



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

PROBATE & FAMILY DIVISION

HIGH COURT CIVIL APPEAL NO. 32 OF 2015

IN THE MATTER OF THE ESTATE OF JANE WANJA KIMUNYA (DECEASED)

BETWEEN

PETER NDUNGU 1ST APPLICANT

HUMPHREY WAINAINA KANARI 2ND APPLICANT

ANDREW KIMUNYA KANARI 3RD APPLICANT

AND

JANET WAITHIRA KIMUNYA 1ST RESPONDENT

HANNAH WANJIRU KIMUNYA 2ND RESPONDENT

(Being an appeal from the Judgment and decree of the Chief Magistrate's Court at Kiambu dated and delivered on 18th March, 2015 by Hon. Ms. C.C. Oluoch, SPM)

JUDGMENT

INTRODUCTION

Jane Wanja Kimunya (hereinafter referred to as the deceased) died intestate on the 14th day of March 2010. Janet Waithira Kimunya, the 1st Respondent herein and Peter Ndung'u Kanari, the 1st Appellant herein petitioner applied to the Court for Letters of Administration intestate vide **Succession Cause No. 111 of 2010** at the Chief Magistrate's Court at Kiambu. The same was issued on the 12th day of August 2010. On the 22nd day of November 2011, one of the co-administrators, Peter Ndung'u Kanari filed Summons for Confirmation of the Grant issued. Janet Waithira, the other co-administrator, filed an affidavit of protest to oppose the Summons for Confirmation of Grant. In the affidavit of protest, the protester stated that the 1st Appellant and his brother misled her by stating that since her other sibling was a minor, it was necessary to have two administrators to the deceased's estate. Unbeknown to her, the 1st Appellant misled the Chief who indicated that the deceased was survived by nine (9) children. The 1st Respondent discovered, after the grant has been issued, that the 1st Appellant had included his siblings as dependants of the deceased. Due to this, she filed another application seeking to remove the name of the 1st Appellant from the Grant.

In response to the Affidavit of Protest, the 1st Appellant herein filed a further affidavit sworn on the 23rd day of February, 2012. He deponed that the deceased was his stepmother and that the 1st Respondent and her sister were fostered and not legally adopted by the deceased and his father. In relation to Tinganga/Ndumberi/1631, he stated that it was their ancestral home and was their father's property who subsequently transferred it to him and the deceased and thereafter he transferred it wholly to the deceased. He further stated that the 1st Respondent submitted false documents at the Land Registry which effected the transfer of the property to her name.

The 1st Respondent then swore a Supplementary Affidavit on the 11th day of April 2012. She averred that the 2nd and 3rd Appellants herein were the deceased's grandchildren. She deponed that Tinganga/Ndumberi/1631 was given to the deceased in 1997 and that the Appellants should have raised any issues they had at that time and further that a cemetery should not be curved on the land since everyone has their own

property. In relation to the allegation of using false documents to transfer the property to her name, she deponed that she had paid one Oliver, with the impression that he was an Advocate, to assist her to remedy the situation occasioned by the 1st Respondent. He later informed her that the title to Tinganga/Ndumberi/1631 was ready for collection. However, Oliver died later in the year as he was intending to resolve the issue of the transfer. On the 4th day of April 2014, the 1st Respondent filed amended Summons for Rectification of Grant seeking to remove the other names apart from hers and the 2nd Respondent herein. Attached was a letter from the Chief revoking the previous letter issued and indicating the 2 Respondents are the sole beneficiaries of the deceased's estate.

The matter proceeded through oral and written submissions. The trial court delivered its judgment on the 18th day of March 2015. The only issue for determination was whether the 2nd and 3rd Appellants were entitled to a provision in the subject land. The learned Magistrate having carefully evaluated the evidence tendered came to the conclusion that the Appellants were not dependants under the provisions of **Section 29 of the Law of Succession Act**. Further, he stated that he cannot set aside a burial site on the land as the original owner of the land would have set aside the burial site when he sub-divided the land and therefore the surviving family members should be buried on their land. The trial court went ahead and confirmed the grant of Letters of Administration and all property of the deceased was to be jointly held by the 1st and 2nd Respondents and money shared equally between them. The Appellant being aggrieved by the trial Court's decision lodged the present appeal.

