



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 44 OF 2019

IN THE MATTER OF THE ESTATE OF JOSEPH MWINGIRWA KIRIMANIA (DECEASED)

LILLIAN KIRITOAPPELLANT

VERSUS

MARY KAUNA MWINGIRWARESPONDENT

(Being an Appeal from the decision of Hon. Sogomo G. (PM) in Tigania Succession Cause Number 31 of 2018 made on 25/5/2019)

J U D G M E N T

1. The deceased died on 16/2/2003 whereby the respondent petitioned for letters of administration on 27/12/2017. She listed the appellant as one of the 5 daughters of the deceased together with a son by the name **Michael Kimathi**. The grant was issued to the respondent on 25/06/2018. Before expiry of the 6 months statutory period, the respondent filed summons for confirmation on 26/9/2018.

2. The summons came up for hearing on 15/11/2018. The record shows that all the beneficiaries were present. The grant was confirmed as had been proposed by the respondent as follows:-

a) Kianjai/Kinajai/1289

Micheal Kimathi - whole parcel

b) Kianjai/Kianjai/2340

i) Jemima Kaingoi - 0.50 Acres

ii) Pauline Kananu - 0.50 Acres

iii) Micheal Kimathi - 1.00 Acres

3. Discovering that she had been left out in the distribution, the appellant filed for revocation of the grant on 20/11/2018. She alleged that the grant was obtained through fraud and forgery. That she was never involved in the initial stages of the succession proceedings. That signature on the consents to lodge the Cause and for distribution was a forgery. That during the hearing the respondent misinformed her that the case was coming up for the court to determine who will get what subdivision of the deceased property. That it was only after their names were called out and the grant confirmed that she realised that she had been lied to and she had not been given any share of the property.

4. Vide a ruling delivered on 2/5/2019 the trial Court dismissed that application. The trial Court held that; the appellant failed to register her complaint during the confirmation of the grant; that **Jemima Kaigongi** and **Pauline Kananu** were granted a share of the estate hence it is misleading for the appellant to plead discrimination on the grounds of gender. That the appellant had not shown what inequality she had faced given that her other siblings **Caroline Kagwiria** and **Miriam Makena** and their mother had been left out in the distribution of the estate.

5. Aggrieved by that decision, the appellant has appealed to this Court setting out 7 grounds of appeal in her Memorandum of Appeal dated 6/5/2019 which can be summarized into as follows: -

a) that the trial Court erred in holding that the appellant had not been discriminated upon;

b) that the trial Court erred in failing to consider the evidence placed before it.

6. On 4/12/2019, the Court directed the parties to canvass the appeal by way of written submissions. At the time of writing this judgement none of the parties had filed their respective submissions.

7. As per the decision in **Selle & Another v. Associated Motor Boat Ltd [1968] EA 123**, this Court as the first appellate Court is enjoined to re-evaluate and re-consider the evidence afresh and come to its own independent findings and conclusions.

8. I have considered the entire record. I will first consider what I have found to be irregularities that occurred before the trial Court before I consider the appeal: -

a) the trial Court proceeded to entertain an application for confirmation that was filed within 3 months of the issuance of the grant. There was no leave sought or granted to lodge that application before the expiry of 6 months as required by law. The grant was issued on 25/6/2018 and confirmation was applied for on 26/9/2018 and confirmed on 15/11/2018. That fell foul with **section 71 of the Law of Succession Act, Cap 160**.

b) when the application for revocation came up for hearing on 25/4/2019, the trial Court did not hear the advocate for the appellant who was in Court. The trial Court only proceeded to give a date for ruling. That was a serious irregularity that goes to the root of our judicial system that requires that a party be heard before being condemned.

9. The foregoing irregularities are so fundamental that the proceedings before the trial Court cannot, by any means left to stand.

10. On the merit, the first ground was that the trial Court erred by holding that the appellant had not been discriminated upon. The findings of the trial Court was that since two other daughters of the deceased, **Jemima Kaigongi** and **Pauline Kananu** had been given a share of 0.5 acres each in **Kianjai/Kianjai/1289**, it was misleading for the appellant to allege that she had been discriminated upon on grounds of gender.

11. With greatest respect, the trial Court failed to consider that, the respondent had not explained by way of a replying affidavit, the rationale for having distributed the property to the said two daughters and leave out the others. It was incumbent upon the trial Court to ask for reasons. Reasons having not been advanced, the trial Court had no basis to hold that the appellant had not been discriminated upon in violation of **Article 27 of the Constitution**.

12. Further, the trial Court fell into further error when it held that since the respondent had not distributed anything to herself and two other daughters of the deceased, **Carolyne Kagwiria** and **Miriam Makena**, the appellant had suffered any iniquity.

13. With the greatest respect to the trial Court, the appellant was indisputably a daughter of the deceased. She had complained of having been left out of the sharing of the estate without any explanation. It was an error of judgment to hold that since the other 2 daughters had also been left out of distribution, the appellant had suffered no loss.

14. Rights are personal and not collective. If the other two did not feel offended by being left out, the appellant was before the seat of justice crying out for her rights that were personal to her. She was entitled to be heard on her cry. The fact that the other two had not come to Court, that in itself did not lessen the appellant's right to seek to enforce her rights. The first ground is merited and I allow it.

15. The other ground was that the trial Court erred in failing to consider the evidence before it. The appellant alleged on oath that; she had not given any consent to either the filing of the Cause or to the mode of distribution. That she had been misled that the attendance in Court on the date of confirmation was for the Court to satisfy itself of who were the beneficiaries of the estate.

16. The trial Court peremptorily dismissed the appellant by stating that the appellant should have objected to the mode of distribution on the day of confirmation. The trial Court did not consider the fact that the appellant had stated on oath that she had been misled by the respondent as to the purpose of that Court attendance.

17. It is also curious that, the trial Court failed in the basic test to find that, the respondent having not denied the averments by the appellant, the same is taken to be the truth. The same was neither denied nor challenged.

18. The trial Court faulted the appellant for not having raised an objection on the confirmation day. I have looked at the record. The same only states that all the beneficiaries were present and the Court proceeded to confirm the grant. The Court erred as it failed in its duty under **section 71 of the Law of Succession Act**. There is no indication of the beneficiaries' names, their identities or that the trial court conducted an examination as to their authenticity and agreement to the *shares of the respective beneficiaries*.

19. In my view, in a situation such as the present one, where some of the beneficiaries are not given any shares, in order to comply with the dictates of the proviso to **section 71(2)** aforesaid, the Court should specifically and expressly ask the left out beneficiaries to state that they have renounced their interest in the estate. The concurrence of such beneficiaries should be expressly noted in the record.

20. In most cases, beneficiaries come to Court on the confirmation day yet they do not know what the petitioner has stated in the affidavit in support of confirmation. Because of the level of illiteracy in this country, beneficiaries in most cases come to court without having had explained to them by the petitioners, the shares being distributed.

21. In view of the foregoing, I find merit in the Appeal and allow the same as follows: -

a) The trial Courts ruling dated 2/5/2019 is hereby set aside.

b) The grant issued to **Mary Kauna Mwiringa** on 25/6/2018 is hereby revoked.

c) A fresh grant hereby issues to **Mary Kauna Mwiringa** and **Lilian Kirito**.

d) The matter is remitted back to the Court below, other than Hon. Sogomo G. for the new administrators to either file an application for confirmation within 30 days, if they agree. If they do not agree on distribution, either of them may file an application for confirmation serve upon the other who should then file a Protest in the normal way.

e) Because of the conduct of the respondent, I will allow costs to the appellant.

DATED and **DELIVERED** at Meru this 30th day of January, 2020.

A. MABEYA

JUDGE