REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 109 OF 2016

IN THE MATTER OF THE ESTATE OF JACKSON KINGARUA MAINA ALIAS KINGARUA MAINA (DECEASED)

LMG.....1ST APPELLANT

NNM.....2ND APPELLANT

VERSUS

HMK.....1ST RESPONDENT

NWK.....2ND RESPONDENT

(*Being an appeal from the ruling of the Honourable Principal Magistrate C. Kutwa (Mr.) delivered on 25th August, 2016 in Succession Cause No. 35 of 2011 at Githunguri Law Courts*)

JUDGMENT

1. The Appellants herein are the Administrators of the estate of the late JKM alias KM, the deceased whose estate is in issue herein. A grant of letters of Administration Intestate was issued to the Appellants, LMG and NNM, by the Principal Magistrate's Court at Githunguri in Succession Cause No. 35 of 2011 on 8th June, 2012.

2. Upon the lapse of six (6) months, the Appellants filed an application for confirmation of grant via summons dated 18th December, 2012. Thereafter HMK, the 1st Respondent herein, filed an Affidavit of Protest dated 28th February, 2013, against the confirmation of grant, and proposed an alternative mode of distribution. The matter proceeded by way of viva voce evidence.

3. During the proceedings, the issue of DNA testing arose to which the trial court directed the parties to file submissions and thereby gave a judgment date of 25th August, 2016. However, on the judgment date, the trial magistrate delivered a ruling. In the ruling, Hon. C. Kutwa found that on a balance of probabilities, the Respondents had established that they were children of the deceased. The learned magistrate then exercised his discretion in terms of **section 27** and **28** of the **Law of Succession Act** and ordered that the Respondents be given 1.5 acres in Githunguri/Kanjai/***.

4. Aggrieved by the ruling, the Appellants preferred the instant appeal by way of a Memorandum of Appeal dated 4th November, 2016 and filed on 15th November, 2016. The Appellants are asking the court to set aside the ruling of Hon. Charles Kutwa Principal Magistrate delivered at Githunguri, Kiambu on the 25th August, 2017 in Succession Cause No. 35 of 2011 and all consequential orders thereto. Further that the costs be awarded to the Appellants.

5. In their grounds of appeal, the Appellants argue that the learned magistrate misapprehended the provisions of **section 27** and **28** of the **Law of Succession Act** in ordering that the Respondents be apportioned 1.5 acres out of the land parcel known as Githunguri/Kanjai/330 despite the fact that the Respondents had not made an application for dependency under **section 26** of the **Law of Succession Act**. Further that the apportioned acreage was more than the 1.2 acres that the Respondents sought for in the Affidavit of Protest dated 28th February, 2013.

6. In the Applicants' view, it was premature to conclude the succession cause via a ruling instead of proclaiming a final judgment from which a decree can be subsequently extracted. They aver that the estate is now in limbo as there is no order as to the confirmation of grant or the mode of distribution of the deceased's estate.

7. The appeal was disposed of by way of written submissions. Learned Counsel Mr. Muhoro filed written submissions dated 12th May, 2019 on behalf of the Appellants in which he asked the Court to allow the appeal as prayed.

8. According to Mr. Muhoro, the trial magistrate directed the Respondents to undergo a DNA profile test upon finding that the Respondents could not prove that they are children of the deceased through the oral evidence and the witnesses that had been presented therein. He contended that the principle of *sua sponte* prohibits Judges and Magistrates presiding over a matter from directing the parties how to prove their case; that in a civil matter, it is the work of the parties to convince the jury on a balance of probabilities in order to prove their case. Counsel urged that by directing the Respondents on what to do in order to prove their case and in turn declaring the Respondents as beneficiaries, the trial Magistrate acted beyond his powers.

9. Mr. Muhoro submitted that the court has a duty to ensure that property is equally distributed and to not go beyond the prayers specified in an application. He asserted that **section 28** of the **Law of Succession Act** provides that the court shall consider the position of other dependants in relation to the suit property. Further that **section 29** is clear that in making such an order, the court should have regard to the nature and amount of the deceased's property and the dependants who are to benefit from the property. This, he says the trial magistrate failed to do.

10. It is the Appellants' argument that the trial Magistrate, in his ruling, ought to have dealt with the issue of whether the Respondents, who were the Protestors therein, were beneficiaries or not and whether the letters of administration were valid or not. That instead, the trial magistrate went ahead to divide the property in an unjust manner leaving the parties in a quagmire of legal wrangles. They urged the court to set aside the ruling and make a pronouncement on the rights of the parties as to who are the legal beneficiaries.

