



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT MOMBASA
(Coram: Law, Potter & Hancox, J.J.A. & Chesoni, Ag, J.A.)
CIVIL APPEAL NO. 30 OF 1983
BETWEEN
PHILIMON JUMBA MANASE APPELLANT
AND
PUBLIC TRUSTEE RESPONDENT
(Appeal from the ruling of the High Court of
Kenya at Kakamega (Gicheru, Ag, J.) dated
18th January, 1983
in
Misc Civil Case App. No. 52 of 1982)
JUDGEMENT OF CHESONI AG. J.A.

Moses Changara was the brother of the appellant Philimon Jumba Manase. Moses died on 18th August, 1979 and was survived by a son namely Kerembogo Changara Buyala. At the time of Moses' death Kerembogo was only 2 ½ years old and the infant's mother who had been cohabiting with Moses when he was alive abandoned the infant, Philimon assumed care, control and custody of Kerembogo and in August, 1982 he successfully applied for such custody care and control of Kerembogo under the Guardianship of Infants Act (Cap. 144). After succeeding in what appears to have been the first hurdle Philimon applied to be appointed the "new Trustees", we believe, of Kerembogo, although in his affidavit in support of the application he referred to being appointed as the new administrator of his late brother's estate. It is not clear as to what remains to be administered in the estate, but he made it clear at the time of his application that the purpose of application of January, 10, 1983 for trusteeship was to gain access to the trust fund whose capital is Shs.130,756.40. When Moses died Philimon referred the estate to have been invested by the Public Trustee in the Public Trustee Investment Fund. The Public Trustee opposed the application, which Gicheru, Ag, J, dismissed. Philimon has now appealed to us and asks us to reverse in his favour the High Court ruling. He has listed seven grounds of appeal. Perhaps his strongest ground is that the capital could be invested at an interest higher than 10% p.a. which the Public Trustee Investment Fund pays. The Public Trustee paid to him last September Shs.16,000/= out of the previous interest on the capital for the maintenance and care of the minor Kerembogo. Strange enough Philimon says that sum is

not enough to take care of the minor in these days of diminished value of the shilling. This appeal concerns a child of tender years and this appeal can be disposed of without going into all the grounds of appeal seriatim which in any even are irrelevant. There is no need to go into the Luhya customary law and to consider whether or not Kerembogo's parents were or were not legally married. This is because there is no dispute that the funds belong to Kerembogo and they are in the hands of the Public Trustee legally and Philion is Kerembogo's guardian and custodian. He is the minor's close relative i.e. his uncle. When Philimon applied for custody care and control of Kerembogo in August, 1982, he deposed INTER ALIA: "I am able to maintain and take care of the said infant." It is paradoxical that hardly four months later when Philimon applies to replace the Public Trustee as the minor's trustee he says that the amount of money, Shs.16,000/=, given to him by the Public Trustee is not enough! His affidavit sworn on 18th December, 1982 summarises that which Philimon had in mind, which is stated in paragraph 4 thereof as follows:

"I can invest and gain a lot of income from the estate of my late brother."

Such motive does not make the welfare of the minor Kerembogo of paramount importance and exposes the danger of inherent in granting the application. The present arrangement is satisfactorily working and we do not anticipate any difficulty in the Public Trustee providing Philimon with sufficient funds out of the income on the capital for maintenance of Kerembogo, if the capital were released to Philimon and it were lost or diminished by misfortune or otherwise Kerembogo could find himself with no beneficial reedy and lose his only source for a living and future education. It would be too risky to accede to Philimon's request. The learned Judge wisely dismissed the application. The application was devoid of merit.

I would dismiss this appeal. I agree with the order of the costs proposed by Potter, J.A.

Delivered at Kisumu this 23rd day of June, 1983.

Z.R. CHESONI

.....

AG. JUDGE OF APPEAL

JUDGEMENT OF POTTER, J.A.

When Moses Changara died in August 1979, the infant son of Moses was left in the care of the appellant, the younger brother of the deceased brother. The infant is Kerembogo Changara Buyala, whom I shall call "the child Kerembogo. In August 1982 the appellant applied to the High Court to be appointed the legal guardian of the child Kerembogo, and he was so appointed by Gicheru Ag, J. in September 1982. In his affidavit in support of his application the appellant swore that he was able to maintain the child Kerembogo, then five years old. The formal order of the High Court at Kakamega appointing the appellant as legal guardian was drawn up on 18th December 1982. On the same day the appellant filed an application to the same court asking that he be made a trustee of the estate of his deceased brother and of the child Kerembogo in place of the Public Trustee. In his affidavit in support of his application the appellant again swore that he was able to support the child Kerembogo. But in the same affidavit the appellant deposed "That I can invest and gain a lot of income from the estate of my late brother at a higher rate of interest than what the public trustee is raising of 9% out of the estate of the deceased." Apart from describing himself as a businessman, the appellant provided no evidence of his qualifications, experience or success as a financial investor. The learned judge did not think that the appellant Philemon Jumba Manase was more qualified to manage the financial interests of the child Kerembogo than is the Public Trustee of Kenya. He was too polite to describe this as an idle boast. I am not. I would not go so far as to say that Philemon's application to take control of the child Kerembogo's money is lacking in BONA FIDES. I would only say that it is difficult

to envisage that any reasonable judge would grant such as application to this. The learned judge was generous, when in dismissing the application he ordered that each party, Philemon and the Public Trustee, bear its own costs. I would not be so generous. But a there is no cross appeal we will not disturb the order as to costs made by the lower court. This appeal is dismissed with costs. The costs of this appeal will be paid by the appellant personally, and will not be paid out of the trust administered by the Public Trustee or of the income therefrom. As Hancox, J.A. and Chesoni Ag. J.A. agree, it is so ordered.

Delivered at Kisumu this 23rd day of June, 1983.

K.D. POTTER

JUDGE OF APPEAL

JUDGEMENT OF HANCOX, J.A.

I have read the judgment of Chesoni, J.A. in draft and I fully agree with his reasoning and conclusions and that this Appeal should be dismissed. I also agree with the orders of the costs proposed by Potter, J.A. which I have read.

Delivered at Kisumu this 23rd day of June, 1983.

A.R.W. HANCOX

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR