



REPUBLIC OF KENYA



**KENYA LAW**  
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**FWO v SW (Succession Appeal 8 of 2019)  
[2022] KEHC 13424 (KLR) (23 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13424 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
SUCCESSION APPEAL 8 OF 2019  
WM MUSYOKA, J  
SEPTEMBER 23, 2022**

**BETWEEN**

**FWO ..... APPELLANT**

**AND**

**SW ..... RESPONDENT**

*(An appeal arising from proceedings and ruling by Hon. TA Odera, Senior Principal Magistrate, in Mumias PMCS53 of 2008 (formerly Kakamega HCSC No. 989 of 2014))*

**JUDGMENT**

1. The appeal herein arises from a decision of the trial court, in Mumias PMCS No 353 of 2018 of August 9, 2019. The grounds of appeal are expressed in a language that is not very clear, but the appellant appears to be challenging paternity of persons he has referred to simply as A, B and C.
2. The impugned ruling by Hon TA Odera, senior principal magistrate, of August 9, 2019, turned on an application for revocation of grant, dated February 11, 2019. It had been argued that the grant was obtained fraudulently, as the administratrix and the 2 others were strangers to the estate. The case for the appellant was that administratrix was not married to the deceased and the other 2 were not daughters of the deceased, as their mother, the administratrix, was not married to the deceased. He asserted that he was the sole beneficiary of the estate. The case for the administratrix was that the appellant was his biological son, and the other 2 the biological sisters of the appellant. She averred that the deceased was her late husband and the father of her 3 children, being the appellant herein and the other 2.
3. In determining the matter, the trial court considered pleadings filed in Kakamega ELC No 531 of 2014, which was a suit between the appellant and 2 others. In the said pleadings, the appellant had referred to the administratrix as his mother. When confronted with the said pleadings, he conceded that they were pleadings that he himself had filed in that suit. In the pleadings, he had further described the



administratrix as a widow of the deceased herein. He pleaded that the deceased had been survived by his mother as widow, himself as son and two others. The trial court relied on that material to conclude that the said pleadings defeated his claim that the administratrix was not his mother and the other 2 were not his siblings; and that he was the sole beneficiary of the estate. The court concluded that daughters of a deceased person are entitled to a share in the estate of their father, and the deceased herein, having died after the Law of Succession Act, Cap 160, Laws of Kenya, had come into force in 1981, his daughters were entitled to a share in his estate on the basis of section 35 (1) as that law did not discriminate against them. Thereafter, the trial court concluded that the survivors of the deceased were 4, being the widow and administratrix, SWO; the appellant, FOW; and the 2 daughters, EOW and ANA. It was ordered that East Wanga/XXXX be shared equally between the 4 of them.

4. In the petition lodged in the cause before the trial court, the administratrix listed herself as widow of the deceased, the appellant as son of the deceased, and E and A as daughters of the deceased. That information was carried into the summons for confirmation of grant, dated December 13, 2018, with the proposal that East Wanga/XXXX be shared equally amongst all the 4 survivors and beneficiaries. Before the grant could be confirmed, the appellant lodged the revocation application dated February 11, 2019, which is the basis of the impugned ruling of August 9, 2019. In that revocation application, it was him who introduced Kakamega ELC No 531 of 2014, where he had sued the administratrix and 2 others.
5. The pleadings in Kakamega ELC No 531 of 2014 were placed on record by administratrix at the oral hearing of the revocation application. They were produced as D Exhibit No 1 When the appellant was confronted with those pleadings, on March 12, 2019, he said:

' CWO is not known to me. I do not know her as my biological mother. I just knew her on November 12, 2014. I have never lived with her. EOW and ANA are strange to me. I do not have sisters and they are not my sisters. Kakamega ELC 531 of 2014 is my papers (Kakamega ELC 531 of 2014) shown to witness DMFI1). The pleadings in that case are the ones shown to me. CWO is one of the defendants in that case'

