



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 16 OF 2019

GIDEON KIDD ORWENYO.....APPELLANT

VERSUS

DAVID ONYANCHA MOGAKA.....1ST RESPONDENT

JARED MICHIRA MOGAKA.....2ND RESPONDENT

(Appeal from the judgment and decree of Hon. N.S. Lutta (SPM) dated and delivered

on the 23rd day of January 2019, in the original Kisii Succession Cause No. 261 of 2016)

JUDGMENT

1. The appellant and the respondents are sons of the late Shem Mogaka Timberia who died intestate on 2nd October 1973. The appellant claims that he was constrained to file a Citation vide Kisii HCC Succession Cause No. 408 of 2015 against the respondents because the family members could not agree on how to proceed with the administration of the deceased's estate. Subsequently, the respondents commenced succession proceedings in accordance with the orders of the court in Succession Cause No. 408 of 2015. The appellant avers that he noticed certain pertinent errors in the petition for grant of letters of administration and had to file a Notice of Objection to the making of the grant. He also filed an answer to petition for grant and a cross application in accordance with **Section 68** of the **Law of Succession Act**.

2. The issues raised by the appellant in his objection were that although he had been named as a co-petitioner, he was not notified of the petition. He also complained that daughters of the estate had not been included in the petition. He accused the respondents of failing to obtain the consent of the rest of the beneficiaries and failing to obtain sureties or guarantors as required by law. The petitioner also pointed out that the respondents had failed to execute the petition which rendered it defective and invalid.

3. The appellant gave oral evidence in support of his case when the matter came up for hearing before the trial court. He testified that he and the respondents were sons of the deceased and Teresia Moraa Mogaka both of whom had since passed away. He told the court that the deceased owned land parcel **Nyaribari Chache Keumbu 946** and by the time he died, the deceased had not shown them where to settle on the land as they were young. He testified that it was during the lifetime of their mother that they agreed on where each person would farm but the respondents felled the live fence demarcating the land after their mother's death. The appellant told the court that his reason for opposing the succession proceedings was because he had not been served with the proceedings. He urged the court to issue him with letters of administration and subdivide the land to all beneficiaries including his sisters.

4. During cross examination, the appellant testified that the chief had appointed him to commence the succession but the 1st respondent resisted and was appointed instead. He denied the claim that he usually made unilateral decisions concerning the estate and insisted that he was not trying to disinherit the respondents.

5. On 16th May 2016, the 2nd respondent filed a reply to answer to petition for grant and a replying affidavit to the cross application filed by the appellant. In the reply to answer to petition, the 2nd respondent averred that the petition had been mounted with the knowledge of all beneficiaries since the proceedings had been filed as a result of a court order after the appellant filed the Citation. He also averred that the objector's consent was not sought because he was not a beneficiary and accused him of trying to defraud the rest of the beneficiaries of their rightful inheritance. In the relying affidavit in response to the cross application, the 2nd respondent reiterated that the objector was out to defraud the beneficiaries. He also expressed his apprehension that the objector would not faithfully administer the estate of the deceased because he had lied in his affidavit.

6. The respondents did not give oral evidence and their case was marked as closed.

7. The trial court considered the evidence before it and found that there was no proof that the petition had been made fraudulently. The court also observed that the appellant was not excluded from the petition and therefore his cross application for petition for grant of letters of

administration was unmerited.

8. Aggrieved by that decision, the appellant filed the instant appeal. The grounds of appeal set out in his memorandum of appeal dated 11th February 2019 may be summarised into the following issues;

- a. What the legal implications of failure to execute the petition and supporting affidavit are;
- b. Whether the appellant was privy to the succession proceedings;
- c. Whether it was necessary for the beneficiaries to consent to the making of the grant to the respondents

PARTIES' SUBMISSIONS

9. The parties took directions to canvass the appeal by way of written submissions.

10. In his written submissions, the appellant's counsel submitted that the respondents failed to sign the petition and the affidavit in support of the petition. He argued that despite raising the issue before the trial court, the court failed to address the issue. In his view, the illegitimate petition was not capable of attracting any favourable orders.

11. Counsel also submitted that whereas the name of the Appellant was included in both the petition and the affidavit in support of the petition, his signature was conspicuously missing from the documents. He argued that the court's finding that the appellant was aware of the filing of the petition had no legal basis. He lamented the trial court's finding that the inclusion of the appellant's name in the Notice to the Government Printers was sufficient to confirm involvement and argued that the Notice is a document prepared by the court.

12. The appellant's counsel also argued that it was upon the petitioners to include all beneficiaries as listed in the chief's letter in Form P&A 5. However, the respondents only included 4 beneficiaries and left out two daughters contrary to Section 29 of the Law of Succession Act.