PLEADINGS

Being dissatisfied with the learned Magistrate's decision the Appellants appealed to this court and in the Memorandum of Appeal filed in court on 13th April 2015, they raised the following grounds:-

- 1) The Honourable Magistrate erred in Laws and fact by finding that the 2nd and 3rd Appellants were not beneficiaries and thus disentitled to benefit from the estate of the deceased.**
- 2) The Honourable Magistrate erred in law and fact by finding that the 2nd and 3rd Appellants did not fall within the definition of *Section 29 of the Succession Act*.**
- 3) The Honourable Magistrate erred in law and fact in finding that the 2nd and 3rd Appellants should have made an application under *Rule 45(1) of the Probate and Administration Rules* yet they were already listed as beneficiaries of the Estate of the deceased in the Petition for Grant of Letters of Administration intestate.**
- 4) The Honourable Magistrate erred in law and fact in wholly disregarding that the Appellants only a portion of L.R. No. Tinganga/Ndumberi/1631, therefore disinheriting them without any legal justification.**
- 5) The Honourable Magistrate erred in law and fact in wholly disregarding or failing to accord due and proper consideration upon the Appellant's evidence and written submissions.**
- 6) The Honourable Magistrate erred in law and fact by failing to address herself to the Defendant's pleadings and evidence.**
- 7) The Honourable Magistrate erred in law and fact by delivering a judgment which was devoid of all the requirements of a judgment pursuant to the Civil Procedure Rules.**
- 8) The Honourable Magistrate erred in law and fact by delivering a judgement that was against the weight of the evidence, submissions and the Law of Succession.**

In addition, the Appellants filed an application through Notice of Motion under Certificate of Urgency seeking among others, stay of execution pending the hearing and determination of the application, stay of execution of the Certificate of Confirmation of Grant issued and a temporary injunction restraining the Respondents from any dealing in relation to L.R. No. Tinganga/Ndumberi/1631. The orders sought were granted in the ruling delivered by this Court on the 16th September 2016. On the 2nd March 2017, this Court issued direction that the parties to file Summons for Confirmation of Grant and those objecting to file affidavit of protests. Janet Waithera Kimunya filed Summons for Confirmation of Grant on the 29th March 2017. Since the Appellants had not yet filed an appeal or informed the court of any changes, the Summons for Confirmation application was granted on the 3rd April 2017. On the 11th May 2017, the 1st Appellant filed Summons for Deputy Registrar to sign forms on behalf of one of the administrators, the 1st Appellant herein. The application was premised on the grounds that the 1st Appellant who is also a co-administrator, refused to sign the requisite forms needed to facilitate registration, partitioning and transfer of two land parcels namely Kiambu Municipality Block 5/Kiamumbi/1566 and Tinganga/Ndumberi/1631. On the 19th April 2017, the 2nd Appellant filed an application seeking orders, among others, that the court vary the terms in the Ruling delivered on the 16th September 2016, the court to extend the period within which the Appellants were to comply with the 4th condition and that the Record of Appeal be deemed to be properly filed. The application was premised on the grounds that they did not receive a notice for the delivery of the ruling and were not aware of the ruling until they were served and due to this, they sought at least 30 days to comply with the same. The 1st Respondent, in response to the application filed a replying affidavit on the 13th June 2017. She prayed that the application be dismissed since the Applicants intend to delay the cause of justice. On the 22nd June 2017, the matter came up for directions and the court stated that the application of 19th April 2017 is compromised and the hearing date of the appeal was issued.

On the 20th July 2017, the matter came up for hearing and Mr. Ambani, counsel or the Appellants proceeded on their behalf. It was his submission that the 2nd and 3rd Appellants were the step-grandchildren of the deceased. Their grandfather had two wives one of them being the deceased herein. Their mother was the daughter of the first wife but after she passed on, the deceased herein and the grandfather took care of them. Their position was that they had been included as beneficiaries when the petition was first filed and should therefore inherit.

Further, their late mother did not inherit from their grandfather's estate.

