



REPUBLIC OF KENYA



**Karuku & another v Njogu (Succession Appeal 5 of 2020)
[2022] KEHC 665 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KEHC 665 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION APPEAL 5 OF 2020**

FN MUCHEMI, J

APRIL 28, 2022

**IN THE MATTER OF THE ESTATE OF GEOFFREY
NJOGU ALIAS NJOGU S/O GITHINJI (DECEASED)**

BETWEEN

SHELMITH WANJIRU KARUKU 1ST APPELLANT

SAMUEL MWANGI KARUKU 2ND APPELLANT

AND

JANE WAIRIMU NJOGU RESPONDENT

*(Being an appeal from the Judgment and Order of Principal Magistrate,
Hon. A. Mwangi in the Principal Magistrate court in Karatina,
Succession Cause No. 89 of 2018 delivered on 30th June 2020)*

JUDGMENT

Brief facts

1. This is an appeal against the judgment of Principal Magistrate Karatina in Succession Cause No. 89 of 2018 whereas the appellants' protest was dismissed for lack of merit. The claim of the appellants was based on the ground that they were grandchildren of the deceased. It was alleged that their grandmother one Salome Mumbi was a wife to the deceased and that her daughter Alice Gathigia Karuku was the appellant's mother. The court found that Alice was not a daughter to the deceased based on the evidence adduced by the appellants.
2. Being aggrieved by the decision of the magistrate, the appellants lodged the instant appeal citing 13 grounds of appeal in their Memorandum of Appeal which are summarised as follows:-
 - a. The Learned Magistrate erred in law and in fact in finding that the late Alice Gathigia Karuku was not a daughter to the deceased intestate.



- b. The Learned Magistrate erred in law and in fact in denying the appellants' witnesses to testify in a language they understood thereby resulting in distorted evidence tendered on behalf of the appellants.
 - c. The Learned Magistrate erred in law and in fact in disinheriting the late Alice Gathigia Karuku from the estate of the deceased.
 - d. The Learned Magistrate erred in law and in fact in not scrutinizing the entirety of the evidence tendered thereby arriving at a wrong conclusion.
3. By consent parties disposed of the appeal by written submissions. The appellants were granted 14 days to file their submissions on 24/11/2021 but they did not do so. The matter was mentioned on 08/03/2022 whereas fourteen(14) more days were granted but the appellants did not file submissions.

The Respondent's Submissions

4. It is the respondent's case that the main issue in the trial court was whether Salome Mumbi was married to the deceased and whether Alice Gathigia Karuku her daughter was the deceased's child out of his union with Salome. The respondent submits that proof of a marriage between the deceased and Salome formed the bedrock of the appellants' claim to the estate, without which the other grounds of the claim would have no substratum. The available evidence in the trial court only suggested sporadic acquaintances between the two marital suspects which the respondent submits, did not suggest any marriage by repute or at all. It is submitted further that there was no evidence of cohabitation between the deceased and Salome at any one time. The respondent further submits that there being no evidence of cohabitation for such a lengthy period of time and in such circumstances as to have acquired the reputation of being man and wife as required under the law, no presumption of marriage could be presumed.
5. The respondent further contends that the appellants pursued the notion of Alice Gathigia being the child of the deceased after her death. The appellants claimed to prove this fact by giving evidence of the deceased being photographed at Alice's wedding, a few visits by Alice at the deceased's business premises where the appellants were informed that the deceased was their grandfather and such other informal contacts which the respondent submits are dismally below the standard of proof required to prove paternity. The respondent states that since there is no proof of a valid marriage between the deceased and Salome, the issue of Alice's paternity is not protected under the principle of presumption of legitimacy provided for under section 118 of the Law of *Evidence Act*. The respondent relies on the case of *Re H & A (Children)* (2002) EWCA, CIV, 383 and *Thomas v Jones* (1921) 1 KB 222 and submits that paternity of a child is to be established by science and not by legal presumption or inference. As such, the respondent submits that there is no shred of evidence that Alice was a child of the deceased. The respondent thus prays that the appeal be dismissed as neither Alice nor Salome or the appellants are persons provided for as dependants of the deceased under the law.

Issue for determination

6. After careful analysis, we humbly submit that the main issue for determination is whether the magistrate erred in holding that the appellants had not proved their case.



The Law

7. Being a first Appeal, the court relies on a number of principles as set out in *Selle and another v 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.”
8. It was also held in *Mwangi v 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 not based on any evidence or on a misapprehension of the evidence; or where the court can be said to have failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence.
9. Dealing with the same point, the Court of Appeal in *Kiruga v 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.”
10. On appeal, 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 has merit

