



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**CIVIL APPEAL NO.13 OF 2018**

**BETWEEN**

**DANIEL OTIENO MAURICE.....1<sup>ST</sup> APPELLANT**

**ELLY OTIENO MAURICE.....2<sup>ND</sup> APPELLANT**

**Y A M**

**S J M.....3<sup>RD</sup> APPELLANTS**

**J A M**

**(Suing by their brother and next friend DANIEL OTIENO MAURICE**

**VERSUS**

**MARY AKOTH MAURICE.....RESPONDENT**

*(An appeal from the Ruling of the Senior Principal Magistrate's Court, Homa Bay in CMC Succession case NO.116 of 2016 delivered on the 11<sup>th</sup> May, 2018 – HON. T. Obutu, SPM)*

**JUDGMENT**

1. Vide the originating summons dated 28<sup>th</sup> February 2018, filed in the Chief Magistrate's Court at Homa Bay on the 11<sup>th</sup> April 2018, the appellants sought a determination on "**inter alia**" whether they are beneficiaries of the estate of the late G O M (deceased), who died at the age of sixteen (16) years after being mauled by a wild rogue hippopotamus, leaving behind his mother (herein, the respondent) and siblings including the appellants herein.

2. The summons were based on the averments contained in a supporting affidavit deposed by the first appellant, **DANIEL OTIENO MAURICE**, on the 28<sup>th</sup> February 2018.

A petition for distribution of the assets of the estate of the deceased was also filed in court on the 11<sup>th</sup> April 2018, by the appellants against the respondent. They sought an order of the court for reasonable apportionment or distribution to all the dependant of the net estate of the deceased which was a sum of Kshs.5 million received as compensation for the death of the deceased from the Kenya Wildlife Services (KWS).

3. After the hearing of the petition, the trial court framed two issues for determination viz: - who are the actual dependants to the estate of the deceased and how then should the estate be distributed.

The petition was thus determined on the basis of the answer to the twin issues made by the trial court as follows:-

**"Really in the case, none of the petitioners by law qualifies at all to jump into the ship of the brackets of dependency. The 1<sup>st</sup> and 2<sup>nd</sup> petitioners have not demonstrated to this court that despite them having their families and homes, they were dependants of the deceased.**

**Be that as it may, being the siblings of the deceased, I will use my discretion and provide for them so that they can wipe their tears having lost a brother. The 1<sup>st</sup> and 2<sup>nd</sup> petitioners all be awarded Kshs.150,000/= each from the estate of the deceased. Collins Odhiambo Maurice, being a sibling will also be awarded Kshs.150,000/= despite not being a party to this cause.**

**The minors, Y A M , S J M and J A M still being under the care of their mother will each be awarded Kshs.150,000/= each from the estate of the deceased. The respondent being the mother of the deceased, with again the sole responsibility of taking care of the minors will be awarded the balance which is Kshs.3,100,000/= of the estate of the deceased.”**

4. The trial court proceeded further to state that:-

**“I do further order that under the provisions of the law of succession, the award of each of the minors which is Kshs.150,000/= each to be invested in a fixed deposit account for each minor to be opened at Co-operative Bank of Kenya – Mbita branch, in the joint names of the minors and the respondent till they reach the age of 18 years and the said principal amount shall not be paid to the said respondent without a prior order of the court.”**

5. Being dissatisfied with that determination, the appellants preferred this appeal on the basis of the grounds in the memorandum of appeal dated 14<sup>th</sup> May 2018. Basically, the appellants complain that the trial court misdirected itself on matters of law and fact by failing to properly interpret and define the meaning of the terms **“dependency”** and **“dependants”** and by misapplying the principles guiding the distribution of the estate of a deceased person thereby apportioning the beneficiaries inequitably and failing to adopt the proposal made by the appellants in their schedule of distribution.

6. The appellants also complain that the trial court erred in law in failing to take cognizance that costs incurred in litigating over the estate of the deceased are to be paid from the same estate. They therefore prayed that the decision of the trial court be quashed with costs to them.

The appeal proceeded by way of written submissions and in that regard submissions were filed by the firm of **G.S. OKOTH AND COMPANY ADVOCATES** on behalf of the appellants and by the firm of **H. OBACH & PARTNERS**, on behalf of the respondent.

7. The respondent’s submissions contained a cross appeal in which the respondent complains that the trial court erred in law and fact in allowing the appellants’ petition in utter and total disregard of cogent, credible and uncontroverted evidence presented before it by the respondent and in failing to consider and address the issues normally expressed to be in contention between the parties and instead considered irrelevant matters including those that were not pleaded by the appellant.

