



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

SUCCESSION CIVIL APPEAL NO. 24 OF 2018

IN THE MATTER OF THE ESTATE OF JOASH ARENDE - DECEASED)

-between-

- 1. BERNARD OUMA AKAMA**
- 2. RICHARD OTIENO OKUMU**
- 3. JOHN ARENDE ONYANGO.....APPELLANTS**

-versus-

- 1. JEREMIAH ODERO**
- 2. JOEL OTIENO ARENDE**
- 3. ROSALINA ODONGO ARENDE.....RESPONDENTS**

(Being an appeal against the orders of confirmation and distribution made on the 28th day of February 2018 by Hon. K. C. M. in Rongo SRMC Succession cause No. 62 of 2016)

JUDGMENT

1. The appeal before this Court is against the ruling and order of **Hon. C.M. Kamau, RM** made on 28/02/2018 which decision confirmed the grant and distributed the estate of **Joash Arende Akama**, the deceased herein.

2. Grant of Letters of Administration of the estate of the deceased herein were jointly issued to **Jeremiah Odero, Richard Otieno Okumu, Benard Ouma Akama** and **John Arende Onyango** on 09/03/2017. On 19/10/2017 the matter was before the subordinate court where it was fixed for confirmation of the grant. On 28/02/2018 the Administrators together with the two surviving wives of the deceased appeared before court for the confirmation of the grant. It seems that the beneficiaries then present did not agree on the distribution of the estate a result of which the court confirmed the grant and distributed the estate. It is that distribution which prompted the appeal.

3. By a Memorandum of Appeal dated 19/03/2013 the Appellants herein preferred the following five grounds of appeal: -

- (i) The learned magistrate erred in law by failing and/or omitting to identify the respective beneficiaries.***
- (ii) The learned magistrate erred in law by failing and/or omitting to specify the beneficiaries and their respective shares.***
- (iii) The learned magistrate erred in law by failing to hear the respective beneficiaries or even the administrators.***
- (iv) The learned magistrate erred in law and fact by effecting distribution to a stranger in the proceedings.***
- (v) The process used in confirmation of the grant and the distribution of the estate is wrought with mistakes.***

4. Directions were taken, and the appeal was disposed of by way of written submissions where both parties filed their respective submissions. The Appellants were represented by **Mr. Gembe** Counsel whereas the Respondents appeared in persons. Counsel for the Appellant argued in

detail that the process towards the distribution of the estate was fatally flawed as the parties were not accorded an opportunity to present their proposals on the distribution and that some other beneficiaries were absent. Counsel relied on **Section 71(1)** of the **Law of Succession Act, Cap. 160** of the Laws of Kenya (hereinafter referred to as '**the Act**') and **Rules 40** and **41** of the **Probate and Administration Rules** in buttressing the argument.

5. The appeal was opposed. The Respondents took the Court through the history of the matter and narrated how several disagreements arose on issues and urged that the appeal be dismissed so that the matter can be rested.

6. As the first appellate Court, my role is to revisit the evidence on record, evaluate it and reach my own conclusion in the matter. (See the case of **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga –versus- Kiruga & Another (1988) KLR 348**).

7. I have carefully and keenly read and understood the proceedings, the ruling and order appealed against as well as the Record of Appeal, the grounds thereof and the parties' submissions. This appeal rests on the process towards the distribution of the estate of the deceased.

8. According to the Certificate of Death on record the deceased died on 15/11/1980. **Section 2(1)** and **(2)** of the **Act** states as follows: -

(1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after, the commencement of this Act and to the administration of estate of those persons.

(2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.

9. The date of commencement of the **Act** is 01/07/1981. The estate of the deceased herein is therefore not subject to the **Act** but to the customary laws applicable to the deceased at the date of death. The distribution of the estate was to be done in accordance with such customs and laws. However, the administration of the estate could be undertaken in accordance with the **Act**.

10. The record does not show that the distribution was done in accordance with the customary laws applicable to the deceased at death. With profound respect to the Learned Magistrate I must find, which I hereby do, that the court erred in acting on wrong principles in reaching the finding. The ruling and order made on 28/02/2018 cannot therefore stand and is hereby set-aside.

11. As I come to the end I must say that there was every need for a formal application for confirmation of the grant and distribution of the estate to have been filed and served on all necessary parties before the proceedings on confirmation and distribution could be entertained. That is a clear calling on **Section 71(1)** of the **Act** and **Rules 40** and **41** of the **Probate and Administration Rules** on the administration of estates.

12. Having so found, I hereby make the following final orders: -

(a) The appeal is hereby allowed;

(b) The Administrators and/or any of them shall file and serve an application for confirmation of the grant and distribution of the estate in the lower court file within 30 days of this judgment;

(c) The matter shall be placed before the trial court at Rongo within 15 days of (b) above with notice to all beneficiaries with a view of taking appropriate directions on the application;

(d) As the matter involves family members and is still ongoing, each party shall bear its own costs of the appeal.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 28th day of February 2019.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Mr. Gembe Counsel for the Appellants.

Respondents in person.