11. In opposition, learned Counsel Mr. Ndegwa filed written submissions dated 10th February, 2020 on behalf of the Respondents, in which he asked the court to affirm the ruling of the trial Magistrate. He asserted that the decision is well thought and legally founded, and to interfere with it would be tantamount to a miscarriage of justice on the Respondents. He urged that the Appellants were accorded a fair hearing at the lower court and that the appeal is therefore a waste of the court's time.

12. Mr. Ndegwa contended that the Magistrates' Court has full power to call for further evidence as envisaged under **section 70** of the **Law of Succession Act** which it did by ordering for a DNA profile test to be conducted on all parties to prove whether the Appellants and the Respondents had any relations. That the Appellants however, without reasonable cause, refused to submit to DNA testing and it was the court's observation that this was a scheme to disinherit their step siblings, the Respondents herein.

13. It was Mr. Ndegwa's submission that the Appellants were given an opportunity to confirm whether the Respondents are their step-brothers, but that the Appellants turned down this opportunity by refusing to submit to DNA testing which would have put the issue to rest.

14. Mr. Ndegwa stated that the trial magistrate found on a balance of probabilities, as is the standard of proof in such matters, that the Respondents are children of the deceased and step-siblings of the Appellants, and therefore dependants of the deceased's estate within the meaning of **section 29** of the **Law of Succession Act**. That the trial magistrate, in exercising his discretion in terms of **section 27** and **28** of the **Law of Succession Act** and holding that the Respondents are entitled to 1.5 acres out of Githunguri/Kanjai/330 therefore acted in accordance with the law.

15. This being the first appeal I am reminded of my primary role as the first appellate court to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the decisions reached by the learned trial magistrate are to stand or not. On a first appeal, the Court should consider the evidence, evaluate it itself 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 that respect. Secondly, the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence. (See - **Abok James Odera & Associates vs. John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR**).

16. The record demonstrates that after the parties and their witnesses gave oral evidence in court, the trial magistrate Hon. J. D. Kwena gave a ruling on 3rd December, 2014. In the ruling, the learned magistrate stated that the evidence that had been gathered from the parties and their respective witnesses was not conclusive. That the evidence was not sufficient as to assist the court to resolve the dispute namely: whether the Protestors, who are the Respondents herein, are children of the deceased and therefore heirs of his estate; whether the Respondents are entitled to share in the property known as Githunguri/Kanjai/330 comprising the deceased's estate and the mode of distribution thereof.

17. In her ruling, Hon. Kwena noted thus:

> "*This is a complicated case which the court must get proper evidence to be able to decide on the three issues above. It is possible to miss out the most important should the court choose to rely on the evidence now before court.*
>
> *This court at this juncture will decline to conclude this petition as is expected by the parties, and request for more evidence.*
>
> *The only other option left for the court to get proper and accurate paternity relation for Henry and his sister N is through a DNA profile test. The court orders that the DNA be conducted between the petitioner or any of her siblings with the two protestors. This is the only way this court will ascertain if they are siblings with equal rights of inheritance.*"

18. Later on 14th July, 2016 the matter proceeded before learned Magistrate Hon. C. Kutwa who directed the parties to file submissions on the issue of DNA testing. The parties filed their respective submissions after which the learned Magistrate gave a judgment date of 25th August, 2016. On the said judgment date, the Magistrate delivered a ruling which is the subject of the present appeal.

19. In his ruling, Hon. Kutwa stated that the sole issue for determination was whether the Protestors who are the Respondents herein, are

entitled to share in the estate of the deceased. The learned Magistrate pointed out that Hon. Kwena had directed the parties to submit to DNA testing, but despite the willingness of the Objectors, the Petitioners declined to submit to the DNA testing instead submitting that the court erred in making the order.

20. The Petitioners had argued that a court cannot move *suo moto* and make an order for DNA. In disregarding this argument, Hon. Kutwa stated that under **section 70** of the **Law of Succession Act**, the court has power to call for further evidence on any matter which requires further investigation before a grant is made. That the court was therefore right to call for DNA testing. He noted that in any event, the order, though contested, had not been set aside.

21. The trial magistrate noted that since the Petitioners did not offer any reasons for their refusal to undergo the DNA test, the only inference that could be drawn was that the Protestors and the Petitioners were related and the Petitioners' refusal to submit to DNA testing was aimed at disinheriting their step-siblings.

