



REPUBLIC OF KENYA



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ANN (Suing as the Legal Representative of the Estate of KG - Deceased) v MG (Civil Appeal E036 of 2022) [2023] KEHC 1816 (KLR) (16 March 2023) (Judgment)

Neutral citation: [2023] KEHC 1816 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E036 OF 2022
LN MUGAMBI, J
MARCH 16, 2023**

BETWEEN

ANN (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF KG - DECEASED) APPELLANT

AND

MG RESPONDENT

(Being an Appeal against the ruling delivered by the lower court on 20/12/2021.)

JUDGMENT

1. Two separate succession causes were filed in relation to Estate of KG. One of the causes was filed by deceased's biological brother, the Respondent herein, MG and indicated the name of the deceased as MG in Magistrate's Court at Embu- Succession cause number 69 of 2016 whereas in Magistrate's Court at Embu Succession cause number 238 of 2018 the Appellant herein was the petitioner on the basis that she was the only surviving biological child of the deceased.
2. The Appellant herein filed an application for revocation of grant issued to the Respondent on May 4, 2017 in succession cause number 69 of 2016. The appellant claimed that the respondent was not a rightful beneficiary of the deceased's estate.
3. The hearing began on September 5, 2019 and after hearing the evidence of the witnesses of the Appellant and Respondent viva voce, the trial court delivered its ruling on December 20, 2021.
4. In its ruling, the court found that the application to nullify the grant was devoid of merit, dismissed the same and upheld the grant issued to the Respondent on May 4, 2017. Consequently, the Court annulled/revoked the grant issued to the appellant (applicant herein) on February 27, 2019. The title deed issued to the Appellant/Applicant emanating from the said grant was declared illegal and invalid including any subsequent transfers thereof.



5. Aggrieved by the ruling of the lower court, the Appellant filed this appeal. In her Memorandum of appeal, she listed seven grounds of appeal follows:
- a. 'The learned trial magistrate erred in law and fact in failing to consider the name of the deceased as appearing in the death certificate held by the appellant, the search certificate of the deceased's land while compared to the different name of the deceased as given by the Respondent.
 - b. The learned trial magistrate erred in law and fact in failing to appreciate that the appellant went away with the mother while the appellant was very young after her mother separated with the deceased, and used this fact against the appellant of failing to have detailed information about the deceased.
 - c. That the learned trial magistrate erred in law and fact in failing to consider the evidence on record as a whole, and in particular the evidence of EIG, a close relative to the deceased to enable her arrive at a decision that the appellant was a daughter to the deceased.
 - d. That the learned trial magistrate erred in law and fact in basing her decision on the relationship between the appellant and the deceased vis-a-viz the relationship between the appellant's mother and the deceased, and failed to appreciate the clear definition of a 'child' as contained in the [Law of Succession Act](#).
 - e. The learned trial magistrate erred in law and fact in failing to interrogate the authenticity of the death certificate held by the Respondent, considering the name of the deceased therein.
 - f. The learned magistrate erred in law and fact in failing to take into consideration the birth certificate of the appellant which was provided to court as ordered and the details therein.
 - g. The ruling was against the weight of the evidence, the pleadings and the applicable legal principles.'
6. The appellant prayed that the appeal be allowed and the ruling of the learned trial magistrate be set aside and be substituted with an order allowing the appellant's claim and confirming the grant issued to her as legal and valid.

Appellant's Submissions

7. Directions were issued that the hearing of the appeal be dispensed with by way of written submissions.
8. The Appellant filed her submissions on December 29, 2022 and submitted on the grounds of appeal contemporaneously. She submitted that the respondent had a legal duty to discharge by proving that KG and MK was one and the same person. The search certificate for land parcel no GATURI/GITHIMU/xxx under part x of the proprietorship section lists KG as the registered proprietor of the land and the Respondent did not summon the land registrar to produce the documents and instruments used in the registration of the land that showed indeed MK was also KG. As concerns ground 2 of the appeal, she submitted that it is fair and reasonable to say that it would be difficult for the appellant to remember vivid and exact details of the marriage between her mother and the deceased who separated while she was still very young.