8. The respondent also complains that the trial court erred in law and fact in finding and holding in utter and total disregard of the respondent’s evidence that the first and second appellants and Collince Odhiambo Maurice, qualified to benefit from the estate of the deceased despite being married and having their own homes and families and in concluding that the first and second appellants and Collince Odhiambo Maurice be awarded the sum of Kshs.150,000/= each from the estate of the deceased despite having held that they were not dependents to the estate of the deceased.

9. In highlighting the rival submissions, both the appellants and the respondent through their respective counsel merely reiterated the contents of their respective written submissions and whereas the appellants contended that they were defendants of the deceased, the respondent contended otherwise.

The appellants urged this court to allow the appeal and enhance the amounts apportioned to each of them.

The respondent urged the court to dismiss the appellants’ appeal and allow her cross-appeal.

10. After due consideration of the appeal and the cross appeal in the light of the supporting grounds and those in opposition thereto and also in the light of the rival submissions and taking into account that this is a first appeal for which the impugned petition and arguments advanced by both sides in respect thereof have been re considered, this court clearly sees that at the heart of the dispute is a mother (respondent) and her children (appellants) fighting over compensation made to the estate of the deceased following his death brought about by a rogue hippopotamus under the care and protection of the Kenya Wildlife Services.

11. It is not clear whether any of them have filed or have since filed a petition for grant of letters of administration intestate respecting the estate of the deceased who was a minor at the time of his death.

His mother (respondent) survived him and so did his brothers and sisters some of whom were also minors (appellants).

It was presupposed that in moving the court by way of the impugned petition, there was in existence a grant of letters of administration intestate respecting the estate of the deceased. If none existed then the petition was premature and the appellants could not purport to ride on the back of the pending originating summons to claim a share of the compensation made to the estate of the deceased.

12. Their share of the compensation (if any) was only determinable in a succession cause for grant of letters of administration intestate. That is why **Rule 45** of the **Probate and Administration Rules**, provides for application under **Section 26** of the **Law of Succession Act** where a grant has been applied for or made but not confirmed.

If the impugned petition was deemed to be the application under **Section 26** of the **Law of Succession Act**, it was clearly improper before the court such that anything arising therefrom including the impugned ruling and this appeal are a nullity and void **“ab-initio”**.

13. Therefore, none of the grounds for the appeal and the cross appeal is competent and valid inasmuch as they involve the provisions of the Law of Succession Act yet none of the parties has moved any court under the said Act for grant of letters of administration respecting the estate of the deceased. If they desired that they invoke the Kenya Wildlife Services Rules pertaining to compensation, they ought to have desisted from invoking the Law of Succession Act in the distribution of the estate of the deceased.

14. **Section 26** of the **Succession Act** is the applicable provision for dependants not adequately provided for an intestacy. Thus – “**where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased’s estate effected by his will or by gift in contemplation of death or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased’s net estate.**”

15. Under **Section 27** of the **Act**; the court in making provision for a dependant shall have complete discretion to order a specific share of the estate to be given to the dependant, or to make such other provision for him by way of periodical payments or a lump sum and to impose such conditions, as it thinks fit.

**Section 29** of the **Act** defines the term “**dependant**” to mean:-

**a) The wife or wives, or former wife or wives and the children of the deceased whether or not maintained by the deceased immediately prior to his death.**

**b) Such of 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 and**

**c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.**

16. So, the appellants would be classified as dependants of the deceased, only if they were maintained by him immediately prior to his death, which was not the case in the present circumstances, where the deceased was a minor who actually depended on his parents. His mother (respondent) is his only surviving parent and would by dint of **Section 39** of the **Succession Act** be the first in priority to apply for grant of letters of administration regarding his estate for her benefit and that of other beneficiaries (if any). The net estate would devolve upon her in priority to other beneficiaries and her dependants.

17. Be that as it may, both the appeal and the cross-appeal are hereby dismissed for want of validity and competence. Each party shall bear their own costs. The “**status quo**” existing prior to the impugned ruling of the trial court made on 10<sup>th</sup> May 2018, be maintained pending the hearing and determination of the pending originating summons dated 20<sup>th</sup> February 2018 or pending the filing of a proper succession cause for grant of letters of administration respecting the estate of the deceased.

Ordered accordingly.

**J.R. KARANJAH**

**JUDGE**

**04.10.2018**

**[Delivered and signed this 4<sup>th</sup> day of October, 2018]**