In re Estate of PKM (Deceased) (Civil Appeal E115 of 2022)
[2023] KEHC 24031 (KLR) (24 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24031 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CIVIL APPEAL E115 OF 2022

FN MUCHEMI, J

OCTOBER 24, 2023

IN THE MATTER OF THE ESTATE OF PKM (DECEASED)

BETWEEN

FKN ..... APPELLANT

SUING AS THE MOTHER & NEXT FRIEND OF FM (MINOR)

AND

ENK ..... RESPONDENT

((Being an Appeal from the Ruling of Hon. C. Cheruto Kipkorir (PM) delivered on 19th October 2022 in Kerugoya CM Succession Cause No. 176 of 2020)

JUDGMENT

Brief facts

1. This appeal arises from the ruling of Kerugoya Principal Magistrate in CM Succession Cause No. 176 of 2020 whereas the court dismissed the appellant's application dated 29/6/2022, seeking for orders for a minor to undergo DNA test to establish whether she was the biological child of the deceased.

2. Dissatisfied with the court's decision, the appellants lodged this appeal citing 5 grounds summarized as follows:-

    a. The learned magistrate erred in law and fact in finding that the appellant had not proved that the minor was a dependant of the deceased despite the fact that she produced a birth certificate indicating the minor was a biological child of the deceased;

    b. The learned trial magistrate erred in law and in fact in dismissing the appellant's application to have DNA test done on the minor which was necessary to conclusively determine paternity.

3. Parties put in written submissions to dispose of this appeal.

Appellant's Submissions

4. The appellant relies on Sections 3(2), 3(3) & 29(a) of the *Law of Succession Act* and submits that she produced a birth certificate which evidently shows that the deceased is the father to the minor. It is argued further that the birth certificate was not contested by the respondent. It is the appellant's case that a birth certificate is one of the crucial documents that proves paternity of a child and therefore the minor being a biological child of the deceased was a dependent of the deceased and she therefore did not need to prove that the minor was being maintained by the deceased.

5. The appellant further submits that since paternity was being contested by the respondent, she made an application for the minor to be subjected to a DNA test. She further states that it was in the best interests of the minor to undergo DNA testing as she risked being disinherited of her father's estate. To support her contention, she relies on the case of *Bother vs Dreyer (now Moller)* High Court South Africa (Transvaal Province) Case No. 4421/08 (unreported) cited with approval in *M.W. & 3 Others vs D.N.* [2018] eKLR and further submits that the best interests of the minor surpasses the right to privacy of the other children of the deceased when it comes to the issue of DNA testing. Thus the appellant contends that the trial court ought to have ordered for a DNA test to be done effectively to determine the paternity of the minor.

The Respondent's Submissions

6. The respondent submits the appeal is in respect of the ruling delivered on 19th October 2022 yet the appellant filed the appeal on 6th December 2022 which is fifty (50) days after the delivery of the ruling. the respondent argues that the appeal was filed out of time without the leave of the court and further that the appellant did not explain the delay in filing the appeal contrary to Section 79G of the *Civil Procedure Act* and Order 50 Rule 6 of the *Civil Procedure Rules*. Moreover, the appellant ought to have sought for leave for the appeal to be admitted out of time, which she did not do. As such, the appeal is incompetent and ought to be dismissed with costs. To support her contentions, the respondent relies on the cases of Civil Misc. Application No. E488 of 2021 Nairobi High Court, *Charles N. Ngugi vs ASL Credit Limited* and Misc. Civil Application No. E024 of 2021 *Siaya Stecol Corporation Limited vs Susan Awour Mudeb*.

7. The respondent submits that the appellant has not amended the index of her Record of Appeal. There is no ruling dated 19th October 2022 in the index yet that is the ruling which has been appealed against. The respondent submits that the same is mandatory as per the practice directions and thus there is no appeal capable of being canvassed due to the foregoing reasons.

8. The respondent relies on the case of *E.N.T vs F.R.T* Misc. Application No. E029 of 2021 High Court Kajiado and submits that a birth certificate is not conclusive proof of paternity. The respondent further argues that the appellant failed to prove dependency pursuant to Section 29(a) of the *Law of Succession Act* as the deceased was not maintaining the minor. The respondent further submits that initially the appellant had filed a civil suit being Kerugoya CM Civil Case No. 45 of 2021 where she sought declaratory orders for her and the minor to be declared as dependants of the deceased but the matter was dismissed. The respondent thus relies on the case of *Re Estate of Jackson Nicholas Kyengo Mulwa* (2021) eKLR and submits that the appellant did not show that at any time the minor was a dependant of the deceased.

Issue for Determination

9. The main issue for Determination is whether the appeal has merit.

The Law

10. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another vs Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:

> " .....this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular,, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence."

11. It was also held in *Mwangi vs Wambugu* [1984] KLR 453 that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence.

12. Dealing with the same point, the Court of Appeal in *Kiruga vs Kiruga & Another* [1988] KLR 348, observed that:-

> " An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand."

13. Therefore this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering and giving allowance for it, that the trial court had the advantage of hearing the parties.