22. It was the trial Magistrate's holding that having looked at the evidence as a whole, and more so that of PW3 on the Protestor's side and PW2 on the Petitioner's side, the Protestors had, on a balance of probabilities, established that they are children of the deceased. He went on to exercise his discretion in terms of **section 27** and **28** of the **Law of Succession Act** and ordered that the Protestors be given 1.5 acres out of Githunguri/Kanjai/***.

23. PW3 on the Protestor's side was one CMK who testified that he was the deceased's friend and further that it was he who built the two (2) houses for the deceased's wives. It was his testimony that the deceased had two (2) wives: the first wife W and the 2nd wife W. He was aged 81 years at the time of giving his evidence.

24. PW2 on the Petitioner's side was one SNK, who was the deceased' neighbour. He testified that the deceased had only one (1) wife who was the mother of the Petitioners and denied any knowledge of the Protestor. He acknowledged that the deceased's home had two houses but stated that one was for his wife and the other for his elder son M. He further stated that if the deceased had another wife elsewhere, he wouldn't know. He did not also know who built the deceased's two houses in the deceased's home.

25. The Petitioners' argument before the trial court was that upon finding that the evidence adduced in court was insufficient, Hon. Kwena ought to have terminated the Protestor's case at that stage. The record further demonstrates that on 28th May, 2015 Hon. Kwena stated that the court would proceed to distribute the estate to the heirs as per the evidence on record given the circumstances that would be observed at the time of distribution. This was while granting an adjournment to allow the administrators who had continuously defied the order of DNA testing to consult their advocates.

26. It is not in dispute as demonstrated by the record that the trial court made an order *suo moto* directing the parties to submit to DNA testing, which order was defied by the Appellants. The record further shows that following the continued defiance of the order, the court gave a further ruling date. The parties were directed to file their written submission with respect to the issue of DNA which the record shows they did prior to the date of the ruling and which submissions were considered by the trial court in its ruling which is the subject of this appeal.

27. In written submissions dated 13th July, 2016 filed by M/s G.K. Gatere & Co. on behalf of the Protestor in the trial court, the learned Counsel while submitting on the issue of DNA, stated that the only inference that could be drawn from the Petitioners' refusal to undergo DNA testing was that they were being economical with the truth in order to disinherit their own from their late father's estate.

28. The Protestor's case was that in cases where paternity is in issue, the most cogent evidence is to be obtained by DNA tests. That since it was impossible to extract DNA from the deceased's remains, the only logical way of determining paternity was by sibling DNA testing which could have been conclusive since it focuses on the male Y-chromosome profile and as such it could have provided useful evidence of the relationship. It was urged that following the refusal by the Petitioners to undergo DNA testing, the only alternative was for the court to proceed to distribute the estate by relying on the totality of the evidence adduced herein, DNA testing notwithstanding.

29. On their part, the Petitioners through M/s G. M. Muhoro Advocates filed written submissions dated 18th July, 2016 in which they implored the court to retract the order for DNA testing as it would occasion a great injustice to the Petitioners and violate their constitutional right to privacy and bodily security. In their view, the court overstepped its role as adjudicator in calling for additional evidence to support the Protestor's allegations.

30. In **Political Parties Dispute Tribunal & Anor v Musalia Mudavadi & 6 Others Ex Parte Petronila Were [2014] eKLR** Odunga, J. while deliberating on the *suo moto* procedure extensively quoted the decision in **Nagendra Saxena vs. Miwani Sugar Company (1989) Limited (Under Receivership) Kisumu HCCC No. 225 of 1993** where **Mwera, J** (as he then was) while citing **Habig Nig Bank Limited vs. Nashtex International Nig Ltd Nigeria Court of Appeal Kaduna Division CA/K/13/04** and ***Playing God: A Critical Look At Sua Sponte Decisions By Appellate Courts* By Adam M Milani and Michael R. Smith, Tenessee Law Review {VOL. 69 XXX 2002}** dealt with the *suo moto* procedure extensively as follows:

> **"The term *suo moto* is a Latin term meaning "on its own motion" and it is approximately an equivalent of the term "*sua sponte*" (Latin) which means, "of one's own accord". The term defines one acting spontaneously without prompting from another party. *Blacks Dictionary* defines "*sua sponte*" as "of his or its own will or motion, voluntarily and without prompting or suggestion". In our jurisdiction action "*suo motu*" or "*sua sponte*" for the two mean the same thing, a judge or court in a given case takes a course or decision without prior motion or request from the parties. Usually the matter being decided *suo motu* or *sua sponte* is not in the pleadings, briefs, submissions, issues and evidence placed before the court for determination. For that is the essence of the adversarial systems where the parties direct the course of the litigation that brought them to court while the judge plays the referee. He/she hears them and makes a decision. In matters *suo motu* the court usually on perusing the file before it comes by a matter that is of the essence of the case but not raised by the parties. It could be a matter of law or procedure or other. Then that is considered by the judge who rules on it. *The better course in matters dealt***

