



**VNKD v RNM (Family Appeal 2 of 2022)
[2024] KEHC 12573 (KLR) (18 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12573 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
FAMILY APPEAL 2 OF 2022
MA ODERO, J
OCTOBER 18, 2024**

BETWEEN

VNKD APPELLANT

AND

RNM RESPONDENT

JUDGMENT

1. Before this Court for determination is the Memorandum of Appeal dated 16th February 2022 by which the Appellant VBJN seeks the following orders:-

- “(a) The appeal be allowed
- (b) The judgement of the Principal Magistrate’s Court at Karatina in Succession Cause No. 235 of 2019 regarding the distribution of the Estate Of EMW (Deceased) be set aside and in its place the Honourable Court does issue an order distributing the estate of the Accused equally amongst all beneficiaries of the deceased as per the law.
- (c) The costs of this Appeal be awarded to the Appellant’

2. The Respondent RNM opposed the appeal. The matter was canvassed by way of written submissions. The Appellant filed the written submissions dated 2nd June 2024 whilst the Respondent relied upon her written submissions dated 30th July 2024.

Background

3. This appeal arises from the judgment delivered by in Karatina Succession Cause No 235 of 2019; In the matter of the Estate of EMW (Deceased)



4. This matter relates to the estate of the late EMW (hereinafter ‘the Deceased’) who died intestate on 10th September 2019. A copy of the Death certificate Serial Number 078XX76 appears at Page 14 of the Record of Appeal.
5. Following the demise of the Deceased the Appellant VBJN describing herself as the only widow of the Deceased applied for and obtained letters of Administration in respect of the estate of the Deceased. In her supporting Affidavit the Appellant deponed that the Deceased was survived only by herself (widow) and her two children JWM and BWM. The only asset left behind by the Deceased was indicated to be 25,000 shares in a company known as Kiter Engineering Limited.
6. A Grant of Representation was issued to the Appellant on 26th February 2020 (see page 10 of the Record of Appeal]. The Appellant then filed a summon for confirmation of Grant dated 26th August 2020.
4. At this point the Respondent RNM filed an Affidavit of Protest claiming that she was also a widow of the Deceased having been married by the Deceased under Kikuyu Customary Law in the year 2006. That she cohabited with the Deceased as man and wife in Mombasa from the year 2006 until his demise in September 2019 – a period of thirteen (13) years. The Respondent further claimed that her union with the Deceased was blessed with one child a daughter named Liz Wangari who was born on 1st December 2010.
5. The Respondent further averred that she and her daughter had been recognized in the obituary and that they attended the burial of the Deceased. The Respondent opposed the Summons for confirmation of Grant filed by the Appellant and demanded that she be allocated an equal share of the estate.
4.

“The petitioner [Appellant herein] to get 17,000 ordinary shares and the Protestor [the Respondent herein] to get 80000 shares to be held in trust for Liz Wangari to be held I trust for Liz Wangari.”
10. Being aggrieved by this judgment the Appellant filed this Memorandum of appeal which appeal is premised upon the following grounds:-
 - “(a) That the learned trial court erred in law and fact by failing and/or omitting to identify two biological children of the late EMW as beneficiaries of his estate.
 - (b) That the learned magistrate erred in law and fact by effecting distribution of the late EMW to his legal wife and only one biological child to the exclusion of two other biological children of the deceased.
 - (c) That the learned magistrate erred in law and fact by failing to consider and analyse the entire evidence of the witnesses and thereby arrived at the wrong finding on the issue of the beneficiaries of the Estate of EMW.
 - (d) The decision of the learned magistrate on distribution of the estate of EMW was and is against the weight evidence and the same was bad in law.”



Analysis and Determination

11. This is a first appeal, thus it is the duty of this court to re-evaluate and review the evidence adduced in the lower court and to draw its own conclusions on the same. In *Selle & Another -vs- Associated Motor Boat Company Limited & Others* [1968] E.A 123, the court of Appeal held that:-

“An appeal to this court from trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.....”

12. The main grievance of the Appellant is that although the trial court allocated to her as the widow 17,000 shares in the company no allocation of shares was made to her two children whilst the Respondents daughter was allocated 8000 shares. According to the Appellant the court erred in not treating all the children of the Deceased in an equal manner. She therefore alleged that her two children had been omitted in the distribution of the estate.

13. At the outset I am in agreement with the finding of the learned trial magistrate that the Respondent had failed to tender sufficient evidence to prove that she was a ‘wife’ to the Deceased. The Respondent clearly failed to prove that the requirements for a Kikuyu Customary marriage were undertaken.

14. The learned trial magistrate did however find that the Respondents daughter was fathered by the Deceased. In so finding the lower court relied on the child’s birth certificate Serial Number 163XX67 in which the name of the child’s father is given as EMW (the Deceased herein). The said Birth Certificate appears at Page 29 of the Record of Appeal.

15. The Court also in finding that the child was a beneficiary of the estate relied upon the fact that the petitioner (Appellant herein) did not raise any challenge to and did not seek to controvert the Birth Certificate in any way.

16. Therefore this was a case in which the Deceased was survived by one widow and three (3) children - Section 35 of the Law of Succession Act, Cap 160, laws of Kenya provides as follows;

Where intestate has left one surviving spouse and child or children

1. Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to
 - a. the personal and household effects of the deceased absolutely; and
 - b. a life interest in the whole residue of the net intestate estate: Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.
2. A surviving spouse shall, during the continuation of life interest provided by subsection (1), have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date.