6. The bundle of filings in Kakamega ELC No 531 of 2014, referred to as the pleadings in Mumias PMCSC No 353 of 2018, include the plaint dated September 24, 2014, the appellant's supporting affidavit sworn on September 24, 2014 and the appellant's witness statement executed on September 24, 2014. In that suit, the persons sued are variously referred to, in the said filings, as defendants and respondents. Those sued are SWO, FO and JN, as 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents/defendants, respectively.
7. In the plaint, dated September 24, 2014, the appellant avers that: 'the defendant is a widow of the late DO.' There are 3 defendants in that suit, but there is only 1 woman amongst them, that is to say SWO. The reference to 'a widow' must be to the said SWO.
8. In the supporting affidavit of September 24, 2014, the appellant makes the following averments on oath:
  - (1) That I am a male adult of sound mind and the applicant herein hence competent to swear this affidavit.
  - (2) That I am the son of the deceased herein.
  - (3) That I was shocked to learn that the respondent had hurriedly registered the suit property in her names. (see copy of search annexed and marked FOW-1).



- (4) That the said parcel of land is subject to succession which is a mandatory process as my father died intestate.
  - (5) That my mother did not do succession but has gone ahead to registered the said parcel in her name fraudulently.
  - (6) That the 1<sup>st</sup> respondent being my mother has fraudulently caused transfer of the land parcel No E/Wanga/XXXX and she had caused sub-division which has creates No XXXX, XXXX, XXXX, XXXX.'
9. The person named as 1<sup>st</sup> respondent, in the heading on the title of the supporting affidavit, is SWO. The appellant avers as follows, at paragraphs 5 and 6 of the said affidavit:
  - ' (5) That my mother did not do succession but has gone ahead to registered the said parcel in her name fraudulently.
  - (6) That the 1<sup>st</sup> respondent being my mother has fraudulently caused transfer of the land parcel No E/Wanga/XXXX and she had caused sub-division which has creates No XXXX, XXXX, XXXX, XXXX .'
10. In the witness statement, dated September 24, 2014, he states as follows:

' The plaintiff is a son while the defendant is a widow to the late DO. The estate of the deceased comprised of land parcel E/Wanga/XXXX. The 1<sup>st</sup> respondent herein is my mother and we were only three children. I being the only son. That my mother colluded with'
11. Of course, the plaint is the principal pleading in Kakamega ELC No 531 of 2014. It is verified by an affidavit sworn on September 24, 2014. The supporting affidavit is a document on oath, while the witness statement is unsworn, but its contexts are meant to disclose to the defendants the evidence that the appellant was to place before the court in that cause. The case, disclosed in those filings, was that the respondent administratrix was the mother of the appellant herein. He avers that his mother and the deceased had 3 children, being self and 2 others. The case that the appellant presented in Mumias PMCSC No 353 of 2018 is the complete opposite of that presented in Kakamega ELC No 531 of 2014. In Mumias PMCSC No 353 of 2018, he denies that SWO was his mother and her children were his siblings. The two cases cannot stand together, and one of them has to be a lie.
12. A party is not expected to file suits before two different courts, urging two mutually exclusive positions. That sort of approach smacks of abuse of the court process. The court process ought to be used to advance a proper cause, and should not be used for ulterior motives. To present different sets of facts before two different tribunals clearly points to dishonesty and cheating, for the two exclusive positions cannot possibly be reflective of the actual situation on the ground. By filing these different suits with different sets of facts clearly pointed to dishonesty and ulterior motives on the part of appellant. It exposed him as devious and unreliable.
13. The motion, dated February 11, 2019, which was the basis for the impugned ruling, was filed after the filing of Kakamega ELC No 531 of 2014. The averments in the said motion contradicted the filings in Kakamega ELC No 531 of 2014. The trial court, in Mumias PMCSC No 353 of 2018, was justified in disbelieving the averments in the said motion, and in relying on the filings in the Kakamega ELC No 531 of 2014, which came earlier.