9. She stated that the court disregarded the evidence of EIG, a biological brother to the deceased who also testified in support of the appellant's case. The said witness recorded a statement dated July 22, 2022 which stated that he knew the appellant as the daughter of the deceased and even recognized that she visited her father during his lifetime and affirmed the marriage between the deceased and the appellant's mother. Although the respondent dismissed the evidence of EI, terming him young enough to be his son despite being born in 1975, the Appellant submitted that is not reason enough for the court to dismiss the testimony of a family member who clearly provided further insight into the family of the deceased. On ground 4 of the appeal, she submitted that she is a child of the deceased and automatically a beneficiary and dependant pursuant to Section 29(a) of the *Law of Succession Act*. She stated that the birth certificate proves that she was a daughter to the deceased, a fact that remains unchallenged. She cited Section 38 of the *Law of Succession Act* and said that the estate of the deceased should have devolved to his surviving child, who is the Appellant herein regardless of whether the deceased was married to the appellant's mother or not.
10. On ground 5 of the appeal, she said that the certificate of principal registrar shows that no grant had been made or applied for in respect of the said deceased MK and the deceased had no other known name. In all succession papers filed in court by the respondent, he described the deceased as KG, no aliases were included. Therefore, the Respondent did not have the correct death certificate from the start and the process he undertook in filing for a grant of letters of administration to the estate of KG was null and void ab initio. She picked out the contention by the Respondent that he had done extensive development on the suit land LR GATURI/GITHIMU/xxx during the lifetime of the deceased and that there was a meeting in which the deceased stated that his estate be transferred to the respondent without opposition. She noted that the respondent did not provide the trial court with minutes of the meeting that stated that he alone would be the one to inherit the estate of the deceased or the pictures of the developments done on the land as initially claimed.

Respondent's Submissions

11. The Respondent filed his submissions on January 12, 2023 and submitted that the supplementary record of appeal did not capture all the documents. In particular, the further list of documents dated November 26, 2021 which contained a letter dated November 24, 2021 from the Director National Registration Bureau which was clear that when the Appellant was obtaining her national identity card, she indicated she was born in Kiambu District and her parents were one Peter Ireri Kandii and Teresia Kanini.
12. He placed reliance on *Trans Mara Sugar Co Ltd V James Omondi Obudho (2020) eKLR* where Justice AC Mrima struck out the appeal which had left out some documents/pleadings in the record of appeal for being incompetent and thus not able to be considered.
13. He submitted that the circumstances in the trial court and the evidence was thus clear that Succession Cause no 238 of 2018 was issued to the appellant on basis of fraudulently obtained documents. She submitted that Succession Cause no 69 of 2016 was on basis of true disclosure and genuine documents.
14. He denied that there was any iota of evidence to show the deceased had a child. He faulted the Appellant for looping in a step-brother to the deceased to be a witness yet he is younger than her by ten years and would thus not tell the court that he knew about her as a child of the deceased who had left with her mother at the age of around 2 years, which is 8 years before the witness himself was born. He stated that if the area chief was forthright, then prior to her issuing the second introductory letter to Appellant, then it would have been prudent to have both parties i.e the appellant and the respondent mentioned in



the introductory letter so that both sides can explain themselves to the court as to who was the rightful heir to the deceased.

15. It was his humble submission that the appellant is the daughter of PIK who is not the deceased in respect of these proceedings and it was beyond any doubt that the deceased died on August 23, 1997 as per the death certificate produced by the respondent. The death certificate used by the appellant was thus a forgery. He placed reliance in Migori High Court Succession Cause no 41 of 2016 Estate of Magangi Obuki where the court when faced with similar facts as in this case, the applicant had obtained grant in a different succession cause using the late registration death certificate and claiming to be deceased's son. The court revoked that grant and had the land which had been illegally transmitted revert to the estate of the deceased. He urged the court to be persuaded by the said decision, affirm the decision of the trial court and dismiss this appeal with costs.

Analysis and Determination

16. Having read and considered the submissions together with the memorandum and record of appeal and the law applicable, I opine that the main issues are:
 - a. 'Whether the trial court was justified in revoking the grant issued to the Appellant on February 27, 2019 in Embu Succession cause number 238 of 2018 and maintaining the grant issued to the Respondent on May 4, 2017.
 - b. Whether the Appellant is a daughter of the deceased KG alias MK.
 - c. Whether in view of a & b above, this appeal is merited.'
17. As the first appellate Court, it is now well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its 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*).
18. Concerning the issue of whether the Court was justified in annulling the grant dated February 27, 2019 in favour of the one issued to the Respondent on May 4, 2017; it is important to underscore the fact that the reasons behind this state of affairs.
19. The appellant has faulted the trial court for failing to consider that the name of the deceased as appearing in the death certificate held by Appellant and the search certificate of the deceased land was consistent unlike the Respondent who had used a different name of the deceased from the one which was appearing in the death certificate and the certificate of search of LR GATURI/GITHIMU/xxx.
20. The evidence of the Respondent was that the deceased went by two names; as a child he was known as MK and his official name was KG. The respondent's witnesses who were the deceased biological siblings stated that the deceased went by those two names.
21. The area chief who was summoned as a witness testified that after she wrote the two letters which the respondent and the appellant used to be granted certificate of confirmation in the respective succession causes, she realised that MK and KG were one and the same person.
22. There was thus ample evidence that the two names belonged to the deceased and they were thus not for two different persons but one.