13. Counsel contended that being the first born in the family, the appellant should have been issued with the grant based on the doctrine of priority. He further submitted that the trial court disregarded the importance of obtaining consents from beneficiaries of the estate ranking in *pari materia* with the respondents by failing to ensure that all the beneficiaries had signed the consent form. He argued that various issues including, the non-execution of the petition and supporting affidavit, the non- inclusion of all beneficiaries and the utterance of false documents had been raised before the trial court but the court failed to address them and therefore the judgment ought to be vacated.

14. For their part, the respondents submitted that they filed the succession cause in compliance of the orders of the court in HCC Succession Cause No. 408 of 2015. That the appellant had attended a family meeting with the area chief where it was resolved that the 1st respondent applies for the grant. They argued that the family preferred them to the appellant due to the appellant's tendency to make unilateral decisions and act with impunity. The respondents also submitted that contrary to the appellant's submissions, they not only signed all documents but also included his name in each of the documents. They further submitted that the inclusion of the appellant's name in the notice to the government printers shows that there was no intention to conceal information.

15. The respondents argued that the appellant cannot feign ignorance of the succession proceedings since both he and his advocate were present when the Citation he had filed was marked as settled. They also submitted that the appellant has not shown why he should be the sole administrator of the estate. They submit that the matter has been pending since 2015 and the application by the appellant puts his intentions to question.

ANALYSIS AND DETERMINATION

16. In determining the issues raised herein, this court is guided by the Court of Appeal decision in the case of **Selle & Another vs Associated Motor Boat Co. Ltd & Another (1968) EA 123**. The Court held that the duty of a first appellate court is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that the court had no opportunity of hearing or seeing the parties as they testified.

17. I have read and considered therecord of appeal and the submissions made by the parties. The first issue raised by the appellant in his objection to the making of the grant was the respondents' failure to sign the petition and affidavit in support of the petition. The Law of Succession Act ("the Act") provides various forms to be adopted when making applications under the Probate and Administration Rules in the first schedule. The applicable form for making a petition for letters of administration is Form 80. The rules provide that the petition should be accompanied by a supporting affidavit which is provided for in Form 5. The Forms in the first schedule prescribe a specific mode of execution. In Form 80, a petitioner is required to sign the petition in the presence of an advocate. As for Form 5, the petitioner is required to swear the affidavit in the presence of a Commission for Oaths.

18. The appellant referred this court to the case of **Shah & Another vs Investment and Mortgages Investment Bank Limited & 2 Others [2001] eKLR** where the court held as follows on the importance of executing pleadings;

There is of course the object the legislator had in mind in requiring that a plaint be signed either by counsel or the party suing. The object must clearly be to make the party suing or filing any other pleading take ownership and responsibility for the contents of the plaint or pleading ...

the position in Kenya seems to us to be that a party who files an unsigned plaint runs a very grave risk of having that plaint struck

out as not complying with the law.

19. In the case of ***Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others Civil Application No. 26 Of 2018 [2018] eKLR*** the Supreme Court held that an affidavit must clearly state the place and date where it was made and it must be made before a Magistrate or a Commissioner for Oaths. The Court further held that an affidavit that was not signed, commissioned or dated was fatally defective for contravening the provisions of the Oaths and Statutory Declarations Act.

20. The respondents jointly filed their petition for letters of administration to be issued to them and the appellant on 8th January 2016. The appellant argued that much as his name was included as a co-petitioner he was not notified of the succession proceedings and did not affix his signature to the petition. The petition filed before the trial court shows that only two signatures, presumably belonging to the respondents, were affixed at the foot of the petition in the presence of an advocate. Form 5 was also signed by both respondents but was not dated or commissioned. The part of the affidavit where the respondents were required to append their signatures was completely missing. As held by the Supreme Court in ***Gideon Sitelu Konchellah (supra)*** failure to commission an affidavit renders it fatally defective. Without the supporting affidavit, the petition for grant before the trial court was incompetent.

21. Further, **Rule 26** of the **Probate and Administration Rules** provides that;

26. (1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.

(2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.

22. From the above quoted provision, it is clear that a petitioner for letters of administration is required to inform all persons who are entitled to apply for letters of administration in the same degree or priority to him that he has lodged the application.

23. In the persuasive authority of ***The Matter of the Estate of Ngari Gatumbi alias James Ngari Gatumbi (Deceased) Nairobi High Court Succession Cause No.783 of 1993*** the court held that:

“A grant will be revoked where a person who is entitled to apply is not notified by the petitioner of their intention to apply and that person’s consent to the petitioner’s application is not sought.”

24. **Section 66** of the **Act** provides the order of priority to be given to certain persons to administer the deceased's estate in case the deceased has died intestate. Where the deceased has no surviving spouse, the surviving children are equally entitled to apply for grant. The Act does not state any preference to children based on their age or gender. The respondents and the appellant are brothers and were therefore equally entitled to apply for grant.