***with sua sponte is to notify the parties to the cause of the point(s) in question, inviting them to submit on it, before a ruling/finding is arrived at. There is no dispute that the fundamental premise of the adversary process is that the advocates do uncover and present more useful information and arguments to the decision-maker than would be developed by a judicial officer acting on his own in an inquisitorial system*.** **Accordingly most lawyers probably never think about a possibility that a court will decide a case or an issue that the court itself raises and which was neither briefed nor argued by the parties. But it happens and it is known as *sua sponte.* Once a court raises an issue *sua sponte* the court can go about deciding it in one of two ways. First, it can involve the parties and request that they submit briefs on the issue to assist the court in reaching a decision. In this context, while the issue may be raised *sua sponte* the decision on the issue is made in accordance with the principles and traditions of the adversarial system. Alternatively, the court can decide the issue on its own without the input from the parties. In this context, the issue is not only raised *sua sponte,* but is also decided *sua sponte. The proper approach to decide sua sponte issues is the former approach – the approach that involves the parties in the decision-making process…It is not in doubt that hearing parties on issues sua sponte or suo motu is better favoured since the parties have been heard before a decision…Even when a court raises a point suo motu the parties must be given an opportunity to be heard on the point particularly the party that may suffer a loss as a result of the point raised. The law is well settled that on no account should a court raise a point suo motu, no matter how clear it may appear to be, and proceed to resolve it one way or the other without hearing the parties…If it does so, it will be in breach of the parties right to fair hearing*."**

31. From the record, it is clear that even though the trial court decided on the issue of DNA test profiling *suo moto, the court proceeded to involve the parties in the decision-making process* by directing them to submit on the issue which they did as evinced by their respective written submissions dated 13th July, 2016 and 18th July, 2016. Both parties were therefore afforded a right to be heard in line with the principles of natural justice.

32. As rightfully pointed out by the trial magistrate, **section 70** of the **Law of Succession Act** grants the court power to call for further evidence. The relevant part thereof is **Section 70(b)** which states thus:

"Whether or not there is a dispute as to the grant, every court shall have power, before making a grant of representation –

(a) …

(b) call for further evidence as to the due execution or contents of the will or some other will, the making of an oral will, the rights of dependants and of persons claiming interests of intestacy, or any other matter which appears to require further investigation before a grant is made; or

(c) …"

33. What then remains is for this court to determine whether the trial court had the jurisdiction to order for DNA testing *suo moto* by dint of **section 70** of the **Law of Succession Act**.

34. Prior to making the order, the trial court examined the evidence before it, which it found inconclusive with respect to the paternity of the Respondents which issue was at the centre of their Protest. Indeed, from the evidence on record there is no doubt that the *viva voce* evidence did not put this issue to rest. It is in this regard that the trial court made an order directing the parties to submit to DNA testing.

35. I am persuaded by the decision in **M.W & 3 others vs. D.N. [2018] eKLR** where Aroni, J while deliberating on the question of whether a court can order for sibling DNA testing opined thus:

"Whereas there is consensus on matters of children and the quest to establish paternity often citing the best interest of the child, as relates to whether DNA testing on matters involving adults some of whom are non-consenting, the issue remains moot, there is yet no consensus.

One school of thought is that for an order for DNA test to be made, a basis must be laid; a nexus or connection between the applicant and the person the order is being sought against must be established.

The other school of thought is that DNA test is to be allowed in fact finding, to establish the truth and reach a just conclusion even where no nexus or connection has been established, if the need is eminent."

36. The learned Judge further cited the decision in **Wilfred Karenge Gathiomi vs. Joyce Wambui Mutura & Another [2016] eKLR** where the court stated thus:

"Therefore, since under our law Sections 107, 108 & 109 of the Evidence Act Cap 80 mandates that he who alleges must prove; the Applicant is the one who raised the issue of paternity against the 1st Respondent. He did not prove. The 1st Respondent claimed in spite of the date contained in her ID card she was born in 1950. She did not prove the same. Therefore, the only option is to result to scientific methods for conclusive results. Both parties should undergo a sibling DNA testing to confirm if they are of the same father or not.