Jane Waithira stated that they were adopted when they were young by the deceased and her husband (deceased). She also stated that the husband to the deceased divided his property during his lifetime and the deceased got title to L.R. No. Tinganga/Ndumberi/1631. She maintained that when the deceased's husband was distributing his property, he gave an acre each to the sons and an acre was left for the children/daughters who were not married at the time including the 2nd and 3rd Appellant's mother.

ISSUES

- 1. Are 2nd & 3rd Appellants; the step grandchildren of the deceased beneficiaries and/or dependents of the deceased and therefore entitled to a share of her estate?**
- 2. Are the 1st & 2nd Respondents children of the deceased and therefore beneficiaries of her estate?**
- 3. Did the Trial Court in the judgment of 12th March 2015 consider all evidence presented?**
- 4. Should the appeal be upheld or dismissed?**

DETERMINATION

Section 78 Civil Procedure Act grants the Appellate Court the following requirements;

1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power:-

a) to determine a case finally;

b) to remand a case;

c) to frame issues and refer them for trial;

d) to take additional evidence or to require the evidence to be taken;

e) to order a new trial.

2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.

In the case of **SELLE & ANOR VS ASSOCIATED MOTOR BOAT COMPANY LIMITED & OTHERS [1968] EA 123**; this Court shall adopt the Appellate Court's mandate as it is exercising appellate jurisdiction as follows;

“...That this Court must reconsider the evidence, evaluate it itself and draw its own conclusion. Though [the Court] should always bear in mind that it has neither seen nor heard the witness and should make due allowance in this respect...”

THE APPEAL:

In summary the grounds of appeal are 3 fold;

That the Respondents are not biological and/or adopted children of the deceased yet they have inherited most of the deceased's estate and refused to distribute part of the estate to the deceased's step grandchildren.

The Applicants are administrator and step grandchildren of the deceased who were not allotted any part of the deceased's estate although they were similarly brought up by the deceased and grandfather after death of their mother, daughter of deceased's husband

The Trial Court did not consider and take into account the Appellants evidence and hence arrived at an erroneous outcome and disinherited the Appellants.

APPELLANTS CASE

In their Supplementary Affidavit sworn by the 1st Applicant on 10th July 2015, the Applicants reiterated the foregoing assertions and argued further that the deceased did not have any biological or adopted children, but had children that she brought into her household and brought up as her own, including the 2nd and 3rd Applicants. Accordingly, that the Respondents are not sisters but children of different parents but were only taken in by the deceased.

It was the Applicants' contention that their father, Andrew Kimunya Njuguna, was a staunch Christian and did not at any time have two wives. That their mother died in 1980 and shortly thereafter, their father married the deceased and hence, it is therefore not correct for the

Respondents to assert that their father's Estate was divided between two wives. That in any event, when the sub-division was done, their father had taken the 2nd and 3rd Applicants as his children and hence, the deceased was meant to escheat the property to them and the Respondents.

They contended further that the 2nd and 3rd Applicants lived with the deceased on the property until they were old enough to fend for themselves and that contrary to the Respondents' assertions, the mere fact that a beneficiary is not residing on a parcel of land as at the time of the demise of the deceased, does not mean that he or she is not qualified to inherit from the deceased's Estate.

RESPONDENTS CASE

It was their contention that they are the sole survivor / children of the deceased and that at the time of her death, she left a number of properties including parcels of land namely;

- a) Kiambu Municipality Block 5/Kiamumbi/11566;
- b) Kakuzi/Kimiriri/Block IV/188;
- c) Ndumberi/Ting'ang'a/1631; and shares namely in Cooperative Bank,
- d) Gatatha Farmers Company Limited,
- e) Kiamumbi Farmers Cooperative Society;
- f) Money in Equity Bank under account No. xxxxxxxxxxxxxxxx.

The Respondents rebutted the assertions by the Applicants in regard to the ownership of the property and stated that the same are false and that in any event; it was the 1st Applicant who approached the 1st Respondent and offered to help her acquire Grant Letters of Administration. In that context, it was their further argument that the 1st Respondent was not aware that the 1st Applicant was duping them with an intention to disinherit them by including the names of their (Applicants) brothers and nephews as dependants.