3. Where any child considers that the power of appointment under subsection (2) has been unreasonably exercised or withheld, he or if a minor, his representative may apply to the court for the appointment of his share, with or without variation of any appointment of his share, with or without variation of any appointment already made.
 4. Where an application is made under subsection (3) the court shall have power to award the applicant a share of the capital of the net intestate estate with or without variation of any appointment already made, and in determining whether an order shall be made, and if so what order, shall have regard to.....
 5. Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children [own emphasis]
17. This court cannot ignore the fact that the children of the Deceased had different mothers. Two out of the three children belonged to the Appellant whilst the Respondent was the mother of the Deceased's last child. Thus the Deceased was effectively survived by two (2) Houses which fact needed to be taken into account in distributing the estate.
 18. The trial court was in my view quite correct in specifying the allocation of the shares to each House. No shares were allocated to the Respondent whom the court had excluded as a beneficiary to the estate.
 19. The allocation of 8000 shares to the Respondent was made purely to accommodate the fact that at the time of the judgment the child was aged only ten (10) years old and was a minor. As such the 8000 shares were allocated to her mother to hold 'in trust' for the minor.
 20. Although the trial court allocated 17,000 shares to the Appellant she submitted that the court erred in failing to make any allocation of shares to her two children. The question is whether the Appellants two children who were beneficiaries to the estate were also entitled to be allocated shares in their individual capacities.
 21. The law provides that the net estate of a deceased person will devolve firstly to the surviving spouse. The surviving spouse will have a life interest over the net estate which life interest is only extinguished upon her death or re-marriage. The children of the Deceased would only come into inheritance once the life interest bestowed on the surviving spouse is extinguished or if the surviving spouse decides of her own accord to transfer some of the assets to the children.
 22. In the case of *Taukakungi -vs- Margrethe Throning Katungi & Another* [2014] eKLR Hon. Justice William Musyoka stated as follows;-

“The effect of Section 35 (1) is that the children of the Deceased are not entitled to access the net estate so long as there is a surviving spouse. The children's right to the property crystallizes upon the determination of the life interest following the death of the life interest holder or her marriage.”

Prior to that, the widow would be entitled to exclusive right over the net estate..... The devise is designed to safeguard the position of the surviving spouse. The ultimate destination of the net intestate estate where there are surviving children is the children. It is the children who are entitled of right to the property of their deceased parent. However, if the property



passes directly to the children, in cases where there is a surviving spouse, he or she is likely to be exposed to destitution.

This would particularly be the case where the surviving spouse was wholly dependent on the departed spouse. She would be left without any means of sustenance.” [own emphasis]

23. Therefore it is clear that as long as there is a surviving spouse (in this case the Appellant) her children do not have an automatic right to benefit from the net estate. The import of Section 35 is that the estate of a deceased person in which the surviving spouse has a life interest is not available for distribution to the children unless that parents bequeaths to them whatever she or her pleases.
24. In the circumstances therefore the children of the Appellant do not have a right to benefit from the estate as their right to inheritance is subject to the life interest bestowed by law upon the Appellant.
25. The obvious question that then arises is what differentiates the Respondents daughter who is also a child of the Deceased from the Appellants children. Firstly the Respondent is not a surviving spouse of the Deceased. The trial court found that the Respondent failed to prove that she was married to the Deceased.
26. Therefore not being a spouse of the Deceased the Respondent does not qualify to be considered as a dependant within the meaning of section 29 of the *Law of Succession Act*. The Respondent has no right to inherit from the estate of the Deceased.
27. However the Respondents child bears a different status. Being a child of the deceased she is a dependant within the meaning of Section 29 and thus has a right to inherit. As the child cannot inherit through her mother she would inherit her share directly. Indeed had this child been an adult then the share of the estate due to her would have devolved to her directly. However being a minor the Court had to appoint an adult to hold the childs share of the estate in trust until she attains the age of majority.
28. Each case must be decided individually on its own merits. This is a case where the wife of the Deceased (the Appellant) did not accept the Respondent as a co-wife. It is highly unlikely that the Appellant could be trusted to properly manage the share of the estate due to the child of a woman she has rejected. As such the court needed to identify an independant person or entity who could be trusted to properly manage the inheritance due to the child.
29. “Section 47 of the Law of Section Act vests court with wide discretion in granting protective powers of purposes of safeguarding the estate of a deceased person. It provides as follows:-

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.”
30. Likewise, Rule 73 of the Probate and Administration Rules provides that:-

“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”



31. The law provides the Court with powers to make such orders as may necessary to safeguard the estate and to protect the rights of beneficiaries. The court is mindful of the provisions of Section 8(1) of the *children Act* 2022 which provides that

“8(1) in all actions concerning children, whether undertaken by Public or private social welfare institutions, courts of law, administrative authorities or legislative bodies

a. The best interests of the child shall be the priority consideration.
[own emphasis]

32. It is my view that in appointing the Respondent as trustee over her daughters share of the estate the court acted within its powers to safeguard the child’s share of the estate. In the circumstances I find no reason to fault the orders made by the trial court allocating the 8000 shares due to the child to the Respondent to hold ‘as trustee’ for the minor beneficiary.

33. Based on the foregoing I find no merit in this appeal, the same is hereby dismissed in its entirety. This being a family matter I will make no orders on costs.

DATED IN NYERI THIS 18TH DAY OF OCTOBER, 2024.

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MAUREEN A. ODERO

JUDGE

