

IN THE COURT OF
APPEAL AT
NYERI

(CORAM: (W. KARANJA, JAMILA MOHAMMED & MUCHELULE, JJ.A.)

CIVIL APPEAL NO. 267 OF 2019

BETWEEN

JERUSHA NKOROI MUTHAMIA.....1ST APPELLANT

SAMUEL KATHIA MUKINDIA.....2ND

APPELLANT AND

LUCY KINYA M'EBUTHANIA.....RESPONDENT

***(An appeal against the ruling of the High Court of Kenya at
Meru (F. Gikonyo, J.) dated 28th February, 2019***

in

Succession Cause No. 344 of 2005)

JUDGMENT OF THE

COURT

Background

- 1) This appeal arises from the ruling and orders of the High Court at Meru (**F. Gikonyo, J.**) delivered on 28th February 2019 in Succession Cause No. 344 of 2005. By the impugned ruling, the High Court revoked a grant of letters of administration intestate previously issued and confirmed in favour of **Jerusha Nkoroi Muthamia** (the 1st appellant) and issued a fresh joint grant to the 1st appellant and

Lucy Kinya M'Ebuthania (the respondent).

- 2) The 1st appellant petitioned for the grant as the widow of **Julius Muthamia Kanampiu** (the deceased) who died on 9th November 1999. The Estate of the deceased comprised several parcels of land. Following confirmation of the grant on 10th December 2008, one of the estate properties, plot number Kangeta/5582 (the suit property) was transferred to **Samuel Kathia Mukindia** (the 2nd appellant) by way of sale.
- 3) On 7th October 2009, the respondent applied for revocation of the grant issued to the 1st appellant alleging that she was a second wife of the deceased under Meru customary law. The application was opposed by the appellants on the ground that the respondent was a stranger to the Estate.
- 4) The High Court allowed the application, finding that the respondent was a wife of the deceased and issued consequential orders in the following terms:
- a. The grant of letters of administration intestate which were made to Jerusha Nkoroi Muthamia on 2nd November 2007 and confirmed on 10th December, 2008 is revoked;**
 - b. A fresh grant of letters of administration intestate is made to Jerusha Nkoroi Muthamia jointly with Lucy Kinya M'Ebuthania;**
 - c. The objector shall file and serve a Summons for Confirmation of grant with detailed affidavit on**

proposed

mode of distribution within the next 30 days which failing the petitioner shall file within 14 days of the default;

d. Upon service in (c) above, the party served with the Summons for Confirmation of Grant shall file and serve a detailed affidavit on the mode of distribution of the estate of the deceased within 14 days thereof;

e. Each party shall bear own costs.

5) Being dissatisfied with that decision, the appellants lodged the instant appeal on the grounds that the High Court erred in law and fact in:

- i. Relying solely on the respondent's witnesses' allegations in arriving at the finding that the respondent was the wife of the deceased;**
- ii. Dismissing the appellants' evidence without giving any tenable reasons at all;**
- iii. Failing to make a finding on the issue whether the respondent was the wife of the deceased which could be properly determined by evidence given viva voce and fully tested on cross-examination;**
- iv. Failing to consider and apply the provisions of section 93 of the Law of Succession Act; and**
- v. Failing to make any finding on the claim by the 2nd appellant;**

6) The appellants prayed that the orders of the High Court dated 28th February 2019 be set aside and that the appeal be allowed with

costs.

Submissions by Counsel

- 7) The appeal was disposed by way of written submissions which were highlighted orally by the parties during the hearing. The appellants were represented by **Mr. Haron Gitonga** while the respondent was represented **Mr. J. G. Gitonga**.
- 8) **Mr. Haron Gitonga** submitted that the appeal raised two issues for determination, that is, whether there was sufficient evidence before the High Court to prove on a balance of probabilities that the respondent was married to the deceased under Meru customary law hence entitled to the estate of the deceased and whether the transfer of the suit property by the 1st appellant to the 2nd appellant was protected by the provisions of section 93 of the Law of Succession. Act.
- 9) On the first issue, counsel submitted that the High Court erred in relying on the witness statements of the respondent's two witnesses to find that the respondent was a wife of the deceased. That the High Court failed to appreciate that the issue of marriage was weighty and could not be based on untested witness statements as the said witness statements were not tested in cross-examination. Further, that the said witness statements were also not supported by any documentary evidence. That there were no minutes of the clan meetings which purportedly found that the respondent was married

to the deceased.

10) Counsel submitted further that there was no evidence to demonstrate that all the ingredients of marriage under Meru customary law were fulfilled by the deceased in respect of the alleged marriage between the respondent and the deceased. That the issue of payment of dowry was alleged by the Chairman and it was not corroborated by either the respondent or her parents and no other witness was called to support that claim. Further, that the High Court dismissed the evidence of the area chief and declared him a liar without any reasonable explanation for such finding.

11) As regards the second issue, counsel submitted that the application for revocation of the grant was opposed by the 2nd appellant in respect to the suit property on the ground that he bought the suit property after a grant had been confirmed in the name of the 1st appellant. Counsel asserted that the 2nd appellant's position was protected by the provisions of **section 93** of the **Law of Succession Act**. Counsel submitted that the transfer of the suit property from the 1st appellant to the 2nd appellant was lawful and the same ought to not be affected by revocation of the Grant. Counsel further submitted that the High Court erred in failing to make any finding on the 2nd appellant's claim. Conclusively, counsel urged the Court to allow the appeal.

