REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO.14 OF 2020

EDDAH WANGU.....1ST APPELLANT

JOHANA NJIRU KARUCHO.....2ND APPELLANT

VERSUS

SACILIA MAGWI KIVUTI (Deceased) Substituted with

RIBERETA NGAI.....RESPONDENT

[An appeal from the ruling and decree of Hon S.Ouko R.M. at Runyenjes in Succession Cause No.146 of 2017 delivered on 20th, February, 2020]

JUDGMENT

1. Before this court is a memorandum of appeal dated 06.03.2020 and premised on the grounds on the face of it wherein the appellant seeks for orders that:

i. That this appeal be allowed.

ii. The ruling of the trial magistrate dated 20.02.2020 be set aside and in its place the court do issue and order distribution of the estate of the deceased as per the law.

iii. Costs of the appeal and proceedings in the lower court.

2. The appellant's case is that they are beneficiaries of the estate of the deceased herein but the trial court vide its ruling dated 20.02.2020 dismissed the protest and found that the protestors had no blood relation to the deceased and had not shown how they depended on him in regards to section 29 of the Law of Succession Act.

3. The appeal was canvassed by way of written submissions.

4. The 1st appellant submitted that she was the wife of one Aloise Ireri Kivuti (deceased) who was a son of the deceased herein. That, being a widow of the deceased's son, she deserved the share that would have gone to Aloise Ireri Kivuti to hold in trust for her benefit and for her children. That the trial court erred in finding that only the children of the deceased son were entitled to inherit and not the widow. It was submitted that the children of the deceased son (grand children to the estate) are not direct beneficiaries of the estate of the deceased and so, their entitlement to the estate of the deceased herein should be through their mother (1st appellant herein) the widow of the deceased's son upon the demise of their father who was a direct beneficiary.

5. It was their case that the 2nd appellant was equally a dependant in that the deceased had given him 1.5 acres out of Kyeni/Kigumo/675 during his lifetime and he had been in occupation of the same piece during the lifetime of the deceased and even after the demise of the deceased and thus he has invested heavily on the same piece. That the deceased had taken the 2nd appellant as his own son; Reliance was made on **High Court of Kenya Succession Cause No. 685 of 2015 (unreported)**, where the court granted an adopted son equal share of inheritance just like the biological sons of the deceased.

6. That the trial court stayed the distribution of Land Parcel Kyeni/Kigumo/675 to enable the purchasers institute in appropriate court for determination of ownership of Land Parcel Kyeni/Kigumo/675; it was their case that the same property formed part of the estate of the deceased and so was available for distribution unto the beneficiaries. That the purchasers having bought the deceased person's land prior to confirmation of letters of administration, the same was illegal and amounted to intermeddling. Reliance was made on the **High Court Succession Cause No. 699 of 2015 Serrah Muruu Mukindia v Ruth Nkatha Rukaria eKLR 2016** where the court was of the view that

…the net effect of dealing in the estate of the deceased person before grant is issued is intermeddling and the same is a crime under section 45 of the Law of Succession Act. That the trial magistrate having rendered a ruling dismissing the protest, then the court ought to have given direction on how the estate was to devolve.

7. On the respondent's part, it was submitted that section 29 of the Law of Succession Act, disqualify the appellants as dependants of the deceased and therefore, they are not entitled to benefit from the estate herein. That both the appellants were found to be total strangers and so they don't have any legal standing to question any finding of the trial magistrate since they are neither beneficiaries nor dependants of the estate.

8. I have considered the record of appeal herein, the party's rival submissions and the issue that I am called upon to determine is whether the appeal is merited.

9. The deceased having died intestate, it therefore means that his estate and distribution thereof is subject to the rules of intestacy. Generally, the law contemplates that a person can either distribute his estate by way of a will or in absence of a will, the estate is subjected to the rules of intestacy. From the reading of Sections 35, 36, 38 and 40 of the Act, the legislature contemplated the rules to apply where the deceased has passed on and left behind survivors. What this means therefore is that where a child of a deceased person has predeceased the deceased, then such a child cannot be said to be a beneficiary. The rightful beneficiary ought to be the spouse of the deceased child (who should hold the property given to her in trust for the children of the deceased child) or where the deceased child is not survived by a spouse but has children, the right person as the beneficiary of the deceased's estate ought to be the child of deceased child (grandchild of the deceased). Where the child who predeceased the deceased was not survived by either a child or spouse, then such a deceased child cannot be said to be a beneficiary of the estate.

10. In the case at hand, it is not disputed that the 1st appellant was a daughter in law to the deceased herein and that her husband has since died but left children, would it therefore mean that she is entitled to the life interest in the whole residue of the net intestate estate due to her deceased husband? In **Tau Kakungi v Margrethe Thorning Katungi & Another [2014] eKLR,** *Musyoka J.* was of the view that the purpose of **Section 35 of the Act** was to prevent a spouse of the deceased from being impoverished after the demise of the other by distributing the entire estate to the children. The court stated:-

> ***"The effect of section 35 (1) is that the children of the deceased are not entitled to access the net intestate 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 remarriage. Prior to that, the widow would be entitled to exclusive right over the net estate…The device 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."***

11. Similarly, in the case of **Cleopa Amutala Namayi v Judith Were Succession Cause 457 of 2005 [2015] eKLR** Mrima, J. observed thus:

> ***"Be that as it may, under Part V of the Act grandchildren have no automatic right to inherit their grandparents …. The argument behind this position is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents indirectly through their own parents…. The children to the grandparents inherit first and thereafter the grandchildren inherit from their parents. The only time where the grandchildren can inherit directly from their grandparents is when the grandchildren's own parents are dead…***

12. It is emerging from **Section 35 of Law of Succession Act** and case law, that the estate of a deceased person in which the surviving spouse has a life interest is not available for distribution unless that parent bequeaths them whatever he or she pleases to them.