23. That was the genesis of the two death certificates at the heart of this dispute. The first with the serial no xxxx has the date of death of the deceased as August 23, 1997 at Embu Hospital while the second one with serial no xxxx has the date of death at December 4, 1997 with the place of death as Gatituri sub-location.
24. The trial court issued summons to the Birth and Death Registrar Embu and one Jackline Mugo came to shed light on the two death certificates. She acknowledged that the two certificates originated from their office with the first one which has entry number xxxx being the registration that the deceased was registered upon death. The second one which has entry number xxxx was a late registration as it was not registered when the deceased died. She told the court that if MK and KG were one the same person, then the late registration was a nullification.
25. Section 16 of the *Births and Deaths Registration Act* CAP 149 provides that every person notifying a death shall, to the best of his knowledge and ability, give the prescribed particulars, which shall be entered forthwith by the registrar in the register, and the person notifying the death shall certify to the correctness of the entry by signing or, if he is illiterate, by fixing his mark to the register.
26. I have looked at the two death certificates and note that the first one was registered on September 15, 1997 while the second one was registered on June 29, 2018.
27. The evidence of the Registrar of Births and Deaths Embu West basically called the death certificate that the appellant was relying on fraudulent. Her evidence also corroborated the Respondent's evidence that the deceased passed on while undergoing treatment at Embu Hospital as the death certificate which the respondent relied on, the notification of death emanated from the hospital.
28. I find that the trial court did not err in finding that the death certificate held by the appellant was fraudulent and thus was justified in annulling the grant secured through the fraudulent death certificate that had been disguisedly obtained as a late registration many years after his demise.
29. The second issue is whether the Appellant is the biological and only surviving child of the deceased and thus the heir of his estate.
30. The appellant faulted the trial court for basing its decision on the relationship between her and the deceased vis-a-viz the relationship between the deceased and her mother. It was the appellant's evidence that the deceased and her mother were married and she is a result of that union. Her parents separated when she was two years old but she visited her father through the years. However, she did not know when her father died and did not have a birth certificate. There is a birth certificate that was included in the record of appeal though which shows the date of registration as October 7, 2019, which to me was long after the deceased's death. In any case, during the trial, the Appellant was cross-examined on that issue, and her response was: 'I do not have birth certificate'. The trial court also note in its ruling as follows:

' Granted that the applicant intended for this court to believe that she was the daughter of the deceased, she would have provided the court with her birth certificate. This was a pre-requisite for her application for a national identity card, she failed to show this nexus despite the court allowing her to produce it after pleadings had closed.'
31. Given the above observations, it is strange that the birth certificate is now part of the record of appeal when it was not part of material that was provided to the trial court. Be that as it may, even assuming that it was an oversight by the trial court, I would not give the said birth certificate much consideration in terms of weight to be attached to it in view of the fact that it was registered when these proceedings



were already on-going before the court which could be an indication that it was procured with a purpose of litigation.

32. Moreover, her maternal uncle whom she called to testify as to the existence of the marriage between her mother and the deceased testified that he was the one who received dowry during the dowry negotiations. On cross examination however, he attested that he was aware that the appellant was taking care and involved in the funeral process of the deceased yet the appellant testified that she was not aware when deceased died.
33. The Respondent in his submissions said that the appellant failed to include his further list of documents dated November 26, 2021 which included a letter from the Director of National Registration Bureau, Nairobi, which provided the name of father of the appellant as PIK. The appellant has not addressed that allegation.
34. Sections 107 and 108 of the *Evidence Act* provide as follows:

'107

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.'

35. I also refer to *The Halsbury's Laws of England, 4th Edition, Volume 17*, at paras 13 and 14: describes it thus:

' The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.'

- (16) The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?'

36. It was incumbent upon the Appellant to demonstrate to this court that the deceased was her father by providing evidence to that effect. The evidence relied on by the Appellant was shaky, sketchy and suspect. Her birth certificate was procured during the progress of litigation many years after the



- deceased died. Her witnesses claimed that the Appellant's mother was married but there was neither a record of the dowry negotiations or even when it was done, or what was exactly provided to them as dowry except a generalised statement that dowry was paid without any more particulars.
37. The Respondent's witnesses denied that the deceased was married or had any children and stated that he had fertility challenges. I find that this position could not be rebutted by the unreliable nature of the evidence tendered by the Appellant.
 38. Section 3(2) of the *Law of Succession Act* provides that references in this Act to 'child' or 'children' shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any child born to her out of wedlock, and, in relation to a male person, any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.
 39. The appellant has not demonstrated to this court that the deceased recognized or accepted her as a child of his own and in the absence of that evidence, this court cannot define the appellant as a child of the deceased as was envisioned by the *Law of Succession Act*.
 40. In the circumstances of this case the court has the appellant's word against that of the respondent. The trial magistrate weighed all this and came to the correct conclusion that the appellant had failed to prove her case as required by law.
 41. I find no reason to fault the learned trial Magistrate.
 42. The upshot is that the appeal lacks merit and is dismissed with costs. The ruling by the trial court is upheld.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 16TH DAY OF MARCH 2023.

L.N MUGAMBI

JUDGE