The court finds that the DNA testing will not cause substantial loss to the applicant, except inconvenience that is less important to finding a lasting solution to the issue raised in the first place…

In light of the above cited authorities that DNA is intrusive and interferes with the right to privacy, this court finds basis for

the DNA testing. Paternity is central to the dispute at hand, whether the 1st respondent is one of the beneficiaries of the deceased's estate. It is the only way to resolve the paternity issue the applicant raised and is now reluctant to pursue the matter to its logical conclusion. The DNA testing will not prejudice the Applicant's case pending appeal, as he has not advanced any proposal on how to resolve the issue it was his word against his."

37. In my considered view, upon finding that the evidence adduced before it was insufficient, the trial court found and rightly so that the issue of paternity of the Respondents could only be put to rest by way of DNA testing. The trial court was therefore right to make such an order *suo moto* to ensure that justice was not only done but seen to be done.

38. As a general rule, the more correct approach is that the discovery of the truth should prevail over the idea that the rights to privacy and bodily integrity should be respected. Whereas the DNA test would infringe upon the privacy of the Appellants and their siblings, it is evident that DNA testing would be the most accurate method to arrive at a just and fair decision in a case such as this one where the evidence adduced by the parties is inconclusive. This is because it would ensure that if the Respondents were indeed children of the deceased as alleged, they would benefit from his estate. As such, I find that directing the parties to submit to DNA testing was the only option available to the trial court in order to arrive at a fair and just determination having found that the evidence adduced thereto was insufficient for the court to make a determination one way or the other.

39. In spite of the existence of the order, which had not been appealed against and was therefore still in force, the Appellants failed to submit to DNA testing which act of defiance forced the court to make a ruling thereto. In its ruling, the trial court stated that the only inference that could be drawn from the Appellant's non-compliance with the orders was that they were related to the Respondents herein and only wanted to disinherit them.

40. Whereas the Appellants argue that the trial Magistrate misapprehended the law by purporting to exercise his discretion under **section 27** and **28** of the **Law of Succession Act**, I am of the considered view that this argument is without basis. **Section 27** of the **Act** clearly stipulates that the court may, on the application by or on behalf of a dependant make reasonable provision for that dependant out of the deceased's net estate. **Section 28** provides the circumstances to be taken into account by the court in making such an order.

41. I note however that while the trial court had the discretion to make a reasonable provision for the Respondents out of the deceased's estate having found that they were children of the deceased, the trial court failed to take into account the circumstances stipulated under **section 28** of the **Act**. The impugned ruling states that the Respondents, who were the Protestors therein, were to get 1.5 acres in Githunguri/Kanjai/330 but it does not state the basis thereof or how the rest of the property was to be shared.

42. According to the Affidavit in support of the Petition for letters of administration intestate the property known as Githunguri/Kanjai/*** was the sole asset of the deceased's estate. A Certificate of Search dated 14th March, 2011 filed as an annexure to the petition indicates that the suit property measures 4.7 acres. However, in the mode of distribution proposed in the summons for confirmation of grant the property is stated to measure 6.0 acres.

43. I therefore find that the trial court ought to have ascertained the acreage of the suit property being the sole asset of the deceased's estate and thereafter proceeded to share the estate equally amongst the children of the deceased in line with **section 38** of the **Law of Succession Act**.

44. While I note that the trial Magistrate was right in declaring the Respondents as children of the deceased, I find that his final orders namely that the Respondents are entitled to 1.5 acres out of Githunguri/Kanjai/330 were made prematurely.

45. Based on the foregoing and to do justice in the circumstances, I order that:

i.) The cause be and is hereby referred back to the Magistrates' Court at Githunguri for confirmation of grant to enable the administrators distribute the deceased's estate.

ii.) In confirming the grant, the Magistrate's Court shall limit itself to ascertaining the acreage of the suit property and then proceed to share it equally amongst the deceased's children in line with **section 38** of the **Law of Succession Act**.

iii.) The share of any of the deceased's children who is deceased shall devolve to their rightful dependants within meaning of **section 29** of the **Law of Succession Act**.

iv.) As the orders giving rise to this appeal were made *suo moto* I direct that each party bear its own costs.

DATED SIGNED AND DELIVERED VIA EMAIL AT NAIROBI THIS 8TH DAY OF APRIL, 2020.

L. A. ACHODE

HIGH COURT JUDGE