Makacha v Ndakaka (Succession Appeal E014 of 2022)
[2024] KEHC 1228 (KLR) (9 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1228 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

SUCCESSION APPEAL E014 OF 2022

PJO OTIENO, J

FEBRUARY 9, 2024

BETWEEN

BENSON MAKACHA ..... APPELLANT

AND

MAUREEN NDAKAKA ..... RESPONDENT

(Being an appeal from the ruling of Hon. B. Ojoo (SPM) in Butere Succession Cause No. 448 of 2018 dated 14th September 2022)

JUDGMENT

1. Following the death of Christopher Ashipole alias Shem Ashikobe("deceased") on the 13th day of June, 1996, the respondent in her capacity as the daughter of the deceased, petitioned the trial court for grant of letters of administration intestate in which she declared that the deceased was survived by herself and Alice Phanice Andati, his wife, and that the deceased's estate comprised of property known as Marama/buchenya/819. The grant was issued to the respondent on 20th February, 2019 and confirmed on 20th August, 2019.

2. The appellant thereafter sought for the revocation of the grant on the ground that the respondent had obtained it by concealing the fact that he was a dependant of the deceased. He added that the deceased had another daughter by the name of Judith Ruth Asira who had not been involved in the succession proceedings.

3. The grant was then revoked and a fresh one issued to the appellant who proceeded to file summons for confirmation of the grant. That summons was protested to by the respondent and was directed to be canvassed by viva voce evidence.

4. In the ensuing proceedings the appellant contended that prior to his demise, the deceased held a family meeting at his home on 5/12/1995 and gave instructions that his estate be equally distributed among

three people that is, the appellant, the respondent and Judith Ruth Asira. He claimed the he was a nephew of the deceased and that the deceased took him in and he lived on his land. That allegation was rebutted by the respondent's mother who stated that the appellant lived with his grandmother on a separate piece of land.

5. In a ruling by the trial court delivered on 14/9/2022, it was a finding of the court that the deceased did not leave behind a valid will; that the appellant had not established dependency and that the respondent's mother having remarried, the respondent was the only beneficiary of the deceased's estate. The grant issued to the appellant was thus revoked and the grant issued to the respondent and confirmed on 20/8/2019 reinstated.

6. Aggrieved by this decision, the appellant lodged a memorandum of appeal dated 30th September, 2022 and faulted the Judgment on the grounds: -

   a. The learned trial magistrate erred in fact and in law by failing to fully analyze and evaluate the evidence presented by the petitioner as required by law.

   b. That the learned trial magistrate erred and/or misdirected herself in law in finding that there was no valid will because the deceased's wife was not present when the same was made.

   c. That the learned trial magistrate erred and/or misdirected herself in law and fact by finding that the appellant had not proved dependency.

   d. The learned trial magistrate erred in fact and in law by failing to appreciate the evidence tendered by the appellant and his witnesses with regard to ownership, occupation and use of the deceased's estate.

   e. That the learned trial magistrate erred and/or misdirected herself in law and fact by finding that the applicant's witnesses were both untruthful by their demeanor without giving reasons thereof.

7. The appellant thus prays that the appeal be allowed and the decision of the lower court be set aside in its entirety.

8. The appeal has been canvassed by way of written submissions which may be summarized as below.

9. It is his contention by the appellant that the trial Magistrate dismissed the will dated 5/12/1995 simply because it was made in the absence and without the knowledge of the deceased's former wife. He submits that where a will is regular on the face of it with an attestation clause and signatures of attesting witnesses and the signature of the testator, there is a rebuttable presumption of due execution. The case of Karanja & another c Karanja (2002) 2 KLR 22 is cited for that proposition.

10. It is further submitted that the will meets the requisites set out in section 11 of the *Law of Succession Act* and with the respondent not having challenged the validity of the Will, the Will ought to have been found valid.

11. On whether the appellant was a dependant of the deceased, it is submitted that the sisters of the deceased who testified as DW2 and DW3 confirmed that followed the death of the appellant's mother, the deceased took the appellant in as his child and is thus a child within the meaning of section 3(2) of the *Law of Succession Act* and an adoption order is not necessary to which he cites the case of In re Estate of Sam (Deceased) 2021 eKLR.

12. The appellant further faults the trial court for dismissing the evidence of DW2 and DW3 based on their demeanor without giving reasons and argues that where the decision of the trial court is based on

the demeanor of material witnesses which is inconsistent with the evidence in the case generally, the court shall not have hesitation but to interfere. The appellant thus cites the case of Ngengi Muigai & another v Peter Nyoike Muigai & 4 others Civil Appeal No. 13 of 2007 for that proposition of the law.

13. For the respondent it is submitted that the appellant is unsure if the deceased left a valid will as he makes that proposition and proceeds to propose that the estate be distributed in accordance with section 38 of the *Law of Succession Act* which is a provision for intestacy. She further contends that the alleged will did not satisfy the requirements set out under section 11of the *Law of Succession Act* as it was not attested by any witnesses.

