's estate.

22. It was further submitted that in failing to present to the trial court her past, present or future income and her existing and future needs, the court was unable to make a determination as to whether or not she was entitled to reasonable provision.

The 3rd respondent's Submissions

23. It was submitted that the appellant failed to present any iota of evidence to show that she was married to the deceased or that there was a presumption of marriage and thus the appellant and her alleged children could not be considered as a wife and beneficiaries of the deceased's estate and subsequently not entitled to inherit anything from the estate.

24. The 3rd respondent submitted that the appellant could not purport to seek any or alternative provision from the estate of the deceased as she was not a dependant of the estate as the conditions for how one can be considered a dependant, which the appellant has not satisfied, were laid out in the case of In re Estate of Gachoki Kabwai (Deceased) [2019] eKLR and in the case of In re Estate of Ezekiel Mabeya Kegoro supra.

Analysis & Determination

25. This being a first appeal, the duty of this Court is as was stated by the Court of Appeal in the case of Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR, where the Court pronounced itself as follows:

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kustron (Kenya) Limited 2000 2EA 212 wherein the Court of Appeal held, inter alia, that: -'On a first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.'"

26. It follows that this court has to critically re-reconsider the evidence adduced before the lower court whether oral or affidavit evidence, the rival submissions of the parties and the law. From a careful perusal of the record of appeal, parties' rival submissions, the legal issue falling for determination can be discerned to be: "Whether the appellant was a dependant of the deceased and therefore a beneficiary of his estate and therefore whether she qualifies for provision from the deceased's estate."

27. Section 29 of the *Law of Succession Act* defines the term 'dependant' as follows, in a conclusive manner:

For the purposes of this part, "dependant" means:

(a). The wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;(Emphasis added)

(b). Such of the deceased's parents, step-parents, grand-parents, grand-children, step-children, children whom the deceased had taken into his family as his own, brothers and sisters and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.

28. The appellant's argument in the trial Court and even before this court was that she was the deceased's third wife having stayed with him for 10 years and further that she looked after him prior to his death. The record further reveals that the appellant claimed that the deceased provided for her and her children even though the children were not the deceased's. In essence, the appellant claimed that she was a dependant of the deceased which according to her, was manifested in the deceased's will when he left her the life interest in the house she occupied in Kisumu Municipality No. 22808.

29. Opposing the appeal and hence the averments and the depositions by the appellant before the lower court, the respondents herein denied that the appellant was a wife or that she and her children were dependants of the deceased asserting that the appellant had not brought forth any evidence to prove her marriage to the deceased or even satisfied the presence of a presumption of marriage or that she and her children were the deceased's dependants.

30. From the provisions of section 29, the appellant and her children would only qualify to be dependants of the deceased, only if they were maintained by him prior to his death.

31. The evidence before the trial court reveals that the appellant and the deceased Alloys Obunga lived together 10 years prior to his death at the suit property, Kisumu Municipality/22808, a fact that was not controverted by any of the respondents herein, and that the deceased felt the need to provide for the appellant thus in his will, he provided that the appellant enjoy a life interest in the house she occupied in the suit property.

32. Regrettably, the evidence adduced before court shows that the suit property was jointly registered in the name of the deceased and the 3rd respondent Florence Atieno Aboge and thus when the deceased passed on, beneficial interest therein passed to the 3rd respondent. In other words, upon death of the deceased, the suit property ceased being part of his estate. The property devolved on the surviving joint owner, the 3rd respondent herein.

33. The question to be answered, in such circumstances therefore, is whether there was a presumption of marriage between the appellant and the deceased that would render the appellant a dependant as provided under section 29 of the *Law of Succession Act*, and therefore whether the appellant is deserving of an order for provision of part of the estate of the deceased, now that the property which the deceased purported to bequeath to her by way of a life interest is non existent by operation of the law as it automatically, upon the deceased's death, devolved onto the surviving joint owner.

34. The appellant spiritedly asserted and submitted very strongly that she was married to the deceased and that the court should have presumed a marriage in view of her long stay with the deceased as husband and wife for ten years and that she took care of him prior to his demise. The Supreme Court of Kenya in

the case of MNK v POM; Initiative for Strategic Litigation in Africa (ISLA) (Amicus Curiae) (Petition 9 of 2021) [2023] KESC 2 (KLR) (Family) (27 January 2023) (Judgment) dealt with the question of presumption of marriage as follows:

> " 64. We find it prudent at this juncture to lay out the strict parameters within which a presumption of marriage can be made:
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> 1. The parties must have lived together for a long period of time.
> 2. The parties must have the legal right or capacity to marry.
> 3. The parties must have intended to marry.
> 4. There must be consent by both parties.
> 5. The parties must have held themselves out to the outside world as being a married couple.
> 6. The onus of proving the presumption is on the party who alleges it.
> 7. The evidence to rebut the presumption has to be strong, distinct, satisfactory and conclusive.
> 8. The standard of proof is on a balance of probabilities.
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> 65. The above notwithstanding, we are of the view, that the doctrine of presumption of marriage is on its deathbed of which reasoning is reinforced by the changes to the matrimonial laws in Kenya. As such, this presumption should only be used sparingly where there is cogent evidence to buttress it.
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> 66. In the same breath, we would be remiss if we did not point out that marriage is an institution that has traditional, religious, economic, social and cultural meaning for many Kenyans. However, it is becoming increasingly common for two consenting adults to live together for long durations where these two adults have neither the desire, wish nor intention to be within the confines of matrimony. This court recognizes that there exists relationships where couples cohabit with no intention whatsoever of contracting a marriage. In such contexts, such couples may choose to have an interdependent relationship outside marriage. While some may find this amoral or incredible, it is a reality of the times we live in today.
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> 67. For instance, a person may have been in a marriage before and the marriage is no more due to death of a spouse or divorce. Due to their prior experiences, such persons may choose to have an interdependent relationship outside of marriage. For others, it may just be their desire never to marry but have a partner without the confines of marriage. Where such situation is evident and there is no intention whatsoever of contracting a marriage, the presumption of marriage must never be made where this intention does not exist. It must always be remembered that marriage is a voluntary union. As such, courts should shy away from imposing 'marriage' on unwilling persons.
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> 68. In addition, in our ever-changing society, current statistics reveal that a man and a woman can choose to cohabit with the express intention that their

cohabitation does not constitute a marriage. The pervasiveness of having interdependent relationships outside marriage over the past few decades means that no inferences about marital status can be drawn from living under the same roof. 'Interdependent relationships outside marriage' is not a new concept.