Whether the Appeal is Properly Filed for Lack of Leave to Appeal Out of Time

14. The respondent has raised a preliminary point herein that the appeal was filed out of time without the leave of court. I have perused the trial court record and noted that the ruling being appealed against was delivered on 19th October 2022 and this appeal was filed on 6th December 2022 which is a period of seventeen (17) days from the date the appellant ought to have filed the appeal. Notably, the appellant did not file the requisite for extension of time to lodge this appeal. Although the appeal has been filed out of time, it is my considered view that a delay of 17 days is not inordinate. Moreover, the matter involves a minor and therefore it is my considered view that in upholding the best interests of the child, the rules of procedure herein may be applied with some flexibility. Moreover, failure to seek leave to appeal out of time is not fatal to the appeal. Thus, it is my considered view that the appeal is deemed properly filed.

Whether the Appeal Has Merit.

15. The impugned ruling dated 19th October 2022 stems from the appellant's application dated 29/6/2022 whereby the appellant sought to have the minor undergo a DNA test to confirm that she is the biological daughter of the deceased. Upon perusal of the grounds of appeal and the submission on the appeal, the appellant seems to be ing both the said application and her affidavit of protest dated 31st March 2023.

16. That notwithstanding, the crux of the appeal is whether the minor is a biological child of the deceased and whether the magistrate erred in dismissing the application that sought orders for DNA to be conducted with a view of determining whether the minor was a dependant of the deceased's estate.

17. Section 29 of the *Law of Succession Act* provides:-

For the purposes of this part dependent 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;

b. Such of the deceased's parents, step parents, grandparents, grandchildren, 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.

18. Section 3(2) of the *Law of Succession Act* describes a child to:-

> Include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, a child born to her out of wedlock, and, in relation to a male person, any child whom he expressly recognized or in fact accepted as a child of his own or of whom he has voluntarily assumed permanent responsibility.

19. From the foregoing, the appellant is required to demonstrate that the minor was a dependant of the deceased thus proving that there is a link between the minor and the deceased. This was stipulated in the case of *H.C.K vs E.J.K* [2008] eKLR where the court held as follows:-

> No reasonable court will order for a DNA test against a person in circumstances which do not appear to link the person with the child intended to be protected. There must therefore be facts strongly linking the respondent to the child. Otherwise an applicant will look at the richest person among those she generally associated with and claim him to be the putative father of her child to thereby entitle her to seek a DNA test against him.

20. The standard and burden of proof provided by the *Evidence Act* ought to be discharged; he who alleges must prove. Section 107 of the *Evidence Act* places the burden of proof on the party that alleges. In *Gatirau Peter Munya vs Dickson Mwenda Kithinji & 3 Others* (2014) eKLR the Supreme Court held inter alia:

> The person who makes such allegations must lead evidence to prove the fact. She or he bears the initial legal burden of proof, which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence of a fact in issue.

21. I the case of *Re Estate of George Musau Matheka (Deceased)* [2010] eKLR where the court held that to prove dependency, the onus lies on the claimant to prove paternity of the deceased.

22. It is the appellant's case that the birth certificate produced is conclusive proof of paternity and therefore the appellant need not prove dependency through further evidence. The respondent, on the other hand argues that a birth certificate is not conclusive proof of paternity and that the appellant must prove that the deceased maintained the minor for the minor to be considered his dependant. The record shows that the appellant gave evidence that she cohabited with the deceased which led to the birth of the minor on 22/4/207 and that the minor is a dependant of the deceased. It is noted that no receipts to proof any monetary support were attached to the appellant's application. Notably the minor was born in 2007 and would be attaining sixteen (16) at the time the application was heard and determined in October 2022. In my view, the appellant needed to provide evidence of monetary support to the minor by the deceased, for example food, school fees and shopping to support the fact that the deceased maintained the child. My view is that the appellant has not sufficiently proved that the minor was biological child or dependant of the deceased. In the absence of a *prima facie case* to show the link between the deceased and the minor, there would be no legal basis to subject the minor to a DNA test. Furthermore subjecting one AMK, a child of the deceased to provide blood samples amounts to violating for he has not given consent or given a chance to respond to the appellant's application. This was stipulated in the case of *S.W.M. vs G.M.K* [2012] eKLR where the court held that:-

> Ordering the respondent to provide DNA for whatever reason is an intrusion of his right to bodily security and integrity and also the right to privacy which rights are protected under the Bill of Rights. The petitioner bears the burden of demonstrating to the court the right she seeks to assert or vindicate and which the court would consider as overriding the respondent's rights.

23. Furthermore, under the *Data Protection Act* No. 24 of 2019, genetic data can only be collected with the consent of the subject in compliance with Section 25 of the *Act*. Further Section 26 of the same *Act* requires that data subject be informed of the use to which his personal data is to be put and to object to the processing of all or part of their personal data. The court below did not err in dismissing the appellant's application, and I so find.

24. It is my considered view that the ruling of the Magistrate delivered on 19/10/2022 was based on sound evidence considered by the court by both parties. The Honourable Magistrate reached the finding that the appellant had not established a *prima facie case* for granting orders for conduct of DNA on the minor.

25. I find no merit on this appeal and dismiss it accordingly.

26. It is hereby so ordered.

DATED AND SIGNED AT KERUGOYA THIS 24TH DAY OF OCTOBER, 2023.

F. MUCHEMI

JUDGE

Judgement delivered through video link this 24th day of October, 2023