14. On whether the appellant was a dependant of the deceased, she submits that a dependant under section 29(b) and (c) must prove that he was maintained by the deceased immediately prior to his demise and that it is not the mere relationship that matters but proof of dependency in which regard she cites the case of R N M v R M N (2017) Eklr. She asserts that following the death of the appellant's mother, he was taken in by his grandmother and that the mere visitation by the appellant to the deceased does not make him a dependant.

15. On the ground that the trial magistrate failed to appreciate the evidence tendered by the appellant and his witnesses with regard to ownership, occupation and use of the deceased's estate, she submits that the trial court was not exercising jurisdiction on a claim for title, occupation, use and ownership of the deceased's estate but its jurisdiction was limited to hear issues relating to inheritance of the estate.

Issues, Analysis and Determination

16. Looking at the record of appeal, the pleadings by parties, evidence led and the Judgment as well as the submissions by the parties, the issues that isolate themselves for determination by the court are: -

    a. Whether the deceased died testate?

    b. Whether the appellant is a dependant of the deceased; and

    c. Whether Judith Ruth Asiri is a beneficiary of the estate of the deceased?

Whether the deceased died testate

17. The appellant contends that the deceased had executed a valid will prior to his demise which will is dated 5th December, 1995 and found at page 91 of the record of appeal. The statutory requirements of a written Will to be valid are set out in section 11 of the *Law of Succession Act* which provides as follows;

> " No written will shall be valid unless-
>
> (a) the testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;
>
> (b) the signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;
>
> (c) the will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that

more than one witness be present at the same time, and no particular form of attestation shall be necessary."

18. A cursory look of the alleged will shows that only the deceased executed the will and that it was not attested by two competent witness as is mandatory under section 11 of the *Law of Succession Act*. The Will not having been attested thus renders it invalid and cannot be the basis of claim by the appellant.

Whether the appellant is a dependant of the deceased?

19. It is not disputed that the appellant was a nephew of the deceased. What is in dispute is the appellant's assertions that following the death of his mother, a sister to the deceased, the deceased took him in as his child and cared for him until his demise.

20. Section 29(b) of the *Law of Succession Act* defines a dependant to include the deceased's parents, step-parents, grandparents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death.

21. The test for dependancy was addressed by the court in the case of Beatrice Ciamutua Rugamba v Fredrick Nkari Mutegi & 5 others [2016] eKLR where it was observed as follows;

> " a dependent under section 29 (b) and (c) must prove that he or she was being maintained by the deceased immediately prior to his demise. It is not the mere relationship that matters, but proof of dependency that counts."

22. The appellant testified as DW1 and at page 26 of the record of appeal he stated that, "It is Shem (the deceased) and my grandmother who raised me."

23. DW2, a sister to the deceased testified on cross examination at page 27 that the deceased was given land parcel No. 819 and that she was born on land parcel No. 818.

24. DW3, a sister to the deceased, on cross examination at page 28 stated, "Benson used to live with our mother".

25. PW2 testified that she was the deceased's wife at the time of his death and stated that the appellant was brought up by his grandmother.

26. If PW2 was married and living with the deceased on land parcel No. 819 while DW2 confirmed that she was born on land parcel No. 818, then it is proper to conclude that the grandmother lived in land parcel No. 818 whereas the deceased lived in land parcel No. 819. Also, if the deceased had a wife, it beats logic how the appellant was brought up by the deceased and his grandmother who lived in different parcels. I find the evidence of PW2 believable that indeed the appellant was brought up by his grandmother and following the death of the deceased and her being thrown out of the home, the appellant might have eventually moved to the deceased's home.

27. The court, upon re-examination and re-appraisal of the evidence at trial upholds the decision of the trial court that the appellant did not prove that he was raised by the deceased and was maintained by the deceased immediately prior to his death.

Whether Judith Ruth Asiri is a beneficiary of the estate of the deceased?

28. The appellant has argued that the deceased had a daughter by the name of Judith Ruth Asiri whose whereabouts are unknown and none of the witnesses appeared to know much about her except DW3 who on cross examination stated that she was married and was still alive without any further details.

29. I find that the appellant failed to discharge his legal burden of proof under section 109 of the *Evidence Act* on the existence of Judith Ruth Asiri and her relationship with the deceased which could have been done by at least summoning the said daughter in court or having the said daughter swear an affidavit to confirm her relationship with the deceased.

30. For the reasons foregoing, the appeal is found to lack merit and the same is dismissed. Being a family matter, the court makes no order as to costs.

DATED, SIGNED AND DELIVERED AAT KAKAMEGA THHIS 9TH DAY OF FEBRUARY, 2024.

PATRICK J. O. OTIENO

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:

Ms. Mburu for the Appellant

No appearance for the Respondent

Court Assistant: Polycap Mukabwa