11. The question that arises is whether Salome and Alice are wife and child of the deceased for the purposes of *Law of Succession Act*. According to the appellants, Salome Mumbi was married to the deceased and they were blessed with one daughter, Alice Gathigia. The 1st protestor led evidence in court that he received dowry for his sister from the deceased because his mother was around. However the trial court noted that the 1st protestor was not a reliable witness as he contradicted his written statement which indicated that his mother received dowry. He later told the court that his sister was buried at their home in Kanjuri and not in the home of the deceased. From the evidence adduced by the 1st protestor and there is no cogent evidence to support the claim that a marriage ensued between the deceased and Salome Mumbi. The witness’s evidence is scanty generally and there is hardly any information of when the marriage ceremony was conducted if any, what kind of ceremony was undertaken, where the ceremony took place, the family members or elders in attendance, who held the negotiations and what dowry was agreed or paid. As such, I find that the evidence on record is not sufficient to confirm that a ceremony of marriage took place between the deceased and the applicant. Even if the court were to assume that there existed a presumption of marriage between the deceased and Salome Mumbi, I find that the appellants did not prove the same to have transpired. The law on presumption of marriage is



settled in the case of *Hortensia Wanjiku Yawe v Public Trustee* Court of Appeal Civil Appeal No. 13 of 1976 where Mustafa JJA stated:-

By general repute and in fact the parties had cohabited as man and wife for 9 years before the deceased died....and during that time, the appellant bore him 4 children....long cohabitation as man and wife gives rise to a presumption of marriage in favour of the appellant, only cogent evidence to the contrary can rebut such a presumption.

12. Having established that the appellants did not prove marriage between the deceased and Salome Mumbi, the court is now tasked to evaluate the evidence of the trial court to answer the question whether Alice Gathigia was a child of the deceased.

13. The first point of instruction is section 29 of the [Law of Succession Act](#) which 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.

14. 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.

15. Thus the appellants are required to demonstrate that Alice was a dependant of the deceased and thus entitled to a share of his estate.

16. 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 v 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.

17. It is thus incumbent that the appellants are obligated to prove on a balance of probabilities that Alice was the biological child/dependant of the deceased. See [Re Estate of George Musau Matheka \(Deceased\)](#)



- [2010] eKLR where the court held that on proving dependency, the onus lies on the claimant to prove paternity of the deceased.
18. It is the respondent's case that the evidence adduced by the appellants in the trial court amounts to casual acquaintances and not proof of the relationship between the deceased and Alice. The appellants on the other had claim that the evidence by the 2nd protestor in the trial court confirmed that Alice was given away from her father's home on the day of the wedding as per tradition and that this proved the relationship.
 19. In my view, the evidence adduced by the appellants was mostly on instances where they engaged with the deceased through their mother . Particularly, the 2nd protestor stated that she and Alice went to the deceased to get school fees, which he provided. accordingly. Further that during Alice's wedding, they picked Alice from the deceased's home in Karatina where they held the reception to the wedding. She further stated that when she pointed out the deceased in the wedding photo produced by the 1st protestor, she was informed that the deceased was there as her father. The 3rd protestor, a child to Alice testified that they had brief encounters with the deceased such as visiting his school, visiting his business premises but not his matrimonial home. He also testified that Alice introduced them to the deceased as his grandchildren and he was very happy. The trial court however noted that this witness gave contradictory testimonies because when he was recalled, he stated that they would visit their grandfather at his matrimonial home. Protestor fourth witness told the court that he got to know that Alice was a daughter to the deceased because he was the best man in her wedding. He produced two photos claiming that they were proof that Alice was the daughter to the deceased. He further claimed on cross examination that they gave the deceased Kshs. 10,000/- as a token after they requested him to allow Karuku to take Alice as his bride which he accepted.
 20. I make reference to the case of *EMM v IGM & another* [2014] eKLR where the court observed:-
Additionally, the definition of a 'child' in section 3(2) of the *Law of Succession Act* includes a child whom the deceased has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility. We agree with the respondent that the appellant has to show a reasonable degree of permanency in the responsibility that the deceased is alleged to have voluntarily assumed over the appellant. Episodic support, as is the case here will not suffice.
 21. Similarly in the case of *Sarah Kanini Thigunku v Elizabeth Njuki Thigunku* (2016) eKLR the court had this to say regarding dependency:-

For one to be a dependant however, under Section 29 aforesaid, it is clear that one must prove dependency. The use of the words as being maintained by the deceased immediately prior to his death.....in that section connotes that one must prove that he was dependent on the deceased before his demise. From the record, there was no evidence to show that either the appellant or any of her children were dependent on the late Mbungu Thigunku. A mere relationship does not automatically qualify one to be a dependant under Section 29 of the Act. Proof of dependency is paramount.
 22. Further, in the cases of *Lucy Wanjiru Mwangi v Daniel Njuguna Njibia & Florence Njeri Mwaura* (2016) eKLR and *Re Estate of James Muiruri Waweru* (2006) eKLR it was held that photographs are not conclusive proof of any relationship.
 23. I have carefully analysed the evidence on record and reach a conclusion that the magistrate's decision was based on cogent evidence that the appellants failed to discharge the burden of proof in their protest. I do not have any basis to find that the magistrate erred or failed to consider any evidence adduced by the appellants.



24. Consequently, I find that this appeal has no merit and I therefore dismiss it accordingly.
25. Each party will meet their own costs.
26. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 28TH DAY OF APRIL, 2022.

F. MUCHEMI

JUDGE

JUDGEMENT DELIVERED THROUGH VIDEOLINK THIS DAY OF 28TH APRIL, 2022