14. Perhaps the appellant should know that lying on oath is a criminal offence, known as perjury, defined in section 108 of the Penal Code, Cap 63, Laws of Kenya. He swore an affidavit, which is a statement on oath, on September 24, 2014, where he described SWO as his mother. When he took to the witness stand on March 12, 2019, he said on oath that he did not know SWO. She was not his mother. He knew her for the first time on November 12, 2014. He perhaps had forgotten that he had sworn an affidavit, on September 24, 2014, saying she was his mother, and the allegation in court, on March 12, 2019, that he only got to know her on November 12, 2014, was a blatant untruth. Clearly, he told lies on oath, and a charge of perjury was open to him. The trial court could not rule otherwise, in the face of the filings in Kakamega ELC No 531 of 2014, for to do so would have been to encourage abuse of the court process.
15. For avoidance of doubt, section 108 of the Penal Code, says as follows:
- ' 108. (1)(a) Any person who, in any judicial proceeding, or for the purpose of instituting any judicial proceeding, knowingly gives false testimony touching any matter which is material to any question then pending in that proceeding or intended to be raised in that proceeding, is guilty of the misdemeanour termed perjury.
- (b) It is immaterial whether the testimony is given on oath or under any other sanction authorized by law.
- (c) The forms and ceremonies used in administering the oath or in otherwise binding the person giving the testimony to speak the truth are immaterial, if he assents to the forms and ceremonies actually used.
- (d) It is immaterial whether the false testimony is given orally or in writing.
- (e) It is immaterial whether the court or tribunal is properly constituted, or is held in the proper place or not, if it actually acts as a court or tribunal in the proceeding in which the testimony is given.
- (f) It is immaterial whether the person who gives the testimony is a competent witness or not, or whether the testimony is admissible in the proceeding or not.
- (2) Any person who aids, abets, counsels, procures or suborns another person to commit perjury is guilty of the misdemeanour termed subornation of perjury.'
16. The appellant appears to say that the only way of establishing paternity is by way of a deoxyribonucleic acid (DNA) test. A DNA test is only necessary where paternity is contested. In this case, the same is not disputed. The appellant filed papers in Kakamega ELC No 531 of 2014, where he identified SWO as his mother, who had 2 other children. SWO identified the appellant as his son, and her other 2 children as EOW and ANA. The filings by the appellant in Kakamega ELC No 531 of 2014 settle the matter of paternity, and his filings in Mumias PMCSC No 353 of 2018 were an ill-fated strategy, designed to frustrate the confirmation of the grant.
17. It would appear that the appellant is unhappy that his sisters get a share in the estate of the deceased, perhaps on the misguided notion that being daughters, or female, they had no right to a share in the estate of their father. The deceased herein died in 1983, after the Law of Succession Act had come into force in 1981. Section 2(1) of the Law of Succession Act ousted the application of African customary law of succession, which the appellant appears to rely on, in his insistence that he was the only son of the deceased. African customary law of succession applies by dint of sections 2(2), 32 and 33 of the Law of



Succession Act, but both do not apply here. Section 2(2) applies the African customary law of succession to estates of persons who died before the Law of Succession Act came into force on July 1, 1981. The deceased herein died on December 24, 1983. Sections 32 and 33 apply the African customary law of succession to immovable property situated in such areas or regions as specified by the relevant minister. That was done through Legal Notice No 94 of 1981. Kakamega was not listed in that schedule and, therefore, land within Kakamega is not subject to sections 32 and 33 of Law of Succession Act.

18. Part v of the Law of Succession Act applies to this estate, as the deceased died intestate. The provisions in part v of the act provide for equal distribution of the assets of the estate of an intestate amongst the children of the deceased. The Law of Succession Act talks of 'children' not 'sons.' There is no discrimination in part v against daughters. In any case, even if there was any, the same would be sorted out by article 27 of the Constitution, which is against discriminatory treatment of women, by decreeing that men and women be treated equally in all spheres of life. There is no room, therefore, at this time and age, for daughters to be treated differently from sons in succession.
19. The distribution that the trial court arrived at, in the impugned ruling, captures the spirit of part v, equal treatment of all the survivors of the deceased. The court divided East Wanga/XXXX equally amongst the 4 survivors. That is what the Law of Succession Act envisages, and that position is bolstered by article 27 of the Constitution.
20. Overall I find no merit in the appeal before the court, and I hereby dismiss the same. As this is a family matter, each party shall bear their own costs.

**JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS  
23rd DAY OF September 2022**

**WM MUSYOKA**

**JUDGE**

**Mr Erick Zalo, Court Assistant.**

Felix Wambande Oronje, the appellant, in person.

Ms Nafuye, instructed by Wesutsa & Company, Advocates for the respondent.