It was their contention that upon agreeing to the 1st Applicant's demands, he filed for Summons of Confirmation dated 22nd November 2011 and proposed to give them all the properties save for three parcels of land, which were to be distributed to the Applicants in various proportions namely, the 1st Applicant was to hold 0.25 Acres out of Ndumberi/Ting'ang'a/1631 to hold in trust for the entire family for burial purposes; the 2nd and 3rd Applicants were to receive 0.5 acres each respectively out of the property.

The Respondents maintained that the property was hived in the year 1987 from a larger parcel of land being Ndumberi/Ting'ang'a/111 and that prior to 1987, the same was registered in their late father's name, Andrew Kimunya Njuguna. That their father, having married two wives, while still alive and well, subdivided the land for the two families and their mother was given the property, while their step-mother was given the parcel known as Ndumberi/Ting'ang'a/1632, 1630, 1629 and 1627 all measuring 5 acres. Accordingly, that in 1997, while still alive, their father registered the title to the property in favour of their mother.

The Respondents asserted that to date, they have been in exclusive possession and enjoyment of the property and the Applicants have never at any time lived on or occupied the property. Further, that the Applicants are not dependants of the deceased as their mother has at no time provided or lived with them.

PROCEEDINGS

THE TRIAL COURT OF 12th MARCH 2015:

The Trial Court heard oral evidence summarized as follows;

'Janet Waithera Kimunya daughter of the deceased testified that they are 2 daughters of deceased with one Hannah Wanjiru. After their mother's death, the family held a meeting and was given authority to obtain grant of letters of administration. They obtained from the Chief that they are only 2 beneficiaries of the estate of the deceased. After few months, the rest of family obtained another letter that there were 6 sons as beneficiaries of deceased's estate. The 6 sons were Peter, Obadiah Samuel & Anthony, her step brothers and Andrew and Humphrey are step grandchildren of the deceased.[are children of their late sister Minnie Wambui Kanari who died in 1980] She complained to D.O and another letter was written.'

'Joseph Njihia Wangai is the Chief of Tinganga Location. He knew family of deceased. She had 2 daughters. The late husband divided his property between 2 houses during his lifetime. On 8th April, 2010 he gave Protestor [PW1] letter to petition for grant. On 6th May 2010 step brother and co administrator told him that they were sent by Janet to collect another letter so as to include the whole family. He gave him the letter and on realizing he had been misled he wrote another letter to revoke it.'

'Peter Ndungu Kanari testified that the Protestor was adopted by his stepmother. The mother of Andrew and Humphrey died when they were young and were taken in by his late mother Gladys Wakahiu. After the death of his mother, his father married the deceased herein and became foster parents of the 2 sons. He proposed that the 2 sons get half an acre while the protestor

and her sister take the other share.....He wants a small portion preserved as burial site for the family as there are people buried there.'

'Humphrey Wainaina Kanari testified he was 10 years old when his mother died. When she died, he went to live with his grandfather. He was staying with him even during his mother's lifetime. His Uncles were providing food until his grandfather married the deceased herein. He grew up with the Protestor when adopted by the deceased. Their mother did not leave any property to them.'

The outline above confirms that contrary to the allegation that the Trial Court did not consider the Appellant's evidence in the judgment this fact is not borne out by evidence on record of appeal.

The Trial Court evaluated the evidence and relied on **Section 29 (a) & (b) of Law of Succession Act Cap 160 Laws of Kenya** as follows;

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

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, 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."

From the evidence on record the Appellants informed this Court through pleadings that the Respondents were adopted children of their late father and stepmother and therefore are children of the deceased as defined under **Section 3(2) Law of Succession Act Cap 160**;

"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, a child born to her out of wedlock, and, in relation to a male person, a 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."

Therefore the estate of the deceased ought/shall be distributed as per **Section 38 of Law of Succession Act Cap 160**;

"Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children."

The children of the deceased rank in priority to the 2nd & 3rd Appellants who are step grandchildren of the deceased. They have not proved that they were dependants of the deceased prior to her demise and they did not apply under **Section 26 of Law of Succession Act Cap 160 and Rule 45 of Probate & Administration Rules** as dependants.