25. The chief’s letter dated 30th December 2015 which was relied upon by the appellant and the respondents listed the deceased’s surviving children as;

a. Kidd Gideon Orwenyo

b. Grace Gesare Mogaka

c. David Onyancha Mogaka

d. Jane Nyaboke Mogaka Gichana

e. Joyce Kemunto Mogaka

f. Jared Michira Mogaka

26. After making the application for letters of administration, the respondents were required to notify the above listed beneficiaries of the application. The beneficiaries would then make a renunciation of their right to administer the estate or sign a consent to the making of the grant to the respondents in accordance with Rule 26 of the Probate and Administration Rules.

27. The record shows that the respondents filed a consent to the making of the grant contemporaneously with the petition for grant. The only name featuring in that consent was the name of Grace Gesare Mogaka. None of the beneficiaries including Grace Mogaka affixed their signatures to the consent. There is no way of telling whether the beneficiaries were notified of the petition since there is no renunciation or consent on record.

28. Rule 4 of the Probate and Administration Rules provides that the notice to the Principal Registrar is sent to confirm that there are no other grants issued to other parties of the same estate. In my view, the notice to the Principal Registrar cannot be relied upon to deduce whether the beneficiaries of the estate were notified of the petition as held by the trial court. It is therefore my finding that the petitioner sufficiently proved the claim that he had not been notified of the institution of the succession cause.

29. The other issue raised by the petitioner was the respondents' failure to include all beneficiaries in Form P & A 5. The appellant brought it to the court's attention that the names of Jane Nyaboke Mogaka Gichana and Joyce Kemunto Mogaka who are the deceased daughters had been left out by the respondents. Form P & A 5 set out the names of all beneficiaries as listed in the chief's letter but excluded the names of the two daughters.

30. **Rule 7 (e) (i) of the Probate and Administration Rules** provides that an applicant seeking a grant of representation to the estate of a deceased person is required to declare the names, addresses, marital state and description of all legitimate beneficiaries. The Act makes no distinction between female and male children of a deceased person, regardless of their marital status. Unless they expressly renounce their interest in the estate, married daughters of the deceased cannot be left out of the succession cause. This principle of law was pronounced as follows by the Court of Appeal in **Stephen Gitonga M'murithi Vs. Faith Ngiramurithi Civil Appeal No. 3 Of 2015 [2015] eKLR**;

“Section 38 enshrines the principle of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender and whether married and comfortable in their marriage or unmarried...”

Applying the above principles to both the learned trial Judges' reasoning and distribution, it is our finding that the learned trial Judge fell into an error when he failed to accord equal distribution to all the children of the deceased in violation of section 38 of the Law of Succession Act by discriminating against the married daughters of the deceased. See Rono versus Rono & Another [2008] 1KLR (G&F) 803.”

31. By omitting the names of Jane Nyaboke Mogaka Gichana and Joyce Kemunto Mogaka, the respondents contravened the statutory requirement to disclose illegitimate survivors of the deceased. The trial court overlooked this non-disclosure and also failed to address the various errors raised by the appellant, including the fact that the petition was not accompanied by a consent or renunciation by the beneficiaries and the affidavit in support of the petition was unsworn. It is therefore evident that the trial court fell into error in allowing the petition for grant by the respondents.

32. The appellant filed a petition by way of cross-application dated 23rd February 2016 in line with **Section 69** of the **Act** but did not swear an affidavit in support of the application as stipulated under **Rule 17 (5)** of the **Probate and Administration Rules**. In view of the fact that there is no proper petition on record, the appeal is allowed in the following terms;

- a. The orders of the trial court dated 23rd January 2019 be and is hereby set aside;
- b. For the avoidance of doubt the grant issued, 30th October 2019 is hereby revoked.
- c. **GIDEON KIDD ORWENYO** is directed to file a petition for grant of letters of administration intestate in Succession Cause No. 261 of 2016. **GIDEON KIDD ORWENYO, DAVID ONYANCHA MOGAKA and JARED MICHIRA MOGAKA shall jointly sign the petition for grant of letters of administration intestate in Succession Cause No. 261 of 2016. This shall be done within 45 days.**
- d. Thereafter a grant shall be issued to **GIDEON KIDD ORWENYO, DAVID ONYANCHA MOGAKA and JARED MICHIRA MOGAKA in Succession Cause No. 261 of 2016.**
- e. **Succession Cause No. 261 of 2016 shall be returned to the Chief Magistrate's court for determination forthwith.**
- f. As this is a matter involving family members, I make no order as to costs.

Dated, signed and delivered at KISII this 17th day of September 2020.

R.E.OUGO

JUDGE

In the presence of:

Appellant Absent

Respondent Absent

Jackie Court Assistant