13. It is argued that the 2nd appellant was a dependant to the deceased in that, the deceased gave him 1.5 acres out of Kyeni/Kigumo/675 during his lifetime and that he had been in occupation of the same piece during the lifetime of the deceased and even after the demise of the deceased and thus he has invested heavily on the same piece. The issue is whether the 2nd respondent is entitled to the 1.5 acres of Kyeni/Kigumo/675 that he currently utilizes?

14. This is because section 29 of the Law of Succession Act sets out the meaning of the term 'dependant' as follows:

For the purposes of this Part, **"dependant"** means—

> ***(a) ……;***
>
> ***(b) such of the deceased's parents, step-parents, grand-parents, 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; and***
>
> ***……"***

15. Section 27 of the same Act provides that "In making provision for a dependant the court shall have complete discretion to order a specific share of the estate to be given to the dependants, or to make such other provision for him by way of periodical payment or a lump sum, and

to impose such conditions as it thinks fit.

16. Section 28 states that "In considering whether any order should be made under this part, and if so what order, the court shall have regard to -

> ***(a) The nature and amount of the deceased's property;***
>
> ***b) Any past, present or future capital or income from any source of the dependant;***
>
> ***(c) The existing and future means and needs of the dependant;***
>
> ***(d) Whether the deceased had made any advancement or other gift to the dependant during his lifetime;***
>
> ***(e) The conduct of the dependant in relation to the deceased;***
>
> ***(f) The situation and circumstances of the deceased's other dependants and the beneficiaries under any will;***
>
> ***(g) The general circumstances of the case, including, so far as can be ascertained, the testator's reason for not making the provision for the dependant.***

17. I have considered the evidence in the court record and on a balance of probabilities, I find that the 2nd appellant has not brought any tangible evidence to show that he was being maintained by the deceased herein. In the case of **Beatrice Ciamutua Rugamba v Fredrick Nkari Mutegi & 5 others [2016] eKLR**, it was observed that "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."

18. Further to that, it is not in dispute that the 2nd appellant is the husband to one Agusta Njoki who is a daughter of the deceased herein. The same Agusta Njoki has been listed as a beneficiary of the estate of the deceased herein. On the other hand, even if the alleged gift by the deceased unto the 2nd appellant was given to him *intervivos*, then the same should be taken into consideration when undertaking distribution of the estate of the deceased. In ***In re Estate of Gedion Manthi Nzioka (Deceased)*** **[2015] eKLR** the court defined gifts *inter vivos* as gifts between living persons, which, for them to be effective, have to be granted by deed or an instrument in writing, or by delivery, or by way of declaration of trust by the donor, or by way of resulting trust or presumption of gifts of land by registered transfer, or by a declaration of trust in writing.

19. In the instant case, there was nothing to show that the 2nd appellant had actually been given the 1.5 acres of Kyeni/Kigumo/675 and so I am unable to find the 2nd appellant was gifted intervivos.

20. It has been argued that the purchasers having bought the deceased person's land prior to confirmation of letters of administration, the same was illegal and amounted to intermeddling.

21. Section 45 of the Laws of Succession Act prohibits dealing in properties belonging to a deceased person before obtaining grant. It states:-

> ***"(1) Except so far as expressly authorized by this Act, or by any other written law or by a grant of representation under this Act, no person shall, for any purpose take possession or dispose of, or otherwise intermeddle with any free property of a deceased person."***

22. Since Land Parcel Kyeni/Kigumo/675 formed part of the suit land, the previous petitioner/administrator sold a portion of the estate to two buyers (Geoffrey Phineas Ndwiga and Julieta Njura Ireri) when clearly she lacked the legal capacity to subdivide and deal in the property without the consent of all beneficiaries and more so when the grant had not been confirmed. In **Gladys Nkirote M'itunga v Julius Majau M'itunga[2016] eKLR** the court stated that;

> ***Whereas the law of succession does not define what intermeddling with the property of the deceased is, there is ample judicial decisions on acts which may amount to intermeddling. For instances, in the case of Benson Mutuma Muriungi v C.E.O. Kenya Police Sacco & Another [2016] eKLR the court observed that:***
>
> ***"Whereas there is no specific definition provided by the Act for the term intermeddling, it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. The category of the offensive acts is not heretically closed but would certainly include taking possession, or occupation of, disposing of, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the Law of Succession Act. I should add that any act or acts which will dissipate or diminish or put at risk the free property of the deceased are also acts of intermeddling in law. I reckon that intermeddling with the free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or fine or both under section 45 of the Law of Succession Act. That is why the law has taken a very firm stance on intermeddling and has clothed the court with wide powers to deal with cases of intermeddling and may issue any appropriate order(s) of protection of the estate against any person."***

23. I hold and find that the above are sufficient reasons to allow the appeal.

24. In the foregoing, I therefore find that;

(i) *The appeal partially succeeds.*

(ii) *The file to be remited back to the trial court for hearing of a fresh application for confirmation of the grant.*

(iii) *Each party to bear its costs in this appeal.*

25. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 15TH DAY OF DECEMBER, 2021.

L. NJUGUNA

JUDGE

…….for the Appellant

…….for the Respondent