In the case of **ESTATE OF JOHN MUSAMBAYI KATUMANGA – (DECEASED) [2014]eKLR** which states as follows;

"... I suspect that she is a daughter of the said heir, and therefore a granddaughter of the deceased. She is described in one of the papers as a dependant of the deceased. The said Laura Mesitsa is not entitled to a share in the estate of the deceased there are two reasons for this. She is not an heir of the deceased for grand children are not entitled to inherit from their grandparents so long as their own parents, the children of the deceased, are alive and themselves taking a share in the estate. Secondly, she is not a dependant of the estate. She did not apply, as she should have, for provision under Section 26 of the Act, and there is no court order making her a dependant of the deceased. Under Section 29 of the Act, a grandchild can be a dependant of her grandparent but for her to qualify as such she must demonstrate to the court in an application properly brought under Section 26 of the Act that she was dependant on the grandparent immediately before his death."

In the case of **ESTATE OF VERONICA NJOKI WAKAGOTO[2013] eKLR** which states;

"Under Part V , grandchildren have no right to inherit their grand parents who die intestate after 1st July 1981.The argument is that such grandchildren should inherit from their own parents.....The children inherit first and thereafter grand children inherit from the children. The only time grandchildren inherit directly from their grand parents is when grandchildren's own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to their parents."

In light of above facts and law this Court finds as follows with regard to the Appeal;

The Respondents are children of the deceased and their late father by virtue of **Section 3(2) of Law of Succession Act**. It is conceded that there are no official documents of adoption of the 2 children /Respondents to the deceased and her husband. It is not contested that they lived with deceased and their father on the said property upto the time of the deceased's demise.If the children of the deceased are not her children and not formally adopted why upon her death did they hold family meeting with them? Secondly, why have they agreed and allowed them to retain the rest of deceased's property?

The 1st Appellant/Administrator sought to hoodwink the Respondents by including 6 sons as children of the deceased herein as confirmed by testimony of the Chief of Tinganga (PW2) as per trial court's record. The 1st Appellant ought not to have been administrator of deceased's estate as he was not a child of the 2nd house and he had his share of the land from what was allocated to 1st house by their father during subdivision that he did during his life time.

The suit property in question LR Tinganga /Ndumberi/1631 was as a result of the original number /111 which was subdivided by their father before his death on 24th September 2003 into 2 portions. 5 acres to the 1st house that comprised of 4 sons and 1 daughter and 2.9 acres to 2nd house; the deceased.

The 5 acres included the share of the Appellant's mother Minnie Wambui Kanari sister to 1st Appellant which share/portion ought to be transferred to the 2nd & 3rd Appellants.

The 2.9 acres remains with the Respondents; children of the deceased and their father.

The 2nd & 3rd Appellants' mother was step child to the deceased herein. Njuguna Kimunya, their grandfather distributed his property during his lifetime to 1st house and 2nd house. They should therefore inherit their mother's share from the 1st House allocation of 5 acres. Further, at the time the subdivision was done by their grandfather no issue/claim /dispute arose. The 2nd & 3rd Appellant cannot now claim for 2nd house yet there is no explanation, reasons advanced or circumstances explained with regard to the 5 acres allocated to 5 children in the 1st house.

There was no agreement to 1st Appellant's proposal that he holds part of the suit property subdivided to the deceased as family burial site. Secondly, the issue ought to have been raised during the lifetime their father and at the time of subdivision. It is not tenable now.

DISPOSITION

- a) The Summons for Confirmation of Grant of 3rd April 2017 is upheld.**
- b) The appeal lacks merit and is dismissed with Costs.**
- c) Any aggrieved party to lodge appeal.**

DELIVERED DATED & SIGNED IN OPEN COURT ON 3RD DAY OF DECEMBER, 2018.

M. W. MUIGAI

JUDGE –FAMILY DIVISION –HIGH COURT

IN THE PRESENCE OF:-

Janet Waithira in person

Mr. Koome holding brief for Mr. Ambani for the Appellants - present

Mr. Nyanja for the Respondents - absent