69. In Alberta, Canada, since 2003, adult interdependent relationships have been recognized and protected through the Adult Interdependent Relationships Act. This creates a specific type of relationship, called an adult interdependent relationship ("AIR"). This term is used in place of the 'common law relationship'. The Act gives rights and obligations to couples in qualifying long-term relationships. In this regard, perhaps, it is time for the National Assembly and the Senate, in collaboration with the Attorney-General to formulate and enact statute law that deals with cohabitees in long-term relationships; their rights, and obligations.

70. To conclude on this issue, we find that the circumstances in which presumption of marriage can be upheld are limited. In other words, a presumption of a marriage is the exception rather than the rule."

35. The appellant herein made no effort to prove before the trial court that she was married to the deceased or that a presumption of marriage arose. She only alleged that she was a wife. There was no evidence adduced by the appellant that despite their alleged long cohabitation with the deceased, there was an intention to marry.

36. Accordingly, I am satisfied that a presumption of marriage did not arise between the appellant and the deceased. In my view what existed is what the Supreme Court referred to as an 'Adult Interdependent Relationship outside marriage'[AIR] which though not recognized in Kenya by statute yet, but that it exists and the apex Court even proposed for enactment of a statute to provide for such relationships and the rights and duties of the 'cohabitees' in such relationships. The Supreme Court was also clear that presumption of marriage should be the exception and not the rule. Having so found, I find that the appellant herein not being a wife or presumptive wife of the deceased as no such evidence was adduced to the required standard of on a balance of probabilities, I find and hold that the appellant herein was not a dependant of the deceased Alloys Obunga Aboge.

37. Turning onto the question of whether the appellant qualified for provision from the deceased's estate. Section 26 of the *law of Succession Act* governs Provisions for dependants not adequately provided for by will or on intestacy. The section provides that:

> "Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate."[emphasis added]

38. Section 27 of the same Act provides that:

> "In making provision for a dependant, the court shall have complete discretion to order a specific share of the estate to be given to the dependants, or to make such other provision

for him by way of periodical payment or a lump sum, and to impose such conditions as it thinks fit.

39. Section 28 of the very same Act provides that:

> " In considering whether any order should be made under this part, and if so what order, the court shall have regard to -
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> (a) The nature and amount of the deceased's property;
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> b) Any past, present or future capital or income from any source of the dependant;
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> (c) The existing and future means and needs of the dependant;
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> (d) whether the deceased had made any advancement or other gift to the dependant during his lifetime;
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> (e) The conduct of the dependant in relation to the deceased;
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> (f) The situation and circumstances of the deceased's other dependants and the beneficiaries under any will;
>
> (g) The general circumstances of the case, including, so far as can be ascertained, the testator's reason for not making the provision for the dependant."

40. From the above legal provisions, it is clear that under Section 26 of the *Law of Succession Act*, only dependants of a deceased person, who feel that the deceased failed to adequately provide for them can apply for such provision to be made by the court.

41. Having hereinabove found that the appellant was not a dependant of the deceased, it is further finding and holding that the appellant herein could not be provided for under the *Law of Succession Act*. Neither can her children who were not the biological children of the deceased and who were, in fact, never adopted by the deceased as his own for them to qualify as his children, now that the appellant was never his wife.

42. On the issue of costs, the appellant herein argued that the trial court erred by awarding costs against her whereas this was a succession matter involving families and thus the court ought to have not awarded costs.

43. The The general rule on costs is set out in section 27 of the *Civil Procedure Act* which specifies that;

> " 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."

44. Therefore, albeit costs follow the event, they are awarded at the discretion of the court. In the case of Supermarine Handling Services Ltd vs Kenya Revenue Authority, Civil Appeal No. 85 of 2006, the

Court of Appeal explained the circumstances that would lead an appellate court to interfere with the trial court's exercise of discretion thus;

> " Costs of any action or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order. It is well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the Judge who tried his case, that discretion is a judicial discretion, and if it be so its exercise must be based on facts. If, however, there be, in fact, some grounds to support the exercise by the trial Judge of the discretion he purports to exercise, the question of sufficiency of those grounds for this purpose is entirely a matter for the Judge himself to decide, and the Court of Appeal will not interfere with his discretion in that instance...Thus, where a trial court has exercised its discretion on costs, an appellate court should not interfere unless the discretion has been exercised unjudicially or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where the reasons are given if it considers that those reasons do not constitute "good reason" within the meaning of the rule...".

45. In the circumstances of this case, I find no error in the exercise of the trial court's discretion in awarding costs against her or that the said discretion was exercised unjudicially or on wrong principles. This ground thus fails.

46. The upshot of the above is that none of the many grounds grounds of the appeal is competent and valid inasmuch as they involve the provisions of the *Law of Succession Act*. I thus find this appeal devoid of any merit. It is hereby dismissed with an order that let each party bear their own costs of the appeal.

47. This file is accordingly closed.

48. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 30TH DAY OF MAY, 2023

R.E. ABURILI

JUDGE