12) In opposing the appeal, learned counsel, Mr. J. G. Gitonga submitted

that the main issue for determination in the appeal was whether the

High Court's finding that the respondent was a wife of the deceased was based on evidence and the law. Counsel submitted that the High Court relied on the evidence of **Ntonja Maburu** and **Zakaria M'Inya** (Chairman and Secretary of Athimba Clan respectively) to correctly find that the respondent was a wife of the deceased.

13) Counsel cited the case of **Ephantus Mwangi & another v Duncan Wambugu (1984) eKLR** where it was held that:

“A Court of Appeal will not normally interfere with a finding of fact by the trial court, unless it is based on no evidence or on a misapprehension of the evidence, or the judge is shown, demonstrably, to have acted on wrong principles in reaching the findings he did.”

14) Counsel submitted further that the findings of the High Court that the respondent was a wife of the deceased was based on evidence and there was no misapprehension of the evidence. Counsel further submitted that the case was determined on the basis of affidavit evidence and witness statements which was a direction made by the High Court on application by the appellants. Counsel asserted that the appellants should not therefore complain that the issue of whether the respondent was a wife of the deceased or not ought to be determined by *viva voce* evidence tested on cross-examination. Counsel further asserted that there was evidence that the father of the deceased paid dowry on behalf of the deceased to the

respondent's family.

15) As regards the claim by the 2nd appellant that he had purchased the suit property from the 1st appellant, counsel submitted that the said claim was not relevant to the respondent's application for revocation of the grant. To sum it all, counsel urged the Court to dismiss the appeal with costs and uphold the finding of the High Court.

Determination

16) This Court is called upon to exercise its duty as a first appellate court by reassessing the evidence produced during trial, evaluate it and arrive at its own independent findings taking account that the Court neither

heard nor saw the witnesses as they testified. See **Rule 31 (1)** of the

Court of Appeal Rules 2022 and this Court's decision in **Gitobu**

Imanyara & 2 others v Attorney General [2016] eKLR. See also **Selle**

& Another vs Associated Motor Boat Co. Ltd & Others (1968) EA

123.

17) Further, in exercise of its appellate jurisdiction, this Court is guided by the decision of its predecessor, the Court of Appeal for East Africa in **Peters vs Sunday Post Limited [1958] EA** page 424 that:

"It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage

of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which

should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.”

18) We have considered the record, the submissions by counsel, the authorities cited and the law. The issues that arise for determination are:

- a) Whether the respondent proved a marriage to the deceased under Meru customary law; and
- b) Whether the High Court erred in failing to determine the 2nd appellant’s claim under section 93 of the Law of Succession Act.

19) This Court in the case of **Joash Ochieng Ougo & another v Virginia**

Edith Wambui Otieno [1987] KECA 71 (KLR) determined the issue of

proof of customary law in the following terms:

“The question that lies at the heart of this matter is whether or not the deceased is subject to the Luo customary law. On the pleadings a dispute of primary fact emerged, making it necessary for evidence to be adduced to prove the relevant customary law as a matter of fact. There was no evidence before the judge on the disputed issue and therefore it was a misdirection for the learned judge to find that it is hard to envisage the deceased as subject to the particular customary law.”

20) Further, this Court in **Geoffrey Mugambi & 2 other v David K.**

M'Mugambi & 3 others [1992] KECA 59 (KLR) stated as follows:

“The former Court of Appeal for East Africa in the case of Kimani V Gikanga [1965] EA 735, held that where African

customary law is neither notorious nor documented it must be established for the Court's guidance by the party intending to rely on it and also that as a matter of practice and convenience in civil cases the relevant customary law, if it is capable of being judicially noticed, should be proved by evidence or expert opinions adduced by the parties."

21) The record before us shows that the High Court relied solely on affidavits and witness statements without the benefit of *viva voce* evidence to establish the alleged elements of a Meru customary marriage. While a court may, in appropriate cases, determine matters on affidavit evidence, the question of customary marriage being a weighty and contested factual issue ordinarily requires oral evidence capable of being tested through cross-examination.

22) An appellate court will generally not interfere with findings of fact by a trial court unless such findings are based on no evidence, a misapprehension of evidence, or wrong principles. See: ***Ephantus Mwangi & Another v Duncan Wambugu [1984] eKLR.***

23) In the circumstances of this appeal, the absence of proof of customary law amounts to an error of principle warranting appellate intervention.

24) We further observe that the High Court failed to address the claim of the 2nd appellant who asserted that he purchased one of the estate properties (the suit property) after confirmation of the grant.

Section 93 of the **Law of Succession Act** protects *bona fide* purchasers for value

who acquire interests from personal representatives after confirmation of the grant in the name of the 1st appellant. With respect, the omission by the High Court to make any finding on this issue constituted a further error.

25) For the foregoing reasons, we find that the appeal has merit. The ruling of the High Court dated 28th February 2019 is hereby set aside. The matter is remitted to the High Court for hearing and determination before a Judge of the High Court other than **F. Gikonyo, J.**

26) Each party shall bear its own costs of the appeal.

27) It is so ordered.

Dated and delivered at Nyeri this 13th day of February, 2026

W. KARANJA

.....
JUDGE OF APPEAL

JAMILA MOHAMMED

.....
JUDGE OF APPEAL

A. O. MUCHELULE

.....
JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR