



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CIVIL APPEAL NO.18 OF 2019

IN THE MATTER OF THE ESTATE OF: OLOKO MUNIKA.....DECEASED

BETWEEN

1. GABRIEL SIMALI

2. THOMAS ODWORI SIMALI

3. MATHEW ODUORI SIMALI

4. MICHAEL SIMALI

5. MARGARET AWINO OSINGO

6. ROSE MAENDE SIMALI

7. MARY SIMALI

8. BONVENTURE CHESAAPPELLANTS

AND

GEORGE ODUOR OLOKO.....RESPONDENT

(Being an Appeal from the ruling delivered in Busia Chief Magistrate's Court Succession Cause No. 579 of 2017 by Hon. S.O Temu-Principal Magistrate).

JUDGMENT

1. The appellants herein had moved the Lower Court by an application dated 29th October 2018. In the application the main prayer was an order for revocation of a grant that was confirmed on 12th April 2016. Thereafter, they were seeking for another grant to be issued and confirmed where they were going to be part of the beneficiaries. Their application was dismissed.

2. The appellants were aggrieved and filed this appeal. The appellants were represented by the firm of Abalo & Company, Advocates. They raised the following grounds:

a. That the learned magistrate erred in law and in fact in failing to properly evaluate the evidence on record before arriving at his findings.

b. That the learned magistrate erred in law and in fact in dismissing the beneficiaries' claim of inheritance from the estate.

c. That the learned magistrate erred in law and in fact in awarding the whole estate to the petitioner and yet he had a step-sister who was the grandmother of the appellants.

3. The respondent was represented by the firm of Wanyama & Company Advocates. He raised the following grounds of opposition:

- a. That the appeal was incompetent for it did not have a complete record.
- b. That the appeal is *res judicata* for the same issues being raised were decided by judge Tuiyott on 25th January 2016.
- c. That the appellants herein lack *locus standi* in this matter.
- d. That their claim is not provided for in law.

4. On 3rd December 2019 this court gave directions that the appeal be disposed of by way of written submissions. Both parties filed and exchanged submissions.

5. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

6. I agree with the respondent that the appellants' record of appeal was selectively compiled. It omitted some proceedings that had been made earlier in the High Court before the matter was transferred to the Lower Court. To that extent the appeal is incompetent. In order to appreciate what had transpired, I called for the Lower Court file.

7. On 26th January 2016 Judge Tuiyott delivered a ruling where the present respondent was the applicant. The application was seeking for revocation of a grant which had been issued to Helena Otsieno Simali and the appellants herein were respondents. The application was unopposed.

8. The main contention in the application was that Helena Otsieno Simali lacked *locus standi* and that at the time she was deceased. With respect, the issue of *locus standi* was not decided. It is clear from the ruling of the judge. He said as follows:

3. As the application is not opposed, I would have no reason not to allow it. I allow it as prayed. But state that the orders shall not be used by the applicant or any other person to change or affect the status quo on the ground. The orders shall not be used to threaten or evict or in any other way to interfere with the possession of any person who may be occupying or using Marachi/Kingandole/1275 at the time of delivery of this ruling.

9. The appeal herein revolve around the issue as to whether the appellants are beneficiaries of the estate of Oloko Munika, the deceased. It is not disputed that the respondent is the son of the deceased. From the record, the respondent was the only surviving son of his father and Klemensia Muniala was his sister. The appellants are therefore great grandchildren of the deceased herein.

10. There are instances when a grandchild or a great grandchild for that matter can inherit directly from the estate of the deceased. One such instance is where it is proved that such a grandchild or a great grandchild was being maintained by the deceased. **In re Estate of Joyce Kanjiru Njiru(Deceased) [2017] eKLR** Judge Lucy Waruguru Gitari observed the following:

From the definition given under Section 29 (supra) the spouses and children of the deceased have priority to inherit the estate. The grandchildren and others can inherit if they were being maintained by the deceased prior to her death. In this present cause, the two grandchildren are not claiming interests as dependents but are coming in to claim the interests of their respective parents who are now deceased. My view is that the children are entitled to inherit the share which their deceased parents would have inherited. [Emphasis added]

I wholly agree with the learned judge. In the instance case, the appellants cannot lay their claim on this basis for they have not proved that the deceased herein maintained them.

11. The second instance is where the grandchild can stake his claim on his/her parents' right to inherit. **Musyoka J.** in the case of Estate of **Veronica Njoki Wakagoto (deceased) (2013) eKLR** described such a right in the following terms:

...grandchildren can only inherit their grandparents indirectly through their own parents, the children of the deceased. The children inherit first and thereafter the grandchildren inherit from the parents. The only time grandchildren inherit directly from their grandparents is when the grandchildren's own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents.

Whereas I agree with the Learned Judge, such must be clothed with legal powers to do so; he/she must first out seek and obtain letters of administration of their parents' estate. This is when he can claim his/her parents' inheritance from the estate of the deceased. In the instant case the appellants have not demonstrated that they have obtained letters of administration to allow them to stake any claim in the estate of the deceased.

12. From the foregoing therefore, I find that there is no basis for challenging the decision of the learned magistrate. The appeal is dismissed with costs.

DELIVERED and SIGNED at BUSIA this 12th day of March, 2020

KIARIE WAWERU KIARIE

JUDGE